



# ERGA Opinion on AVMSD Proposals

## 1. Introduction

The European Regulators Group for Audiovisual Media Services (ERGA) brings together heads or high level representatives of national independent regulatory bodies in the field of audiovisual services, to assist and advise the Commission on the implementation of the EU's Audiovisual Media Services Directive (AVMSD)<sup>1</sup>.

ERGA's work programme for 2016<sup>2</sup> created a new work area, advising on the regulatory implications in the application of new legislative provisions proposed in the review of the AVMSD.

The 5th ERGA Plenary Meeting<sup>3</sup> approved terms of reference<sup>4</sup> for a subgroup tasked with delivering this work area. This Opinion has been produced by that subgroup following a series of meetings held between April and September 2016, and was adopted by ERGA formally on 5 October 2016 following the written procedure envisaged in ERGA's Terms of Reference.

ERGA welcomes the review of the AVMSD and has already produced several reports making specific recommendations in this regard. It is pleased to note the European Commission has drawn from these in preparing its legislative proposal.

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<sup>1</sup> <https://ec.europa.eu/digital-single-market/en/news/commission-decision-establishing-european-regulators-group-audiovisual-media-services>

<sup>2</sup> <https://ec.europa.eu/digital-single-market/en/news/erga-work-programme-2016-tools-european-regulators-converging-media-landscape>

<sup>3</sup> [http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc\\_id=14502](http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=14502)

<sup>4</sup> [http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc\\_id=14496](http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=14496)

ERGA has looked at the legislative proposals<sup>5</sup> from a practical point of view, from the expert perspective of the audiovisual national regulatory bodies: what will be the consequences in terms of day-to-day regulation if the proposals become European law; what would be the implications and needs when applying and enforcing the proposed rules?

These practical consequences will be discussed in the next sections of this document:

- Scope of the Directive
- Video-sharing platforms
- Commercial communications
- European Works obligations
- Protection of minors
- Territorial Jurisdiction

The following positions were also discussed and agreed by ERGA.

### **Independence of audiovisual regulators**

The new Article 30 in the proposal aims to enshrine the independence of audiovisual media regulators into EU law by ensuring that they are legally distinct and functionally independent from the industry and government (e.g. they neither seek nor take instructions), operate in a transparent and accountable manner as set out in a law, and have sufficient powers. Several considerations of the ERGA report on independence in that respect are reflected in Article 30. ERGA endorses these principles and has argued strongly for the independence of regulators<sup>6</sup>.

### **ERGA's status and operation**

The proposals formalise the role of ERGA as an independent, expert advisor to the Commission, and as a forum for the exchange of experiences and best practices between the national regulators. They also assign some new responsibilities to ERGA and its members. The advisory role will be more specific in some cases, for instance with regard to jurisdiction issues and issuing opinions on Union codes based on co-regulation.

ERGA has taken its responsibilities very seriously in the past three years and will be pleased to continue to do so and take on board new tasks. As to new responsibilities, ERGA will consider the practical and procedural implications once the AVMSD has been revised, including for its funding and its resources. ERGA would also wish to consider revisions to its rules of procedure.

### **Accessibility of content for people with a disability**

ERGA notes that the Commission's proposal deletes Article 7 on the grounds that the proposed European Accessibility Act (EAA) will set stricter common accessibility requirements for media service providers. The current rules of the AVMSD have been effective, in ERGA members' experience, in providing the framework to ensure fair access to audiovisual content to persons with

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<sup>5</sup> This Opinion refers to the Commission proposal, and not any subsequent discussions or proposals for amendments.

<sup>6</sup> ERGA published a Report on 11/01/16 on the independence of National Regulatory Authorities which sets out a fuller position, see

<https://ec.europa.eu/digital-single-market/en/news/erga-report-independence-national-regulatory-authorities> and has also made several public statements.

hearing and visual disabilities. ERGA would like to draw the attention on the fact that there could be a time gap between the adoption of the EAA and the revision of the AVMSD.

