



**SG1 Consistent implementation and enforcement  
of the new AVMSD framework  
Final Overview  
(Deliverables 3 and 5 of the ToR)**



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## 1. Introduction

ERGA's work program for 2021 coherently continued the path already crossed in 2020, to ensure a smooth and consistent implementation and enforcement of the revised AVMSD, stating that:

*“ERGA will keep track on how implementation occurs across the European Union. The focus of the work will be of a very analytical nature, focusing on how NRAs are:*

- *dealing with the new obligations for audiovisual media service providers and video-sharing platforms;*
- *enhancing the regulatory framework for media services by regulatory practice;*
- *interpreting their role and competences in an ever-increasing digital world.*

*In order to ensure a coherent implementation of the Directive, ERGA will issue guidance on the interpretation of certain complex new provisions of the revised AVMSD, notably in the area of video-sharing platforms and questions around the concrete nature of vloggers, signal integrity and accessibility.”*

The forementioned tasks have been assigned to ERGA SG1.

## 2. Structure and scope of Subgroup

In order to produce the guidance on consistent approaches to appropriateness of the measures taken by video-sharing platforms (VSPs) and the complaint and redress options envisaged, the Subgroup focused on the implementation of **Article 28b**, from the specific perspective of the responsibility of the platforms in applying the required measures and the role and tasks demanded to NRAs. This topic was handled as a drafter by Irish BAI under the direct responsibility of SG1 Chair.

Given the width and complexity of the issues on which the SG was expected to delivery, the other tasks were assigned to two Workstreams according to the following lines of activity:

- **Workstream 1** (Best practice exchange: Analysis of implementing national measures, under the drafting leadership of German DLM) was mainly focused on an exchange on the national transpositions and particularly:
  - the new rules on the prominence of general interest content (**Article 7a**, directly drafted by German DLM),
  - the scope and exceptions concerning the new signal integrity rules (**Article 7b**, under the drafting responsibility of Slovakian RVR) in order to encourage common approaches.
- **Workstream 2** (Technical expertise: Interpreting and providing guidance on the most complex new provisions, under the drafting leadership of Belgian CSA) focused on:
  - possible criteria for the qualification of **vloggers** as audiovisual media services, drafted by Austrian KommAustria with the cooperation of Dutch CvDM and Belgian CSA;
  - the new rules on the prominence of European works (**Article 13(1)**), drafted by Belgian CSA;



- the new rules on accessibility (**Article 7**)<sup>1</sup>, examining how to facilitate a common understanding of ‘proportionate’ measures, drafted by Swedish SPBA.

The ToR foresaw five deliverables: along with the reports on VSPs, the reports concerning WS1 (prominence of general interest and signal integrity) and WS2 (vloggers, prominence of European works accessibility) it included a general overview on the main findings of the aforementioned papers (purpose of the present document) and the organization of an experts and stakeholders workshop about the interpretation of the new provisions of AVSMD on the responsibility of VSPs and competences of NRAs, which took place on 22 September.

### 3. Guidance and recommendations concerning implementation of Article 28b

This report explores critical issues relating to the interpretation of Article 28b, in order to provide guidance on best practices on its implementation and enforcement. The activity on this point has included i.a. a qualitative survey of the membership of the Subgroup about how Article 28b has been transposed in their jurisdiction.

#### **Part 1 – High Level Discussion of Article 28b**

Part 1 explores several issues relating to Article 28b which requires Member States to ensure that video-sharing platform services take appropriate measures to protect their users. It also explores the different approaches to providing users of VSPs with out-of-court redress mechanisms. This section highlights that the obligation to comply with the article rests with Member States (and NRAs assessing the appropriateness of measures taken by VSPs, by extension) rather than VSPs.

#### **Parts 2 & 3 – Implementation (Practical Examples) and Learning Emerging**

Part 2 of the report looks at different approaches that are being taken to the transposition of the Directive, in particular Article 28b. Four examples are explored. A “Civil Law” approach (Germany), a “Common Law” approach (Ireland), a “Self/Co-regulatory approach” (Netherlands) and a “Flexible approach” (Other Member States).

