

Executive summary and conclusions of ERGA report on territorial jurisdiction

1. FRAMING THE PROBLEMS

This section summarises problems described by ERGA members as resulting from the cross-border distribution of audiovisual media content, taking a thematic-orientated approach without distinguishing between the various legal grounds or mechanisms for the problem reported.

1.1 Forum shopping

The country-of-origin principle and the principle of freedom of establishment are acknowledged by many as a main driving force behind the development of a European single market for audiovisual services today. However, many NRAs also see these principles as **creating a risk of forum shopping** (in the sense that an AVMS provider may choose to establish itself in a Member State in order to avoid either stricter regulation in certain areas or more active and effective monitoring by the NRA in general). In cases when the activity of an AVMS provider does not require the AVMS service to be located in the receiving territory, **such avoidance could be seen as deliberate** – and as the reason for the choice of establishment.

It is also recognized that there are many other reasons for establishment, including favorable tax regimes, reliable and creative production sectors, labour legislation, geographical location, advertisement revenues, less bureaucracy, better evolved infrastructure, and other economic considerations as well as target audiences.

1.2 Difficulties with the enforcement of national stricter rules

Approximately half of the NRAs have expressed that the freedom of establishment has led or can lead to an **unlevel playing field, or perhaps rather unfair competition**, among different media services targeting or being established in different Member States, potentially due to the fact that the **Member States have chosen to adopt stricter rules** in certain areas in accordance with Article 4 of the AVMS Directive. Some NRAs have pointed out that this is an inherent tension in the AVMS Directive, which seeks to achieve a compromise between the aim of **facilitating cross-border European content provision** on the one hand, and the social and democratic aim of **respecting cultural diversity** among Member States on the other.

Many NRAs express the **need to retain the freedom** for Member States to adopt stricter rules in order to preserve cultural diversity, fulfill national objectives and public policy goals, as well as to allow the Member States to protect their citizens accordingly, despite their inability to enforce such rules with the regulatory mechanisms described above.

Consumer protection and pluralism

The **protection of consumers is one central aspect** that is affected by content made available to citizens in one Member State by an AVMS provider established in another Member State or a non-EU country. This is particularly true in cases where the provider established in another Member State has a significant presence in the market of the targeted Member State in terms of **high audience shares**. Predominantly, this concerns the protection of minors and the protection of consumers from audiovisual commercial communications prohibited under the stricter national rules of one Member State but allowed under the rules of another.

This can cause significant problems for Member States in that either they are not able to impose the stricter rules that apply to services within their jurisdiction to services that are outside of their jurisdiction but nevertheless available in their country, or that the mechanisms of the Directive allowing for the enforcement of those stricter rules in certain circumstances were perceived or assessed as difficult if not impossible to use.

Economic aspects

Several NRAs have reported that media services targeting their Member State while being delivered from another Member State may have negative effects on their national market, since for example **certain obligatory contributions to the production of audiovisual content might not apply** to service providers established in other countries. In a similar vein, certain **advertising practices** of broadcasters established in a certain Member State might lead to distortions of the national market in another.

Several NRAs have reported severe market distortions in regards to **advertising revenues**, in particular in cases where the AVMS provider established in another Member State has a significant presence in the national market. Concerns have been raised by NRAs that broadcasters established in other Member States attract **high shares of marketing budgets** of national industry by specifically addressing the citizens of the country of destination.

2. PROBLEMS WITH EXISTING MECHANISMS OF THE DIRECTIVE

2.1 Determining territorial jurisdiction

Primary jurisdiction criteria

ERGA Members have considerable experience in applying the primary jurisdiction criteria as set out in Article 2(3) of the Directive. Most confirmed that the criteria are relevant to the services for which they are responsible and work well. But a significant number stated they

had encountered **difficulties in applying the criteria and considered they were no longer effective**. Several described disputes between NRAs over jurisdiction, which had been experienced by six members of ERGA.

