



**ERGA Paper**  
**to contribute to the consistent**  
**implementation of the revised**  
**Audiovisual Media Services (AVMS)**  
**Directive**

*Towards the application of the revised*  
*Directive by National Regulatory*  
*Authorities (NRAs)*

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# INTRODUCTION

The European Regulators Group for Audiovisual Media Services (ERGA) was established in March 2014 by the European Commission's decision C (2014)462 of 3 February 2014. Among its tasks are: '*to advise and assist the Commission in its work to ensure a consistent implementation in all Member States of the regulatory framework for audiovisual media services*'; *to provide for an exchange of experience and good practice as to the application of the regulatory framework for audiovisual media services*<sup>1</sup>.

Over the past four years, ERGA produced a series of reports<sup>2</sup> whose common aim was to feed into the Commission's broad reflection about the evolution of the EU Audiovisual Media Services (AVMS) Directive. Throughout this collective exercise, ERGA members pointed out to both the challenges and difficulties they faced in applying certain provisions of the Directive. Of all the challenges affecting ERGA members' ability to properly ensure the core values and principles the Directive aims to safeguard, the reports particularly highlighted the following ones:

- Unfair competition on audiovisual markets, which may be due to NRAs' difficulties to efficiently act against services that are trying to abuse the country of origin principle, though being generally perceived as the cornerstone of the European audiovisual media framework;
- Difficulties to enforce stricter national rules in policy areas such as consumer protection, cultural diversity and media pluralism;
- Various understanding of key concepts establishing material and territorial jurisdiction;
- Lack of level playing field due to the fact that some services do not fall under the scope of the Directive.

When the European Commission presented its proposal for an updated AVMS Directive, it appeared that a significant number of ERGA's recommendations had been taken up. ERGA's positive contribution to the debate on the future audiovisual regulatory framework was even formally acknowledged in Recital 36 of the Commission's original text. Amongst its proposals, the Group welcomed the extension of the scope of the Directive to video-sharing platforms; the provisions aiming at better protecting minors against harmful content; the newly introduced article on the independence of regulatory authorities; and of course the new article setting out ERGA's role and tasks<sup>3</sup>. In 2016, ERGA also produced an *Opinion on the AVMSD Proposals* intended to advise the co-legislators' discussions and to anticipate practical issues resulting from changes to the text of the Directive<sup>4</sup>.

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<sup>1</sup> Article 2, point (a) and (c) of the Commission Decision of 3 February 2014 on establishing the European Regulators Group for Audiovisual Media Services

<sup>2</sup> ERGA reports on territorial jurisdiction in a converged environment (2016); on material jurisdiction in a converged environment (2016); on the protection of minors in a converged environment (2016).

<sup>3</sup> ERGA Press release on the European Commission's proposal to revise the AVMS Directive (25 May 2016)

<sup>4</sup> [http://erga-online.eu/wp-content/uploads/2016/10/Opinion\\_avmsd\\_0916.pdf](http://erga-online.eu/wp-content/uploads/2016/10/Opinion_avmsd_0916.pdf)

## **Purpose of the Paper**

Now that the legislative process has come to an end, ERGA members wish to continue to provide valuable inputs on the practical challenges faced when trying to achieve a consistent implementation of the Directive. Building on its members' extensive experience and critical look of the existing regulatory framework, the Group drafted this Paper with a view to identifying concrete implications resulting from the adoption of the new legislative text. It aims at pointing out to potential difficulties in the implementation of some provisions (with a particular focus on cross-border cases), as well as proposing some possible ways forward from the NRAs' perspective.

While the co-legislators' utmost priority has been to introduce up-to-date, flexible and future-proof rules, it is clear that the mere existence of harmonized legal provisions (**Chapter I of the Paper**) is not, *per se*, sufficient to meet the goal of ensuring a consistent and efficient implementation of the revised regulatory framework. Moreover, considering that, in accordance with the Country of Origin (COO) and minimum harmonisation principle, Member States are likely going to impose different regulations on services within their jurisdiction, it might require NRAs to cooperate more intensively and, if possible, work out common solutions. Against this background, the present Paper aims at addressing potential implementation issues (**Chapter II**) and opening up some lines of discussions about how these issues may be addressed in the near future, including by NRAs, the European Commission, and Member States (**Chapter III**). The recommendations presented for consideration in this Paper include commitments that ERGA members may be willing to make in 2019 and beyond, always in the spirit of contributing to the achievement of the main objectives of the regulatory framework.

## **Methodology of the Paper**

This Paper was prepared by a dedicated Subgroup, made up of representatives of 27 ERGA members and 3 observers. Considering the amount of topics addressed in the Directive, it was decided to split the Subgroup into three taskforces, each of them covering some key areas of the legislative reform<sup>5</sup> and striving to explore the following questions:

- What are the main legal changes brought about by the revision of the Directive?
- What are the main implementation issues (possibly) raised by the new provisions?
- How to best coordinate between NRAs so as to ensure that the rules are appropriately enforced?
- What is / should be the role of ERGA in the future?

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<sup>5</sup> Taskforce 1 addressed issues related to the enforcement of rules in the online environment (both to AVMS and video-sharing platforms); taskforce 2 looked at the new obligations concerning the promotion of European works; and taskforce 3 focused on issues related to territorial jurisdiction.

This Paper builds on the answers provided by ERGA members to the questionnaires relating to taskforce 2 and 3<sup>6</sup>, the insights derived from the DLM conference on ‘Safeguarding European Core Values Online’ (11 April 2018)<sup>7</sup> and the ERGA Subgroup 3 workshop on ‘the future of audiovisual regulation in the EU’ (10 July 2018), as well as on the outcomes of the regular meetings which took place at taskforces and Subgroup levels throughout the year. The Paper is divided into three parts and takes as a reference the final text of the Directive (EU) 2018/ amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [*References to be added after final adoption*].

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<sup>6</sup> It must be noted that not all ERGA members replied to the questionnaires, therefore the findings presented in this Paper do not exhaustively represent all ERGA members’ insights.

<sup>7</sup> Conference report available in English at <https://www.die-medienanstalten.de/veranstaltungen/termin/news/safeguarding-european-core-values-online/>

# EXECUTIVE SUMMARY

## I. FOCUS ON THE MAIN ACHIEVEMENTS OF THE REVISION OF THE AVMS DIRECTIVE

This section summarises the main changes<sup>8</sup> brought to the text of Directive 2010/13/EU by the co-legislators during the co-decision procedure, which started in May 2016 with the presentation of the Commission's proposal for a revised AVMS Directive.

### Section 1.1 - The extension of the material scope of the Directive

One of the main features of the revision of the AVMS Directive is the extension of the material scope of application to a new category of players i.e. 'video-sharing platform (VSP) services' whose definition is provided in **Article 1** of the new text. A set of cumulative criteria which regulatory authorities will have to assess are introduced in order for them to determine whether a given service can be assimilated to a 'video-sharing platform' (for example, regulators may have to answer the question whether 'an essential functionality' of a given service is devoted to providing programmes, user-generated videos, or both). The list of criteria acknowledges the fact that VSPs do not have editorial responsibility for the content, which they provide but do have an influence regarding the organisation of the content on the platform.

The extension of the Directive to VSPs is meant to cover the 'programmes', 'user-generated videos' (a concept which is defined in **Article 1** too), and the 'audiovisual commercial communications' available on these services. In this respect, VSP providers are required to take 'appropriate' measures to achieve the following objectives: to protect minors from content harmful to their development; to protect all citizens from content containing incitement to violence or hatred; to protect all citizens from content whose dissemination constitutes an activity which is a criminal offence under Union law (namely, those mentioned in **Article 28b**); and to comply with the requirements set out in **Article 9(1)** of the Directive, as far as audiovisual commercial communications are concerned and taking into account the degree of control exercised over such audiovisual commercial communications.

In line with the e-Commerce Directive (i.e. liability exemption for hosting service providers and prohibition of general monitoring), the VSPs' obligations are related to the responsibilities of the service provider in organising the content on its platform, but do not relate to the alleged problematic content as such. Co-regulation is encouraged as an effective means through which the aforementioned measures can be implemented.

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<sup>8</sup> This document should not be understood as an official interpretation of the Directive.

The ‘appropriate’ measures that VSPs are required to take include, but are not limited to, procedural (e.g. providing for user-friendly complaint mechanisms) and technical (e.g. age verification and parental control systems) aspects. The VSP provider is the sole responsible party for the implementation of these measures while NRAs are specifically tasked, with respect to VSP providers falling under their jurisdiction (by virtue of the country of origin principle), to monitor the ‘appropriateness’ of the measures.

## **Section 1.2 - The new provisions regarding the promotion of European works**

**Article 13** of the revised AVMS Directive is more elaborated than its current version breaking down audiovisual media service providers’ obligations in specific paragraphs. Moreover, while **Article 13** in the current Directive is dedicated exclusively to on demand (linear services’ obligations with regard to the promotion of European works are set out in Article 16 and 17), the revised Article 13 will also apply to linear services insofar as Member States choose to make use of the possibility to apply ‘cross-border’ financial contributions (**Article 13, paragraph 2**).

In comparison with the current Directive, it will be mandatory for on-demand service providers both to reserve a minimum 30% share of European works in their catalogue and to ensure prominence of these works (**Article 13, paragraph 1**). The various means of ensuring prominence may include providing for a separate section dedicated to European works that is accessible from the service’s homepage; giving users the possibility to search for European works in the search tool available as part of the service; using European works in campaigns of the service or a minimum percentage of European works promoted from the catalogue (e.g. by using banners or similar tools - **Recital 35**).

In addition, **Article 13** recognizes the possibility for Member States to impose financial contributions with respect to services, non-linear and linear, established abroad but targeting their domestic territory (to the extent that such contributions are imposed also on media service providers under their jurisdiction). There is no detailed prescription about how Member States should calculate the financial contribution which targeting service providers would have to make under this kind of setting. However, it is set out that such contribution must only be based on the revenues earned in the targeted Member States, and needs to comply with the principles of non-discrimination and proportionality. Direct contributions already made by broadcasters should be taken into account by the targeted Member State (Recital 37). Furthermore, if the Member State where the service provider is established imposes a financial contribution, it shall take into account any financial contribution imposed by targeted Member States (Recital 39).

Finally, **Article 13, paragraph 6** introduces explicitly an obligation for Member States to exempt specific categories of service providers (in case of low turnover and low audience) as

well as a possibility for Member States to exempt, those for which the obligations foreseen under **Article 13 (1) and 13(2)**<sup>9</sup> would be impracticable or unjustified by reason of the nature or theme of the service. **Recital 40** provides some guidance about how to determine whether a service provider has a low turnover and/or a low audience. **Article 13, paragraph 7** foresees that the European Commission is expected to issue guidelines on this issue.

### **Section 1.3 - The changes affecting the determination of territorial jurisdiction and the cooperation between NRAs**

The process allowing Member States to establish jurisdiction over audiovisual media services (**Article 2**) is not going to be fundamentally changed but it should be noted that some primary criteria have been further specified. This is particularly the case of the concept of ‘editorial decisions’, which is being defined under **Article 1** with the objective to help regulators in distinguishing between decisions which have to be taken into account for the purpose of determining jurisdiction and those which do not. Member States and NRAs also have a new obligation to list all the services under their jurisdiction (including VSP providers), indicating the criteria on which such jurisdiction is based.

**Article 3** of the revised Directive - setting out the various derogation procedures a Member State is allowed to pursue in order to restrict the freedom of reception or retransmission of audiovisual media services coming from other Member States on its territory - is applicable to both linear and non-linear services alike. The three distinct procedures foreseen however differ according to both the grounds on which derogation is based and depending on the strictness of the conditions, which have to be respected by the relevant Member State.

The formal cooperation procedure foreseen under **Article 4** of the revised Directive is being extended to non-linear services and more specifications have been introduced. Furthermore, establishing evidence-based circumvention might be facilitated by the specification that Member States do not have to prove the service provider’s intention.

The newly introduced **Article 28a** introduces the rules to be followed in order for Member States to establish jurisdiction over video-sharing platform providers. It seeks to cover both service providers which have an establishment in the EU; and such providers which may not be established on the territory of a Member State, but which have a parent company, a subsidiary or another entity of the same group with such an establishment.

**Article 30a** (new) emphasizes the importance of cooperation between NRAs insofar as it concerns exchange of information which is generally necessary for the application of the Directive (paragraph 1); but also when such exchange can help regulators to address some specific situations. Paragraph 2, in particular, refers to the identification of services which are

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<sup>9</sup> Article 13, paragraph 6 also provides that services with a low turnover or low audience must be exempted (not an option) from the obligations imposed pursuant to paragraph 1 and 2. As far as Article 13, paragraph 2 is concerned, the exemption is only applicable with respect to targeting services and does not include service providers to whom financial contributions are imposed by their Member State of establishment.



‘wholly or mostly directed at the audience of another Member State’ (rather than their Member State of establishment). Paragraph 3 sets out a new obligation for regulatory authorities to inform each other, upon request, about the activities of services under their jurisdiction which are targeting the territory of another Member State (or several others).

**Article 30b** establishes ERGA and defines its tasks, which include: providing technical assistance to the European Commission; promoting the exchange of best practices within the Group; cooperating and providing its members with the information necessary for the application of the Directive.

## **II. POTENTIAL IMPLEMENTATION CHALLENGES RESULTING FROM THE ANALYSIS OF THE REVISED AVMS DIRECTIVE**

This section summarises the main practical implications that might result from the legal changes identified in the previous Chapter. For each of these provisions, the following sections highlight the implementation difficulties regulators may be confronted with, in particular for the following reasons: as they may result from differences in which various provisions of the Directive are interpreted by NRAs; because regulators may lack the powers and/or competences to deal with the issue; or due to the inefficiencies of certain cooperation procedures.

### **Section 2.1 - Issues related to the extension of the material scope**

In this area, one of the main challenges might come from the fact that NRAs may have different interpretations of the newly provided definition of VSPs and the range of services that it covers. For example, the indicators referring to the new ‘essential functionality’ test may not be detailed enough to ensure it is consistently carried out and/or that ‘VSPs’ exercise of control over the organization of the content provided on their service’ is not a defined term (unlike editorial responsibility for example). Yet, these two concepts would absolutely be key in order to qualify a service as a VSP.

Considering that **Article 28b, paragraph 6** establishes minimum harmonisation regarding the provisions applicable to these services by Member States, it cannot be excluded that the transposition of the Directive will result in a fragmented regulatory approach across the EU single market. For the regulators who will have the responsibility to check the ‘appropriateness’ of the measures taken by a given VSP provider - for instance in order to protect minors from harmful content across several Member States - this means that they might be confronted with various expectations as to what constitutes harmful content to minors, in particular considering the diversity of policies and laws in this area throughout the EU.

When it comes to NRAs' direct monitoring of the measures put in place by VSP providers, one of the challenges might be for regulators to elaborate criteria against which they will be able to determine whether a measure, not only has been put in place, but can be considered 'appropriate' in light of the objectives pursued under **Article 28b, paragraphs 1 and 2**. As a consequence, one of the questions concerns what '*appropriate measures*' means in practice, (notwithstanding that the concept itself may be interpreted differently by NRAs), in particular considering that the measures should only relate to how the VSP organizes the content and not to the content itself.

Furthermore, and on a more practical side, this monitoring may bring a considerable extra burden on those NRAs who have VSP providers operating across the whole EU market. For example, whereas the VSP is expected to be the initial recipient of users' complaints, one could imagine that users might prefer to turn to their regulatory authorities instead. Potentially, these NRAs may end up receiving complaints from all over the EU either from users dissatisfied with the outcome of a complaint about a specific instance of content on a VSP, or from users or third parties complaining about the VSP's approach, or the co-regulatory approach as a whole.

## **Section 2.2 - Issues related to the new provisions covering the promotion of European works**

The existence of diverse methods for calculating the share of European works across EU Member States might raise issues in terms of consistency in the application of the now mandatory, minimum share of 30% European works which will have to be applied throughout the single market. Amongst other things, this Paper, for example, highlights the fact that there is currently no prevailing methodology used for the calculation of the share<sup>10</sup>. One of the challenges for ERGA members may be to find a common approach, including through the exchange of best practices, e.g. as regards the genres of works which are excluded from the calculation of the share.

When it comes to implementing the prominence obligation for on-demand services, it is noted that very few ERGA members already have had to check that specific measures were put in place by service providers and/or to carry out impact assessments to evaluate their efficiency. Furthermore, while the Directive does not provide for a definition of what 'prominence' actually means, in practice (despite the examples referred to in Recital 35), some NRAs might have to develop their own approach to the issue over the course of the transposition period.

The challenges relating to the imposition of 'cross-border' financial contributions are analysed extensively in the Paper but a handful of these challenges would seemingly deserve

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<sup>10</sup> The revised AVMS Directive foresees that the Commission will issue guidelines regarding the calculation of the share of European works - Article 13, paragraph 7.

particular attention from NRAs (however, it should be noted that unlike the obligations concerning the share and prominence, measures on financial contributions are not mandatory for Member States).

First of all, one of the challenges is related to the collection (and diligent verification) of the relevant economic data allowing NRAs to calculate the financial contribution that targeting service providers would have to pay (i.e. on the basis of the revenues earned in a targeted Member State). This may be due to the fact that some NRAs are today not granted with the adequate powers to request all relevant information which NRAs in the targeted Member States would need.

The second biggest challenge may be for NRAs (in both the targeted Member States and in the Member State having jurisdiction) to determine whether the service is ‘targeting’ audiences in several territories, as the term ‘targeting’ is not legally defined in the revised Directive and may be subject to various interpretations. It should also be noted that where both NRAs (the one in the targeted Member State and the one in the Member State having jurisdiction) agree that the service is indeed ‘targeting’, there is still a possibility that they, however, have different views with regard to the categorization of that same service as an on-demand audiovisual media service.

Finally, **Article 13** does not deal with sanctions and is silent with regard to situations where a given service provider would not comply with the financial obligations imposed by a targeted Member State. There is a resulting question as to which NRA would be responsible to address the case.

## **Section 2.3 - Issues related to the provisions involving cooperation between NRAs**

While there is quite clearly a lack of familiarity with the concept of ‘editorial decisions’ among NRAs, it is pointed out in the Paper that the newly introduced definition - and the criteria laid down - may not be entirely clear. On the one hand, a lack of consistency across NRAs’ respective approaches to these criteria might create disparities in the way regulators understand the kind of decisions, which have to be considered for the purpose of determining territorial jurisdiction. On the other hand, some NRAs may also lack the necessary legal grounds in order to properly carry out their assessment, in particular with respect to service providers falling outside of their jurisdiction or claiming to do so.

With respect to the new obligation to set up and maintain an up-to-date ‘centralised database’ on all audiovisual media services under EU jurisdiction, ERGA members observed that it would be important to carefully consider, on the one hand, NRAs’ extra burden of having to continually update the database with new/correct information (for example, one question might be: how often can the lists (and the database) be realistically updated by NRAs themselves, given that the formal categorization and registration of audiovisual media

services may be sometimes complex and time-consuming?) and, on the other hand, the benefits of setting up such a common information system which would work as a single point of reference for all matters concerning territorial jurisdiction in the EU.

The Paper highlights a number of conceptual and practical implementation issues, which were pointed out by ERGA members in relation to the revised formal cooperation and anti-circumvention procedures. Although the fact that both procedures are being relatively simplified is welcomed, NRAs might nevertheless have different expectations with regard to both the cooperation as such and its outcome (questions include, for example: what would a ‘swift and sincere cooperation’ entail? How should NRAs materialize the achievement of a ‘mutually satisfactory solution’?).

Beyond the cooperation procedure foreseen under **Article 4** of the Directive, this Paper also elaborates on the potential issues raised by the provisions of the new **Article 30a**. The general view amongst ERGA members is that a significant number of questions would probably benefit from further clarification, as well as informal agreements between authorities in order to make sure the rules are effective. Regarding **Article 30a paragraph 2**, ERGA members wonder what exactly the status of the information obtained is and whether it could be used in the context of an anti-circumvention procedure. In relation to paragraph 3, questions to be addressed in the future include, for example, further specifying the exact scope of the wording ‘*addressing the request*’, referred to in paragraph 3. There are also concerns that the deadline foreseen (two months) may not be long enough in order for the authority, which receives a request to duly address it.

### **III. PREPARING THE GROUNDS FOR AN EFFECTIVE AND CONSISTENT IMPLEMENTATION OF THE REVISED DIRECTIVE**

This section lists all the recommendations put forward by ERGA for consideration with a view to respond to the potential implementation challenges identified in the previous Chapter. Their common purpose is to ensure an effective and consistent implementation of the future EU audiovisual regulatory framework. The 43 proposals presented below are of various kinds and include commitments that ERGA members may be willing to make in 2019 and beyond, depending on their level of priority: while some are relatively straightforward to put in place in the short term other proposals would require further work and a combination of initiatives by ERGA members, the European Commission, national governments, industry experts, etc.

Furthermore, wherever ERGA guidance, common methodology, criteria, principles, etc. are mentioned in the subsequent section, it should be understood that they: i) have no legal effect for ERGA members; ii) are made with due consideration for the principle of minimum harmonisation of the Directive; iii) are without prejudice to the competences and tasks of the

EU Member States, the European Commission and the Contact Committee regarding the implementation of the AVMS Directive.