If policy makers decide to bring access to audiovisual services back into the AVMSD, ERGA will be ready to provide expert guidance and indeed already has a working group devoted to an assessment of the initiatives taken by AVMS providers in this area.

## 2. Scope of the Directive<sup>7</sup>

The relevant changes are:

1. The revision of the definition of AVMS to reflect the possibility that an element of a service might be an AVMS: *“the principal purpose of the service or a dissociable section thereof...”*. (This is complemented by Recital 3);
2. The removal from the definition of *programme* of the criterion *“the form and content of which are comparable to the form and content of television broadcasting”*; and
3. The introduction of a definition of *“user-generated video”*: *“a set of moving images with or without sound constituting an individual item that is created and/or uploaded to a video-sharing platform by one or more users”*.

### 1. “...principal purpose of the service or a dissociable section thereof...”

Recital 3 provides clarification: *“The principal purpose requirement should be also considered to be met if the service has audiovisual content and form which is dissociable from the main activity of the service provider... A service should be considered to be merely an indissociable complement to the main activity as a result of the links between the audiovisual offer and the main activity”*.

In its report on Material Jurisdiction<sup>8</sup>, ERGA requested that the *“principal purpose”* criterion be clarified to address the fact that one *website* might include several *services*, each one having a principal purpose in its own right. This revision, which also reflects the ECJ judgement in the New Media Online case (C-347/14), specifically addresses this concern.

ERGA notes that, even with this revision and the Recital, further clarification in relation to the notion of a *“dissociable section”*, by contrast to an *“indissociable complement”*, would help secure a consistent approach to the application of this criterion across NRAs.

The notion of *“dissociable section”* of a service as well as what is considered to be *“an indissociable complement to the main activity”* will need to be clear to regulators also when implementing the new rules on video-sharing platforms (VSPs). The indication that *“a service should be considered to be merely an indissociable complement to the main activity as a result of the links between the audiovisual offer and the main activity”*, does not provide sufficient guidance for practical overview purposes, as the necessity to identify a *“principal purpose”* only arises in relation to a website offering a plurality of services, which will generally be interlinked.

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<sup>7</sup> The proposal to create a new category of regulated services – video-sharing platforms – is discussed below; this section deals with the possible overlaps and questions regarding VSP and AVMS.

<sup>8</sup> <https://ec.europa.eu/digital-single-market/en/news/erga-report-material-jurisdiction-converged-environment>

## 2. Removal of “the form and content of which are comparable to the form and content of television broadcasting”

In its report on Material Jurisdiction, ERGA pointed out that the “TV-like” criterion which appeared in Article 1 (b) and Recital 24 of the 2010 AVMSD could be clarified to secure the fair, proportionate and consistent determination of the regulatory status of a service. The deletion of this criterion takes account of the convergence of audiovisual media services and will reduce the extent to which it gives rise to confusion or inconsistency and could allow coverage of a wider range of AVMS. The deletion of the criterion could also lead to a significant expansion of the scope of the Directive, which will depend on which elements of the current Recitals (21-24) relating to the scope of the Directive are retained.

This is because, in determining whether services are in the scope of the 2010 AVMSD, some ERGA members have relied on the provisions of Recitals 21-24, which provide clarification of the intended scope of the 2010 Directive.

In particular, Recital 21, which states that AVMS “... are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public”; and that AVMS “... should not cover activities which are primarily non-economic and which are not in competition with television broadcasting”, plays an essential role. Some ERGA members make use of explicit rules which are based on the text of Recital 21 – for example relating to the number of viewers to an on-demand channel on a video-sharing platform – to determine scope.

If the provisions of Recital 21 were to be eliminated from the text, the scope of the new AVMSD could be very broad, covering services – such as many of the channels on a VSP – which are not primarily economic and have negligible audiences, and hence a limited impact on public opinion.

