

Addressing regulatory asymmetries: video-sharing platforms, targeting on- demand services, and services outside the EU

**A workshop of the
European Audiovisual Observatory**

in collaboration with the
European Platform of Regulatory Authorities (EPRA)

**European Youth Centre, Strasbourg, France
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Summary of the debate





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Introduction to the Workshop¹

A new audiovisual legal framework

On 25 May 2016 the European Commission published a proposal to amend the Audiovisual Media Services Directive (AVMSD) in order to cope with an evolving audiovisual sector.² The proposal includes a legal definition of “video-sharing platforms” (VSP), “video-sharing platform provider”, and “user generated video” and a set of obligations concerning the protection of minors and of all citizens against violence and hate speech, as well as rules concerning the assessment of the compliance with them. The proposal also defines the criteria for determining the country of establishment of the VSPs in terms of jurisdiction and therefore the competent member state and regulatory authority. Moreover, the proposal contains rules concerning on-demand audiovisual media services established in countries different from the targeted ones, with the possibility of the latter to impose rules on investments in European works.

The legal debate

Both the scope of the AVMSD and the country of origin principle, as treated under the new proposal, seem to produce the following “regulatory asymmetries”:

1. Scope and video-sharing platforms: Audiovisual media services are regulated in a different way depending on their linear or non-linear nature, while services that do not fall under the editorial responsibility of their providers, as video-sharing platforms, remain outside of the full scope of the AVMSD, and are therefore regulated in a lighter way in the Commission’s proposal.
2. Country of origin and targeting on-demand services: Services provided in a given member state may be regulated in a different way depending on the country of origin of the programme, and additional rules may be adopted, according to the Commission’s proposal, in the targeted member state.
3. Internal market and services outside the EU: Service providers established in non-EU countries remain outside the regulatory reach of the AVMSD, and fall under different regulatory frameworks, as the European Convention on Transfrontier Television (ECTT) or bilateral agreements with the European Union.

This workshop was aimed to discuss the challenges set by existing and upcoming regulatory asymmetries resulting from the EU legal framework.

¹ This report was drafted by Eric Munch, Stefanie Plut and Ismail Rabie and is based on notes taken during the workshop. It comprises key information that emerged from the discussions. Please note that it does not reproduce in full all interventions and presentations. Links are provided where available.

² <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1464618463840&uri=COM:2016:287:FIN>



Opening of the workshop

Tina Mulcahy, Executive Director of the European Youth Centre (EYC), started with a short presentation of the EYC and a brief history of the building. The Centre's mission is to provide non-formal education methods in order to allow young people to become active citizens, advocating human rights.

Susanne Nikoltchev, Executive Director of the European Audiovisual Observatory, welcomed the participants, underlining that the event was the product of a close and long-lasting collaboration between the Observatory and EPRA. She underlined the need for cooperation between the different stakeholders and emphasised the importance of a pragmatic approach in order to conduct fruitful discussions.

Celene Craig, Chairperson of EPRA, followed up on the shared values of the Observatory and EPRA, their goal to bring a richness of perspective to professionals of the audiovisual sector. EPRA welcomes the opportunity to hear of the participants' experience and to share its own.

Emmanuelle Machet, Secretary to EPRA, introduced the concept and choreography of the workshop. She showed a portrait of the Egyptian queen Nefertiti, a striking beauty, due to the perfect symmetry of her straits. But can symmetry always be considered perfection? Looking at media regulation, is the lack of a level playing field – asymmetry – between the different media players a fundamentally negative thing?



Panel 1. The material scope of the AVMSD and video-sharing platforms

Sophie Valais, Legal analyst at the European Audiovisual Observatory, chair of the first session, introduced the first panel. She highlighted the increasing blurring of the boundaries within the audiovisual sector due to the emergence of new players, hence raising the question of a potential need to expand the scope of the AVMSD.

The new proposal, unveiled by the European Commission, introduces new definitions of “video-sharing platform service”, “video-sharing platform provider” and “user-generated video”.³ But are these definitions clear enough? What are the possible overlaps? Those were the questions raised during the first part of the panel. The second part delved deeper into the measures that video-sharing platforms would have to take to protect minors, and the proposal’s impact on the liability of intermediaries.

The audiovisual market in the EU & video-sharing platforms

Christian Grece,⁴ European Television and On-demand Audiovisual Markets analyst at the European Audiovisual Observatory, focused on the evolution of the advertising market in Europe and linked it to the shift in media consumption habits, from traditional media to online media, especially amongst the younger generations. Marketing strategies have shifted from mass advertising to individually targeted advertising, with Internet becoming the main source of advertising in Europe. In 2015, online advertising have overtaken television advertising for the first time.

