



# ERGA report on territorial jurisdiction in a converged environment

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**17 May 2016**

*-Version of the report prior to English language check-*

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## INTRODUCTION

The European Regulators Group for the Audiovisual media services (ERGA) was established in March 2014, by the European Commission's Decision C(2014)462 of 3 February 2014, as an advisory body to the Commission. Its task is to advise and assist the Commission in its work to ensure a consistent implementation of the Audiovisual Media Services (AVMS) Directive, and as to any matter related to audiovisual media services within the Commission's competence.

One of the topics enlisted in ERGA's Work Programme for 2015 is territorial jurisdiction, on which a specific subgroup has been created. Its task is to examine the fitness of the provisions related to territorial jurisdiction of the AVMS Directive.

The notion of territorial jurisdiction determines which Member State's regulation shall apply to a certain audiovisual media service. As stated in its recital 33, the regime of territorial jurisdiction applied in the AVMS Directive is based on the country-of-origin principle. Combined with freedom of establishment, and other mechanisms – including procedures to promote cooperation, procedures for substantiating deliberate circumvention, and procedures for derogating from the principle of freedom of transmission – the country-of-origin principle means that audiovisual media service providers are allowed to operate in other Member States, while only complying with rules from the Member State under whose jurisdiction they fall.

## Purpose of the Report

This report represents a collective view of ERGA on how the territorial jurisdiction of the AVMS Directive should evolve. This is part of a wider programme of work assessing the evolution of the European regulatory framework in a converged media age, which includes:

- a report on **material jurisdiction in a converged environment**<sup>1</sup>; and
- a report on **the protection of minors in a converged environment**<sup>2</sup>.

The AVMS Directive was adopted almost nine years ago. Since then, the European audiovisual sector has evolved rapidly and undergone significant changes, such as the development of internet-based television and of broadband on-demand audiovisual media

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<sup>1</sup> ERGA report on material jurisdiction in a converged environment – ERGA 2015(12) – published on 26 January 2016, available at: <https://ec.europa.eu/digital-agenda/en/news/erga-report-material-jurisdiction-converged-environment>

<sup>2</sup> ERGA report on the protection of minors in a converged environment – ERGA 2015(13) – published on 26 January 2016, available at: <https://ec.europa.eu/digital-single-market/en/news/erga-report-protection-minors-converged-environment>

services, with the availability of new forms of contents, provided by a growing range of content providers – originating in EU or non-EU countries – on a growing number of devices.

These recent developments, often referred to under the topic of “convergence”<sup>3</sup>, may raise questions concerning the regime of territorial jurisdiction of audiovisual media services at EU level. In parallel, along the years, the implementation of the AVMS Directive has given rise to difficulties in applying its provisions related to territorial jurisdiction. This has prompted questions as to whether the approach currently taken in the Directive needs to adapt.

Overall, these challenges include:

- **the protection of national general interest objectives**, including the **conditions of fair competition** between all players targeting European national markets with audiovisual media services;
- **the implementation of the establishment criteria** that determine jurisdiction;
- **the functioning of several mechanisms foreseen in the AVMS Directive**, including the procedures to promote **cooperation**, the procedures for substantiating deliberate **circumvention**, and the procedures for **derogating from the principle of freedom of transmission**.

## Methodology and structure of the Report

This report has been prepared by a sub-group comprising representatives from 27 ERGA member and observer countries<sup>4</sup>. The sub-group decided to frame the report around three main parts:

1. the principles of the framework of the AVMS Directive that have an effect in terms of territorial jurisdiction;
2. the mechanisms of the AVMS Directive;
3. the suitable solutions to address the above-mentioned challenges;

In June 2015, the subgroup sent to all NRAs participating in ERGA a questionnaire aimed at collecting relevant information and data regarding their experience and understanding of territorial jurisdiction. The questionnaire was answered by 27 ERGA members and observers,

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<sup>3</sup> Media convergence is understood as “the progressive merger of traditional broadcast and internet services”, according to the definition given by the European Commission in its Green Paper “Preparing for a fully converged audiovisual world: growth, creation and value” (COM(2013) 231 published on 24 April 2013).

