

### **Panel 3 - Material Jurisdiction**

Dear all,

Coming to the material jurisdiction issues, we sent you some questions earlier to have your initial views on some big issues that we are dealing with as regulators. To set the scene, I will just give you some initial points that you might be debating later on.

We asked you first which services are challenging the existing scope of the AVMS directive. In September last year, we submitted the CSA contribution to the European Commission consultation on the review of the AVMSD and we pointed at too many regulatory unbalances between services which are regulated and others which are less or not regulated at all.

Depending of the category to which the services belong or depending on whether they simply match the criteria defining an audiovisual media service, rules are not the same or not applicable and you notice different regulatory treatments. We observed differences ....

- Between linear vs nonlinear services,
- Between TV-like or not TV-like programs,
- Between services matching the criterion of the principal purpose and others not matching this criterion

Fortunately, the European Court of justice brought some clarification recently in its New Media Online judgement on the two previous concepts - TV-like programs and the criterion of the principal purpose - but we believe that some clarification should be brought in the AVMSD as well.

Last but not least, AVMS rules are not applicable to hosting providers because there are assumed to be in charge of the mere hosting and transmission of their services.

As regulator, we are of course uncomfortable with these differences in regulatory treatment. To preserve competition, we are aiming at imposing the same rules on players providing similar services in an identical perimeter. In our converged world, we believe that the consumers' and citizens' protection should not vary depending on the platforms, their number, or the way content is delivered to consumers. And we trust that this approach can be reconciled with the objective to support the emergence of new businesses.

As you see, regarding the TV-like character of the programs, we have been confronted with some real big existential questions. To be TV-like or not to be TV-like, that's the question. As you know, the question whether the programs can be compared to the form and the content of television broadcasting, is an additional criterion which is at the end limiting regulation to services on which the viewer is deemed to expect regulation. However, we do believe that the number and type of services competing with television have been evolving and growing recently. We see the increasing production and consumption of high quality short form of content

which are appearing on audiovisual platforms. In our view, these short form content services can have an impact on the public opinion and are competing with the same audience as television broadcast. This has been acknowledged by the European Court in its New Media Online judgement. Therefore, we are not sure that the reference to TV-like character is still meaningful, especially because, as it has been said at ERGA level, such a criterion is unavoidably subjective and could lead to several different interpretations, which is not good for the internal market.

As regard audiovisual platforms, it has been demonstrated that certain platforms can play a role in fulfilling some specific goals of the directive, among others: plurality and freedom of information, consumer protection. Against this background, we are wondering whether the concept of editorial responsibility should be revisited or not. The intervention of some hosting providers in the editorial process is of course not to be compared with the editorial intervention of other players. At the same time, suggesting that videos uploaded by users are completely escaping the hosting providers' control might appear excessive. At least, it should be recognised that they play a role in organising the way the content is appearing on their website. Promoting this content, recommending it to their customers and holding the right to modify this content are as much actions which can have a substantial influence on the opinion. In a nutshell, some platforms, to some extent, are telling us who we are and what we should have in mind. Pierre Lescure wrote in a report that there is a human being behind each algorithm and each update of it could be assimilated to an editorial intervention.

Having said that, the CSA is bearing in mind that economic models should not be endangered. Along these lines, requesting that hosting providers would be reviewing each video before being uploaded might be many steps too far.

In our contribution to the European debate, we proposed creating a new subject of rights and obligations in the AVMSD. This new category would cover all platforms distributing audiovisual media services. Obligations linked to this category could relate to the access to these platforms, findability of European works, and investment in local content for instance. There are different existing legal regimes which could be inspiring as you heard this morning. Of course the e-commerce directive should be reviewed in parallel, which is not the case. This is not good Lorena. I will not go into the details of these obligations, but we deem that this proposal is reasonable as it aims at restoring the level playing field. We will not be regulating all audiovisual platforms; it would be impossible, counterproductive and bad for businesses. Instead, compliance could be mandatory only for services with turnovers exceeding a specific threshold, reflecting their significant market position and therefore their possible impact on the opinion. We think that with big money, come bigger responsibilities.

Bernardo Herman