



## **ERGA Subgroup 3**

### **“Implementation of the revised AVMS Directive”**

#### ***Final Report***

*(Deliverable 5 of ToR)*

## I. Introduction

The Subgroup accompanied the implementation of the revised AVMS Directive with a particular focus on the revised material rules for audiovisual media services and on the revised material scope (i.e. the inclusion of video-sharing platforms). Besides, the Subgroup analysed the concrete mechanisms of regulation in a converged media environment, including responsibilities of the various service providers in the online environment.

The AVMS Directive does not impose fully harmonised requirements for content in all areas. Its regulatory framework for audiovisual media service providers and video-sharing-platforms is complemented by the e-Commerce-Directive that focuses on online service providers which are also part of the audiovisual value chain. At the same time, due to their hybrid character, it becomes increasingly difficult to clearly match especially online services with one of the categories established by the legal frameworks. If not properly managed, this constantly changing media reality challenges the effective and consistent enforcement of statutory obligations in some fundamental areas of content regulation.

To address these problems, some Member States already reacted by tightening their national regulatory framework, by at the same putting the Country of Origin Principle into question. These developments make it necessary to explore adequate solutions for concrete legal threats in cross-border cases.

It is noted that ERGA strongly believes in the Country of Origin Principle as the cornerstone of the European legal framework for media services that in many cases is well-functioning in guaranteeing free flow of information in the European Single Market. To strengthen this concept – and this is the spirit in which the Subgroup deliverables have been written –, it is a core task of national regulatory authorities to discuss any need and potential for optimization in this regard. Only an open debate about the problems and pragmatic solutions are able to preserve the full effectiveness of the Country of Origin Principle.

Thus, the Subgroup's work was guided by

- the principle that a consistent and timely transposition of the AVMS Directive into national legal frameworks is necessary for a sustainable media environment in Europe, and would contribute to facilitate the subsequent enforcement of the rules by national regulatory authorities (NRAs);
- the assumption that close cooperation between relevant regulatory authorities is an indispensable tool for effective enforcement of audiovisual media laws, especially in the online context;
- the aim to create awareness for convergent media regulation across Europe.

These general lines resulted in the creation of three Taskforces whose special reports are added as Annexes 1 to 3. Being aware of the fact that these Taskforces covered a wide range of topics, the present Subgroup report is intended to summarize the main findings of the Taskforces (see chapters II, III, and IV below) while at the same time gathering common and overarching conclusions combined with an outlook on next envisaged steps for the work of ERGA in 2020 (chapter V).

## **II. Changes to the material rules for audiovisual media services (Taskforce 1)**

### **1. Starting points and analysis conducted**

The revision of the AVMS Directive brings changes to the legal framework that might lead to a diverging transposition in the Member States with possible negative effects on a consistent application of European standards.

In order to ease the common understanding of central concepts of the revised AVMS Directive and to identify challenges for implementation, Taskforce 1 elaborated on revised material rules, in particular consumer protection (the rules on audiovisual commercial communications), protection of minors and incitement to violence or hatred, accessibility, findability, signal integrity and independence of regulatory authorities.<sup>1</sup>

The common starting point of these analyses was to assess the main and most relevant changes to the set of rules concerning the above mentioned areas. For this purpose, the analyses include references to national particularities in order to draw inspiration from existing regulatory practice in selected Member States.

### **2. Conclusions and recommendations**

A recurring element across the recommendations developed for the single areas is the exchange of best practices with regard to national systems or rules either being developed or already in place – enhanced by an ongoing discussion of key notions and relevant definitions from the revised AVMS Directive:

- The goal of the Taskforce was to assess the changes to the material rules and not to give concrete recommendations on the actual transposition of the new rules because ERGA does not want to interfere with the ongoing transposition process to the revised AVMS Directive.
- In any case, by exchanging experiences from existing national cases and industry practices and standards, NRAs have the opportunity to draw inspiration from other NRAs' systems. This helps ERGA members to develop their own approach towards the application of the new rules that is based on a consistent interpretation of the content of the revised AVMS Directive.