On the market growth of media consumption online, Christian Grece shared the following findings:

- Internet roughly represents 21% of the daily time spent consulting media (hence the interest for this new type of advertisement). And while online video advertising only constitutes a small part of all online adverts - it is growing exponentially.
- Advertising spending online has grown from 1% in the year 2000 to 34% of the overall amount spent on advertising in 2015.
- Five big media players (such as Facebook and YouTube) are controlling around 50% of this new market.
- The shift is also about the content format and the devices used to access content: short videos are gaining more popularity, with 50% of them being watched on mobile devices, with a handful of players dominating the market – which is creating an oligopoly of discovery controlled by a few video-sharing platforms.

³ Under the proposed Article 1.

European Commission, Proposal for a Directive of the European Parliament and of the Council 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 in view of changing market realities, Brussels, 25 Mai 2016, COM(2016) 287 final, 2016/0151(COD), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1464618463840&uri=COM:2016:287:FIN>.

⁴ Link to the presentation of Christian Grece: <https://mycloud.coe.int/index.php/s/hlelweYreasKO3V#pdfviewer>



With the advent of amateur content, big-budget TV shows and the possibility of watching live sports, traditional broadcaster mid-tier content will lose value. Online social media are becoming a main source of information, for instance, thus challenging TV news programmes.

He concluded by addressing the audience with the following questions, for further consideration:

What about the future of news and information distributed through audiovisual content? And how will we get our news, information and content? Those questions are relevant now more than ever before, as recent events have shown how negative the influence of fake news can be.

Scope - the UK experience

Sophie Valais took over, raising questions such as: Have public policies not changed? Has the political framework adapted to the changing environment?

Cathy Taylor⁵ has seen both sides of media regulation – she worked as a TV producer, and then joined the UK regulator Ofcom, where she currently works on Standards and Audience Protection.

Her presentation focused on Ofcom's approach to applying the AVMSD. To illustrate the complexity of the scope of the AVMSD Directive, she shared some concrete examples, where Ofcom had to assess the TV-likeness criteria to determine when a given on demand audiovisual service would fall under the scope of the Directive.

On YouTube, Channel Flip has everything of a classic amateur filmmaker's channel. It is very hard to say if it is "TV-like" or not. Ofcom does not consider it to be competing with broadcasting services. The case of Mist8k might be even trickier - it publishes videos to "educate" on scientific questions. The case could be made that such videos do not aim to compete with broadcasting services (as they are purely educational). When looking at issues of competition, multichannel networks like Barcroft TV (totalising +2.3 billion views) are worth considering. Barcroft TV provides short, a bit television-like content. Cathy Taylor believes that there is a need to focus on other criteria than only the TV-likeness aspect.

Discussion

Sophie Valais launched the discussion by asking the participants if there is a need to put heavier regulatory burdens on online video-sharing platforms, or if it would only create an asymmetric level of regulation?

Paul Avril, Advisor for European Affairs at the French regulatory authority (CSA), presented the main findings of a recent study on digital platforms and the challenges that they raise both in terms of competition and regulation.⁶

Among the challenges raised by the report, he mentioned:

- Platforms are blurring borders between pro and non-pro content, free and paying media, etc.
- Digital platforms take dominant positions.

The study identifies a number of emerging challenges, such as:

⁵ Link to the presentation of Cathy Taylor: <https://mycloud.coe.int/index.php/s/w5rgEEQyqBs1fHj#pdfviewer>

⁶ www.csa.fr/content/download/2F223681%2F597947%2Ffile%2FCSA-Etude_plateformes_%25202016.pdf&usg=AFQjCNGRIBD_YI05NTLvSNsn6V49pzyggg&sig2=0TEH2dtMhel2PJsetZeD_Q



- Social networks have become major sources of information. However, the use of algorithms presents the risk of locking consumers in their own preferences and tastes. How to reconcile content personalisation and cultural diversity?
- Standardisation of content offers: manufacturers opt for the use of standardised operating systems (Google's Android TV, for example). Could this lack of competition be detrimental to consumers and lead to a dominant position of the producer of this operating system?
- Compliance with copyright and IT law.

Sophie Valais invited the audience to react to the new criteria introduced by the directive proposal - removing the criteria of "TV-likeness", and the new definition of user-generated video.

Cathy Taylor remarked that video-sharing platforms have a degree of responsibility on their content, but not a total responsibility; so they're not exactly playing the same game.

Jerzy Walewski, Legal expert at the Polish regulator KRRiT, shared his thoughts on the proposal. First, he argued that the definition of video-sharing platform services, under Article 1 of the proposal, is not clear and does not cover non-commercial platforms, cloud services, and social media. He then added that Article 28a of the proposal should require video-sharing platforms to comply with some requirements with regard to commercial communications and with rules concerning European works. Finally, on hateful content and hate speech, he regretted that the proposal did not foresee any sanction to counter them.