<sup>4</sup> KommAustria (Austria), CSA/VRM/Medienrat (Belgium), AEM (Croatia), CRTA (Cyprus), RRTV (Czech Republic), TRA (Estonia), FICORA (Finland), CSA (France), DLM (Germany), NCRTV (Greece), NMHH (Hungary), BAI (Ireland), AGCOM (Italy), NEPLP (Latvia), RTK (Lithuania), ALIA (Luxembourg), BAM (Malta), CvdM (the Netherlands), Medietilsynet (Norway), KRRiT (Poland), ERC (Portugal), RVR (Slovakia), AKOS (Slovenia), CNMC (Spain), SPBA (Sweden) and OFCOM (United Kingdom).

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The data collected gives a comprehensive picture of the way the current framework related to territorial jurisdiction is interpreted across Member States. It has also allowed the subgroup to identify the benefits and the current and the potential future challenges in connection with the implementation of the provisions of the AVMS Directive related to territorial jurisdiction.

This report builds on the answers provided by the national regulatory authorities to this questionnaire and summarizes the findings stemming from the analysis of those answers with the aim of providing the EU Commission with recommendations to handle a revision of the provisions of the AVMS Directive regarding territorial jurisdiction.

After a brief introduction focused on the reasons why the topic discussed in the chapter is important for territorial jurisdiction, each of the three chapters describes the main findings from the answers.

The conclusions and recommendations of the report, which are based on those findings, provide the opinion of ERGA on how the current regulatory framework could be improved as regards the matter of territorial jurisdiction, including options for non-legislative and legislative options.

# EXECUTIVE SUMMARY AND CONCLUSIONS

## 1. FRAMING THE PROBLEMS

This section summarises problems described by ERGA members as resulting from the cross-border distribution of audiovisual media content, taking a thematic-orientated approach without distinguishing between the various legal grounds or mechanisms for the problem reported.

### 1.1 Forum shopping

The country-of-origin principle and the principle of freedom of establishment are acknowledged by many as a main driving force behind the development of a European single market for audiovisual services today. However, many NRAs also see these principles as **creating a risk of forum shopping** (in the sense that an AVMS provider may choose to establish itself in a Member State in order to avoid either stricter regulation in certain areas or more active and effective monitoring by the NRA in general). In cases when the activity of an AVMS provider does not require the AVMS service to be located in the receiving territory, **such avoidance could be seen as deliberate** – and as the reason for the choice of establishment.

It is also recognized that there are many other reasons for establishment, including favorable tax regimes, reliable and creative production sectors, labour legislation, geographical location, advertisement revenues, less bureaucracy, better evolved infrastructure, and other economic considerations as well as target audiences.

### 1.2 Difficulties with the enforcement of national stricter rules

Approximately half of the NRAs have expressed that the freedom of establishment has led or can lead to an **unlevel playing field, or perhaps rather unfair competition**, among different media services targeting or being established in different Member States, potentially due to the fact that the **Member States have chosen to adopt stricter rules** in certain areas in accordance with Article 4 of the AVMS Directive. Some NRAs have pointed out that this is an inherent tension in the AVMS Directive, which seeks to achieve a compromise between the aim of **facilitating cross-border European content provision** on the one hand, and the social and democratic aim of **respecting cultural diversity** among Member States on the other.

Many NRAs express the **need to retain the freedom** for Member States to adopt stricter rules in order to preserve cultural diversity, fulfill national objectives and public policy goals, as well as to allow the Member States to protect their citizens accordingly, despite their inability to enforce such rules with the regulatory mechanisms described above.