## 3. Introduction of a definition of “user-generated video”, taken with (2) above

There is a combined result of removing the definition of *programme* of the criterion “the form and content of which are comparable to the form and content of television broadcasting”; with the introduction of a definition of “user-generated video”: “a set of moving images with or without sound constituting an individual item that is created and/or uploaded to a video-sharing platform by one or more users”.

The revised Directive envisages that audiovisual media content might be subject to regulation either as a *programme*, or as a *user-generated video*, with regulatory responsibilities placed on the providers of AVMS or the operators of video-sharing platforms. As a consequence it might not be clear for practical purposes which rules should apply to any specific video offered online.

ERGA understands that all the videos on an AVMS are *programmes* under the regulatory responsibility of the AVMS provider; while in contrast “user-generated video” covers all of the video assets on a VSP, apart from the videos which are part of an AVMS provided on that VSP, as explained in Recital 3. While this distinction seems clear in principle, ERGA would like to point out that this will present some practical challenges in application, both for regulators and potentially for VSPs, as the definition of *programme* in Article 1 effectively covers videos of any nature: “a set of moving images with or without sound...including feature-length films, videos of short duration, sports events, situation comedies, documentaries, children’s programmes and original drama”. Any particular video on a VSP may therefore be subject to the stricter rules of the AVMSD, if it is provided as part of an AVMS on that VSP, or it might solely be covered under the more limited regulatory rules applying to user-generated videos.

ERGA acknowledges that this uncertainty also exists under the current Directive, where videos on a VSP may simply be out of scope and therefore subject to no specific audiovisual regulation, or they may be part of an AVMS and therefore subject to regulation.

### 3. Video-sharing platforms (VSPs)

ERGA would like to raise the following issues of a practical nature:

1. The practical steps VSPs and regulators will need to take under the provisions of Article 28a;
2. The ability of NRAs to establish jurisdiction;
3. The interpretation of “*editorial responsibility*”, and “*dissociable content*” within the meaning of VSP providers.

#### 1. The practical steps VSPs and regulators will need to take under the provisions of Article 28a

Namely:

- a. The practical steps the video-sharing platforms will need to take, to satisfy the requirement that they take “appropriate measures” to protect minors from harmful content and all citizens from content containing incitement to violence or hatred;
- b. The practical steps which regulators will have to take to assess the appropriateness of the measures taken by VSPs;
- c. What practical form the “complaint and redress mechanisms for the settlement of disputes between users and video-sharing platform providers relating to the application of the appropriate measures” might take.

Paragraph 1 of Article 28a provides that Member States shall ensure that VSP providers take appropriate measures a) to protect minors from content harmful for their development and b) to protect all citizens from content containing incitement to violence or hatred.

Paragraph 2 of Article 28a sets out broad criteria for determining what an “appropriate measure” is:

- the nature of the content in question
- the harm it may cause
- the characteristics of the category of persons to be protected
- the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created and/or uploaded the content as well as the public interest.

Paragraph 2 of Article 28a gives an exhaustive (maximally harmonised) list of possible “appropriate measures”, and Recital 29 explains these further, stating that “*In light of the nature of the providers’ involvement with content stored on video-sharing platforms, those appropriate measures should relate to the organization of the content and not to the content as such*”.

Paragraph 4 of Article 28a requires Member States to establish mechanisms to assess the appropriateness of the measures, and for content regulators to be given the relevant duties.

Paragraph 6 of Article 28a requires Member States to ensure there are complaint and redress mechanisms in place for dispute resolution relating to the appropriate measures.

In order to provide their practical input on this new regulatory framework, ERGA members discussed what processes and what responsibilities VSPs and regulators might have when appropriate

measures, assessment processes and complaint mechanisms are in place. ERGA identified areas where the implementation of the Directive could take a wide range of forms, with different practical consequences for regulators and VSPs. The AVMS is a Directive, so it cannot be expected to provide the specific provisions of a Regulation – implementation of the AVMSD is in the hands of Member States. However, ERGA considers it would be valuable if the debate about the AVMSD text could take account of these practical questions.