### **Section 3.1 - Proposals to be considered in order to help regulators in addressing some implementation issues**

The main purpose of this subsection is to open up some lines of discussion regarding where and how ERGA might play a role in contributing to the consistent and effective implementation of the revised AVMS Directive. Furthermore, while **Article 30b** of the revised Directive sets out ERGA's formal tasks; it is notwithstanding the Group's added value in providing, for a coordinated contribution to various issues relating to the application of the Directive. To that end, the following proposals may be considered:

- Material scope

**Proposal 1:** ERGA to provide for guidance stemming from an exchange of best practices with regard to the services captured by the Directive to allow for a more harmonized approach to the notion of an (on-demand) audiovisual media service [page 67]

**Proposal 2:** ERGA to provide for guidance stemming from an exchange of best practices on how to register and monitor on-demand audiovisual media services [p.67]

**Proposal 3:** ERGA to exchange views on the different contents of the definition of VSPs and work towards a common qualification methodology [p.69]

**Proposal 4:** ERGA to assist the European Commission with its technical expertise for the drafting of the guidelines foreseen regarding the application of the 'essential functionality' test [p.69]

**Proposal 5:** The European Commission to consider to provide for guidance in order to address the questions raised by the definition of 'user-generated video' [p.69]

- Territorial jurisdiction

**Proposal 7:** ERGA to identify common operational indicators aimed at establishing 'targeting' on the basis of concrete cases [p.70]

**Proposal 8:** ERGA to identify common operational indicators aimed at establishing that a service (with a particular focus on-demand audiovisual media services) is 'wholly or mostly' directed towards the territory of another Member State [p.70]

**Proposal 9:** ERGA members to facilitate the identification of circumvention strategies by certain media service providers by considering to make information about services under their jurisdiction which are ‘wholly or mostly directed at the audience of another Member State’ publicly available [p.70]

**Proposal 10:** ERGA to develop - before the end of the transposition period - an internal list of decisions which can be a priori excluded from the scope of the definition of ‘editorial decisions’ based on commonly-shared indicators and to develop a common analytical framework allowing to test some of these indicators against concrete cases [p.72]

**Proposal 11:** ERGA members to consider options to collectively address service providers outside EU jurisdiction but whose services are available in at least two Member States (see also **Proposal 40**) [p.73]

Furthermore, the following proposals may be considered:

**Proposal 12:** ERGA members to be empowered, on a national basis, to request information from service providers about any change likely to affect their establishment [p.75]

**Proposal 13:** ERGA members to be empowered, on a national basis, to request information about ‘targeting’ strategies by service providers and/or whether their service is expected to be ‘wholly or mostly’ directed towards the territory of another Member State, with due regard to any confidentiality issue [p.75]

**Proposal 14:** ERGA members to agree on a minimum set of ancillary information, which would be relevant to have included in the ‘centralised database’ [p.75]

- Co-regulation of VSPs

**Proposal 16:** ERGA members to exchange best practices on their approaches to regulatory topics, such as criminal offences, protection of minors, etc. [p.76]

**Proposal 25:** ERGA members to facilitate the cross-financing of research projects aimed at underpinning their regulatory approach to VSPs [p.84]

**Proposal 26:** ERGA members to exchange views on proposed approaches to complaints handling, and to explore how the handling of complaints coming from several Member States can be facilitated through ERGA [p.84]

**Proposal 27:** ERGA members to use the Group as a platform to ensure consistency in the level of user protection (both the users complaining about the alleged inappropriate measures

taken by the VSP provider and the ones who have uploaded the content) through dispute settlement mechanisms across Europe and, where appropriate given the geographical coverage of the VSP provider, to explore the possibility of establishing a pan-European dispute settlement mechanism as well as, where appropriate, to encourage the industry to adopt codes of conduct [p.84]

- Share obligation (Article 13, paragraph 1)

**Proposal 18:** ERGA to strengthen the exchange of best practices, in particular with regard to the methodologies used to calculate and monitor a service provider's compliance with any share obligation. This could help to foster, where appropriate, common approaches to NRAs' assessment when it comes to questions like: what is a catalogue? What sort of indicators do NRAs use in order to qualify European works? [p.76]

**Proposal 19:** ERGA to provide technical expertise to the European Commission in the drafting of the guidelines which the Commission is expected to issue regarding the details of the implementation of the share obligation [p.77]

- Prominence obligation (Article 13, paragraph 1)

**Proposal 20:** ERGA to develop internal guidance, based on concrete examples, in order to facilitate the practical understanding of the concept of 'prominence'. This exercise could involve the participation of industry experts, in particular with a view to identifying the most effective measures and strategies taken to ensure prominence of European works [p.77]

**Proposal 33:** ERGA members to facilitate the cross-financing of research projects on the benefits and shortcomings of recommendation tools being used in order to promote European works [p.87]

- 'Cross-border' financial contributions (Article 13, paragraph 2)

**Proposal 21:** ERGA members to define and agree on common cooperation scheme(s) allowing for the collection and exchange of relevant information which is necessary for the application of 'cross-border' financial contributions (see **proposal n°28** too), based on the observations elaborated in this Paper and on existing similar schemes applicable in some Member States [p.79]

**Proposal 22:** The Member States, together with the European Commission, to consider discussing possible common approaches to address cases of non-compliance with the obligation to financially contribute to content production on a 'cross-border' basis (early in the transposition period) [p.81]

**Proposal 23:** ERGA members to define and agree on a common approach on how to address cases of non-compliance with ‘cross-border’ financial contributions based on the observations elaborated in this Paper [p.81]

Furthermore, the following proposals may be considered:

**Proposal 28:** ERGA members to be empowered, on a national basis, to collect and share all relevant economic data they need for the purpose of smoothing the application of ‘cross-border’ financial contributions [p.85]

**Proposal 29:** ERGA members to be empowered, on a national basis, to share relevant information about services ‘targeting’ the audience of another Member State with the authority of the targeted Member State [p.85]

**Proposal 30:** ERGA members to organise regular exchange of best practices and members’ reporting about the internal procedures designed to checking the accuracy of the economic data provided by service providers [p.86]

**Proposal 31:** ERGA members to consider the possibility to develop standardized declaration forms for the purpose of collecting similar types of economic information from service providers [p.86]

- Exemptions (Article 13, paragraph 6)

**Proposal 24:** ERGA to provide technical expertise to the European Commission in the drafting of the guidelines which the Commission is expected to issue regarding the meaning of low audience and low turnover and the associated methodology [p.82]

- Cooperation between NRAs

**Proposal 35:** ERGA members to discuss possible technical standards aimed at ensuring, *inter alia*, the independence of the formal cooperation procedure (ensuring the independent application of the jurisdiction criteria by national governments and any other public or private body); the transparency of the procedure (ensuring predictability for service providers); the identification of a single point of contact (facilitating cooperation between NRAs/Member States) in each Member State [p.87]

**Proposal 36:** ERGA to further explore issues such as: the concept of ‘mutually satisfactory solution’; the kind of evidence allowing to ‘reasonably establish circumvention’, etc. [p.88]

**Proposal 37:** ERGA members to systematically (i.e. prior to receiving a request from another NRA) input information into a centralised database about services which are either ‘wholly or



mostly directed towards the territory of another Member State'; or 'targeting' the audience of another Member State; or both (provided that **proposals n°7 and 8** are implemented) [p.88]

**Proposal 38:** ERGA to address all the issues related to the application of the rules laid down in Article 30a, paragraphs 2 and 3, as identified in this Paper [p.89]

**Proposal 39:** ERGA members to strive, in case of missing material jurisdiction, to contact any media service provider under their jurisdiction in respect of which another NRA in a receiving Member State faces problems [p.89]

**Proposal 40:** ERGA members to strive, whenever media service providers from outside the European Union are concerned, to exchange best practices and to reach out to audiovisual regulators in non-EU countries which have jurisdiction over the received services [p.89]

**Proposal 41:** ERGA members to strive to carry out regular monitoring and reporting (both internal and external) of the handling of cross-border cases [p.90]

**Proposal 42:** ERGA members to regularly exchange best practices on their working methods and tools, which they have developed in the area of 'participatory regulation' (i.e. to foster citizen's engagement and direct contribution to meet the objectives of audiovisual regulation) [p.90]

- The future of ERGA

**Proposal 43:** ERGA members to develop - within a dedicated Subgroup in 2019 - a plan aiming at the necessary transformation of the Group before the end of the transposition process [p.92]

### **Section 3.2 - Proposals for ERGA to work with relevant external stakeholders in order to foster NRAs' understanding of potential practical challenges related to the implementation of the revised Directive**

**Proposal 6:** ERGA to organise meetings with relevant industry experts (including VSP providers) in order to clearly understand issues related to the co-regulation of VSP services (for example, the technologies used, such as algorithms, in relation to the organisation of the content provided on these platforms) [p.69]

**Proposal 15:** ERGA to work together with the European Commission and the European Audiovisual Observatory on issues relating to the centralisation of information about audiovisual media services and VSPs into one database [p.75]

**Proposal 17:** ERGA to provide its technical expertise, where appropriate, in the adoption of Union codes of conduct (which may be fostered by the Member States and the European Commission) based on the development of analytical framework for the effective co-regulation of VSPs, building on the direct contact established pursuant to proposal n°6 [p.76]

**Proposal 32:** ERGA to explore the opportunity to initiate a more structured collaboration with the EFADs (and possibility other industry experts) on common areas of interest (exchange of information relating to the application of ‘cross-border’ financial contributions, effective tools to ensure prominence, etc.) [p.86]

**Proposal 34:** ERGA to identify and, where appropriate, to promote the application of effective techniques adopted by the industry to ensure prominence of European works [p.87]

# CHAPTER I - Focus on the main achievements of the revision of the AVMS Directive<sup>11</sup>

## 1.1. The material scope of the Directive is extended to strengthen the protection of the general public across platforms

The Audiovisual Media Services Directive brings about minimum harmonisation of certain areas of national legislation with a view to facilitating the circulation of such services in the EU single market on the basis of the country of origin (COO) principle. The Directive covers all ‘traditional’ services providing audiovisual content - such as TV broadcasts, VOD services and audiovisual advertising - irrespective of the transmission technology used (principle of technological neutrality) - as long as the service provider is editorially responsible.

The Directive sets out some rules to preserve key societal values which are applicable to all audiovisual media service providers. In specific areas (protection of minors, promotion of European works, commercial communications), a distinct (lighter) regulatory regime is being applied to non-linear services to reflect the assumed higher degree of user’s control over the content and viewing time, as opposed to TV broadcasts.

### 1.1.1. Changes to the definition of an ‘audiovisual media service’ and ‘programme’

**Background** - The definition of what constitutes an ‘audiovisual media service’ and a ‘programme’ lies at the very heart of the AVMSD as adopted in 2007. For the first time since its inception, the scope of the ‘Television without Frontiers’ Directive was extended. Originally covering traditional broadcasting services transmitted by cable, satellite or in the terrestrial network, it was extended to all forms of linear audiovisual media services (including streaming and IPTV) on the one hand, and to non-linear audiovisual media services, on the other hand.

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<sup>11</sup> This section of the Paper does not address all the changes brought about by the revision of the AVMS Directive but focuses on some of the key issues.

Taking into account market developments and the growing convergence of services, the revised Directive, as agreed upon by the EU institutions, goes well beyond the review of 2007.

It is worth reminding that ERGA, in the past few years, contributed with its own reflection relating to the material scope of Directive 2010/13/EU, in particular by drafting a detailed report (ERGA report on material jurisdiction in a converged environment, ERGA 2016). Further on, the Group adopted an Opinion on the Commission's proposal for a revised AVMS Directive (ERGA Opinion on AVMSD Proposals, ERGA (2016)09)<sup>12</sup>.

**Overview of the new provisions** - The changes proposed by the European Commission in this area (and further on by the European Parliament and the Council) were to some extent inspired by the European Union Court of Justice's (EUCJ) judgement in the *New Media Online* case<sup>13</sup>. It is particularly reflected in Article 1, paragraph 1, letter (a) of the revised Directive regarding the definition of an 'audiovisual media service', which reads as follows (changes underlined):

*'a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC of the European Parliament and of the Council; such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph'*.

What appears like a relatively significant extension of the definition is aimed at addressing one of the specific issues raised in the *New Media Online* judgement as further specified in Recital 3 (relevant parts underlined):

*'Directive 2010/13/EU should remain applicable only to those services the principal purpose of which is the provision of programmes in order to inform, entertain or educate. 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, such as stand-alone parts of online newspapers featuring audiovisual programmes or user-generated videos where those parts can be considered dissociable from their main*

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<sup>12</sup> In particular, the 2016 Report focused on three criteria relevant for the delineation of audiovisual media and other services offering audiovisual content. These were: the requirement of a 'TV-like programme'; the issue of the 'principal purpose' of the service and definition issues relating to the terms 'media service provider' and 'editorial responsibility'..

<sup>13</sup> Judgement of the European Court of 21 October 2015, Case 347/14 ("*New Media Online*") regarding a decision of the Austrian regulator on a sub-domain of the regional newspaper "*Tiroler Tageszeitung*", providing clips concerning local news and events, vox-pop interviews on current topics, sports events, film trailers, craft activities for children, or readers' videos selected by the editors.

*activity. A service should be considered merely an indissociable complement to the main activity as a result of the links between the audiovisual offer and the main activity such as providing news in written form. As such, channels or any other audiovisual services under the editorial responsibility of a provider may constitute audiovisual media services in themselves, even if they are offered in the framework of a video-sharing platform, which is characterised by the absence of editorial responsibility. In such cases, it will be up to the providers with editorial responsibility to abide by the provisions of this Directive’.*

It also seems that European co-legislators agreed with the European Commission’s view that the definition of ‘programme’ had to be updated in order to remain consistent with changing consumption patterns. Accordingly, the definition in Article 1, paragraph 1, letter (b) was amended too, with the TV-like requirement being taken out (changes underlined and strikethrough added):

*‘a set of moving images with or without sound constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider, ~~and the form and content of which are comparable to the form and content of television broadcasting~~ including feature length films, video clips, sports events, situation comedies, documentaries, children’s programmes and original drama’.*

The extension of the material scope of the Directive to ‘*dissociable section(s)*’ of audiovisual media services, combined with the deletion of the TV-like criteria in the definition of ‘programme’, is going to bring an increasing number of audiovisual content under the supervision of media regulatory authorities. Provided that the relevant rules applicable to audiovisual programmes (Article 6 on ethics and Article 6a on the protection of minors) and audiovisual commercial communications (Article 9) are effectively enforced, it should mean that the protection of audiences will be strengthened across a growing number of services.

These changes were supplemented by the introduction of a definition of ‘user-generated video’ in Article 1, paragraph 1, letter (ba), which tracks the one of ‘programme’, at least as far as the format and material are concerned, and is mirroring the inclusion of video-sharing platform services into the material scope of the Directive:

*‘a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video-sharing platform by that user or any other user’.*

It should be noted that video-sharing platforms will be subject to the same obligations regarding both programmes and user-generated videos available on their services.

### 1.1.2. The inclusion of video-sharing platforms into the scope of the Directive

**Background** - The proposal of the European Commission for a revised AVMS Directive extends the scope of application to a new category of players i.e. ‘video-sharing platform services’ whose definition is introduced in Article 1, paragraph 1, letter (aa), distinctively from the definition of an ‘audiovisual media service’ (see below).

Further to an extensive REFIT exercise, the European Commission’s impact assessment pointed out to a general ‘insufficient protection of minors and consumers when consuming videos on this type of services. Children’s wide exposure to gory, violent, and/or pornographic content was mentioned as the most significant problem in this respect. Considering that the consumption of videos is on the rise across devices, particularly amongst the youngest audiences, the question was raised as to whether the framework should not be adjusted in order to capture these changing patterns.

Both professionally produced videos (“programmes”) and user-generated content (‘UGC’) are available on services like *YouTube*, the latter being the most popular video-sharing platform on the market. To date, it is not clear that the rules of the AVMSD do not apply to UGC. As intermediary services, platforms however have an obligation to comply with the e-Commerce Directive, which, as a condition of limited liability, requires them to remove illegal content upon becoming aware of it (by way of receiving a court order for example). Unlike the AVMS Directive though, the e-Commerce Directive is limited to dealing with content that is ‘illegal’ and not just ‘harmful’.

Against this background, one could argue that the Commission’s main argument to propose the extension of the material scope of the AVMS Directive to VSPs was to put an end to that discrepancy between, on the one hand, content which is provided on audiovisual media services (and therefore regulated under the AVMSD) and, on the other hand, video content which is consumed on platforms but against which people are less protected because it is not covered by the same rules.

**Overview of the new provisions** - Based on the text that came out of the interinstitutional negotiations between the European Commission, the European Parliament and the Council, the definition of VSPs provides for a set of cumulative criteria which regulators will have to carefully assess:

- a VSP service is ‘a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union’;
- made available ‘by means of an electronic communications network within the meaning of point (a) of Article 2 of Directive 2002/21/EC’;
- and whose ‘principal purpose or of a dissociable section thereof or an essential functionality (...) is devoted to providing programmes, user-generated videos, or both, to the general public’;

- *‘for which the video-sharing platform provider does not have editorial responsibility’*;
- *‘in order to inform, entertain or educate’*
- *‘and the organization of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging, and sequencing’*.

The non-highlighted elements are common to both the definition of an ‘audiovisual media service’ and of a VSP and will not be discussed in this Paper. The underlined and highlighted elements of the definition are specific to the definition of a VSP and are going to be analysed separately as they each may raise specific issues of interpretation (see Chapter II, section 1).

### 1.1.3. The extension to VSP providers aims at extending the protection of the general public

Paragraph 1 of Article 28b provides that Member States shall ensure that VSP providers take appropriate measures to, on the one hand, protect minors from content (programmes, user-generated videos, and commercial communications) harmful to their development and, on the other hand, protect all citizens from content (programmes, user-generated videos and commercial communications) containing incitement to violence or hatred; and/or content (programmes, user-generated videos and commercial communications) the dissemination of which constitutes an activity which is a criminal offence under Union law (namely, public provocation to commit a terrorist offence, and offences concerning child pornography, racism and xenophobia).

**Protection of minors** - Rules protecting the physical, mental and moral development of minors as well as human dignity in all audiovisual media services, including commercial communications, are not new. Under the current AVMS Directive these rules apply to audiovisual media services (linear and on-demand). The revised AVMS Directive includes rules for VSPs on the protection of minors in order to provide for a harmonised and comprehensive approach to the regulation of harmful audiovisual content.

**Incitement to violence and hatred** - The concept of incitement to violence or hatred is more elaborated than in the current Directive as it includes a reference to Article 21 of Charter of the Fundamental Rights of the European Union, giving all the related grounds on which discrimination is prohibited a concrete application in the context of the revised Directive.

**Illegal content** - Article 28b (and corresponding Recital 4) also recognises that video-sharing platforms have become important means to distribute content, the dissemination of which is a criminal offence. It directly refers to Article 5 of Directive (EU) 2017/541 on combating terrorism, Article 5(4) of Directive 2011/93/EU on child pornography, as well as to Article 1 of the Council Framework Decision 2008/913/JHA of 28 November 2008 relating to combating certain forms of racism and xenophobia by means of criminal law.

**Audiovisual commercial communications provided on VSPs** - A very similar approach is followed regarding audiovisual commercial communications provided on VSPs, as paragraph 2 of Article 28b sets out that they must comply with Article 9, paragraph 1 (which is applicable to any other audiovisual commercial communication)<sup>14</sup>, when such commercial communications are marketed, sold or arranged by VSP providers. It is interesting to note that VSPs must take appropriate measures also with respect to commercial communications not marketed sold or arranged by them, taking into account the limited control exercised by VSPs over those audiovisual commercial communications.

**Codes of conduct for the advertising of specific products** - Beyond the general measures that VSP providers will have to put in place, it is important to mention that Article 28b provides an obligation for Member States to encourage the use of co-regulation and the fostering of self-regulation through codes of conduct (i.e. endorsed by the VSPs) in such a way as to reduce the exposure of children to audiovisual commercial communications for foods and beverages containing nutrients, and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended.

**Transparency of audiovisual commercial communications** - Finally, there is an obligation for Member States to ensure that VSP providers clearly inform users of the programmes and user-generated videos that contain audiovisual commercial communications, when those have been declared by the uploader through the functionality put in place by the VSP or in case the provider has knowledge of such circumstances. This provision may well have been thought in order to capture the economic activities of so-called ‘influencers’.

#### 1.1.4. The nature and type of measures that VSPs are required to take

While the objective of including VSPs into the material scope of the Directive was not challenged, the European co-legislators acknowledged that the regulatory regime to achieve this goal should be different for VSPs than for audiovisual media services. This is due to their distinctive way of functioning and especially their lack of editorial responsibility and the vast amount of content available on these platforms.

**Relationship with the E-commerce Directive** - The co-legislators’ choice over the nature of the measures foreseen under Article 28b, paragraph 3 was also affected by the fact that VSP providers are regulated under the regime of the e-Commerce Directive. As it is stated in several instances in the new text, the proposed measures *‘shall not lead to any ex-ante control measures or upload-filtering of content, which do not comply with Article 15 of Directive*

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<sup>14</sup> Namely, the requirements that audiovisual commercial communications provided on VSPs prescribe to ban any of the following practices and content: surreptitious or subliminal techniques, prejudice for human dignity, discrimination, encouragement of behavior dangerous to safety, health or the environment, tobacco products including e-cigarettes, alcoholic beverages targeting minors, prescribed medical products.



2000/31/EC'. It is further reflected in Recital 29 which reads as follows: *'those appropriate measures should relate to the organisation of the content and not to the content as such'*. The measures listed under Article 28b are accordingly not focused on take-down actions but rather on ensuring that the harmful content is not easily put to the attention of the protected public.

**The co-regulation of VSPs** - To further reinforce the distinction between VSPs and audiovisual media services, the implementation of the measures might be carried out preferably through co-regulation, as explicitly stated in Article 28b, paragraph 4: *'for the purposes of the implementation of the measures referred to in paragraphs 1 and 3 of this Article, Member States shall encourage the use of co-regulation as provided for in Article 4a(1).'* For the purposes of some of the measures referred to in 28b, paragraph 3, the Directive specifies that VSPs should apply them through their terms and conditions, and through other systems and mechanisms *'established and operated'* by the VSPs. This is a classic description of a self- or co-regulatory model, where the service provider has the primary responsibility for establishing and operating a regulatory system. Overall, there is a lot of emphasis on establishing constructive dialogue and cooperation with VSP providers<sup>15</sup>. Co-regulation is, however, not strictly required and the Directive allows for *'measures that are more detailed or stricter than the measures referred to in paragraph 3 of this Article'* [28b, paragraph 6].

**Principles governing the co-regulation of VSPs** - Another distinctive aspect - as compared to the regulatory regime applicable to audiovisual media services - is the legislators' choice to emphasize on the *'appropriateness'*, *'proportionality'* and *'practicability'* of the measures that VSPs are required to take, for instance where it is said that *'those measures shall be practicable and proportionate, taking into account the size of the video-sharing platform service and the nature of the service that is provided'* (Article 28b, paragraph 3). The only exception concerns the measures aimed at protecting minors, where, as well as for audiovisual media services (Article 6a), it is foreseen that *'the most harmful content shall be subject to the strictest access control measures'*.

**The (non-exhaustive) list of measures that VSPs are expected to take** - The text of the revised AVMSD includes a catalogue of both procedural (e.g. providing for complaint and redress mechanisms) and technical (e.g. age verification and parental control systems) measures to be implemented by the VSPs. The implementation of these measures is the responsibility of the VSPs, and there is a specific assessment task foreseen for NRAs (i.e. the competent NRA would assess the appropriateness of the measures taken by the VPSs under its jurisdiction, as provided for in Article 28b, paragraph 5).

The catalogue of measures provides for a comprehensive (but non-exhaustive) toolbox:

- Applying in the terms and conditions of the VSPs the content-related requirements set out in paragraph 1 (protection of minors, protection from the incitement to hatred and

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<sup>15</sup> For instance, Recital 49 reads that: *'It is appropriate to involve the video-sharing platform providers as much as possible when implementing the appropriate measures to be taken pursuant to this Directive'*

violence and certain illegal content, qualitative criteria applicable to audiovisual commercial communications);

- Enabling users to easily report, flag, rate content, and to file complaints directly to the VSP provider;
- Protection of minors measures such as: age verification systems, parental controls systems and media literacy tools, provided that protection of personal data is guaranteed;
- Providing a functionality through which individual users can declare whether videos contain audiovisual commercial communications.

**Redress mechanisms** - In relation to the application of measures, users should have the possibility to file complaints with the VSPs. Paragraph 7 moreover provides that Member States shall ensure that out-of-court redress mechanisms are available for the settlement of disputes between users and video-sharing platform providers. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law. Where necessary, users should also have a right to bring their case up to a court against the VSP provider (article 28b, paragraph 8)<sup>16</sup>.

## 1.2. The measures aiming at the promotion of European works are being adapted to the digital age<sup>17</sup>

The current version of Article 13 establishes (paragraph 1) a general obligation to promote production and access to European works by non-linear services and leaves to the Member States, where practicable and by appropriate means, the decision on how to achieve this objective, either through the financial contribution made by these services to the production and rights acquisition of European works and / or the presence of European and / or European publications in the catalogue of programs offered by these services.