## Consumer protection and pluralism

The **protection of consumers is one central aspect** that is affected by content made available to citizens in one Member State by an AVMS provider established in another Member State or a non-EU country. This is particularly true in cases where the provider established in another Member State has a significant presence in the market of the targeted Member State in terms of **high audience shares**. Predominantly, this concerns the protection of minors and the protection of consumers from audiovisual commercial communications prohibited under the stricter national rules of one Member State but allowed under the rules of another.

This can cause significant problems for Member States in that either they are not able to impose the stricter rules that apply to services within their jurisdiction to services that are outside of their jurisdiction but nevertheless available in their country, or that the mechanisms of the Directive allowing for the enforcement of those stricter rules in certain circumstances were perceived or assessed as difficult if not impossible to use.

## Economic aspects

Several NRAs have reported that media services targeting their Member State while being delivered from another Member State may have negative effects on their national market, since for example **certain obligatory contributions to the production of audiovisual content might not apply** to service providers established in other countries. In a similar vein, certain **advertising practices** of broadcasters established in a certain Member State might lead to distortions of the national market in another.

Several NRAs have reported severe market distortions in regards to **advertising revenues**, in particular in cases where the AVMS provider established in another Member State has a significant presence in the national market. Concerns have been raised by NRAs that broadcasters established in other Member States attract **high shares of marketing budgets** of national industry by specifically addressing the citizens of the country of destination.

## 2. PROBLEMS WITH EXISTING MECHANISMS OF THE DIRECTIVE

### 2.1 Determining territorial jurisdiction

#### Primary jurisdiction criteria

ERGA Members have considerable experience in applying the primary jurisdiction criteria as set out in Article 2(3) of the Directive. Most confirmed that the criteria are relevant to the services for which they are responsible and work well. But a significant number stated they had encountered **difficulties in applying the criteria and considered they were no longer**

**effective.** Several described disputes between NRAs over jurisdiction, which had been experienced by six members of ERGA.

The key themes to emerge were:

- (i) a **lack of clarity** of the criteria themselves (in particular a lack of common understanding of what constituted “editorial control”), which were variously described as “vague” and too open to interpretation;
- (ii) **enforcement challenges**, including the difficulty in verifying information about the location of aspects of providers’ activities, and related to the ease with which a head office can be easily located in any Member State; and
- (iii) uncertainty in how to apply criteria to companies with **unusual or new business models** (for example where functions were split across territories, including those outside the EU), and the observation that businesses have structured themselves around the current criteria in a way that could look like “**regulatory gaming**”.

### Secondary jurisdiction criteria

Far fewer ERGA members had experience of applying the secondary, or “technical”, jurisdiction criteria set out in Article 2(4) of the Directive. However, the understanding of those who did have experience of applying these criteria was extensive, and allows us to draw some key observations of the problems involved:

- (i) **Applying the criteria** can be extremely difficult in practice because of the nature of the satellite broadcasting industry and business models. Resulting problems are: a lack of understanding of registration requirements on the part of providers; multiple satellites carrying the same service and the ease of migration from one satellite to another; subcontracting of uplinks; lack of day-to-day oversight of services available on a particular satellite (up- or down-linked); and a lack of any common understanding of the “satellite footprint” criteria.
- (ii) **Enforcement problems** described also seemed to stem from the nature of satellite broadcasting, which often involves more players in a more complex value chain than terrestrial. In particular, NRAs experienced problems with non-EU services carried on EU satellites, through delays in communication and a lack of understanding of the EU regulatory landscape.
- (iii) The **limitations of the criteria** were also noted, in that they apply only to satellite broadcasts and cannot at present be extended to make non-EU services available in the EU via cable, IPTV or the open internet comply with the AVMS Directive.