"Appropriate measures", liabilities and freedom of expression

Monica Horten,⁷ Visiting Fellow at the London School of Economics and Political Science (LSE), focused on the appropriate measures, liabilities and the need to preserve the right to freedom of expression.

She started with a discussion on Article 28a of the proposal, where she highlighted a potential risk for the freedom of expression. The challenge remains in the exercise of assessing the suitability of content to audience groups, and the restrictions which might be imposed by social media and by video-sharing platforms.

She provided a concrete example of a piece of art showing nudity, *The Origin of the World* by Gustave Courbet. The painting is shown in the Musée d'Orsay, in France. Yet a picture of the painting has been taken down by Facebook for not respecting the community rules (it was considered to be showing nudity). There is currently a case opposing Facebook to the user who posted the picture.

Prior control over content is a very complex issue, due to the huge amount of content uploaded online. Although filtering some types of content using algorithms is technically feasible, assessing its suitability – either under hate speech or under freedom of expression – is much trickier.

One other issue regarding the enforcement part is that content filtering is done under the platforms' own terms and conditions of use. Video-sharing platforms have all discretion on what they allow and forbid, outside of the criteria set by EU law (most of them being established in the USA, their criteria broadly follow US law). An illustration of that is the recent case of a journalist who published a picture on which the ISIS flag could be seen, which had been taken down by Facebook. It was not taken down for infringing the law, but for not complying with Facebook's own terms and conditions. Moreover, such actions often do not offer opportunities neither for appeal nor for transparency. Article 10(2) of the European Convention on Human Rights foresees the need for proportionality in any measure restricting freedom of expression. Leaving the entire responsibility of taking down

⁷ Link to the presentation of Monica Horten: <https://mycloud.coe.int/index.php/s/30B3tS6zhkaqVU9>



content to platforms would imply a huge risk of hindering freedom of expression. The monopoly of IT giants, like YouTube and Facebook, over content would be even reinforced as they would be the only ones with the ability to comply.

Discussion

On the availability of pornographic content online, **David Cooke**, Director at Mindgeek, stated that people accessing porn online can be divided into two sets: those who search for it and those who inadvertently stumble upon it. The rules regulating pornography on TV are much stricter than on the Internet. Social networks are practically acting like video-sharing platforms in their own way – as they allow the dissemination of audiovisual content. Moreover, Twitter's terms and conditions, for instance, are "very light" on pornography. Not to provide proper measures means, in fact, allowing more and more people to stumble upon it.

To **Andrea Stazi**, Public Policy and Government Relations Manager at Google Italy, the new proposal is respectful of the existing framework based on the balance between the fundamental principle of freedom of expression and the protection of citizens from harmful content. It is trying to point at new ways to deal with video-sharing platforms responsibilities, but it keeps the exclusion of editorial responsibility which is important in order to allow the audiovisual industry to grow. To him, any newcomer should be able to create a new platform without burden. A new platform, with limited budget, cannot afford monitoring content, enforce rules on the protection of minors, comply with rules on advertising, etc. The problem is purely practical: with hours of video uploaded per minute, how could any platform do this kind of control? On YouTube, many tools are available to users (flagging, reporting), who are asked to check the content themselves. There is a need to look at the legal framework and to the available technical possibilities.

Marcel Boulogne, Head of Sector, Audiovisual Media Services, DG Connect, European Commission, differently from Monica Horten, underlined that Article 28a aims at protecting minors from harmful content. The proposal puts an obligation of means, not an obligation of results on audiovisual platforms. Hate speech is already illegal. The proposed directive includes flagging mechanisms. The proposal is not calling for "deep packet inspection". The aim is that when video-sharing platforms are made aware of something that might be harmful, they should make sure that minors for instance do not have access to such content.

On the efficiency of these measures in protecting consumers, **Maria Michalis**, European Policy Adviser for EURALVA, said that informing users about the content is very important and deserves more attention. To her, protecting and informing are complementary approaches. Platforms already have mechanisms in place to control content. YouTube has a *Restricted mode* which is, in her opinion, far from enough. Those platforms are already regulating content, on their own terms which are insufficient. There is a need for more transparency, so as to know how the existing mechanisms are working and to provide basic guidelines that platforms can follow.

Peter Hyde, Head of Broadcasting Regulation at the regulatory authority of Gibraltar, pointed to one contradiction within the functioning of YouTube. To sign up for an account, users are required to be at least 13 years of age, yet YouTube provides content for children under 13 years of age.