Paragraphs 2 and 3 set out the reporting procedures on the implementation of these obligations. In particular, paragraph 2 establishes that Member States shall report to the Commission every 4 years thereafter on the implementation of paragraph 1. Paragraph 3 establishes that the Commission, on the basis of the information provided by Member States and of an independent study, shall report to the European Parliament and to the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.

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<sup>16</sup> In recital 50, the European legislator justifies the explicit mentioning of access to courts by making a reference to fundamental rights: *‘The right to an effective remedy and the right to a fair trial are fundamental rights laid down in Article 47 of the Charter. The provisions of this Directive should not, therefore, be construed in a way that would prevent parties from exercising their right of access to the judicial system’*.

<sup>17</sup> This section focuses on the changes made to Article 13 of the AVMS Directive laying down the obligations that providers of non-linear audiovisual media services have to respect in order to ensure the promotion of European works.

The structure of the new Article 13 is more complex and full-bodied compared to the version enshrined in the AVMS Directive (2010/13/EU), as it dedicates a specific paragraph to each of the obligations. In the current version of Article 13, the share and/or prominence obligation and financial contributions to the production of works are addressed in the same paragraph, as possible means to achieve the objective of promoting European works. In the new text, there is a clear distinction between the two main measures, which are handled in two separate paragraphs (1 and 2). Moreover, it must be underlined that, while Article 13 so far was exclusively dedicated to on-demand services, the new proposed version is extended as well to linear services, with respect to the financial obligation set out in paragraph 2.

### 1.2.1. The new share obligation for on-demand audiovisual media services

As far as paragraph 1 is concerned, the first obvious change is that the revised AVMSD brings a shift in the character of the obligation to ensure that on-demand audiovisual media services promote European works. Although the current AVMSD includes an obligation to *‘ensure that on-demand audiovisual media services (...) promote, where practicable and by appropriate means, the production of and access to European works’*, it includes the option of *‘the share (...) of European works in the catalogue...’* as only one of the transposition options.

The ‘share of catalogue’ obligation of European works becomes mandatory, with a 30% share. It therefore can be observed a decided change of approach, which tends to align the non-linear services regime with the one adopted for linear services (although the shares are different for each category of services). While no further details are specified regarding the calculation of this share, there is going to be more guidance provided as *‘the Commission shall issue guidelines regarding the calculation of the share of European works (...) after consulting the Contact Committee’* (Article 13, paragraph 7).

### 1.2.2. The prominence obligation for on-demand audiovisual media services

Besides a 30% minimum share obligation, paragraph 1 of Article 13 also provides that *‘providers of on-demand audiovisual media services (...) ensure prominence of these works’*.

Recital 35 also provides some indication - but no legal definition - about what prominence would mean in practice (e.g. it cannot be a simple inclusion of a share of European works in the catalogue). Concrete examples allowing to ensure prominence of European works are mentioned in Recital 35 and include (non-exhaustive list) *‘a dedicated section for European works that is accessible from the service homepage, (the) possibility to search for European works in the search tool available as part of the service, the use of European works in campaigns of the service or a minimum percentage of European works promoted from the catalogue e.g. by using banners or similar tools’*.

### 1.2.3. Financial contributions to the production of European works in respect of both linear and non-linear audiovisual media services

Paragraphs 2 and 3 address the topic of financial contribution to the production of European works. In this case, the revised Directive does not introduce a mandatory regime, as Member States may choose to impose such a measure or not. The financial contribution can be done under multiple forms. Recital 36 sets out that in order to ensure an adequate level of financial investment into the production of European works, and to promote cultural diversity, Member States should be able to impose financial obligations to media service providers established on their territory; these kinds of obligations can take the form of direct contributions to the production of and acquisition of rights in European works. Member States are also allowed to impose levies payable to a fund.

The new provisions with respect to financial contributions feature the following important changes as compared to the previous version of the Directive.

First of all, in making general reference to the category of media services providers, the revised Directive extends the scope of Article 13(2) also to linear audiovisual media services. Secondly, it specifies that Member States which impose financial contribution on media service providers under their jurisdiction may also require financial contributions from providers targeting their audiences even though they are established in another Member State. Finally, such measures should be non-discriminatory and proportionate.

Paragraph 3 establishes general principles to be followed in calculating the financial contribution. On the one hand, only the revenues generated in the Member State will be considered eligible and, on the other hand, financial contributions imposed by targeted Member States shall be taken into account by the Member State having jurisdiction, so as to avoid double imposition cases (Recital 39). This makes the coordination between all NRAs involved in the mentioned procedure a crucial issue (see point 2.2.3.).

### 1.2.4. Exemptions from the measures foreseen under Article 13

For the first time, paragraph 6 of the new AVMS Directive explicitly introduces an obligation to exempt services with a low turnover or low audience, and the possibility to exempt those for which the obligations foreseen under paragraph 1 and 2 would prove to be impracticable or unjustified due to the thematic nature of media services.

The exemptions apply to the obligations set out in paragraphs 1 and 2, the latter only for services established in another Member State. According to Recital 40, the aim is to ‘*not undermine market development and to allow for the entry of new players in the market*’ where ‘*companies with no significant presence on the market should not be subject to such requirements*’. The same Recital also provides for additional details on these concepts (which are otherwise not legally defined in the text). ‘*Low audience can be determined for instance*

*on the basis of a viewing time or sales, depending on the nature of the service while the determination of low turnover should take into account the different sizes of audiovisual markets in the Member States.’*

### **1.3. Cooperation between national regulatory authorities (NRAs) is put at the cornerstone of the implementation of the Directive**

In 2016, ERGA Subgroup on territorial jurisdiction conducted a survey about the challenges faced by ERGA members as a result of the cross-border distribution of audiovisual media content. The survey revealed some successful cooperation among NRAs, and instances of the Directive working well, but also quite prominently a variety of problems and revealed a diversity of experiences with how to solve these problems amongst NRAs.

A series of common general themes emerged too: a) problems with media service providers that are trying to abuse the country of origin principle; b) difficulties encountered with multinational services where there are national stricter rules in the country of reception (particularly in areas like audience protection, advertising and cultural diversity); c) problems linked to the application of the Directive, in particular when it comes to establishing jurisdiction (Article 2), derogating from free circulation of audiovisual media services in the EU single market (Article 3), and demonstrating deliberate circumvention of the rules (Article 4).

On all those key issues, ERGA suggested both legislative and non-legislative solutions which, to a certain extent, were taken up by the European Commission in its original proposal, with a clear emphasis on improving (bilateral and multilateral) cooperation between Member States and amongst regulatory authorities in this area. The relevant changes made to Article 2, 3, 4, and 5 are being described below, as well as the provisions of the new Article 28a and 30a.

#### **1.3.1. The determination of territorial jurisdiction with respect to audiovisual media services (Article 2)**

**Current rules** - Article 2 of the AVMS Directive sets out the criteria for the establishment of territorial jurisdiction on audiovisual media services. It involves the assessment of factual situations and to resolve questions such as where ‘editorial decisions’ are taken, where ‘editorial responsibility’ is exercised, where ‘a significant part of the workforce’ operates, etc. Yet, the assessment of sometimes complex situations against the criteria laid down in the Directive may also lead to conflicting results because definitions are sometimes subject to various interpretations from one country to another. In its 2016 Report on territorial jurisdiction, ERGA therefore was calling on the European 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’.*

**Newly provided definition of ‘editorial decisions’** - Article 1, paragraph 1, letter (bb) of the revised AVMS Directive introduces a definition of ‘editorial decisions’, which reads as follows: ‘*editorial decision means a decision, which is taken on a regular basis for the purpose of exercising editorial responsibility and linked to the day-to-day operation of the audiovisual media service’.*

The key elements of the definition are **highlighted and underlined** and were the main focus of the questionnaire. There is no doubt about the cumulative aspect of these three sub-criteria; however, each of them analysed separately may give rise to some interpretation issues. It is also important to recall that ‘editorial responsibility’ is defined in Article 1, paragraph 1, letter (c) of the Directive: ‘*editorial responsibility means the exercise of effective control both over the selection of the programmes and over their organization either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided*’.

**New wording ‘programme-related activities’ in Article 2, paragraph 3, letter (b)** - Compared to the current AVMS Directive, the co-legislator decided to circumscribe the significant part of the workforce to be considered only to that which is ‘*involved in the pursuit of the programme-related activities*’. What looks *prima facie* like a minor change may actually have numerous implications. It narrows down the notion of ‘*significant part of the workforce*’ (which was already in there) and forces regulators to look more specifically at a media company’s operational structure.

**New obligation for Member States (and/or NRAs) to list all the services under their jurisdiction and maintain an up-to-date centralized database** - The relevant paragraph is paragraph 5b of Article 2 relating to the Member States’ obligations to identify all the services under their jurisdiction; to indicate on which of the criteria their jurisdiction is based; and to communicate all the information to the European Commission in order to get them included into a centralized database.

### 1.3.2. The derogation to the freedom of reception (Article 3)

**Current rules** - The freedom of reception and the prohibition of restrictions on retransmissions are established in Article 3 of the AVMS Directive. The Directive affords the Member States to take measures that restrict freedom of movement of audiovisual media services coming from other Member States, but only under a set of conditions and in accordance with the procedures laid down in the Directive.

This basic framework remains intact, although the procedures themselves have been significantly updated in the revised AVMSD.

The current Directive provides for a two-tier approach: one set of stricter and more limited rules for television broadcasting and a different set of lighter rules for on-demand audiovisual media services (including the possibility of a more streamlined procedure in urgent cases). For linear services, only Articles 6 (incitement to hatred) and 27 (protection of minors) might serve in order to trigger the procedure. For on-demand audiovisual services, the derogation grounds are more numerous. In addition to the same grounds available for television services they also include violations of human dignity, protection of public health and public security and protection of consumers.

The principle of freedom of reception and re-transmission is restated in the first paragraph of Article 3 of the revised directive, but the possibility of derogating is streamlined and identical for all audiovisual media services. The two-tier approach, i.e. distinguishing between television broadcasting and on-demand audiovisual media services will therefore no longer apply. The new Article 3 sets out three types of procedures.

**An ordinary derogation procedure** - It is mainly inspired by the existing procedure for TV services whose conditions are the following: at least three infringements happened during the previous 12 months; notification of the measures was sent to the media service provider, the Member State and the European Commission; the media service provider's right of defence was respected; and consultations with the European Commission and the Member State having jurisdiction have not produced an amicable settlement within one month.

**A 'fast-track' procedure** - it is applicable in cases of conducts prejudicing public security or in cases of public provocation to commit a terrorist offence: at least two infringements happened during the previous 12 months; a notification of the measures was sent to the media service provider, the Member State and the European Commission; and the media service provider's right of defence was respected.

**An emergency procedure** - it is applicable in the presence of the same conducts which are relevant in the context of the fast-track procedure, but also differs with regard to the following aspects: time limit of no later than one month after the alleged infringement; the measures shall be notified in the shortest possible time; a notification of the measures was sent to the European Commission and the Member State, including the reasons for which the Member State considers there is urgency.

**Compatibility of the measures taken** - In order to secure that the notified measures are compatible with Union law:

- In the general and fast-track procedure, within three months, the European Commission shall take a decision on whether the measures are compatible with Union law, after having consulted ERGA's opinion;
- In the emergency procedure, the European Commission shall examine the compatibility of the notified measures with Union law in the shortest possible time.

Where the European Commission lacks the information necessary to take the decision, it shall request additional information from the Member State within one month of the receipt of the notification (only applicable in the context of the general and fast-track procedures).

### 1.3.3. The formal cooperation and anti-circumvention procedure (Article 4)

**Current rules** - Article 4 of the AVMS Directive establishes a cooperation procedure between Member States in order for them to find a mutually satisfactory solution to situations in which services are ‘*wholly or mostly directed at*’ the audience of a Member State where stricter or more detailed rules are applicable. In practical terms, the aim is, provided that certain conditions are fulfilled, to obtain compliance from a broadcaster established in a Member State (country of origin), with stricter or more detailed rules of another Member State (country of destination), whenever a service of this broadcaster is ‘*wholly or mostly directed at*’ the latter’s Member States’ audience.

It is useful to take a look back at the main conclusions of the survey already conducted on this topic in preparation for the 2016 ERGA report<sup>18</sup>:

- Many NRAs (15) declared that they have had no experience of providers (falling under another Member State’s jurisdiction but available in their country) who willingly complied with their stricter rules; nor any experience, or entirely positive outcome, through the formal cooperation procedure;
- At the stage of the anti-circumvention procedure, ERGA members have limited experience in using the procedure, in particular because they acknowledged difficulties in demonstrating deliberate circumvention;
- Around half of NRAs have considered formal cooperation a suitable mean to address the challenges related to stricter rules and recognised that the process helped to raise awareness.

**Overview of the main changes** - Article 4 was changed as follows:

- The formal cooperation procedure is extended to non-linear services;
- With regard to establishing circumvention, it is specified that the evidence to be gathered ‘*shall allow for such circumvention to be reasonably established, without the need to prove intention*’ - paragraph 3, letter b);
- The procedure is more precise about, *inter alia*, what is expected from the cooperation between Member States: cooperate ‘*sincerely and swiftly*’, ‘*regularly*’ inform of, (the successive steps taken to address the problems, the need to prove the results obtained: ‘*inform Commission*’, ‘*explain the reasons*’ - (paragraph 2);

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<sup>18</sup> ERGA report on territorial jurisdiction in a converged environment, 17 may 2016.



- The procedure includes explicit concerns regarding the rights of defence: the media service provider must be given *‘the opportunity to express its view on the alleged circumvention and the measures notifying MS intends to take’* - paragraph 4, letter b);
- The opportunity is left to the Commission to request ERGA’s opinion - paragraph 4, letter c);
- The Commission’s role is clarified and strengthened: it should be kept informed about the outcome of the formal cooperation procedure (e.g. the search for a *“mutually satisfactory solution”*).

#### 1.3.4. The general information requirements for audiovisual media services (article 5)

**Current rules** - Article 5 already exists in the current AVMS Directive and relates to the basic information (name, geographical address, email or website, etc.) that services under the jurisdiction of a Member State have to make accessible to the general public.

**New obligation to disclose information about a media company’s ownership structure (optional)** - The new AVMS Directive extends the scope of this Article by including an option (under paragraph 2) for Member States to take legislative measures providing that media service providers under their jurisdiction make information concerning their ownership structure accessible, including the beneficial owners. Contrary to Article 5 of the current Directive, this second and new paragraph relating to ownership structure provides for an optional measure as Member States *‘may adopt’* these measures.

**Balancing clause** - A typical limitation clause has been introduced as part of the second paragraph, in the sense that such measures shall respect the fundamental rights concerned, such as the private and family life of beneficial owners. These measures shall be necessary and proportionate and shall aim to pursue an objective of general interest.

#### 1.3.5. The establishment of territorial jurisdiction over video-sharing platform providers (Article 28a)

Article 28a sets out the rules to be followed in order for Member States to establish jurisdiction over video-sharing platform providers. It seeks to cover both service providers which have an establishment in the EU i.e. ‘European’ video-sharing platforms; and such providers which may not be established in the territory of a Member State, but which have a parent company, a subsidiary or another entity of the same group with such an establishment<sup>19</sup>.

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<sup>19</sup> Recital 44 of the revised AVMS Directive provides that: *‘it is appropriate to ensure that the same rules apply to video-sharing platform providers which are not established in a Member State with a view to safeguarding the effectiveness of the measures to protect minors and the general public set out in this Directive and ensuring a level playing field (...)’*.

In the former case, establishment is to be determined in accordance with the criteria of the E-commerce directive (paragraph 1)<sup>20</sup>. In the latter case, regulators and Member States will have to check whether the video-sharing platform provider can be linked to a parent undertaking or; a subsidiary undertaking; or a larger economic group who has at least one entity established in the territory of the European Union.

It should be noted that the same obligation foreseen under Article 2, paragraph 5b with respect to audiovisual media services is provided for video-sharing platforms too.

### 1.3.6. Cooperation amongst national regulatory authorities (article 30a)

**Current rules** - Article 30a is one of the articles which takes a closer and more detailed look at the NRAs than in the current AVMSD while today cooperation between Member States (through their regulatory authorities) is an area only covered in Article 30 (duty to take appropriate measures to provide each other – in particular, NRAs and the European Commission – with the information which is necessary for the application of the Directive, in particular its Articles 2, 3 and 4). Further details are also provided for in Recital 95 of the 2010 Directive, which describes specific scenarios of cooperation between NRAs (covering all fields coordinated by the AVMSD at that time).

Compared to the current regime, the new Article 30a may provide more clarity to the process of cooperation and exchange of information between NRAs outside of the already set-out jurisdiction procedures. In the course of the legislative process, Article 30a was highly debated, and the ensuing final compromise could result in crucial changes for the cooperation between NRAs.

#### **Exchange of information necessary for the application of the Directive (paragraph 1) -**

This part of the text reiterates the focus of the already existing provision (Article 30) to ensure that NRAs take appropriate measures to *‘provide each other and the Commission with the information necessary for the application of this Directive’*. The only change is that the focus of the provision is now only on the NRAs and no longer Member States. The notion of independence of NRAs is detached from this Article and is dealt with separately in Article 30.

#### **Information about services *‘wholly or mostly directed at’* the audience of other Member States (paragraph 2) -**

There is a new obligation for NRAs to provide each other with information about AVMS providers wishing to provide services *‘wholly or mostly directed at’* the audience of another Member State. This information duty could provide the NRAs in the possibly targeted territory with ex-ante information about services directed wholly or mostly

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<sup>20</sup> Article 2, letter (c) of Directive 2000/31/EC sets out: *‘an established service provider is a service provider who effectively pursues an effective economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider’*.

at their audiences and therefore possibly help in identifying circumvention strategies. However, the provision itself is just to provide information once received and does not foresee further involvement of the NRA of the targeted Member State. Also, this duty is limited to those services who inform NRAs that they are ‘*wholly or mostly directed at*’, whereas paragraph 3 (see below) refers to services ‘*targeting*’ the territory of another Member State. As a result, a question arises as to whether these two concepts cover the same situations.

**Request for information about ‘targeting’ services (paragraph 3)** - The new provision establishes that if the regulatory authority of the targeted Member State sends a “request ‘*concerning the activities*’ of a provider targeting the territory of another Member State to the competent authority, the latter authority shall do its utmost to address it within two months. There is a question as to what the wording ‘*without prejudice to stricter time limits applicable pursuant to this Directive*’ actually refers to, since paragraph 3 of Article 30a seems to be connected to, *inter alia*, the implementation of Article 13 and ‘*targeting cases*’ (see above point 1.2.3. about financial contributions). It should also be noted that the NRA sending the request has an obligation to provide any necessary information requested by the NRA having jurisdiction.

### 1.3.7. The formal recognition and reinforcement of ERGA (Article 30b)

The compromised agreement on the revised AVMS Directive formalises the existence of ERGA in Article 30b, and specifies its organization and main missions:

- Providing the European Commission with technical expertise;
- Promoting the exchange of good practices on the application of the provisions of the Directive;
- Fostering cooperation and the exchange of information necessary for the application of the Directive (see above paragraph too).

**Technical assistance to the European Commission** - ERGA shall essentially provide the European Commission with technical and factual information with a view to assisting it, on the one hand, in the consistent implementation of the Directive across the EU and, on the other, in all audiovisual matters falling within the Commission’s competence. It may also be requested to provide opinions on several issues related to the application of the Directive. For example, in Article 2, paragraph 5, letter c on the identification of services under the jurisdiction of each Member State, the European Commission may ask ERGA to issue an opinion in the event that the authorities of the Member States concerned disagree regarding which one has jurisdiction over a service provider. Similarly, under Article 3 on the derogation procedure, the European Commission may consult ERGA before taking a decision on whether the restrictive measures taken by a Member State are compatible with Union law. Finally, under the anti-circumvention procedure, the Commission must also consult ERGA

before taking a decision on the compatibility with Union law of measures adopted by a Member State.

**Promoting exchange of best practices amongst NRAs** - Article 30b also provides that ERGA has a role to play in facilitating the exchange of regulators' experiences and practices in the application of the regulatory framework applicable to audiovisual media services.

Regulators are invited, within the framework of ERGA, to cooperate in particular in order to exchange all the information necessary for the proper application of the Directive, whether it concerns the application of the procedure derogating from the freedom of communication, the anti-circumvention system or measures concerning accessibility. While Article 30b sets out ERGA's formal tasks, it is notwithstanding the Group's added-value in providing for a coordinated contribution to the consistent implementation of the Directive. The next Chapter exactly aims at pointing out potential challenges in this respect.

# CHAPTER II Potential implementation challenges resulting from the analysis of the revised AVMS Directive

In line with its current (and future) tasks and in order to contribute to the consistent implementation of the future AVMS Directive, ERGA members looked at the revised text from a practical point of view, anticipating on the future implementation of the rules and asked themselves the following questions: what will be the implications of the new provisions for NRAs' regulatory practices? What would be the practical requirements necessary for the effective application of the new legal provisions? How should NRAs approach newly introduced concepts? Etc.

## 2.1. Issues related to the extension of the material scope

Starting from the identification of the main legal changes, this section aims at pointing out to some potential implementation issues which may, directly or indirectly, result from the extension of the material scope of the Directive. Some of these issues are not new though and had already been spotted by ERGA members prior to the start of the revision process<sup>21</sup>, or immediately after the publication of the Commission's original proposal for an updated AVMS Directive<sup>22</sup>.

### 2.1.1. New definitions of VSPs and 'user-generated video' brings about interpretation challenges for NRAs

**Definition of 'user-generated video' vs. 'programmes'** - Further to the analysis made under point 1.1.1, and considering the new definition of 'programme', one may assume that, in general terms, all video content on websites and VSPs, irrespective of its length, including feature length films, video clips, sports events, situation comedies, documentaries, children's programmes and original drama can be part of audiovisual media services under the new rules, except for content falling under the definition of 'user-generated video'.

Even though the determining criterion to qualify as 'user-generated video' is the nature of the uploader, the material difference between programmes and user-generated content may

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<sup>21</sup> ERGA reports on territorial jurisdiction in a converged environment (2016); on material jurisdiction in a converged environment (2016); on the protection of minors in a converged environment (2016).

<sup>22</sup> ERGA press release on the European Commission's proposal to revise the AVMSD (25 May 2016).

sometimes be unclear. For example, so-called user-generated content (UGC) can look very professional and may include excerpts of content from other sources which may themselves be considered programmes in specific contexts, or materially constitute a programme according to some NRAs.

However, distinguishing UGC from programmes may not be a major issue in practice, since there is no regulatory obligation applying to UGC, which does not also apply to programmes<sup>23</sup>. The functional purpose of identifying UGC is therefore just to identify a VSP.

**Definition of ‘VSPs’** - Unlike the definition of an audiovisual media service (article 1, paragraph 1, point (a)), the definition of a VSP refers to the concept of ‘essential functionality of the service’ as an alternative to the ‘principal purpose’ test. Perhaps this addition was made so as to make the definition broad enough to capture a maximum range of services. For instance, it may be argued that *YouTube*’s principal purpose is the provision of programmes and/or user-generated content but this may be more challenging to prove as far as other social media services are concerned. Yet, programmes as well as user-generated content are also accessible from these platforms, so here again there may be a difficult task for NRAs to set clear boundaries.