ERGA is not commenting on the policy to which the Directive gives effect; but to be able to consider and comment on the practical aspects of the VSP regulatory scheme, there are two areas where regulators would welcome more clarity at the moment of implementation.

First, more clarity on what actions are required to assess the appropriateness of the measures, a responsibility with which they may be tasked. Possible approaches include:

- *An assessment of the overall approach of a VSP* (“Does the VSP have a definition of incitement to violence in their terms and conditions”; “Does the VSP have a mechanism to allow users to flag content which incites violence”);
- *A (regular) assessment of the operation of the measures by the VSP.* (“How many reports of content inciting violence in the last year?”; “How long did it take to review the flagged content?”; “What actions did the VSP take following the review of the content?”);
- *A (regular) assessment of the specific decisions and consequences of the measures taken by the VSP.* (“Do consumers encounter content which incites to violence on the VSP?”; “Is the VSP correctly identifying and acting on specific content which incites to violence on the VSP”).

These different approaches would entail new practical tasks for regulators – in particular, if regulators’ assessment role involves consideration of the decisions taken by VSPs about specific content and/or the general consumer experience of VSP users, it would involve significant new responsibilities, and have implications for the extent of the regulatory oversight the Directive places on VSPs.

Secondly, a similar question about regulators’ practical duties arises in relation to the requirement for complaint and redress mechanisms dealing with disputes between VSPs and users, which Member States must ensure are in place. The question for ERGA members is whether it is expected there will be a role for regulators in the provision of these schemes. Member States might require complaints and redress to be in the hands of

- a) The VSP itself;
- b) The NRA (or another independent body).

As above, in the event that the regulator is given responsibility for complaints handling, this would seem to involve review of the decisions taken by the VSP about specific video content (e.g. considering a complaint such as: “I am complaining that the VSP removed my video, because I disagree with the VSP’s conclusion that it incites to violence”). This would similarly create significant new responsibilities for regulators, and have implications for the extent of regulatory oversight the Directive places on VSPs.

## 2. The ability of NRAs to establish jurisdiction

ERGA notes that it will be necessary for NRAs to have the adequate powers to acquire knowledge of the organisational structure of VSP providers, when their headquarters are in non-EU countries. Otherwise, it will be difficult for Member States to establish jurisdiction on the basis of a “subsidiary

established on their territory” or another company which is part of the same group or another entity of that group.

NRAs would need to be equipped with the information-gathering powers needed to enable them to make such determinations (for example, to require information from VSP subsidiaries in their territory).

### 3. The interpretation of “editorial responsibility”, and “dissociable content” within the meaning of VSP providers.

A clarification of the notion of “editorial responsibility” in relation to content uploaded to VSPs seems necessary. This would help to make clear whether the actions taken by an online service provider which *appears* to be a VSP actually could amount to exercising editorial responsibility. ERGA would also like to note that by definition a VSP may undertake some organising actions in relation to the content it stores, potentially including organising actions taken on videos provided as part of an AVMS on the VSP. Despite this, AVMS providers on VSPs remain editorially responsible for their services, and for compliance with the rules of the AVMSD.

## **4. Commercial communications**

ERGA wishes in particular to highlight practical aspects of the proposed changes in the following areas:

1. The replacement of children’s programmes by “programmes with a significant children’s audience”;
2. The removal of the criterion of “undue prominence” and “special promotional references” in product placement;
3. The removal of the criterion of “special promotional references” in sponsoring.

### 1. “Programmes with a significant children’s audience”.

The proposed new Directive would prohibit product placement (PP) not only (as is currently the case) in children’s programmes but in all programmes with a significant children’s audience. Similarly, co- and self-regulatory codes shall ensure in future that inappropriate advertising of unhealthy food is excluded in or around programmes with a significant children’s audience.

In both cases the scope of the prohibitions is extended in order to ensure a stronger protection of minors. The new criterion “programmes with significant children’s audience” intends to ensure that the majority of children – independent of whether they watch a traditional children’s programme or a programme that is equally attractive to them – will not be exposed to either product placement, which they might not be able to understand or recognise, or to extensive unhealthy food promotion, which may harm their health.

