

ERGA Opinion

on decision No. 68/1-2 of the Latvian National Electronic Mass Media Council restricting the retransmission of the channel Rossija RTR in the territory of Latvia for 12 months

Background

1. On 15 February 2021, the European Commission sent a formal request to the Board of the European Group of Audiovisual Media Services (ERGA) to give an opinion on decision No. 68/1-2 of the Latvian National Electronic Mass Media Council (NEPLP) restricting the retransmission of the channel Rossija RTR in the territory of Latvia for 12 months.
2. According to Article 3(2) of the Audiovisual Media Service Directive (AVMSD)¹, a Member State may provisionally derogate from the general obligation of ensuring the freedom of reception of audiovisual media services on its territory from the other Member States (Article 3(1)), if it meets the conditions laid down further in the same article.
3. This provision further stipulates that the concerned Member State needs to notify the Commission of the measures taken, and that, after having requested ERGA to provide an opinion, the Commission shall take a decision on whether those measures are compatible with Union law within three months of the receipt of the notification.
4. Accordingly, it is one of the tasks of ERGA, according to point (d) of Article 30b(3), to give opinions, when requested by the Commission, on the technical and factual aspects of the issues pursuant to Article 3(2).
5. Pursuant to the request, and after taking into consideration all available relevant documents, ERGA has adopted the following opinion.

¹ See Annex – Applicable legal provisions

Part I – ERGA's remit regarding opinions under point (d) of Article 30b(3)

6. As this is the first time that the European Commission requests an opinion from ERGA pursuant to point (d) of Article 30b(3) since the Article entered into force, ERGA deems it appropriate to discuss the delineation of its remit under this provision and consider the nature of examination upon which the opinion itself shall be based.
7. In the cases of derogation from the obligation laid down in Article 3(1), like the one at hand, point (d) of Article 30b(3) gives ERGA the task of giving "*opinions, when requested by the Commission, on the technical and factual aspects pursuant to Article 2(5c), Article 3(2) and (3), point (c) of Article 4(4) and Article 28a(7)*".
8. The extent of the issues the opinion shall focus on is thus determined by point (d) of Article 30b(3) and the wording of the European Commission's Request itself.
9. The European Commission's Request of 15 February 2021 closely follows the wording of the Directive and specifies that the case at hand is pertinent to Article 3(2). It is, therefore, this provision against which the case will be examined.
10. The Directive further sets the focus of the opinion on the "technical and factual aspects" of the case. It is therefore crucial to understand what this means for the scope of the opinion.
11. By the term "technical aspects", ERGA understands that it is supposed to employ its members' expertise to assess the regulatory aspects of such cases, i.e. those aspects that are typically within both legal and practical remit of individual ERGA members in their jurisdictions.
12. As for the factual aspects, it is clear, that in order to assess the fulfilment of the requirements of Article 3 of the AVMSD, it is crucial to account for all the actions, or omissions thereof, of the relevant parties.
13. This account should include all the documents being produced, adopted, sent or obtained by relevant parties, but it does not require the verification of the contents of these documents nor the evaluation of the legal conclusions of relevant authorities within their competences concerning the domestic laws of the respective Member States.

14. The opinion itself, then, should consist of an assessment of whether the factual account and circumstances of the case satisfies, or fails to satisfy, the regulatory framework established by Article 3(2) of the AVMSD.

Part II – Factual summary account of the case

15. On 12 February 2021, pursuant to Article 3(2) of the AVMSD, the NEPLP notified the European Commission of its decision to restrict the retransmission of the television service Rossija RTR in Latvia for 12 months.