Recital 5 confirms that initial assumption as it makes the connection clear between ‘social media services’ and the concept of ‘essential functionality’: ‘*While the aim of this Directive is not to regulate social media services as such, social media services should be covered if the provision of programmes and user-generated videos constitute an essential functionality of that service*’.

The challenge for regulators will be to correctly apply the ‘essential functionality’ test as the text does not provide for a definition<sup>24</sup>. Recital 5 only provides for the following indicators ‘*if the audiovisual content is not merely ancillary to or constitutes a minor part of the activities of that social media service*’. Another challenge would be to clearly establish the scope of the term ‘functionality’ (e.g. while some services have video capabilities; others simply provide links to videos).

Last but not least, the definition recognizes that VSPs do not have editorial responsibility over the audiovisual content that is provided on their service, be it professionally produced (i.e. programmes) or user-generated. The concept of ‘editorial responsibility’ is defined in Article 1, paragraph 1, point (c) of the current AVMS Directive and deals with how the service provider effectively controls both the selection and organisation of programmes. It was not amended in the course of the legislative process. As a result, the definition of

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<sup>23</sup> VSPs are required, under Article 28b, paragraph 3, letter (c), to put in place a functionality to declare commercial content that, in practice, would only be relevant for the uploader user when uploading user-generated videos).

<sup>24</sup> Recital 3b however sets out that the European Commission may be required to issue guidelines on the practical application of the criterion ‘*in order to ensure clarity, effectiveness and consistency of implementation*’.

‘editorial responsibility’ is irrelevant as far as video-sharing platforms are concerned (it does not refer to user-generated content for instance)<sup>25</sup>. This may be read as an indication that, in principle, regulators should assume – and are not likely to challenge – that video-sharing platforms never can be editorially responsible in the sense of the Directive, regardless of the degree of ‘control’ exercised by the service provider over the organization of the content available.

The organisational features of the VSPs identified (*‘displaying, tagging, sequencing’*) are illustrative and not exhaustive. It will be up to regulators to set the appropriate extent to how a VSP provider can actually exercise control regarding the organisation of the content, without having ‘editorial responsibility’ (which could otherwise bring it closer in line with the definition of on-demand service). Considering that services potentially falling under the definition of a VSP may have various degrees of control over the organisation of the content provided on their service it may be sometimes difficult for regulators to find enough evidence that the organisation of the content is actually determined by the VSP provider.

In conclusion, the following implementation issues that the definition of ‘user-generated video’ and VSPs would potentially raise may be considered:

- The indicators referring to the ‘essential functionality’ test may be not detailed enough (e.g. how should ‘functionality’ be defined?) to ensure it is correctly carried out;
- VSPs’ exercise of control over the organization of the content provided on their service is not a defined term (unlike editorial responsibility for example) but is crucial in the qualification of a service as a VSP.

These issues are being addressed under point 3.1.1.

### 2.1.2. Risks of a fragmented approach to the regulation of VSPs

Whereas the co-legislators’ intention was certainly to set out a number of common public policy objectives supporting the extension of the scope of the Directive to VSPs, it may not likely result in a uniform approach to the measures imposed on VSPs available in the EU..

Considering that Article 28a, paragraph 6 establishes minimum harmonization for the provisions on video-sharing platform providers (contrary to the Commission’s original proposal), therefore allowing Member States to impose stricter or more detailed measures on VSPs, it cannot be excluded that the transposition of the Directive results in various regulatory frameworks applicable to VSPs across Europe. This of course is already the case for broadcast services. However, with VSPs it is their default nature that they are available to users globally, whereas broadcast services on the whole tend to be nationally-targeted. So one

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<sup>25</sup> The definition of ‘editorial responsibility’ is however relevant in order to determine whether a programme which is delivered on a VSP may be found under the editorial responsibility of an audiovisual media service provider.

may anticipate a greater tension between nationally-specific policy goals and the country-of-origin principle, in the case of VSP regulation, than it has been seen in the case of broadcast regulation.

For example, the responsible NRA must assess the appropriateness of the measures taken by a given VSP in order to e.g. protect minors. Yet, it will likely have users in many Member States all of which have different policies and laws as to what constitutes harmful content for minors. Furthermore, there is still no harmonization as to the age of protection of minors, which may compromise the consistent application of protective measures across the EU.

In relation to this specific point, NRAs may also be required to cooperate with another national regulator (e.g. data protection authority in order to ensure that minors' personal data are not being used for other purposes than the implementation of age verification systems).

### 2.1.3. NRAs' assessment of the VSPs' compliance with their obligations may raise both conceptual and practical challenges

**'Appropriateness', 'proportionality', and 'practicability' of the measures taken by VSP providers** - As explained above (point 1.1.4), Article 28b, paragraph 5 foresees that NRAs shall be responsible to assess the appropriateness of the measures taken by VSPs. Accordingly, the challenge is for NRAs to elaborate criteria against which they will be able to determine whether a measure, not only has been put in place, but can be considered 'appropriate' in light of the objectives pursued under Article 28b, paragraph 1 and 2.

One of the challenges may also lie in the requirement that the measures taken have to be both '*practicable*' and '*proportionate, in particular taking into account the size of the video-sharing platform service and the nature of the service that is provided*'. While the NRA's primary responsibility is to make sure that the VSPs under its jurisdiction comply with the obligations laid down in Article 28b, paragraph 3, it also has to ensure that such compliance remains practicable and proportionate from the service provider's perspective, which could leave some space for interpretation and will require a case by case assessment. Member States will need to develop approaches or policies on what this means in practice (this may even be tasked to the NRA). In the end, it may turn out that the NRA is forced to make a judgement on the potential harm of the content in question, which may be sometimes challenging, in particular for the reasons explained above (point 2.1.2).

Finally, the role NRAs may (or may not) have in litigation procedures involving a VSP provider and an individual user is not clearly set out in the text.

**The practical assessment of the measures by NRAs** - On a more practical side, NRAs may also need to consider the following questions:



- Such a type of assessment is totally new for all ERGA members and would probably require them to rely on additional expertise and to put in place specific monitoring procedures and tools (e.g. in the field of data analytics), which may bring significant extra costs;
- As NRAs will be assessing the appropriateness of the measures implemented by a VSP across several countries, and whereas the VSP is expected to be the initial recipient of users complaints, they may as well receive complaints potentially from all over the EU either from users dissatisfied with the outcome of a complaint about a specific instance of content on a VSP, or from users or third parties complaining about the VSP's approach or the co-regulatory approach broadly. The handling of these complaints in the context of just one NRA might prove to be both complex and burdensome;
- The measures foreseen to make audiovisual commercial communications provided on VSPs in line with the requirements of Article 9 may be more difficult to assess than other categories of measures considering the fact that some VSPs are part of highly sophisticated advertising ecosystems, with many external companies involved providing for data-driven ads, which might be different according to each individual user of the platform. This potential difficulty seems to be actually indirectly acknowledged when reading Article 28b, paragraph 2: *'taking into account the limited control exercised by those video-sharing platform providers over those audiovisual commercial communications'*.

In conclusion, the following implementation issues that the assessment of the measures taken by VSPs would potentially raise may be considered:

- There is a question as to what *'appropriate measures'* means in practice, with some room for interpretation, in particular considering that the measures should only relate to how the VSP organizes the content and not to the content itself;
- On a general level, the supervision of VSPs by NRAs may represent a huge task for regulators, bringing significant extra costs and burden, especially if NRAs find themselves in receipt of high volumes of individual users' complaints (potentially coming from several EU Member States).

These issues are being addressed under sections 3.2.1 and 3.2.2 of this Paper.

It should also be noted that ERGA's separate Subgroup on Self- and Co-regulation has considered the application of co-regulatory best practices to the future regulation of VSPs, and has proposed a *Framework for Effective Co-regulation of Video Sharing Platforms*<sup>26</sup>. This is not prescriptive or intended to achieve an identical implementation of the Directive's provisions in Article 28b across Member States. Rather, it aims to ensure that any ERGA member thinking about how to design a co-regulatory scheme, can refer to best practice

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<sup>26</sup> [Insert reference when published]

principles in doing so. A continuing exchange amongst ERGA members will be necessary, as they continue to develop this novel form of regulation.

## 2.2 Issues related to the new provisions covering the promotion of European works

Starting from the identification of the main legal changes, this new section aims at pointing out to some potential implementation issues which may, directly or indirectly, result from the new provisions of Article 13 of the AVMS Directive. This section builds to a certain extent on the answers provided by ERGA members to a questionnaire related to their experience with the existing implementation of Article 13 in their respective country. A summary of ERGA members' answers is provided as an introduction to each following subsection.

### 2.2.1. The existence of diverse policies for the promotion of European works in the catalogue of on-demand audiovisual media services

The questionnaire provides for a very good insight into the current implementation of the AVMSD provisions in this area and actually shows that there is a great diversity in how the policy to promote the production of and access to European works has been implemented to date in the various Member States, including, where it has been applied, a share regime.

**Various levels of experience with implementing share-like obligations** - 16 out of the 23 countries which responded to the questionnaire have required a mandatory share of European works in the catalogue of on-demand services but with very diverse levels. This means that this type of implementation of Article 13 is today quite relevant among the Member States. Among the nine countries which took a different path, some did not use any quota for European works; some included it only as one alternative – usually to the financial contributions; or did not specify a certain percentage; or only reported to the European Commission based on the factual assessment of the situation in their country. For the NRAs in these nine countries, the challenge would be to quickly acquire the required capacities and put in place the regulatory mechanisms adapted to the assessment of the service providers' compliance with their share obligation.

**No single prevailing methodology for the calculation of the share** - Another key finding of the questionnaire is that the preferred methods for calculating the share of catalogue are either on the basis of the number of hours – 9 countries – or on the basis of the number of titles – 7 countries. The option of the calculation based on number of episodes - as far as series are concerned (in number of titles for films) - prevails in 2 countries only. Besides these options, some countries have implemented more impact-oriented calculation methods, such as focusing on the share of the actual viewing time, or combining the quota with a prominence-

like measure, which consists of looking at the percentage of European works on the service homepage.

**Some divergences with regard to the genres which may be excluded from the quota -**

Another important methodological question concerns the possible exclusion of certain types/genres of programmes from the calculation of the quota. Nine countries do not provide for any exemptions. But there is still a large proportion of countries (seven) exempting some genres of content, such as, for example, news programmes, sports events, games, advertising programmes, teleshopping, teletext services, entertainment and current affairs programmes.

**The challenges associated with the implementation of the new share obligation are numerous -**

Such a patchwork of policies implementing share obligations for on-demand audiovisual media services across Europe questions NRAs' readiness to ensure the consistent application of the new rules, given that the mandatory, but minimum, share of 30% European works will have to be applied throughout the EU single market.

On the one hand, the question is: how to ensure a consistent calculation methodology across the EU, despite the fact that Member States may choose not to impose the same quota? As we have seen above, there are various methodologies used in different countries and, with a view for the European Commission to issuing guidelines on these issues, a number of questions would need to be considered in the first place: for example, how each individual work should be measured (in terms of hours, episodes, titles, etc.); how to address differences regarding the qualification of a work as 'European work'? If such national disparities – e.g. regarding the methodology for calculating how services are expected to achieve the required share – remain persistent, there may be a benefit for transnational service providers in locating their business where the regulatory obligation is lower to avoid having to comply with a stricter quota obligation in other Member States. Consistent approaches to the implementation of the share obligation may also allow to make comparable assessments.

On the other hand, and in connection with the previous question, there may be an additional implementation issue in relation to cases where more than one catalogue can be attributed to the same on-demand service provider (as the questionnaire revealed that NRAs refer to various methodologies in that respect); and/or also where a single provider supplies both linear and on-demand audiovisual media services (no prevailing methodology emerged out of the questionnaire).

In conclusion, the following implementation issues that the newly provided share obligation (Article 13, paragraph 1) would potentially raise may be considered:

- In the Member States where no quota obligation was foreseen to date in respect of on-demand services, some time may be necessary for the concerned NRA to adopt the adequate regulatory mechanisms and internal expertise;
- Considering the various quota calculation methodologies currently being used in Europe, the challenge may be to come up with a consistent approach at European

level, while respecting the numerous national disparities, e.g. regarding the genres of works which are excluded from the calculation of the quota;

- Failing to elaborate some form of harmonization in this area, there may be a risk that certain transnational service providers take advantage of regulatory asymmetries in the single market.

### 2.2.2. Scarce and/or diverse experience amongst NRAs with the implementation of prominence obligation

On a general level, it appears that only a few ERGA members have had to check that prominence measures were put in place to ensure better visibility and consumption of European works. Such a general lack of experience and understanding of e.g. what prominence tools are the most efficient may be problematic for the purpose of ensuring an effective and consistent implementation of this new obligation.

**Definition of prominence** – Although no definition of the concept is provided for in the new Directive, the indicators set out in Recital 35 of the revised Directive can be used as a reference. Furthermore, and alike the other obligations laid down in Article 13, prominence to date was to be ‘*implemented where practicable and by appropriate means*’. Consequently, a standard and uniform definition of prominence does not exist and it seems like service providers today are using several means to ensure prominence of specific content. This, in turn, questions whether it may be more appropriate for different approaches to be taken by NRAs in regulating for prominence. As platforms evolve, it also seems likely that there will be innovation in terms of how prominence can be achieved (for example, through voice-driven search). While one-size-fits-all approach should not be a goal as such, there are concerns that there might not be a consistent implementation of this provision across the EU.

It should nonetheless be mentioned that two NRAs have developed a detailed regulatory definition of the concept, while four have provided for practical guidelines and request a significant amount of information from service providers about how they ensure prominence.

**Prominence is mandatory only in a small number of countries** - The main observation relating to the current context is the fact that the prominence option has not been implemented in most EU countries. Measures to secure prominence are mandatory in three countries only and optional in three others. Only two countries adopted detailed measures of prominence. When the new version of the Directive will come into force, most Member States will therefore be required to develop new policies and measures to implement the requirement that service providers ensure prominence of their share of European works.

**NRAs follow various strategies to assess service providers’ performance** - Among the countries in which a prominence obligation is foreseen in their national legislation, different strategies have been developed by NRAs to assess how service providers implement the obligation:

- Monitoring of promotional intensity (i.e. the proportion of European works among the various promotional tools used by the providers) of European works on various promotional channels;
- Monitoring the proportion of promotional spaces dedicated to EU works on home pages of providers at any time;
- Measuring (point-based system of 14 criteria) the performance of a provider regarding the respect of the prominence obligation;
- (annual) Mandatory reporting by the service providers annually on their activities, including prominence measures.

**Limited experience with carrying out impact assessments of the measures taken to ensure prominence** - only a few NRAs have attempted to conduct impact assessments regarding prominence measures. They have included, *inter alia*, using sampling to assess the intensity of prominence; or carrying out some research to measure the impact of prominence tools on the actual consumption of European works.

Finally, the questionnaire also demonstrates that the service providers' use and impact of recommendation systems (algorithms) is insufficiently studied by NRAs, as not a single one referred to specific study on the topic.

In conclusion, the following implementation issues that the newly provided prominence obligation would potentially raise may be considered:

- The absence of any standard definition of what 'prominence' actually means in practice raises concerns as to the effectiveness of certain tools being used by service providers;
- A large number of Member States/NRAs have no experience with implementing a prominence obligation for European works. The transposition period offers an opportunity for these to develop the required capacity in a considered and consultative manner, in particular when it comes to monitoring a service's performance and carrying out impact assessments.

### 2.2.3. Challenges related to the implementation of 'cross-border' financial contributions

The analysis of the legal frameworks and of the current practices in the implementation of Article 13 conducted through the above mentioned questionnaire was focused on on-demand services. However, as the text of the new Directive was modified during the legislative process to encompass linear services as well (as referred to Article 13, paragraph 2), some information was taken from additional sources (European Audiovisual Observatory, national legislations, etc.).

**Great diversity of the national financial contribution schemes** - According to the analysis of the national legal frameworks, there is currently a significant minority (10) of Member States where mandatory measures concerning the financial contribution to the production of European works, including via direct investment in content and contribution to national film funds are implemented, irrespective of whether they are related to the linear or on-demand services. The overall picture shows that Member States chose to transpose Article 13, paragraph 1 in very different ways. In particular, the following key observations (regarding on-demand services only) can be made:

- In seven Member States, the financial obligation is imposed by means of a direct contribution to production or acquisition of rights. In five of these countries such a contribution is mandatory, while it is optional in the other Member States or may even be a substitute to the quota obligation (in one of them);
- In six Member States, a financial contribution is foreseen under the form of a mandatory tax or a levy payable to a film fund. In two of them, such a measure completely substitutes any direct investment obligation; while in two other Member States the payment of a tax comes on top of an obligation to make direct investments into the production;
- It may also be observed that the financial contribution is mentioned as one of the possibilities to secure the promotion of the production of European works in several national legislations, but without specifying any particular share or target. In most of the cases this is the result of a more or less literal transposition of Article 13 of the AVMS Directive, the national legal provision remaining sometimes vague, so that no implementation is concretely carried out. For instance, in one Member State, on-demand service providers have adopted a self-regulation code for the promotion of European works. In the code, the providers acknowledge three different criteria to promote the production of and access to European works within their catalogues, including the financial contribution to European productions, that can be fulfilled (for example, by allocating a certain proportion of their total expenditure to their own production of European programs or contributing to such production);
- In the countries where a financial contribution is required, it is calculated as a share of the total annual revenues generated by the provider, or on some specific revenue streams (basically advertising or licence fee revenues). The range of the shares adopted is quite broad, especially as regards the direct investment in content, where it may vary from 1% up to 26% of the annual revenues (including intermediary levels) depending on various criteria, e.g. whether the provider includes cinematographic works in the catalogue;
- Where imposed, the tax or levy approximatively amounts to 2% of the annual revenues of providers. As a matter of comparison, for linear services, the tax is usually between 1% and 2%, except in one country (5, 5%).

**The collection of relevant economic data is often done by NRAs** - NRAs are usually best positioned to obtain economic information from the providers, even though it should be

underlined that there might be cases where the relevant data could be collected by other public bodies, such as a Ministry or a governmental body, including national funds. It may be observed that NRAs are usually in charge of collecting the information as regards the direct investment in content (with some exceptions), whereas the contributions are paid to and collected by the national funds.

For the purpose of implementing Article 13, paragraph 2, in particular in cross-border cases where another Member State's financial contribution scheme is applicable to service providers under their jurisdiction, one may wonder whether it would not be necessary that NRAs are granted with the adequate powers to collect all relevant economic information, including when they are required for the application of the measures foreseen by the targeted Member State.

**The 'targeting' test** - The first key implementation issue (in logical order) related to the implementation of Article 13, paragraph 2 (where such option is taken by Member States) is the meaning of 'targeting'. A definition of "targeting" does not seem to be provided in any of the Member States' legislations, so there is no national precedent on which NRAs could base their analysis of the term. It will be important for NRAs to decide how 'targeting' should be understood for, at least, two reasons:

- So that a receiving Member State can determine if it is appropriate to impose a financial obligation;
- For the Member State having jurisdiction over a service provider to identify any financial obligations already imposed by targeted Member States.

Recital 42 of the current AVMS Directive provides guidance for the assessment, on a case-by-case basis, whether a broadcast by a media service provider is 'wholly or mostly directed' towards the territory of another Member State. It refers to indicators such as the origin of the television advertising and/or subscription revenues, the main language of the service, or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received.

However, it should be underlined that Recital 38 of the new Directive which refers to on demand services provides for similar although not identical criteria compared to Recital 42 of the current Directive. In particular, Recital 38 neither refers to the notion of 'origin', nor considers 'origin of the revenues' earned as one of the criteria allowing to determine whether the service is actually targeting the Member State of reception. In this respect, one can also note that on-demand services are delivered in a very different way than linear services, particularly in relation to any advertising that might appear on the service's website.

As a result, albeit some criteria may be similar, there is a question as to whether the ones related to the 'wholly or mostly' test would fit the purpose of identifying targeting services. It should also be noted that both concepts are only able to capture a subset of those services which are 'provided' in a given territory. As there is no detail provided in the Directive to

indicate what the intended differences between ‘targeting’ and ‘wholly or mostly’ are, some discussion on this topic is likely to be opened between Member States, in particular to determine how these two categories should be approached.

**Besides the ‘targeting’ test, the identification of the services to which Article 13, paragraph 2 may apply** - Another key topic in respect of the implementation of the new possible measures of Article 13, paragraph 2 will be the identification of services.

Firstly, NRAs would need to identify and have legal certainty about the category of services which are targeting their territory, though being established in another Member State. They may be confronted with some difficulties in keeping an overview of such services and in having access to exhaustive information on this kind of services, be they linear or (to a larger extent) non-linear.

As far as non-linear services are concerned, it should be, on the one hand, assessed whether such information is available in the Member State(s) concerned and, on the other hand, which is the public body who is entitled to receive notifications (if any) and to keep record of providers and services (see point 3.1.3. of this Paper). It should also be highlighted that in some countries those services neither have to be licensed nor notified, so that no comprehensive list of the services established and available is possible.

Secondly, where there is an obligation e.g. to notify, the identification of on-demand audiovisual media services may nevertheless be an issue too and will require NRAs to increase their exchange of information, as well as to work on a certain degree of practical convergence in the implementation of the definition across Member States<sup>27</sup> (see point 3.1.1). Otherwise, while, in some cases, the question arises whether a service is targeting the audience of another Member State may not be such a complex issue, it could be that NRAs (the one of the targeted Member State and the one of the Member State having jurisdiction) however disagree on the qualification of that same service as a ‘non-linear audiovisual media service’<sup>28</sup>. In other cases, thresholds allowing to exempt small or low turnover services can vary from country to country. It is not clear how such disagreements will be resolved, and which NRA would have the deciding say.

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<sup>27</sup> It should be noted though that the definition of “on demand” service in the new Directive is expected to remain unmodified compared to the definition enshrined in the text of the 2010/13/EU Directive (Article 1, paragraph 1, point (g))

<sup>28</sup> Catch-up TV services, for instance, are included in the UK among the types of services which are likely to be considered an on-demand programme service (ODPS), as defined under section 368A of the Communications Act 2003 . In France, according to the Decree n° 2010-1379, the catch-up TV is one of the three categories of on-demand services (SMAD), together with “subscription services” and “other services”, which basically correspond to transactional services. However, obligations concerning the promotion of EU works apply only whereas the revenues of catch-up services are not already taken into account for the obligations of linear services (Art.3). Similarly, in Romania the catch-up TV (“video replay service”) is considered a kind of video on demand, provided that it allows views to view content already broadcast, within a limited period of time. On the contrary, in Italy, since according to Agcom’s regulation 607/10/CONS, catch-up TV services are not required to be licensed, if they merely rebroadcast linear contents, and for this reason this kind of services fall outside of the material scope of the regulation in respect of the promotion of EU works.



