



ERGA work programme 2016 - Tools for European Regulators in a converging media-landscape -

Introduction

ERGA's objectives are twofold. On the one hand ERGA advises the European Commission in its work, to ensure a consistent implementation of Directive 2010/13/EU on Audiovisual Media Services (AVMSD) as well as in any other matters related to audiovisual media services within the Commission's competence. On the other hand, ERGA's objective is to facilitate cooperation between the regulatory bodies in the EU, as provided for in the AVMSD and to allow for an exchange of experience and good practices. In previous years ERGA has focused on advising the Commission towards a revision of the AVMSD. Next year ERGA will continue to do so as the European Commission takes its work forward. In addition, ERGA will start to support and empower its members in their supervisory practice and the application of the regulatory framework for audiovisual media services.

Context

In 2015 the Commission consulted with stakeholders on the application of the AVMSD, to check which parts of it are currently fit for purpose as part of the Regulatory Fitness and Performance Programme (REFIT). The Commission also collected evidence and views on possible changes to the Directive, to feed into an impact assessment. As part of this exercise, ERGA provided advice to the Commission on the independence of audiovisual media regulatory authorities; and on the evolution of the European regulatory framework in a converged media age, with a focus on the issues of material jurisdiction, territorial jurisdiction¹ and protection of minors. ERGA presented a broad view of how these issues should evolve within the AVMSD, based on the collective experience and knowledge of regulators assembled in ERGA, a forum independent from government, media sector and industry. The Commission plans to present the results of the REFIT exercise in 2016, followed by proposals for review of the AVMSD. ERGA will continue to input on the substance of the AVMSD as required, but will also devote efforts to support the Boards of European audiovisual media regulators in their effective strategies.

¹ The final results on territorial jurisdiction are to be expected in the first quarter of 2016.

Challenges for European audiovisual media regulators

Since the adoption of the AVMSD in 2010, supervisory practice has become more complex than ever before. Regulators are confronted with a sector that evolves rapidly and that has undergone significant changes due to convergence. As ERGA identified in its various 2015 reports, we have seen substantial changes in the range of content available in media consumption and in the chain of distribution.² ERGA-members have all been confronted i.a. with a rapid increase of on demand and live streaming services delivered online, and the emergence of services offering audiovisual content as part of a mix of services. At the same time, the consumption of these services has grown significantly. Further, we see more players (from EU and non-EU countries) distributing this content to the viewer, and a growing range of devices to receive it. There is no doubt the converged media-landscape will continue its dynamic course.

As audiovisual media regulators we will continue to face such challenges in our regulatory practice, both under the current and a revised AVMSD. Challenges are best faced when one is well prepared. For authoritative and effective oversight it is essential to be able to focus on those issues that are most relevant to the sector and that will have a greater impact on consumers. To do so, we also need to have access to sufficiently flexible tools. As summarized by renowned Harvard Professor on regulatory strategies, Malcom Sparrow, as audiovisual media regulators we should: *“Pick important problems, fix them and tell everybody.”*

In this context, ERGA in 2016 will focus on providing audiovisual media regulators with instruments to help enhance their regulatory strategy and practice, and to better address new regulatory challenges. Obviously the regulators partaking in ERGA will continue to provide relevant advice to the Commission. The recommendations that have been made by ERGA in 2015 shall serve as a starting point, and we will build on these in our ongoing engagement on these topics.

ERGA's annual work programme for 2016 will cover three main areas:

- **Advising the Commission on regulatory challenges in the application of new legislative provisions from the point of view of regulators (I);**
- **Exploring key themes which are of high relevance and beneficial to future-proof European audiovisual regulation (II);**
- **Creating a Digital European Toolkit (DET) for efficient and flexible regulation (III).**

I. Advising the Commission on regulatory challenges in the application of new legislative provisions from the point of view of regulators

ERGA proposes to set up an **Audiovisual Media Services Directive Review Subgroup**. The subgroup is expected to support the Commission in the upcoming reform of the AVMSD as required. It will be responsible for preparing ERGA's views on implementation challenges, for instance regarding the results of the REFIT-exercise presented by the Commission and a new AVMSD legislative initiative.

The subgroup will build on the conclusions of the 2015 reports on material jurisdiction, protection of minors, and independence, and the anticipated report on territorial jurisdiction. It could take forward some of the proposals made in these reports for further work (for example the development of guidelines).

Expected timetable: This will, to some extent, depend on the Commission's timetable for review but the subgroup could progress with some of the work already identified in the 2015 reports.

² ERGA Report on material jurisdiction in a converged environment, 27 November 2015.

Expected deliverables: The subgroup could prepare opinions, common positions and/or recommendations on potential future regulatory and implementation challenges on some of the areas considered in the review.

Under this area, the **Subgroup on Territorial Jurisdiction**, will progress work started in 2015 with the aim to conclude present conclusions in the first quarter of 2016. After this, the subgroup will be disbanded.

II. Exploring key themes which are of high relevance and beneficial to future-proof European audiovisual regulation

The second subgroup is devoted to issues that are not part of the review of the AVMSD. This subgroup will be able to establish **special task forces** that consist of small groups of ERGA members. They will explore clearly defined and very specific themes which are considered to be of high relevance to future-proof European oversight, without necessarily being connected to concrete and detailed legislative provisions. The intention is to focus on areas that remain beneficial to European media regulation in 2016 and beyond, regardless of the way in which the EU framework for audiovisual mass-media evolves.