16. Rossija RTR is a Russian language television service under the jurisdiction of Sweden as its satellite uplink is located on Swedish territory. It is registered with the Swedish Press and Broadcasting Authority (the SPBA) under the name РОССИЯ РТР (Rossija RTR). An extract from the SPBA's register indicates that the service provider is, since 19 December 2018, 'The Federal State Unitary Enterprise – The Russian Television and Radio Broadcasting Company' (referred to as 'VGTRK' in the NEPLP documents). 'NCP Rusmediacom' (same address) first registered the service on 16 May 2012. The declared broadcasting area of the satellite television service is Estonia, Latvia and Lithuania. The service is also broadcast under the name 'RTR Planeta'. Rossija RTR is received in Latvia via satellite, cable and the Internet.

17. ERGA also notes that on 3 May 2019, the European Commission had decided that previous measures taken by the NEPLP to restrict the retransmission of Rossija RTR in Latvia for a period of three months were compatible with Union law. The European Commission had also decided in 2015, 2017 and 2018 that measures taken by the Lithuanian regulator to suspend the retransmission of 'RTR Planeta', for three, three and twelve months respectively, were compatible with EU law.

18. On the basis of the documents made available to ERGA and the complementary information collected, below is a summary record of the actions carried out by NEPLP before taking the decision to restrict the distribution of Rossija RTR in Latvia, and of this decision.

1/ On 18 August 2020, the NEPLP sent a letter to the European Commission (DG CNECT), to the television service provider (VGTRK) and to the SPBA "On initiating the procedure of restriction of the retransmission of the programme Rossija RTR in the territory of Latvia" (No. 3-6/750)

19. The NEPLP informed the European Commission, the service provider and the SPBA that it had monitored the programme '60 minut' broadcast by Rossija RTR on 10 July 2020. In a discussion about the fact that Ukraine may have planned to commit terrorist acts in Crimea in 2016, Ukraine was described as a terrorist state and the former Ukrainian President Poroshenko was described as a terrorist by some of the participants and the host of the programme.

20. The NEPLP considered that these statements violated Section 26(3) of the Latvian Electronic Mass Media Law (EMML) and point (a) of Article 6(1) of the AVMSD on hate speech.

Section 26(3) of the EMML states that programmes may not contain "incitement to hatred or discrimination against a person or group of persons on the grounds of sex, race or ethnic origin, nationality, religious affiliation or faith, disability, age or other circumstances."

21. The NEPLP informed the recipients of the letter that it was initiating the procedure of restriction of the television service Rossija RTR and announced its intention to temporarily restrict the retransmission of Rossija RTR in Latvia in the case of a repeated violation within 12 months (counting from 10 July 2020).

Section 21(1) of the EMML states that the NEPLP can restrict the retransmission of a television service under the jurisdiction of another Member State in case of a significant violation of Section 26(3), and if such violations have occurred at least twice in the last 12 months.

22. The service provider was invited to ensure compliance with the provisions of the EMML and the AVMSD.

2/ On 5 October and 17 December 2020, the SPBA responded to the NEPLP

23. In a letter dated 5 October 2020 (Case No. 20/03696), the SPBA acknowledged receipt of the complaint regarding the programme broadcast by Rossija RTR (RTR Planeta) on 10 July 2020.

24. The SPBA informed the NEPLP that the Swedish Broadcasting Commission (SBC) had reviewed the complaint and that the Chairman of the SBC had decided that the complaint would not lead to a review of the program before the SBC since there were no applicable rules for the SBC to review the program against. The SPBA further informed the NEPLP that the complaint had been

handed over to the Swedish Police Authority since the complaint concerned incitement to hatred.

25. The letter further informed the NEPLP that the service provider of Rossija RTR changed on 19 December 2018 from 'NCP Rusmediacom' to 'The Federal State Unitary Enterprise – The Russian Television and Radio Broadcasting Company'.

26. In a letter dated 17 December 2020 (Case No. 20/03696), the SPBA informed the NEPLP that the Police and the Chancellor of Justice had decided to close the investigation concerning the programme of Rossija RTR broadcast on 10 July 2020.