For **Elvana Thaci**, from the Media and Internet Division of the Council of Europe, the responsibility of internet intermediaries is crucial from a human rights point of view. There is a need to listen to the stakeholders about the feasibility of the measures, she added. The ECHR is looking at the relation between States and intermediaries (what the intermediaries' responsibilities to protect the rights of users are).



Panel 2. The principle of country of origin and targeting services

The second panel of the workshop, chaired by **Francisco J. Cabrera Blázquez**, Legal analyst at the European Audiovisual Observatory, was dedicated to the principle of country of origin and the financing and promotion obligations with regard to European works.

Targeting services

Gilles Fontaine,⁸ Head of the Department for Information on Markets and Financing at the European Audiovisual Observatory, made a presentation on targeting channels (both linear and non-linear) from a market perspective. The concept of targeting goes beyond the fact that a channel is available in a country, as it consists in an active role in trying to capture parts of the market. To illustrate this concept, he gave an overview of the Swedish TV market. He then listed the several criteria used, in the MAVISE database of the Observatory,⁹ to assess when there is a case of targeting. Such criteria include: the linguistic version, content of the license, local programming, local advertising, and local subscription. A third of all channels licensed in the EU are targeting channels, with 60% of them established in the UK.

The matter is quite different for on-demand services, as some of the biggest players are established in the United States (Microsoft's Xbox, Google Play). To Gilles Fontaine, strategic decisions are based on different approaches than consumer preferences. It probably has more to do with business decisions than with legal decisions.

Country of Origin Principle and Targeting Services

Bernardo Herman,¹⁰ Director General at the media regulator of the French speaking Community of Belgium (CSA), complemented Gilles Fontaine's presentation by discussing the intricacies of identifying targeting channels from a legal perspective.

The "Country of origin Principle" is the cornerstone of the AVMS Directive. It is essential for the creation of the internal market, it provides legal certainty, and is necessary for the business models. The main question is how to reconcile this principle with the other objectives of the AVMSD: the protection of viewers, particularly minors; guaranteeing fair competition; ensuring freedom of information and media pluralism; and the promotion of the diversity of Europe's cultures. Achieving these objectives may be requesting to preserving local culture, local markets and traditions. Hence, Article 3 of the AVMS Directive allows, in certain circumstances – e.g. protection of public security or

⁸ Link to the presentation of Gilles Fontaine: <https://mycloud.coe.int/index.php/s/HSfF8uH1Swd6SsO>

⁹ <http://mavise.obs.coe.int/>

¹⁰ Link to the presentation of Bernardo Herman: <https://mycloud.coe.int/index.php/s/rLY8h59iuSB9pyg>



against incitement to hatred - and under certain conditions, member states to derogate from the obligation not to restrict the transmission of audiovisual media services on their territory. Derogations to the country of origin principle can also be grounded on Article 4 of the AVMS Directive when Member States are confronted with the targeting of their market by a service based outside of their territory but wholly or mostly directed towards it. This derogation is necessary to avoid regulatory asymmetries between services having the obligation to comply with the stricter rules that some Member States might have been adopted and other services which would not respect these obligations while targeting these markets from abroad.

He recalled the definition of targeting services according to this provision, and introduced to some legal criteria of assessing targeting behaviour, under Recital 42 of the AVMS Directive, such as the origin of TV advertising, 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. He then referred to the report of the ERGA working group on territorial jurisdiction, which came to the conclusion of acknowledging the difficulty of implementing regulatory mechanisms aimed at proving circumvention.

Discussion

Francisco Cabrera asked Bernardo Herman to share some thoughts on the French TF1's activities in Belgium, especially regarding the competition with RTL.

Bernardo Herman said that TF1 wants to monetise their services in Belgium, where RTL owns close to 65% of the advertising market. RTL is circumventing the rules of the Brussels-Wallonia Federation, telling the Belgian CSA that all decisions are made in their official establishment in Luxembourg while they have more than 600 persons including most of the decision-makers dealing with the daily editorial decisions, who are working in Brussels.

Kalle Varjola, Legal counsel at the Finnish regulatory authority (FICORA), shared the view from Finland, where no circumvention cases or derogation procedures have been reported.

Marcel Boulogne intervened to underline that the circumvention procedure under Article 4 has not been changed as such. The procedure has just been clarified under the amendment proposal.

Julie Mamou, International affairs manager at Ofcom, expressed Ofcom's concerns about the amendment proposal for Article 13. This proposal allows member states to put levies on on-demand services targeting their territory. She sees this as derogation to the country of origin principle, which undermines the cross-border audiovisual service market, i.e. the very reason for the AVMSD in the first place. She added that such a measure might not be beneficial to either consumers or businesses, as services might be reluctant to invest with regard to such financial obligations. She conveyed Ofcom's worries about how such measures would be implemented, practically speaking.

