

[ERGA (2016)03]

**ERGA Opinion on AVMSD Proposals**

***Commercial communications***

**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

(…)

**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 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.