From a regulator’s point of view, the question is how to implement the new provisions in practice.

AVMS providers would have to know in advance of a programme’s distribution whether it qualifies as a “programme with a significant children’s audience” in order to comply with the requirement not to include product placement in that programme or to abstain from advertising High Fat Sugar and Salt (HFSS) products. An ex-post analysis by the regulator of each programme in order to establish the percentage of children’s audience on a case-by-case basis would neither achieve the intended goal to protect minors from inappropriate advertising nor would it enable industry to comply with the rules in a reliable and consistent way.

In order to ensure sufficient certainty for both regulators and industry, and efficient, appropriate protection in practice, one option for regulators to implement the new provision could be to identify certain categories of programmes which – according to the results of data research in the respective Member States or according to their nature – tend to attract a significant number of children.

## 2. The removal of the criterion of “undue prominence” and “special promotional references” in product placement.

Under the current AVMSD, a product that is featured within a programme may not be given undue prominence (Article 11 para 3, subpara 3(c)). The Commission proposes to abolish this prohibition because “it has proved difficult to apply in practice” and “also restricts the take-up of product placement which, by definition, involves some level of prominent exposure to be able to generate value” (see draft Recital 17). On the other hand, the Commission’s proposal underlines, in the context of product placement, the need to ensure that the audiovisual media service provider’s editorial independence is not affected (draft Recital 17 and Article 11(3)(a)).

On the factual side, some regulators have indeed struggled to apply the criterion of “undue prominence”, whereas others have published clarifications or guidelines on how to apply it in practice and find it useful. In addition, jurisprudence on undue prominence has been developed in several Member States. Both have contributed to legal certainty as to the application of the criterion in some Member States.

On the practical side, regulators will still need to ensure that the editorial independence is not compromised by the insertion of product placement: indeed, this becomes the main focus. In the absence of an “undue prominence” criterion, and that of “special promotional references”, regulators consider it might in some cases be more difficult to apply Article 11(3)(c) to determine – in a legally sustainable way – that editorial independence has been affected or compromised by product placement interests.

## 3. The removal of the criterion of “special promotional references” in sponsoring.

Article 10, point (b) in its current form states that sponsored programmes “*shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services*”.

In the proposal the latter part of quoted provision (*underlined*) is to be removed. The explanation for this measure in the proposal seems to be Recital 14 according to which “*for sponsorship to constitute a valuable form of advertising technique for advertisers and audiovisual media service providers, sponsorship announcements can contain promotional references to the goods or services of the sponsor, while not directly encouraging the purchase of the goods and services*”.

In ERGA’s view, this change will help to clarify the hitherto unclear interpretation in Article 10 regarding the content requirements for sponsorship announcements that in ERGA’s experience has manifested itself in diverging regulatory practices in this area. However, while Recital 14 seems to be focused solely on sponsorship announcements, the removal of the criterion of ‘*special promotional references*’ in Article 10 point (b) does not concern only sponsorship announcements, but sponsored programmes as a whole.

The elimination of the ban on the special promotional references may have consequences for the sponsored programmes as a whole. This measure might have an impact on the practical application of the principle of separation of commercial content from the editorial one. Without the criterion of “special promotional references” there will be no limit to permissible commercial content in the sponsored programme except for the direct encouragement to the purchase or rental of goods and



services. This means, in practice, that sponsored programmes would be allowed to contain special promotional references to products or services of the sponsor (or other entities) that would not need to be distinguished from editorial content as such.

This step could legitimize the demand on the side of advertisers for more commercial utilisation of the content of the sponsored programmes which could, in turn, intensify commercial pressure on the service providers and their editorial responsibility. Even if Article 10 point (a) will still prohibit the sponsor from exerting an influence in such a way as to affect the responsibility and the editorial independence of the service provider, without the additional provision prohibiting objective manifestation of such an influence in the programme, such as current Article 10 point (b), this might be in many cases unenforceable in practice.

