

Emerging Hypotheses and Supplementary Questions

1. About this Document

This document serves as an annex to the scoping paper produced by the sub-group on “material jurisdiction in a converged world” which was established under ERGA’s 2014 work programme. It firstly identifies some emerging hypotheses about the development of the audiovisual market and the potential implications of these developments. The ideas identified will form a starting point for the analysis that this sub-group conducts in 2015.

It then goes on to set out some supplementary questions in relation to a number of the high-level themes identified in the scoping paper. These questions will be considered in 2015 alongside the key questions identified in the main scoping paper. They do not constitute a definitive list of supplementary questions, and we anticipate that they will be considered alongside new ones which may emerge during the course of ERGA’s work in 2015.

The hypotheses and questions have been suggested by a range of contributors from within the sub-group.

2. Market Context

*Note: This analysis represents some emerging thoughts that have arisen during the preparation of the scoping paper for the ERGA sub-group on material jurisdiction. We anticipate that this will be developed further during the course of ERGA’s work under the high level theme “**The emergence of digital intermediaries and new forms of content provision in the audiovisual chain of distribution and their relationship to existing players in the audiovisual chain of distribution**”*

Across the globe, new video services are proliferating. Many of these service providers offer high quality content, have formed relationships with major consumer brands (e.g. internet companies, manufacturing companies and software vendors) and have effectively integrated their services with consumer devices.

Many of these companies operate over the top of communications network without using their own infrastructure. Faced with this trend, ISPs may try to be more active upstream in the value chain, by integrating with content providers or access providers. An ever increasing vertical integration between network services and content services, as well as the establishment of relationships with other content providers or access providers, may create new revenue streams for ISPs, and also cover their network costs. This is occurring in a context where internet access offers are increasingly bundled with specific applications or content subscriptions, leading to growing multi-market interactions between telecoms operators, media providers and internet companies (such as search providers or OTT players). This is a worldwide trend with an impact, now and in the future, on competitive conditions at national level. Several telecoms operators are considering offering a wider range of applications, and their business models may evolve in order to ensure higher revenues, for example by creating value around the provision of internet access.

ANNEX 2

Connected TV or Smart TV, sometimes referred to as Hybrid TV (not to be confused with IPTV, or linear TV delivered over the internet), describes a trend of integration of internet features into television sets and set-top boxes, as well as technological convergence between computers and television sets and set-top boxes. These devices are often focused more on offering online interactive media, internet TV, as well as on-demand streaming media than they are on offering traditional broadcast TV. The goal is often to replicate the same experience, and the same applications that are available and embedded in tablets and modern smartphones. These devices can allow viewers to search and find videos, movies, photos and other content on the web, on a local cable TV channel, on a satellite TV channel, or on a local storage drive indistinctively. Some of the features provided by connected TVs are:

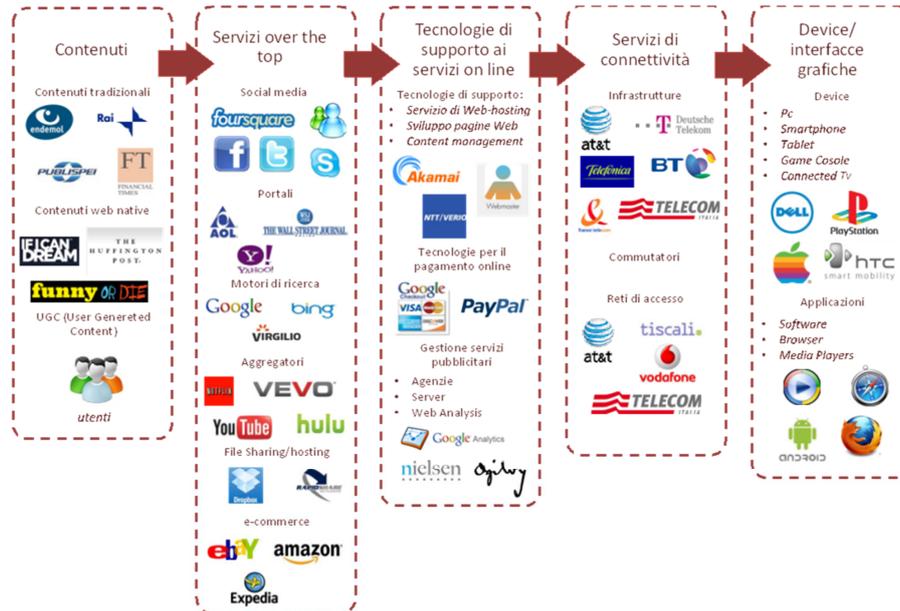
- Delivery of content from other devices attached to a network through either a “Digital Living Network Alliance”, or Universal “Plug and Play” media server, “Network-attached storage device (NAS), or an online portal;
- Provision of access to internet-based services including traditional broadcast TV channels, catch-up services or other video-on-demand services, electronic program guides, interactive advertising, personalisation, voting, games, social networking, and other multimedia applications;
- provision of access to user-generated content (either stored on an external hard drive or in cloud storage), interactive services and internet applications;
- delivery of value added services which complement traditional broadcast content by combining information from the internet with content from broadcasters.

Some devices even feature additional interactive organic user interface, or natural user interface technologies, or even speech recognition technologies. These facilitate a range of human-device interactions, for example in order to use navigation controls

Traditional broadcast content is just one of several features delivered on connected TVs. For consumers, this could make it more difficult to distinguish between content from a linear TV channel and content delivered through an app or over the internet.

The concept of smart TVs is still emerging, with both proprietary and open source software frameworks being commercially promoted. Some have the ability to run applications (sometimes available via an 'app store'), interactive on-demand media, personalised communications, and social networking features. Smart TV platforms or middleware tend to have a public software development kit (SDK) and/or native development kit (NDK) for apps. This enables third-party developers to develop applications for distribution on that platform. The public SDK enables third-party companies and other interactive application developers to “write” applications once and see them run successfully on any device that supports the smart TV platform or middleware architecture for which it was written, no matter who the hardware manufacturer is. Smart TVs often have app stores which enable end-users to install and uninstall apps themselves.

ANNEX 2



3. Potential implications to consider

This section sets out some early observations which will be developed further alongside other ideas which may emerge under the theme “the consequences of the developments identified under 3.1 - 3.4 for, amongst others, efficacy of enforcement, competition, choice, quality & diversity, content funding, and data privacy”. It provides a starting point for the analysis that will be conducted under this work stream.

Competition

- Traditional broadcasters and regulated video on demand (VOD) providers may face increased competitive pressure from sharing platforms, even if the presence of video sharing platforms in the market for editing and distributing audiovisual services is currently limited to VOD and subscription video on demand (SVOD) services.
- The ensuing competition throws up several points worth considering further which do not only stem from sharing platforms.
- New players could potentially have an effect on competitive market dynamics at several different places in the value chain:
 - Device manufacturer: ability to facilitate or even to limit access to some content providers through a default screen, whether it be for technical, commercial or economic reasons.
 - App store: ability to facilitate or limit access to some content providers through a default screen for technical, commercial or economic reasons.
 - OS editor: ability to request editors to develop specific versions of their services compliant with the terms and conditions of the OS. An OS editor could be in a strong position to do so in cases where its OS has a strong penetration rate in major devices. This could potentially create barriers for smaller players that do not have the resources to develop several versions of their services.