## **III. Changes to the material scope – the inclusion of video-sharing platforms (Taskforce 2)**

### **1. Starting points and analysis conducted**

The revised AVMS Directive widens its scope of application by including certain obligations for a new category of services, i.e. video-sharing platforms (VSPs) in the area of protection of minors, hate speech, terrorist content, and commercial communications. Such a completely new area of regulation requires close cooperation of the involved regulatory bodies from the very beginning to secure a common understanding of the newly introduced concepts and to address cross-border issues.

In this vein, Taskforce 2 analysed the newly provided definition of 'video-sharing platforms', the nature and purposes of the measures to be implemented by these services, as well as possible principles for

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<sup>1</sup> These areas were selected to cover the topics that were not analysed in the context of Subgroup 3 in 2018.

an effective monitoring of VSPs by NRAs. The Taskforce has also identified and discussed the provisions of the Directive setting out NRAs' tasks with respect to VSP providers. In both areas – assessment of the appropriateness of the measures and out of court redress mechanisms – the Taskforce provides for some key considerations about how regulators (or any other responsible authority/body) may meet up the challenges identified.

The work of the Taskforce resulted in a concise paper (see Annex 2) that functions as a reference document for ERGA members when dealing with the issues relating to the identification and regulation of VSPs. The document features: a) an easy-to-use list of analytical questions to consider for the application of the definition of VSPs; b) a mapping of the tasks incumbent upon NRAs with regard to VSPs; and c) some issues to consider in relation to these new tasks, particularly where cross-border cooperation might be necessary.

## 2. The Workshop from 27 September 2019 (Deliverable 4 of ToR)

In order to best prepare ERGA members to fulfil their duties regarding supervision of VSPs, the Workshop – by bringing together interested parties (the European Commission, representatives of video-sharing platform services, ERGA members, as well as researchers) – looked at the following specific issues raised by the renewed regulatory framework:

- the key metrics that NRAs need in order to assess the 'appropriateness' of the measures that VSPs are expected to take;
- effective measures already put in place by VSPs to ensure that their users are protected from harmful and illegal content.

At a time when the AVMS Directive is being transposed across the EU by national governments and parliaments, the Workshop informed the debate about the purposes and terms of the relationship which regulators and VSP providers should build in the future in order to achieve the public policy objectives at stake.

## 3. Conclusions and recommendations

Against this background, the main recommendations of the Taskforce are the following:

- As to the identification of VSPs, the Taskforce determines the criteria of "principal purpose", "dissociable section", and "essential functionality" as the core of the definition of VSPs. In this vein, the Taskforce concludes that these three criteria raise specific issues where intuitive determinations – as opposed to an analysis based on clear indicators – are insufficient to grasp the complexity of the services potentially covered. Thus, further analysis is recommended, taking into account the expected guidelines of the Commission on the essential functionality test. Finally, the Taskforce also shed a light on the difficulties for NRAs to provide grounded answers to some analytical questions as some of the necessary data are currently not made available by the services potentially covered.
- As to the incumbent tasks for NRAs, the Taskforce advises to take a 'macro-level' approach (as opposed to the 'micro-level' application of content moderation measures by VSP providers themselves) in which the regulator is in charge of assessing the VSP provider's compliance with a comprehensive regulatory assessment framework (e.g. a statutory regulation or a code of co-regulation), set out by the national legislator. The paper makes recommendations about

what should be the key performance indicators and requirements of such an assessment framework.

- For all situations concerning VSPs with a cross-border element, such as the management of disputes between VSP users and providers, the Taskforce elaborates on possible forms of cooperation, ranging from a simple notification transfer to deeper engagement of the NRAs concerned. Acknowledging the ongoing transposition process, the Taskforce encourages ERGA to further discuss these results to implement this form of cooperation on a pan-European level, in line with the recommendations put forward by Taskforce 3 (see below).