Jerzy Walewski, Legal expert at the Polish regulatory authority (KRRiT), discussed the "majority of the workforce" criteria under Article 2.3(b), as he identified it to be problematic. He shared the Polish regulator's proposal to create an economic criterion, regarding audience's targeting by commercial communications. He also thinks that the circumvention mechanism under its current status does not work and should be replaced as proposed under Article 4. A complete notification should be defined, otherwise the Commission would decide in an arbitrary way when a notification is complete or not.



The principle of country of origin and targeting services

Julie Jeanne Régnauld (CNC, France) and **Joanna Chansel** (French Ministry of culture, France) made a joint presentation¹¹ about the principle of country of origin and its impact on the financing and on the promotion of European works.

Joanna Chansel gave an overview of the rules on the promotion of European works in France. To her, prominence, content share and financial contribution are complementary measures, as she shared figures from the French VOD market. France is a strong and growing VOD market. Despite that being said, it is not a "hub" for VOD service wishing to establish in Europe. She identified the taxing system as a major reason behind the choice of establishment of VOD services in Europe, and not the legislative framework, as it may be thought. She gave some examples of Netflix's involvement in the production of European cultural works, within the countries it is targeting, as it produced shows dedicated to particular European countries (Marseille in France, The Crown in the United Kingdom) with budgets going higher than what national channels could offer. On the other hand, she shared the example of SFR Play, a French VOD service established in Luxembourg, which does not give a fair share to European works in its catalogue as 77% of the works are American productions.

On the protection of minors, she acknowledged that the age classification shall not be harmonised all over the EU, notwithstanding the respect of the legal framework in the targeted country.

She then handed over the floor to **Julie Jeanne Régnauld**, who discussed the contribution of VOD services to the ecosystem of the audiovisual industry, as she presented CNC's involvement in France.

CNC is not financed by public budget but relies on taxes coming from diverse sources, such as theatre tickets, TV channels, TV distributors, sales of DVD and online video. She recalled the evolution of taxing audiovisual content in France.

In 2013, the TSV tax was extended to EU services targeting the French territory, following the introduction of the levy system in Germany. The other EU countries also have an obligation similar to the French and German system: Croatia, Czech Republic, Portugal and French speaking Belgium. All of them have set low rates, ranging from 1% to 2,3%, with an exemption for small operators.

She stressed how this obligation would benefit European works and provide more equality of treatment between all the market players. She highlighted Netflix (which alone stands for half of the French SVOD market), Google and Amazon dominance in the French market. To this extent, their contribution is much needed. Moreover, Netflix already benefits from CNC's support, as it provides subtitling for foreign language content.

She concluded by calling for more cooperation among EU member states.

Discussion

According to **Marcel Boulogne**, Article 13, as it currently stands, does not harmonise the field well enough. Concerning the prominence and the share of catalogue, there is no baseline across Europe

¹¹ Link to the presentation of Joanna Chansel: <https://mycloud.coe.int/index.php/s/BFpPf3JAAujXKu7>



offering a comparable level of promotion of European works. Concerning levies and taxes, the current Directive clearly puts them outside of its scope, although in the German case the European Commission has considered the newly introduced levy obligation to be compatible with the current framework. Now that Netflix has appealed the Decision, the Court of Justice of the EU will have to decide.

Cathy Taylor also welcomed these tax initiatives as they contribute to support European works. She highlighted some disparities within the types of European works where investments are made. To solve this issue, she suggested that the investments should be more regulated and directed towards priority areas, such as European works for children, for example.

Heiko Zysk, Vice President and Head of European Affairs at the German channel ProSiebenSat.1, supported the French approach. He highlighted that the economic context in some countries, especially in terms of revenues of VOD services, might help complying with a tax or levy obligation. For instance, Netflix is earning more money in Germany than in the UK, due to a lower VAT rate in Germany. Therefore, it is easier for them to comply with the system of levies in Germany. He also agreed with Cathy Taylor on the need for a more targeted investment in certain fields, if a member state needs to do so.

On the prominence requirement regarding VOD services, **Ronan Fahy**, Researcher at the Institute for Information Law (IViR), stressed that Netflix is popular because it is customisable. On that point, he shared his concern over the possible interference of prominence obligations with this particular business model, considering that it would affect the ability to offer personalised service to the viewers.