In conclusion, the following implementation issues that Article 13, paragraph 2 would potentially raise with respect to cross-border services may be considered:

- The fact that the Member State where the provider is established has an obligation ‘to take into account’ of any financial contribution imposed by targeted Member States may be challenging in practice considering the great diversity of financial contributions schemes currently set up across the EU;
- The meaning of ‘targeting’: the concept may be interpreted differently and there seems not to be a clear definition provided in any Member State legislation;
- The categorization of on-demand services: Member States/NRAs could disagree on the qualification of the same service as on-demand service and it is not clear whose decision would take precedence;
- The identification of the (potentially) ‘targeting’ services which are under another NRA’s jurisdiction;
- The collection and exchange of economic information concerning the services targeting a Member State which are necessary for the calculation of any financial contribution (be it direct investment into production or a levy payable to a films fund).

#### **2.2.4. Possible changes to collection and processing of data by NRAs**

Considering all the amendments made to Article 13 as a whole, it is worth exploring how NRAs’ current practices may be challenged, especially in light of the following questions:

- Could the implementation of the provisions of Article 13 (30% minimum share, prominence obligation, financial contributions, and provisions on targeting services) result in more challenges for NRAs in their task of assessing services’ performance?
- How could NRAs cooperate in order to facilitate the assessment of the performance and, possibly, the enforcement with regard to services operating across several Member States?

As mentioned before, the subsequent analysis is based on ERGA members’ experience to date with carrying out compliance checks, considering in particular three aspects: a) the main tools being used in order to both collect and check relevant information provided by service providers; b) the kind of information being required; c) the procedures and enforcement tools available in case of non-compliance. The answers to the questionnaire have been processed in particular with a view to finding out to what extent NRAs’ internal processes and assessment methodologies differ from one country to another.

**Regarding the practices of collecting and verifying information** - A vast majority of NRAs require service providers to self-declare information about the fulfilment of their obligations. While five of them receive declarations only upon specific request, in most Member States, the declaration is routinely done on an annual basis. It is sometimes supplemented by a

structured dialogue with the service providers concerned, e.g. in order to address any question related to the reporting of data.

The new provisions of Article 13 are not likely to significantly change the way regulators collect information, except when it comes to services targeting Member States (see below). However, it should be noted that the new quota (30% minimum share of European works) and prominence obligation on on-demand services may require NRAs in those countries where such detailed obligations did not exist to date, to adjust their practice (update their reporting form, get the process more routinized, provide continuous assistance to stakeholders especially in the first years, etc.) which may create extra administrative burden and costs.

When it comes to checking the information provided by service providers, very few authorities currently have long-established regular procedures. Where necessary, these NRAs may e.g. ask companies to disclose additional information or evidence substantiating what they have declared. Ex-post controls can also take place (randomly or on a regular basis) in order to compare what service providers reported (e.g. in terms of investments) with available data and facts.

It also seems that the NRAs are relying mostly on the information provided by the providers at different intervals (usually once a year or quarterly). Some of the NRAs prefer an administratively lighter procedure (existing form for supplying data, reporting only on a day, picked at random during a specific period each year). The fact that follow up and verification procedures are not systematically carried out by a majority of NRAs (which can be explained by a number of different reasons: lack of appropriate resources in order to be able to monitor the great number and diversity of on-demand services available; by the fact that these services' characteristics are constantly evolving and therefore make NRAs' monitoring more challenging; or by the decision taken in that Member State that it would be disproportionate to introduce strict verification processes in the context of provisions applied 'where practicable and by appropriate means') may create some enforcement issues. For services operating across borders in particular, it might be a disproportionate demand to ask the competent authority to carry out this sort of compliance checks alone and for every relevant market, especially if no internal procedure is currently set up on a regular basis. Even making the assumption that all relevant information would be available to that authority, the amount of additional work and potential language barrier may be particularly challenging (see below).

**Regarding the kind of information required from service providers** - In a majority of Member States, the information that the service providers are required to disclose go beyond what relates to the promotion of European works. Where it is the case, the information collected can be put into two categories:

- Information about the service itself, including but not limited to: type of on-demand service (catch up TV, VoD, etc.), business model (subscription, advertising, both, etc.), any applicable geographical access restriction, etc.

- Information concerning the promotion of European Works, both in terms of financial contributions to the production (annual revenue, costs related to rights acquisition, details about each audiovisual work financed, etc.), prominence and quotas (percentage of European works in the catalogue in terms of number and/or hours, audiovisual works' country of origin, search functions etc.).

Such a high diversity of information requirements across the EU obviously reflects the various options Member States took when they transposed Article 13 of the latest Directive. Now that the Directive foresees a mandatory 30% minimum share of European works, as well as an obligation for on-demand services to ensure prominence of these works, some NRAs might need to adjust their declaration forms in order to allow service providers to provide more details.

The answers to the questionnaire also highlight the fact that a number of NRAs have no experience in collecting information about service providers' investments into production and/or financial contributions to film funds. While under the revised AVMS Directive Member States remain free to decide not to impose financial obligations on service providers under their jurisdiction, such providers might be imposed financial contributions in the targeted Member State (provided that such a Member State applies contribution also on the providers established in its territory). The question is whether NRAs in countries where services do not have to comply with financial obligations may have to require from those targeting other Member States to declare relevant information, including about their revenues made abroad (provided that the country of origin principle would apply for the purpose of collecting information from service providers targeting the audience of another Member State)<sup>29</sup>. In such a scenario, the facts and figures would have to be detailed and comprehensive enough so as to ensure that the authority(ies) of the targeted Member State(s) can effectively assess the services' respect of their obligations on its(their) own.

**Regarding the procedures and available enforcement tools** - In case where non-compliance is established, it appears that a common practice is for NRAs to request additional information from service providers, as a first step prior to the launch of a sanction procedure. The range of possible sanctions is quite broad possibly in order to reflect various levels of severity: warning letter or reprimand, obligation to publish a press release, restrictions on advertising revenues, fines, restricted access to the service, and termination of the service.

It is also worth mentioning that very few NRAs grant service providers the possibility to postpone the fulfilment of their financial obligations to the subsequent year.

Article 13 of the AVMS Directive does not deal with sanctions. It is therefore entirely up to Member States to decide (in compliance with EU law) what kind of sanctions may be applied

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<sup>29</sup> According to Recital 36 of the revised AVMS Directive, '*financial obligations should only be charged on the revenues generated through the audience in the targeted Member State*'.

to service providers failing to comply with the obligations they have chosen to enforce. Where Member States make use of the option to impose financial obligations on service providers under the jurisdiction of another Member State, it is not clear how compliance can be ensured (i.e. which of the two involved NRAs is in charge of enforcement).

In conclusion, the following implementation issues that the future assessment of services' compliance with their (financial) obligations would potentially raise may be considered:

- There may be extra costs for those NRAs who need to adjust their internal monitoring procedures for the purpose of checking services' compliance with their share and prominence obligations;
- In Member States where no data verification processes are currently carried out routinely, there may be cases where the enforcement of the financial obligation by the targeted Member State is made more burdensome. On the other hand, the NRA of the Member State having jurisdiction may be confronted with a disproportionate task to verify the economic data for every relevant market in which the services under its jurisdiction are operating;
- NRAs' different requirements, as well as levels of experience when it comes to collecting economic data (i.e. companies' annual revenues) which are necessary for, inter alia, the calculation of the financial contribution imposed may be an issue in cross-border cases;
- There is also a question as to whether the country of origin principle should also apply when it comes to the application of sanctions in the event where a service provider fails to comply with financial obligations imposed by a targeted Member State.

### 2.2.5. Exemptions

Before going through the analysis of the key implementation issues concerning exemptions, it may be observed that while, on the one hand, the exemption from the obligations set out in paragraph 1 of the new Article 13 (concerning the share of catalogue and the prominence to be secured to European works) is addressed exclusively to on-demand providers, the one from the obligations set out in paragraph 2 (concerning the obligation to financially contribute to the production of EU works) encompasses all kind of media service providers (linear and on-demand), but only in case where such services target audiences in another Member State.

The questionnaire issued to ERGA members within taskforce 2 provided for particularly relevant information as regards the current practices of NRAs in respect of the possible exemptions already accorded to particular categories of services. In particular, the questionnaire highlighted that a significant minority of countries (8) foresees exemptions for on-demand audiovisual media services providers.

All the countries adopted exemptions in respect of the specific nature of the catalogue (thematic catalogue). These are mainly related either to those genres whose transmission time

is not taken into account for the obligation under Article 16 (news, sport events, games) or to adult content. However, in few cases, providers delivering particular kinds of non-EU cinematographic works, or distributing content in foreign languages, are exempted too.

In general, the assessment of ‘the size’ is based on the provider’s annual revenues, except in one country where the threshold is anchored to the amount of financial obligations that a provider is expected to pay: for instance, in cases where the application of the percentage gives rise to a financing obligation of an amount equal to or less than 200,000 euros, the provider may choose to make the contribution in that year, or accumulate this amount to the following year. In some countries, the derogations can be granted by the NRAs upon specific request, when particular circumstances occur.

Economic thresholds are considered also in order to waive providers from the obligation to financially contribute to the production of European works. As already reported in another section of this Paper, for example, in one Member State, both linear and on-demand providers whose annual revenues are lower than 300,000 euros are exonerated from the financial obligations. Similarly, in another country, broadcasters with an annual turnover generated by films lower than 750,000 euros are not required to pay the levy to the national fund.

It should finally be noted that Recital 36<sup>30</sup> and 37<sup>31</sup> provide further guidance on principles for the imposition of financial contributions on services which have already financially contributed to content production (broadcasters in particular). These steers from the Directive might result in particular policy directions taken by Member States that could also result in divergence and might need to be studied further.

### 2.3. Issues related to the provisions involving cooperation between NRAs

Starting from the identification of the main legal changes, this new section aims at pointing out to some potential implementation issues which may, directly or indirectly, result from the provisions analysed under point 1.3 of this Paper. This section builds, to a certain extent, on

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<sup>30</sup> Recital 36 also notes that services should not be made to contribute to funding schemes from which they themselves cannot benefit: ‘Media service providers that are required to contribute to film funding schemes in a targeted Member State should be able to benefit in a non-discriminatory way, even in the absence of an establishment in that Member States, from the aid available under respective film funding schemes to media service providers.’

<sup>31</sup> Recital 37 reads as follows: ‘Broadcasters currently invest more in European audiovisual works than providers of on-demand audiovisual media services. Therefore, if a targeted Member State chooses to impose a financial obligation on a broadcaster that is under the jurisdiction of another Member State, the direct contributions to the production and acquisition of rights in European works, in particular co-productions, made by that broadcaster, should be taken into account, with due consideration for the principle of proportionality. This is without prejudice to the Member States’ competence to establish, in accordance with their cultural policy and subject to compatibility with State aid rules, the level of financial contributions payable by media service providers under their jurisdiction.’

the answers provided by ERGA members to a questionnaire related to their experience with, *inter alia*, the establishment of territorial jurisdiction, the derogation procedure, the anti-circumvention procedure, etc. A summary of ERGA members' answers is provided as an introduction to each following subsection.

### 2.3.1. New criteria for determining jurisdiction over audiovisual media services may bring about interpretation challenges for NRAs

As set out above, Article 2 of the revised AVMS Directive introduces, for the first time, a definition of 'editorial decisions' and circumscribes the significant part of the workforce to be considered only to that which is '*involved in the pursuit of the programme-related activities*'.

**The newly provided definition of 'editorial decisions'** - It appears clear from the NRAs' answers to the questionnaire that they are not equally familiar with the concept of 'editorial decisions'. For instance, not a single Member State has introduced such a notion in their national law, which would have been otherwise useful for the purpose of identifying possible ways of practical implementation.

The second main trend of answers points out to the fact that the newly introduced definition may not encompass all possible situations. For instance, one may wonder to what degree of granularity the assessment should go in order to find out the kind of decisions covered by the definition. In this respect, while some NRAs mentioned the substance of the decisions (a majority of replies referring to 'day-to-day concrete' decisions) as a relevant criteria, another group would insist on the temporality of the decisions too ('regular', 'seasonal', or 'long-term vs. short-term' decisions), and others would look at the type of programmes (news vs. entertainment) in order to base their assessment.

Depending on the criteria regulators would choose to primarily look at, the implications on the establishment of territorial jurisdiction may not be the same and it seems like there may be a need for further guidance on, *inter alia*, the type of activities which can be related to 'taking editorial decisions', the category of positions of the staff 'taking editorial decisions', as well as the location of their usual workplace. It therefore seems natural to raise the following question: is there a need to further develop common indicators (e.g. who in a media company is expected to take editorial decisions in order to find out where they are taken?) with a view to avoiding disparities across Member States?<sup>32</sup>

Finally, regulators also raised the point that it may be difficult to get access to relevant information about a media company's editorial decision-making process (e.g. who is the chief

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<sup>32</sup> It is noted that the same discussion would also be relevant as far as 'editorial responsibility' and the concept of 'effective control' are concerned. A better understanding of these notions would also help NRAs in their process of establishing territorial jurisdiction.

editor?), especially when that company falls outside an NRA's jurisdiction<sup>33</sup>. However in this event, the NRA of the Member State who has jurisdiction would need to be able to provide non-confidential information in response to any enquiries from other regulators, and also to possibly carry out investigations requested by other NRAs in the normal course of cooperation between NRAs.

In conclusion, the following implementation issues that the newly provided definition of 'editorial decisions' would potentially raise may be considered:

- On the one hand, a possible lack of consistency across NRAs' respective approaches regarding the criteria laid down in the definition may give rise to a different understanding about the kind of decisions which have to be considered for the purpose of establishing jurisdiction;
- On the other hand, some NRAs may also lack the necessary legal grounds in order to properly carry out their assessment, in particular with respect to service providers falling outside of their jurisdiction or claiming to do so.

**The new wording 'programme-related activities' in Article 2, paragraph 3, letter (b) -** No particular difficulty was pointed out by ERGA members regarding the possibility to get access to information, such as the share of staff involved in programming activities. In many Member States, the law actually requires service providers (especially broadcasters as part of the licensing process) to declare how their programming activities are being organized. Where necessary, some NRAs also have powers to obtain further information upon specific request.

When it comes to giving a practical application of the term 'significant', a majority of regulators finds it irrelevant to approach this question from a strict numerical point of view. What seems to be more meaningful is rather to look at the company's workforce in terms of each unit's particular role, especially now since the focus is on those departments '*involved in the pursuit of the programme-related activities*' of the service.

However, considering that these activities may split across several units in one company, and as the legal text does not provide for any indication on this point, it would eventually be the regulators' task to carefully single out those which have to be taken into account when carrying out the 'significant part' test. Should the entire workforce involved in programming activities be equally considered or should regulators focus their assessment only on a few of them and, if yes, which ones? This question prompted very diverse reactions from ERGA members but a majority of them generally considers that activities directly related to the content of the programmes should primarily be considered. Some of them specifically mentioned 'scheduling' and 'rights acquisition' as relevant examples of programme-related

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<sup>33</sup> When seeking to check where exactly editorial decisions were being taken, some NRAs have already been confronted with situations where companies refused to provide information on grounds that they claimed to be under another Member State's jurisdiction.

activities. Other operations, such as technical support, compliance, design and play out, were mentioned as secondary activities in this respect.

In order to establish where ‘*a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activities operates*’, regulatory authorities may refer to different indicators but overall it seems that there is a limited risk of inconsistency.

### 2.3.2. New obligation for Member States/NRAs to list all the services under their jurisdiction and maintain an up-to-date ‘centralized database’

A lot of answers point out to the difficulty of getting a complete overview of all the services under a Member State’s jurisdiction. The only exception concerns small markets. ERGA members also underline that linear services (with the exception of satellite channels based outside the EU) are easier to identify compared to providers of on-demand audiovisual media services (including services distributed on open platforms) largely because the information requirements are usually stricter (authorization vs. notification) with respect to the former services. It is however interesting to note that a number of NRAs are already used to making publicly available lists of the services under their jurisdiction.

Even in countries where on-demand services have to notify their activity to the competent regulatory authority, their formal registration (and subsequent listing) may not be immediately effective for reasons that include, *inter alia*: inaccurate self-categorization of the service provider as a non-linear audiovisual media service, inaccuracy and/or incompleteness of the data provided by the service provider, etc. A few NRAs also raised the problem that these services’ business and distribution models being in constant evolution, their characteristics may change up to a point where they would no longer meet the definition of a non-linear audiovisual media service. Furthermore, in a number of countries, it is not currently a requirement of the law that providers of on-demand services inform their regulatory authority about any event likely to affect the establishment of jurisdiction (e.g. a significant part of the workforce being transferred to another country). Unless the law is changed, the implementation of Article 2, paragraph 5b may necessarily mean for NRAs to carrying out jurisdiction checks on a more regular and proactive basis (especially with respect to non-linear services).

In principle, the idea to build up a list of all audiovisual media service providers under the jurisdiction of EU Member States in a ‘centralized database’ is welcomed by ERGA members. They, however, have concerns in relation to the extra administrative burden it would involve.

The MAVISE database was generally acknowledged as a useful tool, on the basis of which a ‘centralized database’ could be further developed. Should it be considered relevant for the purpose of gathering all the data, a number of issues would, however, need to be sorted out according to many NRAs. Firstly, there seems to be a set of issues relating to the database as



it currently stands and would include such things as: inaccuracy of the data, lack of transparency regarding the source of information, irregular updates, etc. Secondly, given the obligation foreseen under Article 2, paragraph 5b, it seems important to, on the one hand, carefully consider the extra costs of NRAs having to continually update the database and, on the other hand, the opportunity to use it as a single reference point for all matters concerning territorial jurisdiction in the EU. In this case, the database would probably need to entail all information allowing territorial jurisdiction to be established (e.g. the location where editorial decisions are taken), and not be limited to a reference to the legal basis originating from the Directive. Last but not least, considering the variety of existing licensing/notification regimes, there is a risk that the information collected by NRAs are not consistent from one country to another<sup>34</sup>.

In conclusion, the following implementation issues that the fulfilment of this new obligation would potentially raise may be considered:

- How often can the lists (and the database) be updated by NRAs themselves, given that the formal categorization and registration of audiovisual media services (especially non-linear) may be sometimes complex and time-consuming<sup>35</sup>?
- Considering that a number of NRAs solely rely on information provided by service providers in order to establish territorial jurisdiction, how to effectively ensure that there are the least inaccuracies possible?
- As NRAs may request more and/or different information from service providers, how to make sure that all the additional information which is uploaded to the database is consistent and comparable?

### 2.3.3. The revised derogation procedure (Article 3) may remain cumbersome in practice

The responses to the questions on Article 3 are rather incomplete to allow this Paper to draw any substantial conclusion. It seems like a number of NRAs do not know yet what to expect from the new provisions of Article 3, but some underlined that the current text of Article 3 and the procedures described therein may still be cumbersome to apply.

Despite the fact that the same grounds for derogation will apply across all audiovisual media services – as recommended in the ERGA report on territorial jurisdiction in a converged

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<sup>34</sup> It should be noted though that some of the other challenges mentioned here have already been to a large extent addressed through the cooperation of MAVISE and the EPRA network, including the nomination of points of contact at each member NRA to resolve any queries or inconsistencies.

<sup>35</sup> Some authorities also shared their thoughts regarding the implication of this new obligation in relation to services falling to their jurisdiction under the satellite criteria only. To establish jurisdiction with a degree of certainty, NRAs need to know a relatively important set of information including (but not limited to): all the satellites used, the geographical location of all the uplink used, the dates the satellites were used to uplink the service, the footprint of the satellites used, etc. This investigative process takes time in order to be fully completed, and only then would the NRA be in a position to update the list of services under its jurisdiction.

environment – a great majority of the respondents do not think that the procedure prescribed in Article 3 will necessarily be more often launched. The new provision (previously this duty has been just implicit in the text) according to which the media service provider has to be granted the opportunity to express its views may also pose a challenge to NRAs as they will have to correspond with media service providers that fall under the jurisdiction of other Member States.

#### **2.3.4. The anti-circumvention procedure (Article 4) may raise both conceptual and practical challenges for NRAs**

The following issues - some of them are not new - were pointed out by ERGA members in their responses and may be further considered.

**NRAs' and Member States' roles throughout the procedure** - Article 4 designates 'Member States' to be in charge of the procedure. In practice, ERGA members' replies reveal that the allocation of tasks between NRAs and State administration remains unclear or at least diverse across countries:

- Two respondents declare that article 4 is the sole responsibility of State administration;
- Seven respondents declare that article 4 is the sole responsibility of the NRA;
- Five respondents declare that article 4 implies mixed procedures with spontaneous interventions of both the NRA and the State Administration.

The set of questions also prompted various reactions from ERGA members, including some reflection about what could be the role of the Group in this area. It appears clear from the replies that the relationship between NRAs and Member States throughout the procedure may raise a number of difficulties and therefore that it would be worth having a collective discussion in particular on the following issues:

- Streamline cooperation by determining a single point of contact in each country (be it the NRA or the Member State's administration) for all issues linked to article 4;
- To make the procedure is more coherent without interfering in internal affairs;
- Ensure that the procedure is carried out independently from any political interference.

**Limited NRAs' experience with the 'wholly or mostly' test** - Successfully carrying out the 'wholly or mostly' test remains a challenge. A majority of respondents assesses the "wholly or mostly" test as hard to conduct. 10 NRAs are even considering it to become more complex when applied to 'over-the-top' services. The survey demonstrates a significant request for ERGA internal guidance: six respondents attempted to conduct the test; five of them reported difficulties.

Most attempts were based on the criteria set out in Recital 42 of the 2010 Directive: origin of the television advertising or subscription revenues, main language of the service, and existence of programmes or commercial communications targeted specifically at the public in the Member States where they are received.

Finally, nine respondents consider that the analysis of these criteria will require more cooperation and data exchange among NRAs.

**Keeping track of the services ‘wholly or mostly directed at’ is not a routine task for most NRAs** - Information about this kind of services is presently not compiled:

- Seven NRAs include specific questions in their license application (or notification form) so that potential circumvention issues can be anticipated. However, this information is collected once and not necessarily kept up to date;
- Fourteen NRAs identify MAVISE as the best existing tool to centralize information about this kind of services. This potential new use would require adaptations, in particular in order to keep the database up to date (see above section 2.3.2.).

**Have NRAs achieved a ‘mutually satisfactory solution’?** - This level of agreement has so far remained out of reach, according to ERGA members’ replies:

- Only one NRA reported a successful case. However, the procedure was not implemented to its full extent because the broadcaster, once informed of the ‘stricter or more detailed rules’, decided to comply voluntarily;
- Five NRAs tried to reach the “mutually satisfactory solution”. Four out of five remained totally or partially unsatisfied. Seven NRAs never tried;
- Since this last step of the procedure was almost never reached, no experience was shared regarding the legal vehicle which could materialize the “mutually satisfactory solution” (treaty, convention, cooperation agreement...), nor on how to overcome potential incompatibilities between the laws of the country of origin and of the country of destination.

Of course, a majority of the NRAs considers that cooperation between ERGA members would be necessary in order to address these issues. They also believe that this cooperation, now described as "*swift and sincere*", should offer concrete guarantees of effectiveness (quickness of reaction, quality of the argumentation, single point of contact). However, there may be various expectations with regard to what ‘sincerely and swiftly’ might mean in practice, and to what extent how NRAs currently cooperate would be changed as a result.