#### **IV. Concrete Mechanisms of Regulation (Taskforce 3)**

##### **1. Starting points and analysis conducted**

NRAs are detecting an increasing number of infringements upon the media law framework that contain cross-border-elements, in particular in an online environment. This both concerns areas harmonised by the AVMS Directive, including where stricter national rules were implemented, as well as areas which fall out of the scope of the AVMS Directive. In addition, NRAs face problems with content coming from outside the European Union. These challenges are aggravated by enforcement hurdles in relation to service providers that are part of the changed media reality and that fall under the scope of the e-Commerce-Directive.

Against this background, Taskforce 3 sought to find ways to secure compliance with fundamental principles of the European media framework across the European Union.

This led to an analysis of the mechanisms of regulation depending on the fundamental values at stake and the services regulated, accompanied by the evaluation of cooperation models both between ERGA members on European level, and between NRAs and regulatory authorities from other sectors on national level.

##### **2. Conclusions and recommendations**

###### **2.1. Matching fundamental values with existing forms of regulation**

The revised AVMS Directive deals with questions concerning different mechanisms of regulation and encourages the Member States to make use of co-regulation and the fostering of self-regulation, as a complement to statutory regulation, in some fields coordinated by the Directive. As a benchmark that functions as basis for the further discussions, the Taskforce presents an overview that proposes to match the fundamental values at stake with various forms of regulation, giving guidance on which forms of regulation may be suited for certain areas of regulation.

It turned out that, taking into account the various national regulatory traditions, protection of consumers and issues of diversity (i.e. internal plurality) can be secured by using all forms of regulation, whereas pluralism (i.e. external diversity) and human dignity/viewers' protection from incitement to violence or hatred, might be best safeguarded by statutory regulation. Co-Regulation of hate speech in the online environment can also be an option but must be supported by a solid regulatory backstop. Protection of minors is generally open also for self- and co-regulation (if not used as a stand-alone option), but should not be left to mere codes of conduct.

## 2.2. Cooperation on national level

Due to the increasingly converged media reality, NRAs need to co-operate on national level with authorities and institutions from other areas (competition, infrastructure, penal law etc.) to secure sustainable compliance with the values at stake.

The basic requirement for an effective cooperation in this regard is to reach a common understanding of where responsibilities lie for each regulator, taking into account the specific conditions and purposes of the envisaged cooperation.

Acknowledging that the added-value and scale of any cooperation may vary from case to case, the most important prerequisites to successfully set up a cooperation are to determine the right partners to start with, to inspire them and to create the best surrounding conditions to realise the project, bearing in mind that motivations, goals and approaches might differ across the partners.

## 2.3. Cooperation of ERGA Members

The procedures foreseen in Articles 3, 4 and 30a of the AVMS Directive lay down the essential rules of cooperation between NRAs in the application of the provisions of the Directive, but may have potential downsides that can make their use less satisfying and difficult in practice. They are designed to apply to individual cases only and do not establish a general and ongoing cooperation of NRAs. The practical experience of the regulators has shown that more structured cooperation amongst NRAs in cross border cases is essential to ensure the effective enforcement of the Directive and at the same time preserve the efficiency and stability of the Country of Origin principle.

To foster cooperation between ERGA members when dealing with cross-border cases, the Taskforce put emphasis on finding solutions that help to practically deal with the given procedures, on the one hand, and to draw inspiration from those procedures for scenarios that are not directly covered by the framework of the AVMS Directive, on the other hand.

The proposed solutions contain elements that complement the existing procedures and fill in existing gaps. Those that can be solved by NRAs, ERGA or NRA cooperation through EPRA, respectively, heavily rely on a close and stable cooperation of authorities. The spirit of European solidarity should guide every commitment for an improved application of the AVMS Directive in each Member State.

