

 [ERGA (2016)03]

**ERGA Opinion on AVMSD Proposals**

***Scope of the Directive***

**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)1.

ERGA’s work programme for 20162 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 Meeting3 approved terms of reference4 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.

ERGA has looked at the legislative proposals5 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

(…)

**2. Scope of the Directive**

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 Jurisdiction8, 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.

**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.