**Establishing circumvention** - The procedure seems to be simplified for a majority of NRAs. The evidence to be gathered by the requesting NRA should ‘reasonably’ establish circumvention without the need to prove the media service provider’s intention. This is considered as a step forward even if the type of evidence may remain subject to interpretation and may include various types of data/information:

- The nature of the stricter rules (contribution to production, advertisement rules...) and the competitive advantages of circumvention are considered by several respondents as evidence of a strategy to avoid stricter national regulation;
- Other indicators are elaborated in the survey, proving that there are different - not necessarily opposite - views amongst ERGA members;
- Ten respondents declare that cooperation among NRAs may be key in collecting evidence.

### 2.3.5. The general information requirements for audiovisual media services (article 5)

Sixteen NRAs responded to this part of the questionnaire relating to Article 5. Only few of them identified actual ‘implementation issues’, mostly because comparable measures are already in force at national level:

- Most Members States already have reporting and transparency rules on ownership of media companies (several NRAs stated that there is no further need for this provision);
- The majority of the remaining NRAs explicitly answered with respect to broadcasting/linear services. Only two members commented on the applicability of the provision to on-demand services. According to one of them, the identification of an on-demand service can be a problem as imprints are often lacking; the other one stated that a change in legislation will be required in order to apply the provision to non-linear services;
- One NRA voiced its concern about identification difficulties that might occur when dealing with free float<sup>36</sup>.

As to the necessity of sanctions, a majority of answers suggest that sanctions should be possible in case of non-compliance with these reporting obligations. Most of the Member States are already eligible to impose fines. However, some NRAs expressed the opinion that no specific rules need to be foreseen as part of the transposition of the new Directive.

The proportionality test, which aims at balancing the measures taken by the Member States with fundamental rights, is well known to NRAs:

- Either by own experience, because a balancing of fundamental rights is part of every decision making process within an authority, or;
- Because these are general principles known from constitutional and administrative courts.

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<sup>36</sup> Free float refer to shares which are owned by public/individual investors and are traded on the stock exchange.

Due to the fact that Article 5 paragraph 2 is not mandatory, it may be expected that this is going to lead to uneven levels of both implementation and law enforcement in the different Member States. It may be a problem in the event where a Member State which has not implemented this provision has jurisdiction over a media service provider which has economic links with companies located in another Member State and the authority of the latter is interested to receive information about the ownership structure of the whole entity.

### 2.3.6. Complex rules for the establishment of jurisdiction over VSPs (Article 28b)

**Jurisdiction over VSPs established in the EU** - Only a few authorities replied that they are aware of service providers potentially fitting the definition laid down in the Directive and established in their territory. The starting point would be for NRAs to assess whether the latter *‘effectively pursue an economic activity using a fixed establishment for an indefinite period’* according to the terms of the definition laid down in Article 2 of the E-commerce Directive. The specific jurisdiction rules applicable to audiovisual media services (i.e. Article 2) are not relevant here so NRAs may rely on the European Union Court of Justice’s standard case law in the event where their factual assessment would prove to be tricky.

**Jurisdiction over VSPs not established in the EU** - The set of rules to be followed in relation to VSPs providers who do not have an establishment on the territory of the EU is quite complex. Although the concepts of ‘parent undertaking’ and ‘subsidiary undertaking’ seem quite familiar to NRAs, it may be more challenging to correctly assess the type of economic relationship which would demonstrate that two companies (including the VSP provider) belong to the same ‘group’ as the legal text only refers to *‘undertakings having economic and legal organizational links’* (e.g. can a company selling advertising to provide revenue for the VSP provider be considered part of the same group?). From a practical point of view, this might also mean that NRAs would have to be granted access to economic information which they are usually not entitled to request from the operators under their jurisdiction.

The revised AVMS Directive does not however address the issue of VSPs (as well as on-demand service) providers who neither have an establishment on the territory of the EU, nor can be linked to a parent undertaking or multiple subsidiaries but are nevertheless available to the general public in Europe. In the case of audiovisual media services, a recent survey suggests that a significant number of these services originate from the United States<sup>37</sup> and do not self-declare to any European regulatory authority. One might anticipate a similar picture with VSPs.

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<sup>37</sup> *Audiovisual services in Europe - Focus on services targeting other countries*, European Audiovisual Observatory, Strasbourg, 2017, p. 46

A simple notification obligation raises implementation issues and may not in itself provide for a sufficient answer to the problem, either for VSPs or for non-linear services. What seems more important is to prevent these services from circumventing the rules applicable in the single market on the basis that the criteria establishing a Member State's territorial jurisdiction are not applicable to them whereas they may provide access to potentially harmful content and target the audiences of certain EU countries. In this specific case where the criteria of the Directive would not be applicable to a given service, there is a question as to what set of rules might be applied and by which Member State(s).

### 2.3.7. Some substantive and procedural issues may make Article 30a less appealing than informal cooperation

**Substantive issues related to the application of Article 30a, paragraph 2 (information about ('wholly or mostly directed' services))** - Paragraph 2 of Article 30a states that '*when national regulatory authorities and/or bodies receive information from a media service provider under their jurisdiction that it will provide a service wholly or mostly directed at the audience of another Member State, the national regulatory authority and/or body in the Member State having jurisdiction shall inform the national regulatory authority and/or body of the targeted Member State*'.

Since this new information obligation indirectly entails the necessity of possessing the information about the services and the targeted territories, the NRAs were asked if the information they currently receive from service providers is sufficient.

It seems that only 3 NRAs believe that there is enough information available in order to find out whether a service is '*wholly or mostly directed at the audience of another Member State*', while eight NRAs claim the contrary. This might pose a problem for the future applicability of the provision. One of the issues flagged by one NRA was the different understanding of the concept 'wholly or mostly directed' by NRAs. Two NRAs furthermore raised the point that information on this kind of services (i.e. those wholly or mostly directed at the audience of another Member State) is sometimes not available at all.

One ERGA member also pointed to the issue of harmonisation of an exchange of information which would be limited to the issue of the 'wholly or mostly' services and not 'targeting services', which may cover a wider category of services than the ones covered in article 13, paragraph 2.

One NRA is of the view that the wording in paragraph 2 suggests that the information subject to the information exchange would be voluntarily supplied, since there is no obligation on the NRA to require certain information be provided by applicants/licensees, in order for it to be passed on; but rather that the obligation is to pass on the information that it does have. The question here is whether paragraph 2 only provides that NRAs have an obligation to pass on information which they have (already) received from the service provider or whether it creates

an additional responsibility for ERGA members to investigate whether a service is planning on directing its programmes wholly or mostly at the audience of the requesting Member State. Furthermore, this NRA identified a possible issue insofar as the data would not be accessible due to confidentiality reasons.

**Procedural issues related to the application of Article 30a, paragraph 2 (information about ‘wholly or mostly directed’ services)** - Beyond the more substantive issues in paragraph 2 discussed above, there are also important procedural questions that might be as well important. Provided that the NRA in the Member State having jurisdiction receives information about a provider’s intention to wholly or mostly direct its service towards the territory of another Member State, one important question includes when should the information be provided (i.e. at the time of granting the licence/receipt of the notification, before and/or after). There was no clear consensus between the NRAs: nine argued for this to happen at the time of granting of the license, five before granting of the license and 3 after learning of any relevant change. At the same time, seven NRAs agreed with the fact that there should be an update in the case of a granting of the license/authorization. One regulator raised the question whether it would anyway be possible to share such information prior to the granting a license if NRAs are not legally granted the right to do so.

The next question is how to transmit this information and whether this could be done through a new single database. The approach of using this database was supported by a majority (13) of the responding NRAs (the MAVISE database was mentioned by some NRAs). There were several solutions (described in the next section) aimed at improving the usability and operability of this system. A minority of the NRAs (4) believe that the information should be transmitted informally or individually outside of a database or would see this as an alternative if such functionality is not part of a database. Two NRAs also raised the issue of the possible administrative burden associated with this new duty, especially for smaller NRAs.

The final important question is what happens with the received information. The idea of a follow-up communication after the data is transmitted is supported by a significant number of the replying NRAs.

**Substantive issues related to the application of Article 30a, paragraph 3 setting out basic cooperation rules in ‘targeting’ cases** - It seems that 13 of the replying NRAs see the added value in the formalization of the rules for cooperation, provided for in this paragraph of Article 30a. There are different expectations regarding the results this change might bring: Some members would expect a possible increase of successful cooperation cases. One regulator thinks that it will raise awareness of the interests at stake. A small number of NRAs point out to the expected benefits in terms of transparency and certainties while others stress the facilitation of gathering of evidence and information or think it will increase the efficiency of the cooperation.

There were also a number of issues raised by ERGA members in relation to the application of these new rules. One member wondered whether paragraph 3 would only be applicable if the

requesting NRA has demonstrated that its territory is being targeted in the first place (in accordance with the indicators laid down in Recital 38). Does the competent NRA have the ability to challenge that assumption and what would happen if it does so?

An important question of the set-out rules is how the notion of ‘addressing the request’ should be interpreted. It seems that the majority of the replying NRAs believe that it should be results-oriented. Some members see this as a desirable outcome; one member stressed the insufficient clarity of this notion; one member believes that, at least, a preliminary answer should be the result. One member stressed that in case there is a need for additional information, the deadline would need to be suspended (and this might increase the chances of a more result-oriented approach). Several NRAs also believe that a first reply should be enough to fulfil the obligation to address the request, possibly including ‘negative’ replies. Some NRAs also believe that the possible results of the cooperation in the set-out deadline will depend on a case by case basis.

**Procedural issues related to the application of Article 30a, paragraph 3 setting out basic cooperation rules in ‘targeting’ cases** - One member pointed to the issue of the insufficiency of the set two months deadline to resolve jurisdiction issue – especially for the most complex cases – and that it does not take into account the possible necessity to resolve any jurisdiction conflicts. The issue of confidentiality and the different rules applying in different countries was also raised, as it might possibly limit the gathering of information.

In relation to this, there is a question as to whether it would be necessary to allow for a suspension of the two months deadline in situations where the requested NRA needs more information in order to address the request. A majority of NRAs replied supporting such an approach while two NRAs were against. Those that agreed with such an approach stressed that this was acceptable due to the complexity of some of the cases and in exceptional and well-founded cases (e.g. if the competent NRA demonstrates that it makes its best efforts) and if it does not lead to misuse of such a provision.



# CHAPTER III - Preparing the grounds for an effective and consistent implementation of the revised AVMS Directive - *Possible approaches to the challenges*

The subsequent sections of this Paper are about proposals that ERGA may consider with a view to respond to the potential challenges highlighted in the previous Chapter. Wherever ERGA informal guidance, common methodology/criteria/principles, etc. are mentioned, it should be stated that they:

- have no legal effect for ERGA members;
- are made with due consideration for the principle of minimum harmonisation of the Directive
- are without prejudice to respect for the respective competences and tasks of the EU Member States, the European Commission, and the Contact Committee regarding the implementation of the AVMS Directive.

Without pretending to be exhaustive, but considering the potential implementation issues discussed in the previous Chapter, this Paper would argue that ERGA members' objective to contribute to an effective and consistent implementation of the revised AVMS Directive may be hindered for, at least, three reasons:

- Because NRAs have different ways to understand and potentially resolve differently **the identification of the services** to which the provisions of the Directive should apply (e.g. different understanding of the definition of 'editorial decisions');
- Because the analytical framework setting out **the underlying objectives of the provisions and the criteria to assess whether they have been achieved** by the service providers may be different from one Member State to another (e.g. different methodologies for calculating how the 30% minimum share of European works may be achieved);
- Because NRAs' **capacity to enforce the rules in cross-border cases** may vary from one Member State to another for reasons that include: lack of appropriate legal grounds (e.g. if a NRA is not legally entitled to request certain kind of information

from service providers), lack of information, lack of human/technical resources to deal with the problem, etc. (e.g. no information about a service's targeting strategy).

In this context, ERGA members were invited to think about possible solutions to address the challenges identified in the previous Chapter, through cooperation. While some proposals received a large support from NRAs and are relatively straightforward in the short term, others may require further work in order to appropriately assess their viability and benefits in the long term. It is also important to stress that several solutions to the potential problems highlighted before would probably require a combination of initiatives and the involvement of multiple parties (e.g. the European Commission, national lawmakers, other NRAs, industry experts), not just ERGA or its members.

Finally, because some of these proposals are transversal by nature and may have the potential to address several of the problems raised, it is proposed to group them in accordance with the typology presented just above, except for the last section, which is dedicated to ERGA's internal organisation.

### **3.1. Reinforcing cooperation between NRAs with a view to facilitating the identification of the services to which the provisions of the revised Directive should apply**

#### **3.1.1. Working towards a common understanding of certain key concepts defining material and territorial jurisdiction**

This section opens up some lines of discussion regarding the problems which relate to the material and territorial identification of the services to which the provisions of the revised AVMS Directive should apply. It is assumed that conflicts of material and territorial jurisdiction between NRAs may affect the consistent implementation of the regulatory framework and may sometimes result in creating regulatory distortions. They often are the consequences of a different understanding of key legal definitions from one Member State to another.

**Definition of an 'on-demand audiovisual media service'**- In quite a significant number of areas (imposition of financial contributions to 'targeting' services, establishment of territorial jurisdiction, the anti-circumvention procedure, etc.) a recurring problem seems to be that NRAs may disagree over the qualification of the same service as a non-linear audiovisual media service. As a result, it may hamper the implementation of certain provisions of the Directive and informal cooperation in this area does not always guarantee a successful outcome for all involved parties.

In order to clarify the issues mentioned above, it seems therefore advisable for:

1. ERGA to provide for guidance stemming from an exchange of best practices with regard to the services captured by the Directive to allow for a more harmonized approach to the notion of an (on-demand) audiovisual media service;
2. ERGA to provide for guidance stemming from an exchange of best practices on how to register and monitor on-demand audiovisual media services

**Definition of ‘VSPs’-** The new AVMS Directive requires Member States to establish a list of the video-sharing platforms under their jurisdiction (cf. Article 28a, paragraph 6). There is a risk that NRAs use different indicators when assessing whether a particular service fits the definition of a VSP, therefore compromising the consistent enforcement of the rules applicable to them. A different understanding of what qualifies as VSP could furthermore lead to some frustration, especially in cross-border cases where authorities disagree over the assessment of material jurisdiction.

For regulators across the EU, it would seemingly be important to agree on a common methodology to identify these services or, at least, to exchange further on the various contents of the definition at a bilateral or multilateral level (i.e. within ERGA). The European Commission may be tasked to elaborate guidelines on the application of the concept of ‘essential functionality’. ERGA members’ inputs may well be welcomed in this respect too.

Possible approaches to address each of the points mentioned above are suggested here in order to feed into that discussion.

a. ‘The essential functionality’ test

This concept may be approached from either a quantitative or substantive perspective. Firstly, what is ‘ancillary to’ or what ‘constitutes a minor part of’ may simply be inferred on the basis of whether the service, considered in its entirety, provides access to more audiovisual content than to non-audiovisual content or, in other words, provides applications the most important of which is (or not), from a user’s perspective, to be able to watch audiovisual content.

However, in order to achieve a level playing field between audiovisual media services and services meeting the criteria laid down in the definition of video-sharing platforms (as the co-legislators intended), it may be inappropriate to exclude some service providers from the scope of the Directive merely on grounds that a relatively small quantity of videos are provided on their platform. This would not otherwise grant users with the level of protection they can expect and would also fail to take into account the importance of these videos in, *inter alia*, making the service more attractive to users. Furthermore, from a practical point of view, this approach would raise a number of very complex questions for NRAs, e.g. how should the other content provided on the platform be weighted in? Are two lines of text quantitatively comparable to a two hours video?

From a substantive perspective, one may try to find out whether the provision of programmes and/or UGC takes a significant part in the social media service's business model. Recital 4<sup>38</sup> indeed acknowledges that these services are in direct competition with audiovisual media services (this competition being one argument in favour of their inclusion into the scope). Accordingly, specific questions to be considered in order to evaluate whether an 'essential functionality' of the service is the provision of programmes and/or UGC might include: does the provision of programmes and/or UGC make the service more attractive to users? Are there advertisements displayed around or before the video? Are videos available on the social media service organised in a way to optimize their viewing rates (e.g. if auto play is provided or not, or if the service has a stand-alone section for livestreamed content)?

b. The concept of 'user-generated video'

Guidance from the European Commission would be helpful in order for regulators to better understand what the co-legislators have intended with the definition of 'user-generated video' by contrast with the definition of 'programme'. Videos which are uploaded by individual users may also raise fundamental rights issues. It will be important for regulators to be able to identify 'user-generated videos' easily so that viewers are effectively protected from harmful content on VSPs. In this context, and in line with the legislators' objectives to protect audiences across services and 'platforms' alike, it would be advisable for regulators to develop the most comprehensive possible interpretation of the notion of 'user-generated video'.

c. Assessing the VSPs' degree of control over the organization of the content

In order to assess whether a service falls into the category of VSPs, in accordance with the terms of the definition, NRAs will have to evaluate to what extent the organization of the content provided on that service is actually 'determined' by the VSP provider. This exercise would be facilitated if NRAs regularly exchange on their approaches. A dialogue with VSP providers should also be foreseen, in particular in order to clearly understand the various technologies used in an environment where proposals are made through automatic means. It would also be important in order for NRAs to develop their approaches to other aspects of VSP co-regulation, for example to understand the particular challenges of smaller platforms, in developing an approach to proportionality. Rather than have NRAs needing to individually conduct such multiple dialogues in parallel, ERGA can add value by co-ordinating these on behalf of its members.

To sum up, and in order to respond to the interpretation challenges posed by the newly provided definition of 'VSPs', the following proposals may be considered:

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<sup>38</sup> Recital 4 reads that: '(...) those social media services need to be included because they compete for the same audiences and revenues as audiovisual media services (...)'. Recital 6 is also worth quoting in this respect as it provides that 'the definition of a video-sharing platform service should not cover non-economic activities (...)'

3. ERGA to exchange views on the different contents of the definition of VSPs and work towards a common qualification methodology;
4. ERGA to assist the European Commission with its technical expertise for the drafting of the guidelines foreseen regarding the application of the ‘essential functionality’ test;
5. The European Commission to consider to provide for guidance in order to address the questions raised by the definition of ‘user-generated video’;
6. ERGA to organise meetings with relevant industry experts (including VSP providers) in order to clearly understand issues related to the co-regulation of VSP services (for example, the technologies used, such as algorithms, in relation to the organisation of the content provided on these platforms).

**The concept of ‘targeting’ services in the context of Article 13, paragraph 2** - As far as the definition of “targeting” is concerned, the analysis conducted among the NRAs highlights, on the one hand, the lack of such a definition in the national legal frameworks and, on the other hand, a general need to clarify the criteria considering that the ones enshrined in Recital 42 of the current Directive may not be appropriate for this purpose.

The cooperation amongst NRAs, under ERGA’s coordination, may be envisaged with the purpose of developing common indicators and sharing national best practices on this issue.

On a more bilateral level, the identification of services ‘targeting’ the audience of another country may also be facilitated in two different ways:

- Identification of services under a Member State’s jurisdiction that target another (or more) Member State(s);
- Identification of services established in other Member States, targeting a Member State’s audiences.

As far as the first case is concerned, it should be understood whether the competent NRA has the information concerning the availability of national services in other Member States. In one Member State, the license application includes questions about distribution and targeted audiences. However, this example is an exception across the EU and it is not sure that it will be replicated after the transposition of the new AVMS Directive.

As far as the second case is concerned, further indicators to identify the ‘targeting’ service (as previously mentioned) could be considered useful in order to keep track of these services. To that end, some NRAs pointed out that the focus should be set on indicators more specifically designed to evaluate a provider’s capacity to exploit a market/targeting consumers such as, *inter alia*: the source of advertising revenues; the source of the subscription revenues (in case of pay for services); the country of registration of the credit card and/or (in all cases) the IP address origin; the language for the service provision (contracts, menus, national sections);

the language of the advertising messages and the nature of the goods or services advertised, in order to identify if they are targeted to one or more countries<sup>39</sup>.

In this respect, it is however worth noting that (to a certain extent) the identification of free-to-view, advertising-based services seems to be more problematic compared to the pay-for services. As a matter of fact, the origin of advertising revenues could be more difficult to trace back. On the one hand, the advertising displayed within some kind of content provided by cross-border service providers could be the same in different countries, thus making it more challenging to understand the extent to which a service is targeting a specific country. On the other hand, even where the advertising is differentiated according to the targeted audience, the sale of the advertising spaces could have taken place in a different country, therefore making the pursuit of the origin of the revenues more challenging.

To sum up, and in order to respond to the interpretation challenges posed by the newly provided definition of ‘VSPs’, the following proposals may be considered:

7. ERGA to identify common operational indicators aimed at establishing ‘targeting’ on the basis of concrete cases

**The ‘wholly or mostly’ test in the context of the anti-circumvention procedure and Article 30a, paragraph 2** - Following proposals of a majority of respondents:

8. ERGA to identify common operational indicators aimed at establishing that a service (with a particular focus on-demand audiovisual media services) is ‘wholly or mostly’ directed towards the territory of another Member State;
9. ERGA members to facilitate the identification of circumvention strategies by certain media service providers by considering to make information about services under their jurisdiction which are ‘wholly or mostly directed at the audience of another Member State’ publicly available.

### 3.1.2. Addressing some outstanding issues related to the territorial scope of the revised AVMS Directive

In respect of both audiovisual media services and VSPs, ERGA members will have the responsibility to, on the one hand, correctly interpret the new criteria laid down in the revised Directive for the purpose of determining jurisdiction and, on the other hand, find collective

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<sup>39</sup> In this respect, Agcom’s experience in online copyright protection in Italy is worth mentioning. In particular, Agcom’s resolution n.680/13/CONS foresees a specific procedure for online copyright infringements, which could be applied also to providers that are not established in Italy, but targeting national audience. The measures that could be adopted to these operators are not the ones applicable to operators established in Italy, because there is the limit of action related to the territorial jurisdiction, but Italian experience in this field could be considered as a leading example in the establishment of targeting.

solutions to ensure that, whenever audiovisual content from third countries enters the single market, core values and principles can be protected (provided that the AVMS Directive is applicable). Each of these tasks may have different kinds of implications for NRAs and therefore would call on diverse solutions.

**In relation to the objective of correctly applying the establishment criteria of the new Directive** - The newly introduced definition of ‘editorial decisions’ has the potential to help regulators in applying the establishment criteria laid down in Article 2 of the Directive, but it may also give rise to additional difficulties due to some uncertainties in the wording chosen by legislators.

One main issue relates to identifying the exact scope of the definition, in particular with a view to be able to draw clear boundaries between the decisions which are covered and those which are not. As suggested by some authorities in their response (because the question might be raised during the transposition period) it would be worth exploring the possibility for ERGA to develop internally a list of examples of decisions which may be *a priori* excluded from the definition (it may indeed be harder to agree on what the definition actually covers than the other way around).

In addition, it would seemingly be useful that regulators discuss some relevant indicators on the basis of which such a list would be elaborated, including, for example, the type of activities which can be related to ‘taking editorial decisions’, the category of staff positions taking such decisions; the nature of the programmes in question; or the temporality of the decision (e.g. does it have to be a decision taken every day?); or their impact over time (long-term *vs.* short-term impact); and/or over the organization of the schedule/catalogue.

On a more general level, it may be useful for ERGA members to elaborate on a common analytical framework, which would allow testing some of these indicators against practical cases.