## 5. European Works obligations

ERGA would like to raise the following practical issues:

1. The identification and monitoring of the share of 20% of European Works (EW) in the catalogue of on-demand audiovisual media services;
2. The prominence of European Works (EW) in this catalogue;
3. The imposition of financial contributions;
4. The application of the waiver.

### 1. The identification and monitoring of the share of 20% of European Works (EW) in the catalogue of on-demand audiovisual media services

ERGA envisages two principal ways to determine the 20% of EW in the catalogue of an on-demand audiovisual media service:

- a) in terms of duration of transmission, as actually happens in linear services; or
- b) in terms of number of titles.

This last approach might seem more practical, although there remain questions as to how each individual work should be measured. In particular, while a one-off work such as a film should be counted as one work, there are different interpretations regarding works related to each other, for example in the case of series. It seems likely that many NRAs will count episodes as individual works, however, absent any further guidance in the Directive, it will be up to the Member States to determine the implementation of this rule.

### 2. The prominence of European Works

As well as securing at least a 20% share of European works in the catalogue of on-demand AVMS in their jurisdiction, Member States are also required to ensure prominence of these works.

There are several ways for service providers to give prominence to specific content. For instance, a service provider could organise a specific category dedicated to a certain type of content in the catalogue. Another way of giving prominence could be advertising inserts on the home page of the Electronic Programme Guide or the website. The service provider could also give prominence in a “barker channel” (a linear channel created simply to promote an on-demand service), or by references to the specific content in promotional material. Another possibility could be giving prominence under headings in the navigation of an on-demand service. A service provider could also give prominence to specific content in promotional campaigns for the service itself.

It is appropriate that the proposal does not prescribe the way(s) of giving prominence, given the diversity of practical solutions. For purely practical matters, ERGA could assist in collecting and exploring some existing best practice models.

### 3. The imposition of financial contributions

Both the recitals and the provisions imply that –as an exception to the country of origin principle – the targeted Member State may also impose a financial contribution on the VoD provider but only based on the revenues earned in the targeted Member State. ERGA notes that under the proposals, a service provider established in one country and targeting several other countries with one service, can be subject to several financial contributions, since one can be imposed by every targeted country.

Some providers do not exclusively offer on-demand audiovisual media services, which could lead to the practical question of how to assess and isolate the revenues gained from the on-demand audiovisual media service as distinct from other revenues. ERGA also notes that the current text does not explicitly make clear that the imposition shall be based only on on-demand revenues.

ERGA members also identified the practical question of how the Member State of establishment could take into account any financial obligations imposed by one or more targeted Member States. Given the possible duplication of imposed financial obligations, there should be some collaboration and exchange of information between the different Member States if NRAs are to ensure that account is taken by the Member State of establishment of revenues and levies in the targeted Member State.

### 4. The application of the waiver

Paragraph 5 of the proposed Article sets several conditions in which Member States shall release a provider from contributing to the promotion of EW. These are the following:

**a) Providers with a low turnover or low audience or if they are small and micro enterprises and b) cases where they would be impracticable or unjustified by reason of the nature or theme** of the on-demand audiovisual media services.

In this sense, Recital 25 of the AVMSD proposal establishes that *“In order to ensure that obligations on promotion of European works do not undermine market development and to allow for the entry of new players in the market, companies with no significant presence on the market should not be subject to such requirements. This is in particular the case for companies with a low turnover and low audiences and small and micro enterprises as defined in Commission Recommendation 2003/361/EC. It could also be inappropriate to impose such requirements in cases where – given the nature or theme of the on-demand audiovisual media services – they would be impracticable or unjustified”*.

ERGA sees some practical challenges with the second part of this paragraph: the identification of cases where this obligation would be “impracticable or unjustified” because of the “nature or theme” of the on-demand audiovisual media services.

In this respect, a two-tier approach can be used: a) one based on the nature of the audiovisual content and b) a quantitative approach.