27. The SPBA also gave the information that the Swedish Radio and Television Act had been amended on 1 December 2020 and now contains rules in regard to satellite media services that fall under Swedish jurisdiction but are not intended to be received in Sweden. These new rules complement already existing rules under criminal law and state, in short, that programs broadcasted in such services may not be in breach of Article 6 in the AVMSD. The Chancellor of Justice is responsible for monitoring these new provisions.

28. During a meeting with ERGA, the SPBA confirmed that the case – according to the information received from the Police Authority – seems to have been dismissed on territorial jurisdiction grounds.

3/ On 13 January 2021, the NEPLP sent a letter to the European Commission (DG CNECT), to the television service provider (VGTRK) and to the SPBA "Regarding violations of regulatory enactments established in the programme Rossija RTR" (No. 2/3-6)

29. The NEPLP informed the European Commission, the service provider and the SPBA that it had monitored three '60 minut' programmes. It had found hate speech in each of these three programmes:

- '60 minut' broadcast on 10 July 2020
The NEPLP had found hate speech towards Ukraine and its former and current president.
- '60 minut' broadcast on 17 September 2020

The NEPLP had found:

- Hate speech towards Lithuania, Poland, Estonia, Latvia, all 'Russian bordering neighbouring countries' and hate speech based 'on ethnic principle' against the Lithuanians, the Poles, the Estonians, the Latvians, and 'all nations of bordering neighbouring countries of Russia';
- Hate speech with threats of military nature with regard to Germany, Sweden and Ukraine;
- Hate speech on the basis of 'ethnic principle' towards the Germans, the Swedes and the Ukrainians.

- '60 minut' broadcast on 21 October 2020

The NEPLP had found incitement to violence towards a Belarus politician. It had also found:

- Hate speech directed to a female Belarus politician, hate speech based on 'ethnic principle' against the Belarus, the Belarusians and the women of Belarus;
- Hate speech with threats of military nature with regard to Ukraine and hate speech based on 'ethnic principle' against the Ukrainians;
- Hate speech with threats of military nature against the European Union.

30. The NEPLP considered that these programmes violated Section 26(3) of the EMMML and point (a) of Article 6(1) of the AVMSD on hate speech; and that they also contained incitement to violence and threat of military nature violating Section 26(4) of EMMML, which states that programmes may not contain "incitement to war or the initiation of a military conflict".

31. The NEPLP informed the recipients of the letter that it was entitled, pursuant to Section 21(1) of the EMMML, to continue the restriction procedure launched for Rossija RTR and informed them about its intention to restrict retransmission of the service in Latvia for 15 months.

32. The service provider was invited to submit its written comments and to participate in a meeting on 28 January in order to discuss the violations and agree on further activities. Furthermore, the service provider was requested to ensure compliance with the EMMML and the AVMSD.

4/ On 27 January 2021, the Federal state unitary enterprise – The Russian Television and Radio Broadcasting Company (RTR) sent a letter (7/2200/11) to the NEPLP

33. The service provider expressed its disagreement with the allegations of the NEPLP concerning 'RTR-Planeta (logo Rossija RTR)'. It considered that the NEPLP had fulfilled its tasks in a discriminatory manner and had violated the freedom of expression. It accepted the meeting.

5/ On 28 January 2021, the NEPLP held a meeting with representatives of VGTRK

34. During this meeting, the service provider had the opportunity to express its views on the alleged violations.

6/ On 2 February 2021, the NEPLP held a meeting with the SPBA and the European Commission

35. During this meeting, issues related to the violations identified by the NEPLP were discussed.

7/ On 8 February 2021, the NEPLP took its decision "on the restriction of distribution of the programme Rossija RTR in the territory of Republic of Latvia" (No. 68/1-2)

36. Taking into account new infringements in a programme broadcast on 6 December 2020, the NEPLP assessed that four programs violated Section 26(3) and Section 26(4) of the EMMML and Article 6 of the AVMSD in less than a year:

- '60 minut' on 10 July 2020;
- '60 minut' on 17 September 2020;
- '60 minut' on 21 October 2020;
- 'Sunday evening with Vladimir Solovyov' on 6 December 2020.