In part 3 the different approaches to transposition are considered in the light of three criteria: (1) Clarity of Obligations, (2) Responsiveness of Enforcement and (3) Managing Complexity. These factors have been selected because they are likely to be important from a regulator’s perspective.

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<sup>1</sup> Though initially foreseen in the ToR as under WS 1, the topic of accessibility was moved to the WS 2, deeming it more coherent and useful for the purpose, as agreed during the first meeting of the SG, held on 10 February 2021.



## **Part 4 – Conclusions**

A consistent theme emerging from the inputs informing this report and the analysis of these inputs is that, unsurprisingly, the regulation of platforms under Article 28b will not be straightforward because it is linked to a range of practical issues that regulators will have to consider when regulating VSPs - particularly when assessing the appropriateness of the measures they adopt.

Another theme emerging is how the roles that regulators play can vary within different jurisdictions. In the “civil law” tradition, the regulator can be expected to play a strong enforcement role, while “self/co-regulatory approach” may ensure faster results and “flexible approach” could ultimately be the most appropriate where concerns about non-compliant VSPs are minimal.

The approach taken in Article 28b ultimately provides each Member State with the flexibility it needs to regulate platforms in a manner that best suits its legal and cultural traditions.

Anyway, looking to the future, it is likely that many of the issues explored in this report will have relevance in the context of the Digital Service Act, since it extensively codifies services’ obligations and processes at a legislative level, making the responsibility of bodies empowered to act as a digital service coordinators more similar to the role of an enforcer.

## [4. Overview document on the exchange of best practices regarding Articles 7a and 7b](#)

### **Part 1 – Article 7a**

The final report on the work of ERGA Subgroup 1 Workstream 1 is an attempt to provide with an overview on the current state of the national implementation of Art. 7a and 7b of the AVMSD, to continue an exchange of best practice examples and to facilitate a common understanding of the regulatory mechanism of the provisions. Therefore, ERGA members were invited to provide answers to a digital questionnaire on the national transposition.

The answers by ERGA members demonstrate that the current state of national implementation of Art. 7a AVMSD varies largely in between Member States. The few transposition examples already in place indicates a few common denominators: general interest content must promote media pluralism and must be of an adequate and actual “public interest”. Such a definition should not be limited to public service media but shall also include content provided by commercial media services, which aims to fulfil social, democratic and cultural needs. It should also refrain from potentially subjective quality standards. Therefore, a mixed approach for a definition of criteria for general interest content is preferable, composed by criteria regarding the content provided but also indicators that are connected to the type and formation of the media service provider, in order to be kept as abstract, principle-based and technologically neutral as possible in order to be future-oriented.



The result of the report also shows similarities regarding the understanding of the technical implementation of prominence measures.

Due to the lack of a greater number of transposition examples effectively in force, any references concerning a more harmonized approach among Member States would be premature at this time.

## **Part 2 – Article 7b**

Article 7b of the AVMSD lays down rules governing signal integrity. Article 7b aims to protect the rights of the media service providers by prohibiting overlaying for commercial purposes or modifying their media services without their explicit consent. The media service can be modified in a number of different ways, by shortening, altering or interrupting the content.

From the wording of Article 7b, it is apparent that overlays requiring a consent of the media service provider need to be commercial in nature. However, when it comes to altering, shortening and modifying the content, a consent is required whether it is done for commercial purposes or not. Recital 26 mentions several types of overlays which are exempt from the obligation laid down in Article 7b.

The results of the survey submitted to ERGA members show that Member States who implemented the provision mostly did so without any changes. Even when the wording of the obligation was slightly changed, the obligation stayed the same. The national provisions are usually a mixture of Article 7b and Recital 26 of the AVMSD, the latter providing the exemptions from the obligation. The transposition of Article 7b of the AVMSD has so far not posed many problems because the wording itself is quite unambiguous.

Practical implementation, however, may pose some trouble in deciding which overlays or scaling are still permissible and which aren't. Since in practical regulators will have to ascertain the commercial nature of the various overlays that could be used mainly by distributors and TV manufacturers, a common approach in implementation of the new rules will be useful and appropriate. Therefore, an exchange of best practices is crucial.