Articles 16 & 17 exclude some types of audiovisual works (news, sports events, games, advertising, teletext services and teleshopping) from the proportion of broadcasting time which should be allocated to EW. A similar approach in relation to these types of content might be relevant for non-linear services, notably where the on-demand service is thematic.

In order to establish that a service is thematic, both a qualitative and a quantitative approach can be used. In some Member States, a quantitative threshold in terms of titles is required in order to establish that a provider of on-demand audiovisual media services is a thematic provider. This threshold could be significant and clear in order to avoid doubts about the type of service that this party provides, but ultimately it will be for Member States to set their own criteria for “thematic” service.

## **6. Protection of minors**

ERGA would like to raise the following practical issues:

1. Protection tools
2. Other intermediary parties

### 1. Protection tools

The protection levels of linear and non-linear audiovisual media services are levelled by introducing in Article 12 the same rules for both domains. From the perspective of oversight in practice, the protection measures mentioned in Article 12 need more elaboration. To be able to regulate effectively, a clearer typology for the different types of protection measures is desirable. This could include scheduling measures on the one hand and parental and access control measures on the other hand.

Additionally, it would be helpful for oversight to clarify that the application of watershed-based measures to on-demand media services could continue under the future AVMSD as a protection measure, if proportionate to the potential harm.

With regard to the practical implications of Article 12, ERGA notes that the adequate protection should be effective within the whole converged media value chain. On traditional broadcast platforms, service providers are able to make use of protection tools implemented on the platform. But in some new environments – on the open internet or on specific digital devices – the protection measures may not always be available. This has to do with a variety of circumstances, such as the lack of machine-readability, common interfaces and standardisation.

The AVMSD does not impose obligations on TV platforms or devices relating to the provision of protection tools. However, that raises a question about the obligations of AVMS providers whose service includes content to which minors’ access should be restricted (and a related question about ERGA members’ enforcement of the rules). Recital 3 makes clear that an AVMS provider on a VSP platform is responsible for compliance with the Directive; ERGA considers that this means that an AVMS provider with content to which minors’ access should be restricted should not offer its service on a VSP which does not incorporate adequate protection measures, as minors’ access would not be appropriately restricted.

ERGA members note that this clear duty on AVMS providers would also apply in other environments and platforms: an AVMS provider whose service includes content to which minors’ access should be restricted would be likely to be in breach of its obligations if it offered its service on platforms and devices which do not incorporate adequate protection measures, as it is the AVMS provider which is responsible for ensuring the protection of minors.

In order to implement these provisions, regulators will need clarity as to whether AVMS providers' responsibilities apply in all environments.

## 2. Other intermediary parties

The proposal distinguishes two main types of providers which would fall under the scope of the Directive and have been assigned a responsibility with respect to the protection of minors from harmful audiovisual media content:

- 1) The providers of audiovisual media services, both linear and on-demand who are already under the scope of the current AVMSD and which bear full responsibility.
- 2) The providers of video-sharing platforms who fall only to a certain extent under the Directive on the basis of Article 28a.

ERGA observes that regulators can be confronted with specific situations and cases that potentially can lead to overlaps or gaps when it comes to the protection of minors. For example, there can be situations where on-demand media services are offered within a video-sharing platform. This is for instance the case when a (professional) media service provider has channels on YouTube. Recital 3 suggests that it is the AVMS provider (e.g. "*with editorial responsibility*") which is required under the Directive to provide information and/or protection measures under those circumstances. However, the video-sharing platform operator will need to enable the AVMS provider to apply such measures.

## **7. Territorial Jurisdiction**

This section comments on the practical implementation of the provisions regarding attachment to the jurisdiction of a Member State (Article 2), derogations (Article 3) and the anti-circumvention procedures (Article 4).

In its report on Territorial Jurisdiction, the ERGA assessment of the current provisions of the Directive highlighted a number of practical challenges following from the existing jurisdiction criteria<sup>9</sup>.