37. The NEPLP decided to prohibit the retransmission of Rossija RTR in Latvia for 12 months from the date of this decision entering into force.

38. Pursuant to this decision, the retransmission of the television service Rossija RTR by the Latvian cable operators was suspended. The service may still be received in Latvia by direct-to-home satellite and the internet.

Part III – Conformity with the Audio-Visual Media Services Directive

39. ERGA, taking into account all of the proceedings and relevant documents summarised above, and following its task conferred by point (d) of Article 30b(3) of the AVMSD, reviewed the present case, and considered whether the conditions for derogation from the country of origin principle (Article 2(1) of the Directive) in Article 3(2) of the Directive, as invoked by the NEPLP, were met, thus allowing for a temporary suspension of retransmission (including distribution) of the programme Rossija RTR in the territory of Latvia for a period of 12 (twelve) months (decision No. 68/1-2 of 8 February 2021).

40. It should be emphasised that the admissibility of invoking Article 3(2) of the Directive depends on both 1/ procedural as well as 2/ material aspects.

1/ In a first step, ERGA examined whether the procedural steps foreseen in points (a) to (d) of Article 3(2) of the Directive had been complied with by NEPLP

41. Firstly, it was established that VGTRK had already performed one or more instances of conduct described in the first subparagraph of Article 3(2) at least on two prior occasions during the previous twelve months, in assessment of NEPLP a manifest, serious and grave infringement of point (a) of Article 6(1) of the Directive in the programme '60 minut' on 10 July 2020, on 17 September 2020, on 21 October 2020, and on 6 December 2020, in the programme "Sunday Evening with Vladimir Solovyov". It can, therefore, be concluded that the condition stipulated in point (a) of Article 3(2) of the Directive is met.

42. Subsequently, by letter of 18 August 2020, the NEPLP (i.e. the Member State concerned) notified VGTRK (i.e. the media service provider), the SPBA (i.e. the Member State having jurisdiction over the provider) and the European Commission in writing of the alleged infringement in the broadcast '60 minut' of 10 July 2020, and of the proportionate measures (temporary suspension of retransmission) envisaged should any such infringement occur again. Furthermore, by letter of 13 January 2021, NEPLP informed VGTRK, the SPBA and the European Commission with reference to broadcasts of '60 minut' on 10 July 2020, on 17 September 2020, and on 21 October 2020, that three violations had been established and the procedure to restrict retransmission in the territory of Latvia would be commenced. It can therefore be concluded that NEPLP complied with the obligation set out in point (b) of Article 3(2) of the Directive.

43. NEPLP gave VGTRK in writing the opportunity to express its views on the alleged infringements at least on two occasions: by letters of 10 July 2020 and of 13 January 2021, in which the factual circumstances of the alleged breach, the infringed provisions and the potential sanctions were described. In the second letter, VGTRK was explicitly requested to comment on the violations and accept a meeting to settle the issue. This request was responded to on 27 January 2021. On 28 January 2021, a meeting between NEPLP and VGTRK was held, and representatives of VGTRK were given the opportunity to express themselves in their native language. As the media service provider gave its comments both orally and in writing, and they were taken into account by the NEPLP in its Decision of 8 February 2021, it can be concluded that the rights of defence of the media service provider in accordance with point (c) of Article 3(2) were respected.
44. NEPLP's (first) letter notifying VGTRK, the SPBA and the European Commission dates 18 August 2020. On 19 October 2020, the European Commission proposed a meeting to discuss the alleged violations in the programme Rossija RTR, which subsequently led to a call between NEPLP and representatives of the European Commission. Furthermore, consultations with the SPBA were held by way of written exchanges of 18 August and 5 October (complemented by letter of 17 December) 2020. NEPLP then addressed the letter of 13 January 2021, among others, to the SPBA. It should be noted, in the context of a potential settlement of the case, that the SPBA informed NEPLP that there were no applicable rules for the SBC to review the programs against, and that the Police, to which the issue had been forwarded, had closed the case. Thereafter, on 2 February 2021, NEPLP met with the SPBA and the European Commission. It follows from the correspondence that no solution was reached. On 12 February 2021, NEPLP's decision of 8 February 2021 was notified to the European Commission to trigger the procedure foreseen in Article 3(2) of the Directive, the period between the notification of 18 August 2020 and the formal notification of the measures to the European Commission on 12 February 2021 thus exceeding one month. It is therefore concluded that the condition stipulated in point (d) of Article 3(2) of the AVMSD is satisfied, as consultations with the European Commission and the Member State having jurisdiction have not led to an amicable settlement within one month of notification.
45. In view of the above, ERGA concludes, in consideration of the circumstances of the case, that the procedural conditions for derogation from the principle of the country of origin laid down in Article 2(1) of the Directive, as foreseen points (a) to (d) of Article 3(2) of the Directive, have been met.

