

[ERGA (2016)03]

**ERGA Opinion on AVMSD Proposals**

***European Works obligations***

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

(…)

**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.