## **5. Guidance/analysis and recommendations**

### **5.1. Analysis and recommendations concerning the regulation of vloggers**

The first issue of ERGA WS2 is dedicated to the theme of Vloggers. This specific stream focuses on the consistent application of the revised AVMSD (and in particular its advertising standards) to vloggers and strive i.a. to provide clear criteria for the qualification of vloggers as audiovisual media services.

The Draft guidance paper starts with an introduction about definitions and pre-requirements for Vloggers, describing the concept of Vloggers and its legal framework, by a comparison from the Directive 2010/13/EU to the new Directive 2018/1808/EU. It further describes the key elements



applicable for Vloggers' activities, which need to be checked in order to assess if a certain service may be qualified as an on-demand audiovisual media service or not. Furthermore, a comparison with the regulatory requirements for Video-sharing platforms is carried out and identifies the regulatory challenges of both of these activities.

This is followed by a number of country examples, showing the national differences of the regulatory needs and interventions, carried out by the respective NRA's and authorities.

At the end a short wrap up with some conclusions is given, also providing some suggestions for further guidance on the theme of Vloggers, specifically pointing out the criteria to apply to Vloggers legal provisions for ODAVMS deemed more useful: mass media; economic service; editorial responsibility; catalogue; other instruments, complementary and/or statutory regulations.

## 5.2. Transposition and implementation of Article 13(1) of the new AVMSD – Ensuring prominence of European works in the catalogues of on-demand audiovisual media services

With regard to the enforcement of prominence of European works, the report is the result of the answers collected among Members of ERGA SG1 and shows that most of the Member States don't define the notion of prominence, not going further recital 35 of the AVMSD, and leave on-demand audiovisual media service providers free to use any mean they find appropriate.

Regarding the minimum share of 30% of European works, almost all Member States transposed or are about to transpose the obligation without any modification. Few Member States provide more detailed measures such as higher quotas or sub quotas.

Regarding the control of on-demand audiovisual media service providers compliance with their obligations, while some NRAs already developed a control procedure of prominence and quotas obligations, some others still need to implement concrete processes. Most of the regulators declare collecting the information through self-declarations on a yearly basis. The extend of the control of on-demand audiovisual media services by national regulators varies from case to case.

As the transposition into national legislation is quite recent for most of the NRAs, most of them did not have the occasion to complete a full control of the obligations on prominence so far. Therefore, it was impossible to determinate which tools were the most efficient to ensure the prominence of European works in a post transposition environment. These questions will need further examination in the future when compliance assessments will have been completed.

As regards labelling in metadata, the standardization of the EU classification and the creation of the European database should be done by a European entity according to most of the respondents. Nevertheless, the opinions on the way to fill the European database and its management either by a European entity or by rightsholders are more divided. Moreover, on the type of metadata contained in audiovisual works to be used for the labelling of European works, most of the respondents agreed on the main country of production provided by the content providers (licensors).



### 5.3. Accessibility and “proportionate” measures (Article 7.1)

The report consists of the following sections: Introduction, Legal provisions in the revised AVMSD, Summary of the findings in the 2019 report on Accessibility, Mapping of ‘proportionate’ measures in the different national accessibility obligations and General trends and possible guidance.

The Introduction includes some general information about ERGA’s work during 2018 and 2019 leading up to this report, excerpts from the 2021 Work Programme as well as a description of the SG1 WS2 work during 2021.

Legal provisions in the revised AVMSD recites Article 7 and Recitals 22 and 23 of the revised AVMSD.

The Summary of the findings in the 2019 report on Accessibility briefly maps out the findings in the overview document relating to Article 7 in the 2019 report Implementation of the revised AVMS Directive.

The section called Mapping of ‘proportionate’ measures in the different national accessibility obligations summarises the responses to the questions in the digital survey that was sent out to all NRAs, with questions regarding ‘proportionate’ measures in Article 7.1 of the revised AVMSD.