2/ Secondly, ERGA examined whether the conclusion by the NEPLP of a material breach of subparagraph 1 of Article 3(2) in conjunction with Article 6(1) of the Directive was adequately justified

46. In accordance with subparagraph 1 of Article 3(2) of the Directive, it must be established that the media service provider subject to the jurisdiction of another Member State manifestly, seriously and gravely infringed Article 6(1) of the Directive. This article stipulates that audiovisual media services may not contain incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union. Article 6(1) was transposed into national legislation by Sections 26(3) and 26(4) of the EMMML.
47. ERGA, upon review of the cases at hand and the assessments by NEPLP, has no doubts as to the justification of NEPLP's arguments. The relevant contents of the show '60 minut' mainly dealt with Russia's neighbouring countries and, as was established convincingly, contained incitement to hatred directed both against groups of peoples in terms of nationality and/or ethnicity and to members of groups of people thereof. It, therefore, follows that an infringement of Article 6(1) of the Directive was rightly established by NEPLP.
48. The European Court of Justice, in its ruling of 22 September 2011 (Joined Cases C-244/10 and C-245/10), held that the terms used in Article 22a of Directive 89/552/EEC (thereby referring to the expression of "incitement to hatred") must be determined by considering the usual meaning in the everyday language of the terms used in that Article, while also taking into account the context in which they occur and the purposes of the rules of which they are part of. Regarding the words 'incitement' and 'hatred', they refer, first, to an action intended to direct specific behaviour and, second, a feeling of animosity or rejection with regard to a group of persons (Recitals 40 and 41 of the judgment).
49. With a view to the content of the concerned broadcasts, NEPLP has convincingly argued that they all contained statements suitable to appeal to feelings of animosity towards other ethnicities and nationalities or individuals from these groups, such as from Ukraine and the Baltic countries. In addition, as was equally established, the broadcasts directly incited violence, both against individuals or ethnicities, by way of military aggression and called for the

restoration of Russia within the borders of the Soviet Union (and beyond). As NEPLP held, the content of the programmes was thus suitable to create/increase tensions between the Russian minority in Latvia and the Latvians. It can, therefore, be concluded that a material breach of Article 6(1) of the Directive has occurred.

50. ERGA equally shares NEPLPs' view that the relevant media service provider manifestly, seriously and gravely infringed the material provision of Article 6(1) of the Directive: after reviewing the transcripts of the relevant programmes, there are no difficulties in concluding that the infringements established by NEPLP are manifest to every average viewer of the programme, not requiring any specific knowledge to understand the conflicts addressed in these programmes. Regarding the requirement of the seriousness of the breach, it must be emphasised that in this case, hate speech incited violence, and, therefore, the infringements need to be qualified as serious. Hate speech in the definition of the Directive constitutes one of the two grounds upon which the freedom of speech is restricted (see the European Commission's argumentation in its Decision of the compatibility of the measures taken in accordance with Article 3 of Directive 2010/13/EU by Lithuania of 4 May 2018, C(2018) 2665 final). Finally, the breaches must be qualified as grave, as they are suitable to aggravate tensions impeding a peaceful coexistence of sovereign nations and ethnicities.