Panel 3. Internal Market and services outside the EU: future perspectives

Emmanuelle Machet, Secretary to EPRA, introduced the third panel of the workshop, which addressed the asymmetry between the rules applicable to services established within the EU and those concerning services operating within non-EU countries. The first part of this panel was devoted to the topic of non-EU services from a legal angle, looking in particular at the interaction between the AVMSD and the European Convention on Transfrontier Television (ECTT); whereas the second part focused at the analytical framework that has been recently developed to assess platforms.

The European Convention on Transfrontier Television and the EU

Silvia Grundmann, Head of the Media and Internet Division at the Council of Europe, retraced the history of the European Convention of Transfrontier Television (ECTT). There are 33 members to this convention, among which 21 EU member states. Since its entry into force, in 1993, many technological and political developments have happened which required the Convention to be revised. Nevertheless, the Committee of ministers of the Council of Europe was unable to adopt the revision of the Convention, despite several failed attempts between 2009 and 2011. The current text of the ECTT is out-dated. In 2014, a recommendation from the Parliamentary Assembly of the Council of Europe has called for a revision of the Convention¹² However, on 23 September 2014, the Committee of Ministers of the Council of Europe informed that "(it) has not allocated any resources to work on the European Convention on Transfrontier Television over the last three years and sees no reason to review its position for the time being¹³".

More recently, the Steering Committee on media and information society has recalled the current standstill on the revision of the ECTT and invited member states parties to the ECTT to communicate their position on this matter at the next CDMSI meeting in June 2017.

She concluded by stating that the CDMSI will closely follow the revision of the AVMS Directive and will give feedback to the Steering Committee.

For additional background information on the failed attempt to revise the ECTT and the arguments put forward by the European Commission, **Marcel Boulogne** referred participants to the Minutes of the 34th Meeting of the Contact committee of the AVMS Directive on 24 May 2011. The Commission's position has not significantly changed on the subject since that date.

¹² Recommendation 2036 (2014) Final version, Revision of the European Convention on Transfrontier Television <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=20507&lang=en>

¹³ Reply | Doc. 13605 | 23 September 2014; Origin - Adopted at the 1207th meeting of the Ministers' Deputies (17 September 2014: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21152&lang=en>



Jurisdiction and connection criteria

Mark Cole, Professor for Media and Telecommunication Law at the University of Luxembourg, recalled the current AVMS Directive's jurisdiction criteria as well as their hierarchy. The primary criterion to determine the appropriate jurisdiction as set out by Art. 2(3) is the one of the country of establishment derived from the location of the headquarters or of the majority of the workforce of the AV media service provider. The secondary (technical) jurisdiction criteria are set out in by Art. 2 (4) and place the main emphasis on the location of the uplink since the revision of 2007.

The recent ERGA report on territorial jurisdiction¹⁴ highlighted that the application of the current AVMSD criteria creates a risk of regulatory gaming, allowing picking the state with the most lenient framework. The report also points out difficulties in the application of the current jurisdiction criteria in practice.

The new AVMS draft states that member states have to communicate to the Commission a list of the providers under their jurisdiction. He proposed that such lists should be transparent for all.

If a non-EU provider offers a service globally and the AVMS jurisdiction criteria do not apply, that means, in theory, that each member state is free to regulate that service in the way they deem appropriate. The AVMS revision proposal addresses the status of video service providers (VSPs) that are not established within the EU but offer services in certain member states with Art. 28b which introduces new establishment criteria, notably based on the notion of parent company or subsidiary. He believes that any type of establishment should be sufficient to enforce EU rules and that this would foster cooperation between regulators. He also suggested that a hierarchy of the applicable legal frameworks should be put in place, placing the AVMS Directive at the top, above the E-Commerce Directive.

Discussion

Marcel Boulogne reacted by saying that the criteria determining establishment under the current AVMS Directive are clear enough, as in the case of YouTube.

Heiko Zysk questioned the legal construction, by bringing the issue of data protection on the table. All video-sharing platforms use personal data and are therefore bound by data protection regulation. Could the country of jurisdiction under the AVMS Directive determine their jurisdiction with regard to data protection related issues? According to Heiko Zysk there is a need for synchronisation between all the present legal frameworks.

Paul Avril, Advisor for European Affairs at the French regulatory authority (CSA), highlighted the difficulties that they have faced with the application of the subsidiary up-link criterion given its volatility. He added that Article 28a of the revision proposal needs more clarification in the CSA's view.