The key themes to emerge were:

- (i) a **lack of clarity** of the criteria themselves (in particular a lack of common understanding of what constituted “editorial control”), which were variously described as “vague” and too open to interpretation;
- (ii) **enforcement challenges**, including the difficulty in verifying information about the location of aspects of providers’ activities, and related to the ease with which a head office can be easily located in any Member State; and
- (iii) uncertainty in how to apply criteria to companies with **unusual or new business models** (for example where functions were split across territories, including those outside the EU), and the observation that businesses have structured themselves around the current criteria in a way that could look like “**regulatory gaming**”.

Secondary jurisdiction criteria

Far fewer ERGA members had experience of applying the secondary, or “technical”, jurisdiction criteria set out in Article 2(4) of the Directive. However, the understanding of those who did have experience of applying these criteria was extensive, and allows us to draw some key observations of the problems involved:

- (i) **Applying the criteria** can be extremely difficult in practice because of the nature of the satellite broadcasting industry and business models. Resulting problems are: a lack of understanding of registration requirements on the part of providers; multiple satellites carrying the same service and the ease of migration from one satellite to another; subcontracting of uplinks; lack of day-to-day oversight of services available on a particular satellite (up- or down-linked); and a lack of any common understanding of the “satellite footprint” criteria.
- (ii) **Enforcement problems** described also seemed to stem from the nature of satellite broadcasting, which often involves more players in a more complex value chain than terrestrial. In particular, NRAs experienced problems with non-EU services carried on EU satellites, through delays in communication and a lack of understanding of the EU regulatory landscape.
- (iii) The **limitations of the criteria** were also noted, in that they apply only to satellite broadcasts and cannot at present be extended to make non-EU services available in the EU via cable, IPTV or the open internet comply with the AVMS Directive.

2.2 Freedom of reception, exceptions and derogations

There is limited experience among ERGA members of applying the procedure in the Directive to derogate from freedom of reception (as set out in Article 3 of the Directive), and almost no NRAs have given consideration to how they would apply the concept of a “manifest[], serious[], or grave[]” breach of articles 27 or 6 of the Directive . For those who have followed the procedure, or at least given it serious consideration, key criticisms to emerge were:

(i) **the timeframe** for each stage of the procedure to derogate in relation to television broadcasting, as set out in Article 3(2); the procedure was described as taking too long, and – conversely – the 15 day deadline for reaching an “amicable settlement” as unrealistic;

(ii) the **lack of an emergency procedure** (such as that for non-linear services, as set out in Article 3(5)) which meant that – in conjunction with the detailed requirements of Article 3(2) – action could not be taken in urgent cases; and

(iii) the lack of clarity over what is meant by “**an amicable settlement**” .

2.3 Formal cooperation

Few NRAs have had experience of using the formal cooperation procedure envisaged in Article 4(2), although around half consider it to be a suitable means of addressing the challenges posed by the ability of Member States to impose stricter rules domestically.

In practice, **very few members have had an entirely positive result** through the use of the mechanism, because it places no obligations on broadcasters to comply with a request from their NRA. However, it is recognised that the process has helped raise awareness of the existence of stricter rules, and occasionally has facilitated reaching compromises with broadcasters. One NRA (Norway) was able to provide an example of broadcasters voluntarily complying with stricter rules in a country of reception specifically following a formal cooperation procedure. There are also examples of broadcasters voluntarily tailoring their content to the country of reception without a formal request. A significant number of NRAs having tried the mechanism have been met with a rejection of the request.

2.4 Demonstrating deliberate circumvention

No successful attempts to demonstrate deliberate circumvention of a receiving Member State’s stricter rules were reported. There is consensus that it is difficult or very difficult to prove deliberate circumvention and that this is not helped by a lack of any indication of what evidence threshold would be needed.

2.5 Informal cooperation

Informal cooperation is also envisaged as a route to solving problems related to cross-border broadcasting, and is regarded positively by a clear majority of members. However, despite

the anecdotal successes mentioned by many NRAs, some have pointed out that informal cooperation on its own has **not proved sufficient to meet the bigger challenges** of problems such as determining jurisdiction.