This section will focus on practical issues that may arise in the field of territorial jurisdiction, in respect of the following proposals.

### **1. Simplification and clarification of jurisdiction criteria (Article 2.3b)**

For the practical application of the provision, regulators will need clarity regarding the application of the criterion of the place where editorial decisions are taken and on the concept of editorial decision itself. Different approaches to the concept of editorial decision – especially the nature of the editorial control (effective control) and the place where decisions are actually taken – may lead to regulators being confronted with enduring conflicts of jurisdiction and to difficulties in addressing apparent circumvention practices. So further clarification on jurisdiction could provide added value, especially with regard to the concept of editorial control (including tools to tackle split or shared functions), and "workforce".

The proposals simplify the criteria for determination of the competent State, for providers where headquarters and editorial decisions are localised in different Member States. The provision proposes that in such cases, the Member State with jurisdiction is the place where the *majority* –

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<sup>9</sup> <https://ec.europa.eu/digital-single-market/en/news/erga-report-territorial-jurisdiction-converged-environment>

instead of the *significant part* – of the workforce involved in the audiovisual media services activities operates. The revised proposal related to the determination of the "workforce" is a helpful clarification but may not fully avoid conflicts of jurisdiction and the resulting problems.

## **2. Information by the Member States on the list of AVMS providers under their jurisdiction (Articles 2.5a and 5)**

The Commission proposal to add Article 2.5a and a provision to Article 5 will increase transparency and inform the Commission about which service providers Member States deem to be under their jurisdiction.

To enable further transparency and ease the exercise of oversight and enforcement, the register might be made available directly to all citizens, regulators and market players.

## **3. Cooperation between Member States and within ERGA to arbitrate conflicts of jurisdiction (Article 2.5b)**

From a practical perspective, it seems natural that regulators – who must already make determinations of jurisdiction in order to issue licences etc. – should collaborate through ERGA where there are disputes.

Requesting ERGA to provide an opinion could be an improvement and help strengthen cooperation between regulators, but it raises a practical issue that a deadline of 15 days for issuing an ERGA opinion will be quite challenging.

## **4. The application of the anti-circumvention procedure (Article 4)**

The Commission proposes to further clarify the anti-circumvention procedure, with an obligation to state reasons, a respect for the rights of defence, and a lengthening of the review time by the Commission by setting up a double period of three months (a first to check the completeness of the file, a second to validate the measure).

As mentioned in its report of May 2016, these additional requirements do not seem to sufficiently address the practical difficulties of applying Article 4, highlighted in the ERGA report.

At the stage of formal cooperation procedure (the first of finding mutually satisfactory solutions), many NRAs have encountered providers falling under another Member State's jurisdiction not complying with their stricter rules. In some cases providers did not show willingness to assist NRAs despite several attempts. At the stage of the anti-circumvention procedure, most of the NRAs consider that it is difficult to prove circumvention.

The ERGA report makes various proposals to improve the current system for linear services and find new solutions for non-linear services, in particular regarding the burden of proving the existence of circumvention or the evidence base to identify it.

## **5. Territorial jurisdiction of non-linear services (Article 13)**

In terms of territorial jurisdiction, the Commission proposes – for video-on-demand services – to outline the criteria for establishing when a service is targeting a country of destination. Furthermore, it makes explicit that, where there is targeting, Member States may require services to contribute financially in the targeted country to the production of European works. In this case, it will therefore be sufficient to simply establish the targeting of the destination market.

ERGA considered in its report that in a revised Directive, the formal cooperation procedure envisaged in Article 4.2 and the anti-circumvention provisions in Article 4.3 should also apply to on-demand service providers (Recommendations 9 and 12).

Such a proposal is offering a way to limit the risk of circumventing provisions which aim at funding production, or indeed any other domestic provisions imposed by Member States for public policy reasons.

Nevertheless, regulators would find it easier and potentially more effective to work with a single framework dealing with circumvention and co-operation, covering linear and non-linear services.