Celene Craig shared her insight on the situation in Ireland. The Irish regulator (BAI) has no role in terms of on-demand services, which is somewhat unique among regulators. It has limited powers, as

¹⁴ ERGA report on territorial jurisdiction in a converged environment of 17 May 2016; <https://ec.europa.eu/digital-single-market/en/news/erga-report-territorial-jurisdiction-converged-environment>



it only approved the Code of conduct of the body regulating this area. As a largely English-speaking country, a big part of the services received are coming from outside of their jurisdiction. It is still very unclear, at this point of time, which regulatory arrangements are likely to be put in place by the Irish authorities with regard to the regulation of VSPs

Global platforms

Pieter Nooren,¹⁵ Senior Scientist at TNO, ran a presentation based on a study whose aim is to develop an analytical framework to identify and assess the policy questions related to digital platforms (not limited to video-sharing platforms, but also covering Uber, Amazon, among others) – One of the conclusions of the study is that to understand platforms, one needs to understand the business models they use. Their key characteristics are geographical dependency; public and service market; and editorial control. Some platforms like Netflix, have the provision of audiovisual content as their main activity, while others use video-sharing as one of many components driving their network.

Facebook does more than “social networking”. It also hosts online games, videos, live streams and many other things. Although Facebook does not earn money directly through users – as it is a free service –, its business model is constructed on advertising, which works through users and through commercials of potential interest to them. It uses the data it gathers on users internally and externally, to propose content of interest to them.

He underlined that in order to determine the applicable regulation, the main characteristics of platforms need to be assessed individually, as a transversal approach might not be suitable and may fail to reflect the diversity of the existing cases. From a practical point of view, he recommended to take a closer look at existing measures before considering new rules as legal frameworks need time to be set, especially in an evolving technological environment.

Discussion

underlined the fact that although the Directive provides a general definition of video-sharing platforms, the focus and the discussion concern specially the main video-sharing platform, YouTube.

Sophie Stalla-Bourdillon, Associate Professor in Information Technology / Intellectual Property Law at the University of Southampton, agreed on the aforementioned point, as she wondered whether within the video-sharing platforms there would be a differentiation between big and small players. To illustrate her purpose she mentioned Article 13(5) which allows smaller on-demand service providers to benefit, under certain conditions, from an exemption of a general obligation – prominence and share obligations with regard to European works.

Peter Nooren expected the regulators to focus on the larger ones. It is also possible to apply existing legislation in a stricter way on big players.

Silvia Grundmann remarked that the idea is good but feared that the problem might come from some regulators' limited financial resources.

¹⁵ Link to the presentation of Pieter Nooren: mycloud.coe.int/index.php/s/lr7xHp944I7nGch



Monica Horten wondered which current legal instruments could be applied to video-sharing platforms. She mentioned the fact that platforms use their own terms of service to regulate content, some of which should have been defined under terms of law, in the first place.

In reaction to what has been said, **Marcel Boulogne** remarked that such platforms need to include elements about protection of minors, hate speech, harmful content and add them in their own terms and condition, possibly making them stricter, to keep up with requirements foreseen by the Directive.

Emmanuelle Machet then concluded panel 3, leading up to the World Café discussions on asymmetries, tools and remedies.



Panel 4. Round-up discussion: Working together

The last panel of the workshop offered the opportunity to take part in a “round-up discussion” about the available and possible tools and remedies. **Maja Cappello**, Head of the Department for Legal Information of the European Audiovisual Observatory, chairing this panel, invited the participants to engage in group discussions inspired by a “world café” approach. Groups included media regulators, users and civil society, media players and industry, European and national public institutions with the following distribution of the participants:

1	Media regulators (9)	Table host: Celene Craig Brainstormers: Kalle Varjola, Peter Hyde Discussants: Paul Avril, Cathy Taylor, Julie Mamou, Jerzy Walewski, Thomas Fuchs, Bernardo Herman
2	Users and civil society (8)	Table host: Maria Michalis Brainstormers: Luc Steinberg, Jeanette Steemers Discussants: Sophie Stalla-Bourdillon, Monica Horten, Ronan Fahy, Gianna Iacino, Pieter Nooren
3	Media players and industry (7)	Table host: Heiko Zysk Brainstormers: Andrea Stazi, Cecil Ameil, Carolina Lorenzon Discussants: David Cooke, Jerome Chung, Jenny Weinand
4	Commission and institutions (5)	Table host: Marcel Boulogne Brainstormers: Elvana Thaci, Joanna Chansel Discussants: Silvia Grundmann, Julie-Jeanne Regnault,


Discussion

The table discussions were followed by an eager exchange of comments on what had been reported by the rapporteurs of the four working groups. Many ideas emerged, such as the need for more clarification of some rules in order to avoid legal uncertainty.



At the end of the brainstorming session, the table hosts for each group summarised the main points of discussion.