Sometimes informal cooperation with the authority in the Member State where the service provider is presumed to be established may allow to appropriately identify where editorial decisions are actually taken. Such exchange of information between regulators may take place on the basis of Article 30a and consist of transmitting facts and figures relating to the company’s activities in the respective Member States.

The criteria for establishing territorial jurisdiction on VSPs remain quite general and have not yet been identified as raising particular challenges of interpretation. Only in the event where NRAs would have to look at whether any other company belonging to the same economic group has an actual establishment in the EU might difficulties arise.

To sum up, and in order to respond to the interpretation challenges posed by the newly provided definition of ‘editorial decisions’, as well as the establishment criteria for VSPs, the following proposals may be considered:

10. ERGA to develop - before the end of the transposition period - an internal list of decisions which can be a priori excluded from the scope of the definition of ‘editorial decisions’ based on commonly-shared indicators and to develop a common analytical framework allowing to test some of these indicators against concrete cases.

**The case of non-European audiovisual media service and VSP providers making their services available in several EU Member States** - Although Article 28a of the revised AVMS Directive introduces a partial form of extra-territoriality (as a result of the links possibly connecting a non-EU VSP provider with an economic entity established in the EU), it is very likely that ERGA members may still be faced with service providers - either a VSP or an on-demand video service - whose main characteristic is to give European audiences access to potentially harmful content while there is no possibility to relate it to any establishment in the EU.

If any legal solution was to be found as the regulatory framework currently stands, one may infer, by reading Article 2, paragraph 6<sup>40</sup> *a contrario*, that the Directive is applicable to audiovisual media services which are not intended exclusively for reception in third countries and which are received with standard consumer equipment directly or indirectly by the public in more than one Member State. Furthermore, the current Directive does not prevent Member States from the possibility to adopt restrictive measures to audiovisual media services originating from third countries (see Recital 54 of the 2010 AVMS Directive) so the combination of both provisions may give Member States (and NRAs) sufficient leeway (although they might be limited to audiovisual media services and not VSPs) to ensure that the general provisions of the Directive are respected.

Where it is not possible to relate a given service provider to the territorial jurisdiction of one Member State/NRA pursuant to the application of the criteria set out in Article 2 of the AVMS Directive, ERGA members might discuss how to address such cases collectively or in a co-ordinated way, for example by approaching non-EU regulators who have jurisdiction over services; or by working through international multi-stakeholder initiatives. Specific questions to consider here might include:

- It is illegal or harmful content which the ERGA members are seeking to prevent entering the EU jurisdiction?
- Is the content in question a common problem across ERGA members?
- To what type of content and what type of services would such an intervention apply?

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<sup>40</sup> Article 2, paragraph 6 of Directive 2010/13/EU reads as follows: ‘*This Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.*’



To sum up, and in order to address the case of non-European audiovisual media service and VSP providers making their services available in several EU Member States, the following proposal may be considered:

11. ERGA members to consider options to collectively address service providers outside EU jurisdiction but whose services are available in at least two Member States (see **Proposal 40** too).

### 3.1.3. Contributing to the establishment of a common information system centralizing information about audiovisual media service and VSP providers

Quite clearly, the obligation for Member States to identify all the services under their jurisdiction and to whom the Directive applies was identified as a major challenge, especially in countries where the number of audiovisual market players is significant. At the same time, the existing MAVISE database was mentioned on several occasions as a relevant tool for the purpose of collecting and putting together all relevant information about service providers under EU jurisdiction (noting that the database also includes information about services established outside of the EU territory) in one place. This section discusses possible ways forward for the MAVISE database and how it may help in addressing some of the issues identified in Chapter II.

**In relation to the objective of listing all audiovisual media services and VSPs in a centralized database (Article 2, paragraph 5a)** - Firstly, the existence of various practices, for instance, with regard to the categorization of on-demand services (see point 3.1.1. above), is an issue of material jurisdiction which means that any list provided by NRAs will be based on their own interpretation of the definition of on-demand audiovisual media services or VSPs and may potentially exclude some services which would have been included by other NRAs. Formalising the role of the database places greater importance on those interpretative decisions.

More importantly, one big challenge for NRAs would be, on the one hand, to periodically monitor the services already under their jurisdiction in order to check whether the criteria of the Directive are still met and, on the other hand, to spot any ‘new’ service provider which would have to be included in the database.

In relation to the first point, it would be key that Member States require service providers to notify any change (e.g. a change in the location of the company’s staff dealing with programmes) in connection with the information provided at the time of licensing/first formal notification. This would probably allow for more regular updates to take place, where necessary. On a more general note, it should be considered whether NRAs’ average practice of collecting data once a year would meet the objective to ensure that the database is maintained up to date and should not need to be adjusted accordingly. ERGA could also act as

a forum to explore technological innovations that could help to address the problems of up-to-date information.

**In relation to other objectives set out in the Directive** - The MAVISE database may be a good starting point for the establishment of a ‘jurisdiction database’, which is common to all NRAs and made available to the general public. However, and as suggested by a number of ERGA members, there may be a need to think about how to separate it into two sections, one of them entailing more information, as compared to the current MAVISE database, about service providers, including, but not limited to, the provisions on which territorial jurisdiction is based. This would seemingly allow NRAs to use some of this additional information for other purposes, which are related to other provisions of the Directive. It should also be noted that the database currently covers more than 40 countries that are members of the Council of Europe.

Within that second section (one may call it an ‘appendix’) the information could be solely and directly provided by NRAs on a regular basis. It would include a minimum set of information (e.g. type of license, location of the provider’s head office, location of the relevant workforce(s) to be considered, location of the editorial team, names of representatives for legal persons, postal addresses, websites, etc.) allowing jurisdiction to be presumably established (to be agreed amongst ERGA members in order to avoid inconsistencies) but also additional information voluntarily shared by NRAs. It would also seem important to ensure that there is some historical depth of the data in order for them to be included in (e.g. has a service ever changed territorial jurisdiction in the past?).

For instance, as regards the identification of services to whom ‘cross-border’ financial contributions may be applied, the analysis of the national practices shows that improving the exchange of information between NRAs supports the project of a centralised database where information about existing services, their establishment and availability could represent a key issue. In this respect, the MAVISE database of the European Audiovisual Observatory is indubitably the most comprehensive and advanced source of information available across Europe. The same observation can be made with respect to services ‘*wholly or mostly directed at the audience of another Member State*’. It seems like a majority of ERGA members would support the use of a single database, bearing in mind the extra burden that it might bring about, especially for smaller regulatory authorities.

**Cooperation with the European Audiovisual Observatory and the Commission to improve the MAVISE database** - ERGA members also pointed out to some needed improvements of the database, particularly regarding the accuracy of data, the frequency of data collection, and cross-checking mechanisms. The continuous monitoring and update of the information collected would play an important role in this respect. The database would

eventually benefit from a tighter cooperation with NRAs, even allowing to easily provide for inputs based on the information they are able to collect at national level<sup>41</sup>.

Finally, the accuracy of the data may be further improved by intensifying cooperation between nominated experts within regulatory authorities and the MAVISE project. ERGA would be in a good position to work together with the European Commission and the European Audiovisual Observatory on this matter.

To sum up and in order to respond to the challenges posed, on the one hand, by the implementation of Article 2, paragraph 5b and, more generally, by the centralization of various categories of information regarding service providers under EU jurisdiction, the following proposals may be considered<sup>42</sup>:

12. ERGA members to be empowered, on a national basis, to request information from service providers about any change likely to affect their establishment;
13. ERGA members to be empowered, on a national basis, to request information about ‘targeting’ strategies by service providers and/or whether their service is expected to be ‘wholly or mostly’ directed towards the territory of another Member State, with due regard to any confidentiality issue;
14. ERGA members to agree on a minimum set of ancillary information which would be relevant to have included in the ‘centralised database’;
15. ERGA to work together with the European Commission and the European Audiovisual Observatory on issues relating to the centralisation of information about audiovisual media services and VSPs into one database.

## 3.2. Developing common assessment frameworks in order for NRAs to ensure that the objectives of the revised Directive are effectively and consistently achieved across the EU

### 3.2.1. Defining common indicators to assess the achievement of the objectives of some provisions of the revised Directive

Where there is no conflict with regard to the identification of the services to which the provisions of the Directive should apply, it remains important that NRAs share a minimum level of expectations regarding the service providers’ fulfilment of their obligations, as well as

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<sup>41</sup> It should be noted that direct collaboration has already been in place between the Observatory and NRAs through a project initiated by the EPRA network, which has improved the accuracy of the data and has already seen the creation of a common verification procedure in order to cross-check the information provided by service providers, although more work would be needed in this respect.

<sup>42</sup> Proposals 12 and 13 could be examined further in the context of the Contact Committee

how NRAs should approach the application of the measures from a practical point of view, especially in cross-border cases. Beyond circumvention scenarios, and while respecting national disparities in the implementation of the regulatory framework, it appears that several of the issues identified in Chapter II may relate to a lack of consistency in the criteria allowing NRAs to assess whether the objective of the measures in question has been achieved. A lack of consistency in relation to new provisions of the revised Directive could, as discussed above, present practical problems for NRAs, so in some cases this Paper identifies areas where a common approach could bring benefits.

**A framework for the effective and consistent regulation of VSPs** - In order to avoid a possible fragmented approach to the regulation of VSPs across the EU (as identified under point 2.1.2 of this Paper), it is clear that most of the responsibility will lie on Member States when transposing the rules set out in Article 28a. However, it seems like it would be beneficial, in some areas of public interest (protection of minors, prohibition on incitement to hatred and terrorism, advertising rules, etc.), that ERGA members increase their cooperation and exchange of best practices, particularly in areas where codes of conduct may be developed.

Furthermore, it would seemingly be important to design an analytical framework for an effective co-regulation of VSPs. Further work by ERGA on this topic could include a reflection about indicators to assess the ‘appropriateness’, as well as a common understanding of what ‘practicable’ and ‘proportionate’ measures could mean in practice, particularly with a view to promoting the adoption of Union codes of conduct. To meet these several purposes, the following proposals may be considered:

16. ERGA members to exchange best practices on their approaches to regulatory topics, such as criminal offences, protection of minors, etc.;
17. ERGA to provide its technical expertise, where appropriate, in the adoption of Union codes of conduct (which may be fostered by the Member States and the European Commission) based on the development of analytical framework for the effective co-regulation of VSPs, and building on the direct contact established pursuant to proposal n°6.

**Promoting a more consistent calculation of share of European Works across EU Member States** - Based on the risks identified under point 2.2.1 of this Paper, and while considering the diversity of the transposition of the current rules, it is clear that there are certain possible approaches to ensure that NRAs share, at least, some common grounds when having to monitor the implementation of the quota by service providers.

In particular, the following proposals may be considered:

18. ERGA to strengthen the exchange of best practices, in particular with regard to the methodologies used to calculate and monitor a service provider’s compliance with any share obligation. This could help to foster, where appropriate, common

approaches to NRAs' assessment when it comes to questions like: what is a catalogue? What sort of indicators do NRAs use in order to qualify European works?

19. ERGA to provide technical expertise to the European Commission in the drafting of the guidelines which the Commission is expected to issue regarding the details of the implementation of the share obligation.

**Facilitating the practical understanding of the concept of 'prominence'** - Beyond the discussion on the tools available to NRAs to control that adequate prominence measures have been put in place (see below, point 3.2.2), it would also seemingly be important to define more clearly what should be the underlying objectives of such measures and work on a more practical definition of 'prominence'. The convergence of existing approaches as well as the development of ERGA internal guidance would facilitate the consistent implementation of the measures. The elements set out in Recital 35 could be further developed to provide for more guidance with regard to the implementation and control of the obligations.

To sum up and in order to respond to some of the potential challenges raised by the new prominence obligation, the following proposals may be considered:

20. ERGA to develop internal guidance, based on concrete examples, in order to facilitate the practical understanding of the concept of 'prominence'. This exercise could involve the participation of industry experts, in particular with a view to identifying the most effective measures and strategies taken to ensure prominence of European works;

**Defining a common approach regarding the collection of information which are necessary for the application of 'cross-border' financial contributions** - The new provision of Article 13, paragraph 2 allowing Member States to require media service providers targeting audiences in their territories but established in other Member States to contribute financially to the production of European works will require Member States/NRAs to be aware of economic data related to foreign services providers. In this respect, many ERGA members have pointed out that establishing direct contact with each and every provider could be very difficult, if not impossible, while, on the other hand, it should be considered that providers may object in case they would need to cope with several requests of information from different NRAs.

Also considering that reports and accounts issued by providers for their services, with particular respect of on-demand services, may not to be sufficiently detailed to provide segmentation on a country-by-country basis, the new provisions may require particular attention from NRAs and Member States.

It seems like the application of 'cross-border' financial contributions could essentially be done envisaging two different methodologies:

- Direct relationship with providers established in another MS. In this hypothesis, each NRA would request information about the revenues generated in its own country, from service providers established in another Member State;
- Exchange of information between NRAs: each NRA would collect information on providers under its jurisdiction, including data about the activities of those providers in other targeted Member States, and, upon request, transfers this information to NRAs in the targeted countries.

As far as the first hypothesis is concerned, the direct request of information to a provider concerning the revenues generated in a country may appear the most straightforward way to acquire the relevant information. However, the establishment of a direct relationship with such provider(s) could be difficult – both from a jurisdictional and a practical point of view – especially considering that in some countries the number of available services established in another Member State could be significant (though not all would be targeting the Member State).

Firstly, the provider may deem inappropriate to disclose sensitive information to a foreign authority and may therefore deny the access to it. Secondly, from the provider’s perspective, it could be very costly to cope with a number of requests coming from different NRAs or other public bodies from several Member States, possibly issued in different formats, and requiring different kinds and levels of information.

Furthermore, this approach does not seem to be best aligned with the main objectives and pillars of the AVMS Directive, including respect for the country of origin principle. As a result, the question arises if the NRA in the country of establishment should be responsible to collect relevant information directly from service providers under its jurisdiction.

In this second hypothesis, the request would be sent from the NRA or other public bodies of the targeted Member State to its counterpart in the Member State where the provider is established (i.e. who has the jurisdiction over the latter and who is in charge of collecting economic information from that service provider). In this case, from the ‘targeted’ regulator’s perspective, it would mean reducing the number of requests per country.

However, the accessibility of such information may raise some questions. On the one hand, the NRA or the public body may not be entitled to share confidential information regarding a provider that operates under its jurisdiction, and, on the other hand, the NRA or public body may not have the powers to collect such information in the first place (this point is discussed under point 3.2.2. below).

The second approach might be consistent with the new Article 30a, concerning the case where a request on the activities of a provider targeting a Member State is sent from the authority and/or body of the targeted Member State to the regulatory authority and/or body of the Member State having jurisdiction over that service provider. This article reinforces

cooperation and exchange of information between regulatory bodies, which are required to do their utmost to react to this kind of requests<sup>43</sup>.

Having made the assessment of the frameworks applied by NRAs at present, ERGA would be very well placed, in line with this approach, to help to devise a set of practical guidelines setting out the best approaches to be followed by NRAs in two Member States where one is the country targeted, and the other the country with jurisdiction.

To sum up, and in order to work towards a common ERGA approach regarding the collection of information which is necessary for the application of ‘cross-border’ financial contributions, the following proposals may be considered:

21. ERGA members to define and agree on common cooperation scheme(s) allowing for the collection and exchange of relevant information which is necessary for the application of ‘cross-border’ financial contributions (see **proposal n°28** too), based on the observations elaborated in this Paper and on existing similar schemes applicable in some Member States.

**Defining a common approach regarding enforcement in case of non-compliance with ‘cross-border’ financial contributions** - Article 30a, paragraph 3 sets out an obligation for regulatory authorities to cooperate when a service provider is targeting the territory of a Member State in which it does not have an establishment. In practice, the authority of the targeted Member State will have the possibility to address a request ‘*concerning the activities of that provider*’ to the authority having jurisdiction, and the latter ‘*shall do its utmost to address the request within two months*’.

Notwithstanding the possible interpretation disputes it may give rise to (see point 2.3.7. of this Paper), it is interesting to question whether this new Article should not be used as a basis to foster exchange of information between NRAs and potentially allow for joint settlements of cross-border financial obligations cases.

**First step** (see above point too) - the collection of information from service providers: ‘*a request concerning the activities of that provider*’ may potentially cover information such as data relating to the revenues made by this company in a given country of reception, provided that all the relevant information was actually collected beforehand. On the basis of such information, the requesting authority could start carrying out an assessment of the service’s

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<sup>43</sup> It is worth noting that in Italy Agcom’s regulation implementing the recently approved reform of the quotas system (legislative decree 7 December 2017, n.204, modifying Art.44 of the AVMS Code) introduces a similar provision, in the spirit of fostering the cooperation with other NRAs, also by means of the ERGA platform. As a matter of facts, the new Italian law extends the financial obligations for non-linear services also to those providers targeting Italian consumers even though they are not established in Italy. In this respect, Article 6, paragraph 5 of the regulation foresees that in case the provider is established in another MS, the financial contribution should be calculated on the revenues earned in Italy and that such information should be collected by contacting the NRA or the body of the MS where the provider is established, and that this could be done also through the ERGA.

compliance with its obligations in the Member State of reception, based on its own rules and practice.

**Second step** - the settlement of the case and the ensuing enforcement (two assumptions): The outcome of this initial assessment can vary, depending on how the territorial jurisdiction issue is resolved:

- Assumption A (enforcement by the country of establishment): the initial assessment (including conclusions as to whether the service is compliant or not) could be forwarded to the authority of the Member State where the service provider is established, including, where appropriate, indications regarding the type of sanction which might have been applied if the service was under the jurisdiction of the requesting authority. The competent authority is not bound by the conclusions of the requesting authority and exercises its competence and powers according to its own rules and practices;
- Assumption B (enforcement by the targeted country): based on the information collected from the service provider and communicated by the authority in the country of establishment the NRA in the Member State of destination assesses the factual situation against the financial obligations foreseen under national law. If it finds that the service provider does not comply with its obligations, it has the ability to impose sanctions and has a duty to inform the authority in the country of establishment of its decision and of the grounds substantiating it.

The two enforcement options have different merits and drawbacks:

- The latter may be more in line with the Directive's objective to ensure adequate levels of investment in European works, while respecting Member States' different cultural policies. Furthermore, given the fact the latter are closely related to services' financial obligations, one could also argue that the Member State of destination is in a better position to assess whether a service provider is compliant or not and the most appropriate sanction to be applied in case of non-compliance. By contrast with a strict application of the country of origin principle, sanctions would also be better legally grounded, notably in the perspective of a potential appeal procedure. It may otherwise be difficult for the authority in the country of establishment to take sanctions against a service under its jurisdiction based on what the laws of another Member State foresee.
- On the other hand, one may argue that the country of origin principle should apply in any case to enforcement procedures despite the fact that this specific area is not covered by the Directive, for reasons that include consistency, as well as legal certainty for media service providers (considering that the latter otherwise would be subject to potential sanctions by more than one NRA and may have to plead their cases before several judicial authorities located in more than one Member State).



There is no straightforward answer to this issue, as legal arguments as well as practical issues of application need to be taken into account in both hypotheses. Whichever of these assumptions is opted for, it is key to make sure that a coordinated and consistent approach is implemented by Member States. In any event, maintaining a close and constant dialogue between the involved authorities will absolutely be crucial too.

To sum up, and in order to work towards a common approach regarding the enforcement of Article 13, paragraph 2 related to ‘cross-border’ financial contributions, the following proposals may be considered:

22. The Member States, together with the European Commission, to consider discussing possible common approaches to address cases of non-compliance with the obligation to financially contribute to content production on a ‘cross-border’ basis (early in the transposition period);
23. ERGA members to define and agree on a common approach on how to address cases of non-compliance with ‘cross-border’ financial contributions based on the observations elaborated in this Paper.

**Regarding exemptions for low turnover and low audience providers and waivers justified by reason of the nature or theme of services** - As far as the definition of low audience and low turnover are concerned, it should be highlighted that the revised Directive clarifies that the European Commission is committed to issue guidelines concerning the definition of ‘low audience’ and ‘low turnover’, following due consultation of Member States in the context of the Contact Committee.

It is also worth noting that the revised Directive limits the possibility of exemptions from financial contribution obligations exclusively to those media providers targeting audiences in other Member States.

Concerning the definition of ‘low audience’, the existing guidelines for monitoring the application of Articles 16 and 17 of the current AVMS Directive (issued in 2011), are a relevant point of reference<sup>44</sup> but only cover linear services. The exact same approach could not be followed with respect to on-demand services for, at least, two reasons.

On the one hand, the audience of on-demand providers can be assessed according to different indicators than for linear services, depending on the business model adopted (the number of sales for transactional services, the number of subscribers for on-demand service providers, the number of views for advertising-based services etc.). On the other hand, it should also be

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<sup>44</sup> On that occasion, the Commission pointed out that it should be considered appropriate to set up a common framework for the application of the limited margin of flexibility in the implementation of Article 16 and 17 of the AVMS Directive. In particular, in respect of the performance of a given provider in terms of viewers, an audience share of 0.3% was seen as a ‘tolerance threshold’ below which it could be supposed that the reporting obligation may place too heavy a burden on the channels concerned.

considered that obtaining consumption data related to on-demand providers may be more challenging as, in most cases, these service providers are reluctant to share such highly sensitive information. Many on-demand service providers neither disclose such data, nor do they cooperate with audience measurement organisations.

With respect to providers with a ‘low turnover’, one essential question is to define what sort of financial and or/economic data are relevant to be taken into account to determine whether a given turnover is low or not. Firstly, it seems that it should be carefully assessed in accordance with the respective size of each relevant market (as pointed out under Recital 40 of the revised Directive). Indicators, such as net annual revenues of the company, could refer to a specific amount of annual revenues as it is already the case in some countries (see above) but could also potentially be expressed as a market share.

According to the revised Directive, Member States also have the opportunity to waive the obligations for specific categories of services, in cases where such obligations may be deemed ‘*impracticable or unjustified by reasons of their theme or nature*’. With regard to the concept of “impracticable or unjustified reasons”, exchanging experiences and best practices amongst NRAs could be relevant, in particular in order to share a common reflection on the situations where the respect of obligations for the promotion of European works may become too burdensome for specific categories of providers.

Concerning the nature or theme of the catalogues, in a minority of countries exemptions for specific categories of services already exist, and they are mainly related to specific genres (news, sport events, games, or adult content). However, other kinds of exemptions could be motivated if the service provider supplies contents of cultural interest, targeting specific niches. This may happen, for instance, in cases where the content originates from non-mainstream areas of production (such as Asia, Latin America).

Even in this respect, NRAs’ exchange of best practices may be beneficial to understand the criteria that may be considered to assess the thematic nature of a service provider.

24. ERGA to provide technical expertise to the European Commission in the drafting of the guidelines which the Commission is expected to issue regarding the meaning of low audience and low turnover and the associated methodology.

### **3.2.2. Reinforcing ERGA members’ enforcement capacities in cross-border cases through cooperation**

In the absence of conflicts regarding material and/or territorial jurisdiction, and while NRAs share the same views and are (in principle) aligned in terms of monitoring priorities, there could still be a possibility that the provisions of the Directive are not consistently implemented for reasons that include NRAs’ limited enforcement capacities. This section discusses possible ways forward to reinforce such capacities in particular by exploring how,

under the revised regulatory framework, NRAs could benefit from the mutualisation of certain tasks (i.e. the possibility to address some concrete cases/problems collectively), as well as from the dissemination of best practices.