Given the unanimous recognition of ERGA members of the importance of delivering effective protection of minors in a converged media environment, we could set up one special task force on this topic. It could, for instance, explore how the industry could be encouraged to take up further standardization and harmonization of protection measures. Depending on time and available resources, other task forces could look into terrorist propaganda, audiovisual commercial communications such as advertising and product placement, the promotion of the European audiovisual culture beyond and/or complementary to the quota system, and accessibility for the visually or hearing impaired.

Expected timetable: It will be left to the discretion of the chair of the subgroup, in discussion with the subgroup members, to decide which specific task forces should be set up, as well as whether they should work consecutively or in parallel. In any case the number of task forces established and the topics concerned should stay limited and narrowed to a manageable level.

Expected deliverables: This will depend on the nature and scope of the task force. In some cases, we could anticipate the organisation of a workshop with industry and other stakeholders and/or the elaboration of reports summarising the conclusions reached.

III. Creating Digital European Toolkit (DET) for efficient and flexible regulation

European audiovisual regulators, and particularly their boards, nowadays encounter very similar challenges. How to set up a framework for prioritizing efficiently and consistently in an ever expanding media landscape? Which are the most effective levels of enforcement? How should the boards of regulators define their communication strategies? Which standards and criteria should inform co-operation with other supervisory authorities? Which Better Regulators Principles could boards define to inspire their entire staff and drive up quality and professionalism? Each national regulator will have its own answers based on its own priorities, culture and strategies. But there may be more common ground and similarity than expected. Further, each regulator will have a series of tools and regulatory approaches to pursue its goals. These tools and approaches do not necessarily change when legislative provisions do.

In this context, ERGA that is inter alia established to provide for an exchange of experience and good practice as to the application of the regulatory framework for audiovisual media services³ sees merit in exploring a more structured exchange of practices and regulatory tools. It therefore proposes to set up a third **Subgroup to create a Digital European Toolkit**. This subgroup will focus on sharing (existing) both high level and practical documents and best practices on oversight, and making them readily accessible via a restricted members area on the ERGA website. As the materials that will feed into the toolkit to a large extent already exist within the NRA's, it is expected that resources that are needed for this subgroup are limited. The toolkit should have an integrated focus, be ready to use and provide the boards of regulatory authorities with a set of tools that will support their overall strategies and priority setting, as well as effective oversight, facilitating their day-to-day practice. It goes without saying that the tools of the toolkit can be used at one's own discretion.

The toolkit could contain for instance:

- A listing of Good Regulators Principles that can be used as a professional compass (e.g. The LITER-principles:⁴ Legality, Independence,⁵ Transparency, Effectiveness and Responsibility);
- A toolbox for boards with different instruments for tailor-made oversight in audiovisual-media:
 - A listing of the most effective tools for enforcement: from consultation and informing towards the different formal enforcement instruments that are available in the respective national laws;
 - Tips & tricks for putting responsibility where it belongs: horizontal oversight and governance;
 - Tips & tricks regarding information meetings with stakeholders in the sector;
 - Communication strategies for supervisory authorities;
- Boiler plates for co-operation protocols with other supervisory authorities in connected fields (e.g. privacy- and competition authorities), especially relevant in a converging media landscape;
- Best practices on cooperation procedures between audiovisual media regulators;
- Framework for effective prioritizing within the scope of the public policy goals from the EU framework for audiovisual mass-media.

With the often rather limited resources and the ever-expanding audiovisual universe, while respecting the limits set by national implementation policies, constant prioritizing by the boards of the regulators has become a necessity. The models developed on the instruction of the NRA's boards may include criteria for prioritizing cases such as the impact of infringements on public policy values (e.g. independence of information or protection of minors), transparency of the infringed norms, culpability of offenders, complaints received, context analyses of the media-landscape and yearly focus, and can be used at the discretion and convenience of other ERGA-members;
- Examples of agreements for the exchange of experts between audiovisual media regulators.

³ Commission Decision of 3.2.2014 on establishing the European Regulators Group for Audiovisual Media Services, C (2014) 462 final, article 2.

⁴ Prof. A. Ottow, Good Agency Principles, Oxford: Oxford University Press 2015.

⁵ Principles to empower independence of regulators, for instance with regard to transparency and accountability, feeding in the ERGA Report on the independence of NRAs, chapter 5, 27 November 2015.

When defining the exact scope of the toolkit in the Terms of Reference, other forums where best practices are shared should also be taken into account. It goes without saying that duplication of valuable research already carried out, within particularly EPRA, will be avoided. This should however not prevent that where possible available research material and findings EPRA already produced could be taken into account and can feed into this subgroup.

Expected timetable: The subgroup is not dependent on the findings that emerge from the first and second subgroup and can establish the framework of the Digital European Toolkit as soon as the Terms of Reference of the subgroup are adopted. These Terms of Reference will identify the tools that the toolkit should contain at the end of 2016. However, as the toolkit should continue to be of relevance to the boards of the regulatory authorities, it is suggested that this subgroup will also need to continue its work after 2016, feeding new tools into the toolkit and keeping it up to date.

Expected deliverables: This subgroup is targeting at sharing documents, practices and learning from each other's insights, not creating binding standards. As a deliverable this subgroup will list relevant documents uploaded on the ERGA website.

Terms of Reference

ERGA will be able to decide on the more specific themes and the expected outcomes of the new subgroups, and their timetables, in the Terms of Reference. They will be drafted by the future subgroup chairs, in close cooperation with the ERGA-board and members of the subgroup, and will take account and leave room for eventual upcoming developments around the AVMSD in the course of 2016. The Terms of Reference are expected to be adopted during the upcoming plenary meeting of ERGA to be held in Amsterdam on March 2, 2016.