51. As a final step, ERGA assessed whether the measures taken by NEPLP appeared proportionate in view of the infringements referred to above, as any restriction on the freedom of reception in regard to Article 3(1) of the Directive must be proportionate (point (b) of Article 3(2) of the Directive). NEPLPs' Decision of 8 February 2021 prohibits retransmission (including distribution) of the programme Rossija RTR in the territory of Latvia for a period of twelve months. In this regard, not only recurrence of the infringements must be taken into account, but also the fact that similar infringements by the same media provider have led to a prohibition of retransmission for three months on a previous occasion (see the Decision of the European Commission C(2019) 3220 of 3 May 2019) in Latvia, as well as on other occasions, for periods of three months (see the Decisions of the European Commission (C(2015) 4609 of 10 July 2015, and C(2017) 814 of 2017) and twelve months (see the Decision of the European Commission C(2018) 2665 of 4 May 2018) in Lithuania.

52. In this regard and given the factual and technical circumstances of the case at hand, ERGA is of the opinion that the decision (No. 68/1-2) by NEPLP to provisionally derogate from Article 3(1) was substantiated and is compatible with the Directive.

Annex

Applicable legal provisions

Audiovisual Media Services Directive (Directive 2010/13/EU as amended by Directive 2018/1808)

Recital 17:

"In order to ensure coherence and legal certainty for businesses and Member States' authorities, the notion of 'incitement to violence or hatred' should, to the appropriate extent, be understood within the meaning of Council Framework Decision 2008/913/JHA (1)."

Article 3:

1. *"Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.*

2. *A Member State may provisionally derogate from paragraph 1 of this Article where an audiovisual media service provided by a media service provider under the jurisdiction of another Member State manifestly, seriously and gravely infringes point (a) of Article 6(1) or Article 6a(1) or prejudices or presents a serious and grave risk of prejudice to public health. The derogation referred to in the first subparagraph shall be subject to the following conditions:*
 - (a) during the previous 12 months, the media service provider has on at least two prior occasions already performed one or more instances of conduct described in the first subparagraph;*
 - (b) the Member State concerned has notified the media service provider, the Member State having jurisdiction over that provider and the Commission in writing of the alleged infringements and of the proportionate measures it intends to take should any such infringement occur again;*
 - (c) the Member State concerned has respected the right of defence of the media service provider and, in particular, has given that provider the opportunity to express its views on the alleged infringements; and*

(d) consultations with the Member State having jurisdiction over the media service provider and the Commission have not resulted in an amicable settlement within one month of the Commission's receipt of the notification referred to in point (b).

Within three months of the receipt of the notification of the measures taken by the Member State concerned and after having requested ERGA to provide an opinion in accordance with point (d) of Article 30b(3), the Commission shall take a decision on whether those measures are compatible with Union law. The Commission shall keep the Contact Committee duly informed. Where the Commission decides that those measures are not compatible with Union law, it shall require the Member State concerned to put an end to the measures in question as a matter of urgency."

Article 6:

1. *"Without prejudice to the obligation of Member States to respect and protect human dignity, Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any:
(a) incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter; (...)"*

Article 30b:

2. *"ERGA shall have the following tasks:
(...)
(d) to give opinions, when requested by the Commission, on the technical and factual aspects of the issues pursuant to Article 2(5c), Article 3(2) and (3), point (c) of Article 4(4) and Article 28a(7)."*

Charter of Fundamental Rights of the European Union (2012/C 326/02)

Article 21:

"Non-discrimination

1. *Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."

Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law

Recital 9:

'Hatred' should be understood as referring to hatred based on race, colour, religion, descent or national or ethnic origin.

Article 1(a):

"1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

(a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;"