3. ERGA RECOMMENDATIONS

This section summarises possible solutions proposed by ERGA to the challenges outlined above. In line with the structure of the report, it considers:

1. Non-legislative solutions that ERGA could implement;
2. Non-legislative solutions that the Commission could implement;
3. Legislative solutions that entail amendments to the mechanisms that support the territorial jurisdiction framework;
4. Cooperation between regulators; and
5. Legislative solutions that would require more fundamental changes to the operation of the territorial jurisdiction framework.

3.1 Non-legislative solutions that ERGA could implement

I. Common information system on services and providers:

ERGA members support the idea of a common system of information on broadcasters that are licensed/authorised in each Member State. It is generally recognised that this would improve cooperation between regulators, and prevent instances of multiple licensing.

There were different views as to the type of information that should be included in such a system, and what form the system should take. Some NRAs noted that resource considerations and differences in NRAs' information gathering powers point to the need for further discussion on this point. A number of NRAs highlighted existing work led by EPRA and the EAO to improve the MAVISE database.

How to enforce and facilitate the exchange of best practices can be explored further within the ERGA Subgroup on *Creating Digital European Toolkit (DET) for efficient and flexible regulation* which has been created by ERGA Work Programme for 2016.

Recommendation 1: ERGA believes a common information system on media services licensed in each Member State can play an important role in ensuring the effective implementation of the framework for determining territorial jurisdiction. ERGA notes that work led by the European Audiovisual Observatory and EPRA is underway, and underline ERGA's commitment to supporting this initiative.

II. Common information system on national legislative frameworks:

ERGA supports the idea of developing an information system mapping different national rules, as it could help raise awareness of different national interpretations of AVMS rules. In order to build on what already exists and to diminish the amount of administrative and translation work that this could entail, the AVMS-Database of the EAO is considered to be an appropriate basis, as it contains – in English – the national stricter rules for the areas harmonised by the AVMSD.

Recommendation 2: ERGA supports the further development of any information sharing systems on national legislative frameworks to help raise awareness of different national interpretations of AVMS rules.

III. Exchange of good practices:

ERGA is supportive of further informal cooperation and exchange of best practices. NRAs have submitted a range of proposals for areas where regulators could collaborate to develop common approaches based on their experiences. These included interpretations of the establishment criteria, experiences of implementing Article 3 (derogation from the principle of freedom of reception) and determining whether a service is “wholly or mostly” targeting a Member State.

Recommendation 3: ERGA will consider in the future how to foster a more common approach to the implementation of key areas of the framework for establishing territorial jurisdiction.

3.2 Non-legislative solutions that the Commission could implement

ERGA supports in principle the clarification of several aspects of the territorial jurisdiction framework under the AVMSD. In particular, this is sought on the application of the establishment criteria (Article 2), the possibility to restrict transmission (Article 3) and the anti-circumvention procedures (Article 4). There is a range of non-legislative instruments available to the Commission which could be possible solutions, including soft-law (Recommendations) and/or official guidance.

Recommendation 4: this ERGA report lists a number of non-legislative initiatives to clarify elements of the territorial jurisdiction framework under the AVMSD. ERGA would support being associated with these initiatives, should the European Commission make use of them.

3.3. Legislative solutions to amend the mechanisms that support the territorial jurisdiction framework

I. Article 2 – The primary establishment criteria

ERGA calls upon the Commission to take action to clarify the establishment criteria, in particular on concepts such as “editorial control”.

Recommendation 5: ERGA calls on the Commission to review and clarify the primary criteria for establishing jurisdiction, in order to ensure a more harmonised application of key concepts such as “editorial control”.

II. Article 2 - The secondary establishment criteria

Views appear to be split on whether the secondary criteria should be amended to cover non-EU services delivered over technologies other than satellite (e.g. internet distribution). Several individual NRAs made suggestions as to how this could be achieved in practice.