In particular, ERGA recommends to:

- Improve cooperation of NRAs by an increased use of the MAVISE database, which should, for this purpose, be updated regularly by the NRAs, by setting up a list of points of contact, by establishing a regular “call of regulators” and by foreseeing a regular reporting session at ERGA plenaries;
- Make cooperation in cross-border cases more efficient with a view to mutual help and information whenever the legal procedures of the AVMS Directive could be too cumbersome or where they do not apply;
- Ensure that internal procedures at the NRA concerned are made faster and more effective to avoid that problems in cross-border cases merely arise from individual circumstances;
- Use the EPRA network and particular NRAs (i.e. from the same language or cultural area) in relation with content coming from media services from third countries.

Whenever there is the need for an according intervention of the legislator, ERGA encourages the European legislator to:

- Create effective and time-saving procedures in the audiovisual media framework to safeguard the consistency of the Digital Single Market;
- Re-think regulatory approaches contained in other legal acts with relevance to the media sector to adapt them to changed media realities (e.g. in the e-Commerce Directive).
- Design the legal acts in a way that services from third countries cannot benefit from the liability exemption without having to commit to comply with the European legal framework.

## **V. Overall Conclusions**

### **1. Joint conclusions and recommendations**

The outcome of the Subgroup shows that securing pan-European compliance with fundamental values has a threefold dimension:

- A consistent and consequent implementation of the revised AVMS Directive requires a common understanding by NRAs of the material rules and definitions, including the underlying concepts.
- Regarding the expanded material scope of the Directive, NRAs need to develop an approach ensuring that the new obligations for VSPs are properly applied in practice, including through a regular monitoring of the appropriateness of the measures put in place by those providers.
- Tools and procedures need to be in place that guarantee a sustainable cooperation between ERGA members. Such cooperation needs to be detached from case-by-case procedures, therefore leading to general standards of mutual information, exchange and collaboration in the areas covered by the AVMS Directive and beyond. These general standards should focus on the full range of measures of cooperation available to NRAs, including early-stage consultations and pre-issue co-ordination. They necessarily include commitments amongst ERGA members regarding concrete steps of collaboration and actions to be taken. A Memorandum of Understanding, to be developed by a competent Subgroup in 2020, will gather such commitments. It will include means of cooperation for the different steps of the relevant procedures and will in particular draw upon the ideas and deadlines that are occasionally already mentioned in the Taskforce 2 and 3 paper.<sup>2</sup>

Bearing in mind that the Country of Origin Principle is strengthened by improving cooperation between NRAs, the recommendations do not question the validity of this principle. On the contrary, they have been developed with the purpose to ensure its full effectiveness, by avoiding incentives across market players to make illegitimate use of the benefits of this cornerstone of the AVMS Directive.

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<sup>2</sup> Acknowledging that not all ERGA members dispose of powers exceeding the scope of the AVMS Directive (yet), it is noted that the present paper does only govern those aspects that each NRA can touch upon on national level. In other words, the paper does neither alter existing attributions of responsibilities nor does it create new competences for ERGA members in their respective Member States.

## 2. Next steps and outlook

As next steps, ERGA members are invited to implement the suggested recommendations of the Subgroup by intensifying the envisaged exchange and cooperation and by putting into place the necessary internal procedures.

Generally, there is a need to take a more holistic approach to the regulation of all sorts of audiovisual content irrespective of their way of distribution, including all entities that are part of the audiovisual value chain.

Any further amendments to both the AVMS Directive and the e-Commerce Directive should rely on the Country of Origin Principle in its full dimension as the cornerstone of the European media framework, while seeking for a feasible adjustment to the changed media reality in order to avoid an erosion of this principle.

*Annex 1 – Paper of Taskforce 1 (Deliverable 1 of ToR)*

*Annex 2 – Paper of Taskforce 2 (Deliverable 2 of ToR)*

*Annex 3 – Paper of Taskforce 3 (Deliverable 3 of ToR)*