ANNEX 2

- Search engines: ability to favour certain search criteria which could promote, demote or even exclude certain content providers in the results.
 - ISPs: ability to favour certain digital audiovisual services within its managed services.
 - Online platforms: ability not to make some audiovisual content available, for example for due to economic relations with the copyright holder.
- In order to understand the potential effects that new forms of content distribution could have on competition, quality and choice and media plurality, a number of issues merit careful consideration.
 - For example, it is particularly important to conduct an in-depth analysis of the position of vertically integrated “environments” (e.g. those which manage of sharing platforms and operating systems) and the potentially significant influence this may have on the dynamics of the digital audiovisual market.
 - For instance, a platform operator may choose to significantly change its access parameters (terms and techniques, algorithms, API) even if they are critical to the ability of third party companies that use its ecosystem to access consumers. Significant financial implications may arise for such third party companies. Competitive issues may also arise if these third companies eventually become platform competitors. Innovation may also be affected if the development conditions are modified, which could eventually be to the detriment of users. Interoperability could become increasingly important, particularly in order to reduce technical barriers for innovation.
 - A central point of this analysis should be the extent to which there is potential for these large environments to demonstrate “gatekeeper” tendencies and, how important this could be for users’ access to digital audiovisual services.
 - Similarly, in these large environments, especially operating systems, app stores or sharing platforms, it is important to consider the extent to which there might be barriers to switching to other providers e.g. due to difficulties in bringing users’ data/profiles to another environment.

Content, choice, quality and diversity

- It will be vital to further analyse the extent to which some players may begin to begin to demonstrate “gatekeeper” characteristics, and the extent to which this could reduce consumer choice in terms of audiovisual content. It will also be important to consider the potential implications of this for plurality of opinion and quality of content.
- Several players (including intermediaries) may play an increasingly important role in determining the conditions of access to information and content (sometimes combining the utility and opacity of their algorithms). It could become difficult for the user to easily determine what content results from:
 - Advertising techniques (e.g. behavioural)
 - generic algorithmic selection/result
 - personalisation / customisation
 - or preferential treatment by the host platform
- This opacity may reduce the diversity and quality of the content to which consumers are exposed if, for example, only the most popular content, or only content that is

ANNEX 2

similar to what the user has already viewed, is prominent. The diversity of content available to consumers could also be affected if platform providers were to specifically exclude certain content and/or prioritise others for economic or other reasons.

- The role of search engines and recommendation services, whether they relate to application stores, digital audiovisual services, OTT platforms, sharing or other online platforms, is at the heart of this issue.

Content funding

- Among the new players in the audiovisual sector, intermediaries, platforms and large environments may play a central role. As a result they may be able to capture a significant share of the value created by new digital audiovisual services
- Since these players are out of the scope of the regulatory framework, it may challenge the current funding arrangements for content creation, and therefore by extension may have an effect on diversity and quality of content, which merits further in-depth analysis.

Data privacy

- Personal data is at the heart of innovation in the digital ecosystem and is increasingly playing a role in innovation in the digital audiovisual market.
- In particular, a number of platforms, intermediaries and digital audiovisual services derive much of their strength from their ability to monetise the information gathered from their users.
- Personal data allows for the development of customisation features, which aim to facilitate choice in an environment where there has been substantial growth in the number of options available to consumers.
- The customisation features have both potential advantages, such as improved efficiency of navigation, and potential disadvantages, such as the risk of difficulties in finding alternative content to what has already been viewed.

Interaction between issues

- There is a clear whole interaction between the different issues (competition, diversity, etc.)
- It appears at this stage, given the issues identified above, that particularly careful consideration should be given to the emergence of vertically integrated players, and the extent to which consumers could switch between and from these providers.

3. Supplementary questions to be addressed by ERGA in 2015

This section sets out some questions for ERGA to examine in 2015 that have been suggested by the members of this sub-group. They are detailed questions which are complementary to the high level questions set out in the main scoping paper. This does not represent a definitive list, and these questions will be considered alongside any others which emerge during the course of that work.

3.3 The distinction between regulated non-linear audiovisual services and other unregulated services containing audiovisual content

ANNEX 2

- Would it be appropriate to maintain graduated regulation of TV broadcast and on-demand services but extend the scope through a wider definition of non-linear services?
- How may a future framework achieve greater clarification that audiovisual material that is clearly ancillary to an overall non-media service falls outside of its scope?
- To what extent can services whose characteristics differ depending on the means of distribution be characterized?
- What difficulties in defining whether or not a service is an AVMS can arise as a result of current criteria used to define territorial jurisdiction? Are new provisions required in order to combat circumvention arrangements and forum shopping?