Recommendation 6: ERGA could further explore whether the secondary jurisdiction criteria could be modified to cover non-EU services delivered over technologies other than satellite

III. Article 3 – Derogation from the principle of freedom of reception

ERGA calls on the Commission to make the derogation procedure more efficient, and to clarify certain terms in it. ERGA also supports the idea of having the same grounds for derogation on linear and on-demand services.

Recommendation 7: ERGA calls on the Commission to review and clarify the administrative procedure for derogating from the principle of freedom of reception under Article 3. In doing so the Commission should ensure that the procedure is practically enforceable and efficient, rather than formal and protracted.

Recommendation 8: ERGA supports the view that the same grounds for derogation should apply across all audiovisual media services. Further work should be carried out by ERGA to determine whether these grounds should be levelled up or down. Moreover, the fast track procedure of Article 3.5 should also apply to all audiovisual media services.

IV. Article 4.2 – The formal cooperation procedure

ERGA supports the extension of the application of the enhanced cooperation procedure (under article 4.2) to video-on-demand services.

Recommendation 9: ERGA considers that in a revised Directive, the formal cooperation procedure envisaged in Article 4.2 should also apply to on-demand services.

Considering that very few members have had an entirely positive result through the use of the formal cooperation mechanisms and that most of them have no providers falling under another Member State's jurisdiction who have willingly complied with their stricter rules, ERGA suggests that the procedure could be simplified and improved.

Recommendation 10: ERGA supports the view that the Commission should consider ways of improving the formal cooperation procedure outlined in Article 4.2.

V. Article 4.3 – The circumvention procedure

ERGA members have limited experience of using the procedure, though a majority of them noted the difficulties in demonstrating deliberate circumvention. ERGA supports the idea that the circumvention procedure should be reviewed and clarified.

Recommendation 11: ERGA calls on the Commission to review, clarify and simplify the procedure regarding circumvention of stricter or more detailed rules adopted by a Member State.

ERGA consider that the anti-circumvention provision should also apply to on-demand service providers.

Recommendation 12: ERGA considers that in a revised Directive, the anti-circumvention provisions in Article 4.3 should also apply to on-demand service providers.

VI. Cooperation between regulators

The concept of informal cooperation – being undefined in legislation – is understood in different ways, but highly valued by regulators.

Recommendation 13: ERGA members call upon the Commission to work with ERGA to ensure optimal cooperation between regulators on matters of territorial jurisdiction.

3.4 Legislative amendments which entail more fundamental modifications to the Directive

I. Possible changes to the country of origin approach

ERGA members have expressed a range of different viewpoints as to whether the country of origin approach should change, and if so in what areas and how. Many ERGA members support a country of origin approach overall but make suggestions for a “country of destination” approach in one or more specific areas. These include in relation to one or more **content standards** obligations (e.g. protection of minors, categories of advertising) or **cultural promotion** mechanisms (e.g. content quotas or financial obligations). Some argue that it should only apply in the context of particular services, such as **services originating from countries outside the EU**, or **video-on-demand services**. Others suggest that the country of destination could be determined by referring to the **effects on audience, market, market shares and economic activity in the targeted country** when a market is targeted. There are also several objections from members to taking any kind of country of destination approach, with several NRAs expressing concerns about the implications for the free flow of media services and for media pluralism in the EU.

Recommendation 14: ERGA could consider further in-depth discussion on possible variations to the country of origin approach within the course of its future works.

II. Harmonised licensing

Views were split on the need for a harmonised licensing framework, with several NRAs expressing views both in favour and against this. Views were also split on the desirability of a system of mutual recognition of decisions related to licence or authorisation revocation. Overall, NRAs seemed supportive of the idea of exchanging best practices in relation to licensing/authorisation procedures.

Recommendation 15: given the complexity of views, ERGA would support at this stage the on-going exchange of best practices among regulators in relation to licensing/authorisation procedures. This could be dealt with for instance within the ERGA Subgroup on *Creating Digital European Toolkit (DET) for efficient and flexible regulation* which has been created by ERGA Work Programme for 2016.