Based on the analysis provided for under Chapter II, it seems that ERGA members could particularly take advantage of the Group's inherent 'network effects' in two areas: the practical aspects of the co-regulation of VSPs; and in their assessment of some of the obligations applicable to audiovisual media service providers.

**Regarding the practical assessment of the measures taken by VSPs and, where applicable, the handling of complaints** - First of all, and in light of the challenges identified under point 2.1.4 of this Paper, it would seemingly be relevant for ERGA members to increase their knowledge about the technical and business specificities of VSP providers. This would partially meet the necessity to level up regulators' expertise of the ecosystem which they regulate (in particular, when one thinks about the assessment of the measures taken in the area of audiovisual commercial communications) and might reinforce their ability to substantiate their approach to co-regulation with more solid evidence. In doing so, a dialogue with representatives of major VSPs and social media services as well as potentially the co-financing of research projects may also be fruitful.

In general, another question is what role NRAs might have, if any, in litigations between a user and a video-sharing platform?

On the one hand, one may argue that the wording of Article 28b, paragraph 1<sup>45</sup>, as well as practical considerations (such as the possibly unmanageable amount of individual complaints from users), both point to the necessity of a new, indirect form of supervision where NRAs' duty is to make sure VSP providers put in place adequate measures (such as the ones enumerated in Article 28b, paragraph 3) but do not *per se* have to handle individual users' complaints.

On the other hand, one could argue that because NRAs' general task is to check whether VSP providers have adopted appropriate measures (i.e. measures which have to be taken in accordance with Union law, in particular respecting the freedom of expression and information - Recital 51) to protect the general public, there is a resulting responsibility for NRAs to have sufficient oversight of VSPs' activities, including, where provided by national law, an oversight of individual user's complaints (perhaps as a second stage process once the VSP's own process is exhausted, or perhaps as a research exercise, to indicate the success of the VSP's measures). Yet, in accordance with the country of origin principle, some NRAs may find themselves in a position to check the appropriateness of the measures implemented by a particular VSP provider that is operating across several (or all EU) countries. This may

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<sup>45</sup> First subparagraph of Article 28b, paragraph 1 reads: '*Without prejudice to Articles 12 to 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect*'

lead to a NRA being the recipient of high volumes of complaints, potentially coming from several Member States.

Without prejudice of the answer that will be given to this alternative, in order to respond to these challenges, it may prove useful for ERGA members to consider the following options:

25. ERGA members to facilitate the cross-financing of research projects aimed at underpinning their regulatory approach to VSPs;
26. ERGA members to exchange views on proposed approaches to complaints handling, and to explore how the handling of complaints coming from several Member States can be facilitated through ERGA;
27. ERGA members to use the Group as a platform to ensure consistency in the level of user protection (both the users complaining about the alleged inappropriate measures taken by the VSP provider and the ones who have uploaded the content) through dispute settlement mechanisms across Europe and, where appropriate given the geographical coverage of the VSP provider, to explore the possibility of establishing a pan-European dispute settlement mechanism as well as, where appropriate, to encourage the industry to adopt codes of conduct.

**Regarding NRAs' assessment of service providers' compliance with financial obligations in cross-border cases** - While Article 30, paragraph 4 provides a general requirement for Member States '*to ensure that national regulatory authorities and/or bodies have adequate financial and human resources and enforcement powers to carry out their functions effectively*', the purpose of this Paper is not make any recommendation with regard to the tasks and corresponding resources which should be assigned to NRAs.

One may nevertheless expect that, considering both the extent of the changes brought to the AVMS Directive and the fact that some of its provisions are no longer optional to implement (e.g. minimum 30% share of European works in the catalogue of on-demand services), some NRAs' enforcement capacities shall be adjusted to this new reality.

As far as the imposition of 'cross-border' financial contributions are concerned, the analysis presented under point 3.2.1 of this Paper has revealed, *inter alia*, that the kind of economic information that service providers have to declare vary a lot (both in quantity and in terms of details) from one country to another as a result of the different transposition choices made by Member States after the last revision of the Directive. In light of the approach suggested above (regarding the collection and exchange of such information between NRAs for the purpose of implementing 'cross-border' financial contributions), it would be crucial that, on the one hand, any regulatory authority or body in charge of collecting information is empowered to do so with respect to service providers under its jurisdiction and, on the other hand, is also allowed to transmit such information to the requesting NRA, provided that any confidentiality issue has been sorted out beforehand.

To that end, the following proposals may be considered:

28. ERGA members to be empowered, on a national basis, to collect and share all relevant economic data they need for the purpose of smoothing the application of ‘cross-border’ financial contributions;
29. ERGA members to be empowered, on a national basis, to share relevant information about services ‘targeting’ the audience of another Member State with the authority of the targeted Member State.

For the NRAs who do not currently carry out a thorough verification/monitoring process once they have collected information from service providers, it may be useful to benefit from the experience of other authorities who have developed routine procedures in this area, without prejudice to their ability to develop their own approach to the issue.

The purpose would be to provide guidance to NRAs with the monitoring of the services which have self-declared information about the fulfilment of their obligations, possibly in more than one Member State. This could include, *inter alia*, an overview of the main measurement tools being used in order to check how service providers ensure prominence (e.g. through the evaluation of the search functions) and how the financial information they declare can be cross-checked (e.g. data verification processes). ERGA could be the right place to organize such exchange of best practices between regulatory authorities. A reporting about the challenges faced in setting up the monitoring process could take place on regular occasions (e.g. ERGA plenary and/or dedicated working structures).

In the longer term, it would seemingly be necessary for ERGA members to think about the opportunity to produce standardized declaration forms. The purpose would be to ensure that the same kinds of data and information about services’ activities are available from one country to another. Such standardized forms could entail a list of minimum information and data that all NRAs would have to require from service providers under their jurisdiction, as well as standardized formats for the answers (e.g. offer the possibility to breakdown the total accounting). The list could be developed on the basis of what appear to be the most common types of data collected but would obviously leave the possibility for NRAs to request additional information in accordance with the implementation options taken by their national government at the moment of transposition.

Finally, one way to benefit from the mutualisation of resources and knowledge at the ERGA level would be to reinforce exchanges between the NRAs and the national film funds. The coordination between ERGA members and the EFADs (i.e. European Film Agencies Directors) network would be desirable, provided that common areas of interest are identified, such as the implementation of ‘cross-border’ financial contributions (see above). The pooling of information and data in respect of the promotion of European works and the development of possible tools in this field could prove to be mutually beneficial and be a point of reference for every stakeholder.

**Regarding NRAs' assessment of service providers' compliance with their share and prominence obligations** - With respect to the fulfilment of the prominence obligation, it was noted under point 2.2.2 of this Paper that only a few ERGA members already have had to check that adequate prominence measures were put in place by service providers.

In order to bridge that gap, ERGA could facilitate the identification of the most effective tools used/available to service providers in order to ensure prominence of European works. An evidence-based research on the impact of recommendation tools (such as algorithms) would be useful to better understand the eco-system of film and audiovisual production marketing and to establish the most effective procedures to ensure prominence in an environment where recommendations are largely based on users' personal preferences. Regarding the use of Artificial Intelligence (AI) and algorithms in relation to promotion and suggestion of audiovisual works in on-demand services, a specific independent study could help to define the possibilities, limits, and impacts of business models of AI-driven recommendation tools.

Further on, ERGA could also play a role in encouraging the exchange of best practices in this area and the development of industry codes of conducts. A more direct contact and collaboration between VOD services, distributors and producers would be useful in order to pinpoint industry best practices and to have more impact on which strategies are more efficient. An exchange between ERGA members and service providers could be a first step, followed, for example, by a workshop including national film agencies and distributors/producers, as they can play an important role in identifying best promotional practices adopted to implement prominence.

Finally, with a view to facilitating the enforcement of the quota obligation across the EU, and in line with Commissioner Gabriel's ongoing project of a creating an online directory of European films, the existence of a database listing the programmes which each country considers to be meeting the definition of a 'European work', would be very useful for regulatory authorities, as well as for services operating across borders. In the absence of such a common reference point, the risk is that the identification of audiovisual works fulfilling the 30% minimum share in the catalogue of on-demand services would be too cumbersome.

To sum up and in order for ERGA members to benefit from the mutualisation of resources, experience and knowledge for the purpose of efficiently assessing service providers' compliance with some of their obligations, the following proposals may be considered:

30. ERGA members to organise regular exchange of best practices and members' reporting about the internal procedures designed to checking the accuracy of the economic data provided by service providers;
31. ERGA members to consider the possibility to develop standardized declaration forms for the purpose of collecting similar types of economic information from service providers;
32. ERGA to explore the opportunity to initiate a more structured collaboration with the EFADs (and possibility other industry experts) on common areas of interest

(exchange of information relating to the application of ‘cross-border’ financial contributions, effective tools to ensure prominence, etc.);

33. ERGA members to facilitate the cross-financing of research projects on the benefits and shortcomings of recommendation tools being used in order to promote European works;
34. ERGA to identify and, where appropriate, to promote the application of effective techniques adopted by the industry to ensure prominence of European works.

### **3.2.3. Developing common targets for the improvement of cooperation between NRAs**

As highlighted under point 1.3.6 of this Paper, the newly provided Article 30a sets out some rules, emphasizing situations (i.e. ‘targeting’ services and services ‘*wholly or mostly directed at the audience of another Member State*’) where cooperation between NRAs could make a positive contribution to the consistent implementation of the provisions of the Directive.

However, such a formalisation of cross-border cooperation between NRAs is not, *per se*, likely to be sufficient and it may be necessary for ERGA members to find possible ways forward to make that cooperation as smooth and efficient as possible.

**Setting up common indicators to evaluate the outcome of a formal cooperation procedure (article 4)** - A majority of NRAs considers that cooperation between ERGA members is obviously key to the success of the procedure laid down in Article 4 of the revised Directive. Whenever a Member State chooses to apply stricter rules to the services of a provider which is under the jurisdiction of another Member State, the NRAs concerned may need to agree on the interpretation to be given to the provisions of Article 4, as well as on the implementation of each step of the procedure.

The allocation of tasks (between NRA, administration, government) is rather considered as a national issue, yet a majority of ERGA members expressed interest in further discussing this issue within ERGA. Beyond clarifications provided by the revised AVMS Directive, several NRAs also expressed some desire for elaborating indicators allowing to assess when a cooperation can be considered ‘*sincere and swift*’ (quality, precision, time management, transparency, single point of contact, etc.). Such indicators could be developed within ERGA as internal reference points.

To sum up, the following proposals may be further considered by ERGA members:

35. ERGA members to discuss technical standards aimed at ensuring, *inter alia*, the independence of the formal cooperation procedure (ensuring the independent application of the jurisdiction criteria by national governments and any other public or private body); the transparency of the procedure (ensuring predictability for service

providers); the identification of a single point of contact (facilitating cooperation between NRAs/Member States) in each Member State;

36. ERGA to further explore issues such as: the concept of ‘mutually satisfactory solution’; the kind of evidence allowing to ‘reasonably establish circumvention’, etc.

Regarding the provisions laid down in Article 30a, the analysis presented under point 2.3.7 of this Paper provides for an overview of the procedural and substantive issues NRAs may be confronted with. As far as paragraph 2 is concerned (information about the services ‘wholly or mostly directed at’) it seems like the use of the existing MAVISE database would be supported by a number of NRAs in order to centralize information about the kind of services concerned (see point 3.1.3) or, at least, that if such information would be part of another database, there should be a link to the existing MAVISE database with the already existing data on these services (as complementary information). The legal possibility to collect such information directly from service providers would help in this direction, as highlighted under point 3.1.3 of this Paper.

Likewise, it would seemingly be important for NRAs to agree on the following issues:

- What sort of benefits do ERGA members think the rules set out under Article 30a would bring to the successful resolution of cross-border cases (i.e. aligning expectations in order not to create frustration)?
- How any follow-up communication should look like e.g. once the information on services ‘*wholly or mostly directed at the audience of a Member State*’ has been sent (Article 30a, paragraph 2)?
- What status would information about services ‘*wholly or mostly directed at*’ the territory of another Member State have in relation to the anti-circumvention procedure?
- What does ‘addressing a request’ made pursuant to Article 30a, paragraph 3 mean in practice?
- Should the requesting NRA prove the ‘targeting’ prior to expecting any response from the other NRA?

Overall, it seems like a number of ERGA members would support continuing the analysis in 2019 to provide guidance on the practical application of Article 30a, paragraph 2 and all the procedural issues raised above.

To sum up, and in order to address the issues raised by the practical application of Article 30a of the revised AVMS Directive, the following proposals may be considered:

37. ERGA members to systematically (i.e. prior to receiving a request from another NRA) input information into a centralised database about services which are either ‘wholly or mostly directed towards the territory of another Member State’; or



‘targeting’ the audience of another Member State; or both (provided that **proposals n°7 and 8** are implemented);

38. ERGA to address all the issues related to the application of the rules laid down in Article 30a, paragraphs 2 and 3, as identified in this Paper.

Beyond Article 30a of the revised AVMS Directive, and on the basis of the informal discussions which took place amongst ERGA members over the last months, some additional observations can be made regarding the common targets that NRAs should strive to achieve in order to improve the resolution of cross-border cases through cooperation.

- Where the AVMS Directive provides for comprehensive and clear rules (e.g. in the area of quantitative advertising rules, or advertising for alcoholic beverages), regulation and co-operation works well across European media regulatory authorities;
- Co-operation between national regulatory authorities frequently occurs on a case-by-case basis and on the basis of bilateral agreements. When handling such cases, often a certain degree of routine can be observed;
- Experience shows that when cases are forwarded to an authority for consideration, it is helpful to have as much information as possible about the complaint. This should include basic details – for example to identify a particular broadcast – and may also include the grounds for a complaint, or any other additional contextual information that the authority might find helpful. Such details can make it easier for the receiving authority to handle such cases effectively.

In light of these observations, the following proposals may be considered:

39. In case of missing material jurisdiction, the NRA in the country of origin where possible should at least strive to get in contact with the respective media service provider. The reason should be to act on the assumption that any media service provider basically aims for complying with the legal framework. Making the provider aware of the problems another regulatory authority in the Country of destination might have with parts of its content, can lead to a change in its behaviour even without material jurisdiction of the acting authority in the Country of origin;
40. Whenever media service providers from outside the European Union are concerned, national regulatory authorities should intensify the exchange of their best practices to improve learning from each other. In any case, to gather more experience in handling non-EU cases, it seems to be helpful if ERGA members could at least try to reach out to audiovisual regulators in non-EU countries which have jurisdiction over services. It may be possible to exercise ‘soft power’ through international networks, in the absence of EU regulatory jurisdiction. Certain general prevention achievements that might result from a mutual exchange with the foreign authority in these circumstances prevail upon solving the individual case (see point 3.1.2 above and the case of non-European audiovisual media service and VSP providers making their services available in several EU Member States);

41. NRAs should be encouraged to commit to a regular monitoring and reporting of cross-border cases, both internally and externally:
  - a. Internal reporting can regularly be done at ERGA plenary meetings. Such reporting has the double function of informing other members of NRAs' own activities as well as encouraging other members to get more active themselves;
  - b. External communication should be aimed at stakeholders and market players. It can function as a signal to the audiovisual sector that ERGA members are willing to jointly defend core values of European media law in a consistent and self-confident way. This bottom-up convergence of the European media framework, by national regulatory authorities can reduce incentives for media service providers to abuse the country of origin principle by tactically shifting their businesses within the digital single market in order to avoid regulation by a given national regulatory authority.
  
42. Finally, it would be fruitful for NRAs to regularly exchange best practices in the frame of ERGA on working methods and tools they have been developing and implementing so as to achieve an increased engagement and direct contribution of the citizens to the objectives of audiovisual regulation. Such “participatory regulation” mechanisms (e.g. via user-friendly interfaces facilitating notification mechanisms, social media, widely accessible public consultations, etc.) indeed appear particularly relevant in the digital age, as a means both to provide valuable, crowdsourced input to the regulation and to strengthening the links between regulators and the general public.

### **3.3. Reforming ERGA’s internal organization to meet its new responsibilities**

The formal recognition and reinforcement of ERGA’s role in the new AVMS Directive can be seen as an acknowledgment of its positive contribution towards a consistent implementation of the regulatory framework to date. They, however, also raise expectations regarding the role which ERGA will play in the future. It will be up to its members to find out how to live up to its new responsibilities following the revision of the AVMS Directive, while (at least) maintaining the quality of the work being carried out and keeping NRAs’ overall workload within reasonable limits.

The institutionalization of ERGA de facto coincides with an increasing number and larger scale of challenges which NRAs will have to face - as explained in Chapter I of this Paper. Some of the possible solutions may involve ERGA and therefore it is worth asking whether the Group’s internal structure and processes are fit for its future purposes.

It seems like a number of changes could be envisaged. For instance, the voting procedures as they currently stand are too lengthy in the event where the Group would be requested to provide an opinion in accordance with Article 2, paragraph 5c, or Article 28a, paragraph 7, of the Directive (i.e. within 15 working days). It also seems necessary to appropriately change ERGA's theme-based approach as far as the work programme is concerned, in particular in order for the Group to be able to deliver more practical and operational outputs (which should aim at addressing the concrete issues identified in Chapter II). This could also lead ERGA members to think about how to ensure more continuity in the activities of the Subgroups - for instance, instead of having to draft a different work programme every year as is the case today it could be decided to set up more continuity and flexibility in ERGA's architecture. Finally, one may wonder whether ERGA's working calendar should not be more flexible (e.g. in order to allow Subgroups to start their work earlier) in order to, on the one hand, continue to improve the overall quality of the Group's outputs and, on the other hand, allow it to be more responsive as new issues arise, while keeping in mind that members' ability to provide inputs on short notice may be limited in some cases.

This Paper therefore takes the view that adjustments to the internal rules of procedures would be necessary as of 2020, in particular considering that ERGA will enter into a new phase of its development after the Directive is transposed in all EU Member States. Literally speaking, ERGA's role and responsibilities are not going to be totally shifted under the new AVMS Directive as compared to the current situation. It is nonetheless important to take into account all the areas where ERGA may be relevant for the purpose of, *inter alia*:

- Facilitating cross-border cooperation between NRAs (including the exchange of information);
- Fostering the bottom-up convergence of regulatory practices (compliance checks, monitoring strategies);
- Providing assistance to its members by disseminating best practices in relevant areas which are not thoroughly addressed in the Directive (media literacy, gender issues, accessibility, media pluralism, etc.);
- To continue working with experts (academics, media service providers, NGOs, video-sharing platform providers, law enforcement authorities, etc.) on relevant issues related to the implementation of the regulatory framework.

Against this background, it is proposed that ERGA members strive to develop and agree on a plan aiming at the necessary transformation of the Group by 2020 at the latest (i.e. before the end of the transposition period). Such a plan would likely involve several modifications of the existing rules of procedure by ERGA members themselves (which is foreseen under Article 30b, paragraph 4 of the Directive) and could be developed within a dedicated Subgroup in 2019.

While it is worth reflecting what flexibility there is within the current structures and processes, it would be critical for the plan to take due consideration of the above observations and address both substantive and procedural issues, taking into account the experience of

other Subgroups over the past years. On the one hand, it should be assessed which topics ERGA Subgroups should be dealing with in the future. On the other hand, such a plan would also include suggestions to change ERGA's rules of procedure, in particular to make sure that the Group's working and voting procedures allow it to have the adequate level of reactivity.

To sum up, and in order for ERGA to initiate a strategic shift of its internal structure and working and decision-making procedures, the following proposal may be considered:

43. ERGA members to develop - within a dedicated working group in 2019 - a plan aiming at the necessary transformation of the Group before the end of the transposition process.

# CONCLUSIONS

The present report provides for a general, though only partial, overview of potential implementation challenges that NRAs may be confronted with as a result of the adoption of the revised AVMS Directive. It must be stated though that neither the identified issues might all turn out to be actual challenges for regulators nor may the list be exhaustively explored on time for the entry into force of the new text. It is nevertheless important that regulators and legislators within their respective remits and competences keep on bringing forward the discussion about the practical implications of the changing rules, in continuation of the following prominent observations:

- The extension of the material scope and the possibility to apply ‘cross-border’ financial contributions are going to challenge NRAs’ ability to set up clear boundaries between various sorts of service providers (both VSPs and audiovisual media services) to which some provisions of the Directive may (or not) apply. The drafting of the revised AVMS Directive leaves room for various interpretations and progressively working towards a more convergent understanding of a number of key concepts is identified as a priority for regulatory authorities - **See proposals n° 1, 2, 3, 4, 5, 7**
- In order for the provisions of the Directive to be effectively enforced, it would seemingly be necessary to improve NRAs’ exchange of information about the services available throughout the EU single market. Contributing to the establishment of a common information system and setting up common communication protocols, in particular regarding the exchange of financial information, would improve the efficiency of NRAs’ enforcement - **See proposals n° 9, 14, 21, 30, 31, 37**
- The revised AVMS Directive sets out renewed objectives whose fulfilment by service providers would ideally need to be assessed in accordance with common indicators and analytical frameworks jointly developed by NRAs. In several areas, it would seem beneficial, to a desirable extent, for NRAs to seek to align their regulatory approaches in order to ensure more consistency - **See proposals n° 10, 16, 18, 20, 24, 27, 42**
- Last but not least, and in light of all the expectations raised by the revised Directive, the most urgent questions to be addressed by EU Member States and the European Commission have to do with reinforcing NRAs’ enforcement capacities, in particular to make sure that - before the entry into force of the Directive - they are granted with all the appropriate legal and investigative powers necessary to carry out their functions effectively<sup>46</sup> - **See proposals n° 12, 13, 28, 29**

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<sup>46</sup> In this respect, Article 30, paragraph 4 of the revised AVMS Directive provides that ‘*Member States shall ensure that national regulatory authorities and/or bodies have adequate financial and human resources and enforcement powers to carry out their functions effectively and to contribute to the work of ERGA.*’

To a large extent, it emerges from the Paper that the common answer to all these challenges lies in strengthening and deepening NRAs' cooperation, be it on bilateral or multilateral level through ERGA.

As far as the former is concerned, the priorities are twofold. On the one hand, the newly introduced Article 30a provides for a relevant framework of cooperation but emphasizes on specific situations (in which cooperation between NRAs particularly makes sense) and leaves some unanswered questions which ERGA members would better address collectively in order to make that cooperation as smooth and efficient as possible (**see proposal n° 38**). On the other hand, all the experience acquired by NRAs in that field so far should help in developing indicators deemed to assess whether the outcome of a bilateral cooperation is positive or not (**see proposals n° 35, 41**).

Regarding ERGA, the Group's added value in organising the cooperation that is necessary for the consistent and effective implementation of the revised Directive would likely not live up to its full potential if the rules of procedures are not significantly updated, *inter alia*, to take into account of what Article 30b of the revised Directive formally provides (**see proposal n°43**). As highlighted in this Paper, after having positively contributed to the public debate on the revision of the AVMS Directive, ERGA members should now aim at putting themselves in a position to tackle the issues which are necessarily going to result from the implementation of the new regulatory framework.