3.4 The points of interaction between the AVMS framework and other regulatory frameworks, including the telecoms framework and the e-Commerce Directive

- To what extent is it possible for non-editorially responsible providers to take ex-ante actions to achieve public policy goals?
- Could the liability of intermediaries be defined considering new technological capabilities (i.e. content recognition)?

3.5 The consequences of the developments identified under 3.1 - 3.4 for, amongst others, efficacy of enforcement, competition, choice, quality & diversity, content funding, and data privacy

Competition

- What effect does users' data/profile portability from platforms and switching costs have on normal and fair competition between platforms?

Content, choice, quality and diversity, creation funding

- What role could referencing play with regard to the access to audiovisual and cultural content?
- Would it be appropriate or desirable to introduce a "must be found" obligation (as the European Parliament proposal made to the European Commission in its report on the connected TV)?
- How could the virtuous effects of current content funding mechanisms be adapted to the changes occurring in content provision (including platforms)?
- To what extent are intermediaries earning income from audiovisual media services contributing to content funding?

Personal data / Data privacy

- To what extent does awareness of the issues of data, personalisation, and their effects in order to give citizens the ability to choose knowingly between various content services (diversity) or accordingly to the customization options chosen on a particular service? How can awareness of these issues be raised?
- How can we ensure that users of digital content services enjoy the right to control the uses made on their data even if they are secondary uses?

ANNEX 2

- To what extent and in what form should close cooperation be pursued between audiovisual regulators and data protection authorities?

3.6 The roles and responsibilities of all digital intermediaries in securing public policy goals (e.g. accessibility and discoverability, protection of minors, quality and diversity of programs, content funding etc.), and the evolution of the editorial responsibility concept

- Is it desirable to distinguish between fundamental and desirable public policy objectives, and introduced graduated responsibilities on that basis? How could responsibility be graduated (e.g. market share of services)?
- What mix of powers, tools and responsibilities are best suited to achieving the desired policy objectives (whatever these objectives may be)?
- What regulatory framework is best suited to delivering these goals? What roles might statutory regulation, self-regulation, and co-regulation play under a future framework?
- To what extent is it feasible and desirable to place obligations specific to the EU or one Member State on players that are multinational by nature?
- How do we determine and enforce editorial responsibility in a converged audiovisual landscape?
- Could other kinds of responsibility than editorial be considered, depending on the role that each digital intermediary could play?
- Can and should incentives be created for content providers fulfilling a public service objective or making a contribution to the promotion of public interest objectives? How might this be achieved?
- How can intermediaries be incentivised to provide transparency and clarity on the mechanisms of classification, rankings and editing provided to users? What are the potential implications of this in terms of choice, diversity of opinion, etc.?
- Can and should obligations be imposed on intermediaries providing access to public service media? What form could those obligations take?
- How can intermediaries earning income from audiovisual media services be incentivised to contribute to content funding?

There are also two potential questions which could overlap with the work that is taking place in the sub-group on protection of minors. If these questions are to be explored, then the Chairs of both sub-groups should maintain regular contact in order to ensure consistency:

- Taking into account the work on 3.2 would it be desirable to introduce a common regulatory framework for all commercial audiovisual media services as currently defined under the AVMS? What standards might this cover? Would differential high standards for protection of minors and human dignity and reasonable standards with respect to consumer protection and other policy goals be justifiable?
- Would it be desirable or appropriate to have a common regulatory framework for all audiovisual media services including those further identified in 3.3 providing a basic-tier regulation for core values – such as protection of minors, human dignity services, consumer protection or media pluralism - and containing an option for providers to subject themselves to voluntary higher standards if this voluntary action permits findability and distribution privileges?