The final section of the report focuses on General trends and possible guidance. This part of the report is based on the responses described in the abovementioned section. In this section we summarised the responses to the questionnaires, pointing out some general trends, which may serve as general guidance on how ‘proportionate’ measures may be interpreted in the continued work with making services and programmes accessible to persons with disabilities. Since most countries already have accessibility obligations in place, we did not consider it appropriate to produce more strict “guidelines”. Instead, a “smoother” approach has been chosen, allowing all NRAs, both those whose countries are still in the process of finalizing their obligations and those whose countries already have obligations in place, to use the general trends as perhaps inspiration for the future. As can be seen from the section called Mapping of the different national accessibility obligations, ‘proportionate’ measures differ at least slightly from country to country. They differ regarding which providers, services and programmes that the obligations apply to. They also differ when it comes to the different obligations themselves (i.e., techniques, quantity, quality etc.). Some general trends can still be observed however, as described in this final section of the report.

## 6. The Workshop on the implementation and enforcement of the new AVMSD framework

The workshop took place on 22 September via Webex. After the opening remarks by ERGA Vice Chair and EU Commission, which pointed out that implementation and enforcement of AVMS Directive is an essential premise to ensure the condition of a correct development of the digital environment, the first





session has focused on AVMSD provisions concerning audiovisual media services (from the double perspectives of prominence of general interest content and accessibility) while the second analyzed the provisions related to VSPs (NRA's assessment of appropriateness of measures taken by VSPs to protect users and out-of-court redress mechanism).

The sessions were attended by academics, representatives of services providers, technical stakeholders, users and an international civil society organization.

During the first panel - focusing on the issue of “prominence of AVMS of general interest”, panelists Prof. Dr. Juliane Lischka of University of Hamburg, Erard Gilles of ACT and Richard Moreton of Samsung stressed that prominence is aimed at first at protecting the user's interest and the users often adopt a passive attitude when receiving information, and therefore prominence to the general interest content should be ensured also when users do not look actively for it.

The use of metadata was defined crucial also for the TV manufacturers, not only for the content providers, to ensure that the viewers have a satisfactory experience, while it was pointed out that prominence of general interest content is a sort of continuation of “must carry” regulation, which, however, must be implemented uniformly in different platforms and types of screens.

In the second session of the first panel - focusing on accessibility - the European disability forum, represented by Prof. Pilar Orero and Mher Hakobyan illustrated the EDF kit, containing interesting and goal-oriented suggestions to guarantee an efficient implementation, also from the technical perspective, of the AVMSD provisions related to accessibility.

In the second panel – focusing on the Video Sharing Platforms and seeing as panelists Prof. Fabio Bassan of Università Roma 3, Pierre Francois Docquir of Article 19, Susan Moss of TikTok and Marco Pancini of YouTube – it emerged that the implementation of Article 28b of the AVMS Directive may prove to be problematic because each EU Member State may have transposed the obligations in a different manner and because each video sharing platform might decide to implement these obligations in its own way. It was also remarked that the approach of increasing codification (e.g.: DSA) should be coordinated with the reality of the market and the solution could be a self-regulation coordinated by National regulatory authorities. It was also highlighted the importance of applying international human rights principles to content moderation decisions, while the representatives from VSPs highlighted their companies’ firmly commit to removing content that violates their policies and that a balance must be found between the application of the Country-of-origin principle and the need for online platforms to have regard to local sensitivities.

The discussion of the workshop showed that the update of the AVMS Directive, alone, is only the initial and essential step and needs further complementary interventions to regulate the new market dynamics and to ensure a fair and sustainable competition between the traditional media and the new digital players.



The conclusions of the workshop can be summarised as follows. Many of the questions raised during the workshop may be answered only by the very recent legislative initiatives carried out by the EU Commission: the Digital Services Act (DSA), which is going to shape the role of regulation of the digital platforms and of the non-audiovisual content, and the Media Freedom Act (MFA) which will likely touch upon the topic of the freedom of media also in the digital environment. Since they do not need transposition, both initiatives will be implemented in a uniform manner by the Member States, and this is an important step forward when regulating platforms available in more than one European Country.

In its position paper adopted on July 5, ERGA has already officially pointed out that the rules of the DSA should be improved by taking into account the specific needs of online content regulation, which cannot solely rely on the provisions of the AVMS Directive. Securing an efficient interplay between the DSA and the AVMS Directive will allow competent institutions to regulate better the provision of content in the online environment and exploit better enforcement tools.