The following table provides an idea of the big lines of the discussion identifying existing tools and remedies and what each stakeholders deems possible to do with them (the blue cells with “Can/cannot”) and what they expect from each of the others (to white cells be read horizontally):




	Media regulators	Users and civil society	Industry and media players	European and national public institutions
Available tools and remedies	AVMS Directive, E-commerce Directive. If no competency at EU level, member states can individually apply national remedies.	Users are represented by small associations, can lobby, but lack legitimacy.	AVMS Directive, E-commerce Directive. If no competency at EU level, member states can individually apply national remedies.	European regulation and national laws. Encourage co-regulation initiatives and exchange of best practices.
Media regulators 	Can do <ol style="list-style-type: none"> 1. Share approaches to regulation, with new players in scope. 2. Share legal insight with new players. 3. Discuss case for regulation, what it can bring into the sector also regarding users 4. The regulatory mind-set needs to evolve and be prepared for change. 5. Provide guidance for industry players on upload of content on video-sharing platforms to be on the right side of the law. 6. Have greater level of engagement with new media players that will be covered by the Directive to help develop an understanding of what is possible and what is not. 	Expectations <ol style="list-style-type: none"> 1. Same level of protection regardless of the platforms. Also linked to better information and transparency, and media literacy. 2. Regarding complaint mechanisms against operators targeting other countries: users feel powerless. 	Expectations <ol style="list-style-type: none"> 1. Flexibility when applying rules, in a global competition. 2. Appropriate funding of regulators is important, as no regulator is practically able to operate under the abundance of content. 	Expectations <ol style="list-style-type: none"> 1. Common interpretation of EU regulation, where possible. 2. Transparency on their practices.



	Media regulators	Users and civil society	Industry and media players	European and national public institutions
	Cannot do Difficult to enforce without powers, players also know this. Provide copy clearance services			
Users and civil society 	Expectations Media literacy requires a wider engagement, an idea of shared responsibility, with regard to the protection of minors. 1. Greater sharing of knowledge for parents on parental control settings. 2. Giving prominence to such protection tools.	Can do Spot gaps in policy proposals to identify what users want. Cannot do Not all people are equally media literate. Issue is too complex, regulators give up, which is a situation players can exploit. This leaves users out of the loop.	Expectations 1. Help in finding self-regulatory tools for the industry. 2. More collaboration with users.	Expectations Take their responsibility in flagging the content.
Industry and media players 	Expectations 1. Sharing information in order to form viewers and share tools that might help active choice. 2. Formal requirements should be more visible. 3. Have stronger dialogue together with the national regulators.	Expectations 1. Help finding approach for content classification. 2. Make it clearer how to flag content that can be problematic. 3. Invest in media literacy.	Can do Follow existing regulatory framework. Cannot do Face a common set of demands for all players. Solve jurisdiction problems (btw MS or EU and others).	Expectations Take responsibility. Inform society on what they are ready to do.



	Media regulators	Users and civil society	Industry and media players	European and national public institutions
EU Commission and public institutions 	Expectations <ol style="list-style-type: none"> 1. More engagement in media literacy and education 2. Be "brave" in applying the rules. 3. Maintenance of database of AVMS providers, with NRAs giving information 4. Re other institutions, the Mavise of the Observatory can be important for jurisdiction issues 5. Make it mandatory for regulators to engage in media literacy, which has a tight budget. 	Expectations <p>Focus their thinking more on guiding users, and not only about the big players.</p>	Expectations <p>Same simple rules for same services.</p>	Can do <ol style="list-style-type: none"> 1. Support regulatory cooperation. 2. Listen to all stakeholders, including users. 3. Organised media groups to facilitate discussions Cannot do <p>Public institutions cannot enforce everything. Give up their role as "guardians of the treaties". Media literacy cannot be centralised because of subsidiarity principle.</p>



Closing remarks

Each of the four panels could easily have filled a full-day conference, but the highly interactive character of the workshop allowed most aspects to be put on the table.¹⁶

An IRIS *Plus* publication of the European Audiovisual Observatory on "VOD, platforms and OTT: which promotion obligations for European works?" was announced to be published in January 2017.¹⁷ It focuses on the revision of the AVMS Directive and several issues which were raised during this workshop.

As the role of users and the importance of media literacy popped up during the discussion, the participants were informed of the soon to be published Mapping report of the media literacy actions and practices in the 28 EU member states.¹⁸ The study was conducted by the European Audiovisual Observatory and commissioned by the European Commission.

¹⁶ A storify collects some of the images of the workshop and interactions on social media, <https://storify.com/EuAVObservatory/workshop-2016>.

¹⁷ www.obs.coe.int/documents/205595/8351541/IRIS+plus+2016-3+VOD%2C%20platforms+and+OTT+which+promotion+obligations+for+European+works.pdf.

¹⁸ www.obs.coe.int/reports