## 2.2 Freedom of reception, exceptions and derogations



There is limited experience among ERGA members of applying the procedure in the Directive to derogate from freedom of reception (as set out in Article 3 of the Directive), and almost no NRAs have given consideration to how they would apply the concept of a “manifest[], serious[], or grave[]” breach of articles 27 or 6 of the Directive . For those who have followed the procedure, or at least given it serious consideration, key criticisms to emerge were:

- (i) **the timeframe** for each stage of the procedure to derogate in relation to television broadcasting, as set out in Article 3(2); the procedure was described as taking too long, and – conversely – the 15 day deadline for reaching an “amicable settlement” as unrealistic;
- (ii) the **lack of an emergency procedure** (such as that for non-linear services, as set out in Article 3(5)) which meant that – in conjunction with the detailed requirements of Article 3(2) – action could not be taken in urgent cases; and
- (iii) the lack of clarity over what is meant by “**an amicable settlement**”.

## 2.3 Formal cooperation

Few NRAs have had experience of using the formal cooperation procedure envisaged in Article 4(2), although around half consider it to be a suitable means of addressing the challenges posed by the ability of Member States to impose stricter rules domestically.

In practice, **very few members have had an entirely positive result** through the use of the mechanism, because it places no obligations on broadcasters to comply with a request from their NRA. However, it is recognised that the process has helped raise awareness of the existence of stricter rules, and occasionally has facilitated reaching compromises with broadcasters. One NRA (Norway) was able to provide an example of broadcasters voluntarily complying with stricter rules in a country of reception specifically following a formal cooperation procedure. There are also examples of broadcasters voluntarily tailoring their content to the country of reception without a formal request. A significant number of NRAs having tried the mechanism have been met with a rejection of the request.

## 2.4 Demonstrating deliberate circumvention

**No successful attempts to demonstrate deliberate circumvention** of a receiving Member State’s stricter rules were reported. There is consensus that it is difficult or very difficult to prove deliberate circumvention and that this is not helped by a lack of any indication of what evidence threshold would be needed.

## 2.5 Informal cooperation

Informal cooperation is also envisaged as a route to solving problems related to cross-border broadcasting, and is regarded positively by a clear majority of members. However, despite the anecdotal successes mentioned by many NRAs, some have pointed out that informal

cooperation on its own has **not proved sufficient to meet the bigger challenges** of problems such as determining jurisdiction.

### 3. ERGA RECOMMENDATIONS

This section summarises possible solutions proposed by ERGA to the challenges outlined above. In line with the structure of the report, it considers:

1. Non-legislative solutions that ERGA could implement;
2. Non-legislative solutions that the Commission could implement;
3. Legislative solutions that entail amendments to the mechanisms that support the territorial jurisdiction framework;
4. Cooperation between regulators; and
5. Legislative solutions that would require more fundamental changes to the operation of the territorial jurisdiction framework.

#### 3.1 Non-legislative solutions that ERGA could implement

##### I. Common information system on services and providers:

ERGA members support the idea of a common system of information on broadcasters that are licensed/authorised in each Member State. It is generally recognised that this would improve cooperation between regulators, and prevent instances of multiple licensing.

There were different views as to the type of information that should be included in such a system, and what form the system should take. Some NRAs noted that resource considerations and differences in NRAs' information gathering powers point to the need for further discussion on this point. A number of NRAs highlighted existing work led by EPRA and the EAO to improve the MAVISE database.

How to enforce and facilitate the exchange of best practices can be explored further within the ERGA Subgroup on *Creating Digital European Toolkit (DET) for efficient and flexible regulation* which has been created by ERGA Work Programme for 2016.

**Recommendation 1:** ERGA believes a common information system on media services licensed in each Member State can play an important role in ensuring the effective implementation of the framework for determining territorial jurisdiction. ERGA notes that work led by the European Audiovisual Observatory and EPRA is underway, and underline ERGA's commitment to supporting this initiative.

## II. Common information system on national legislative frameworks:

ERGA supports the idea of developing an information system mapping different national rules, as it could help raise awareness of different national interpretations of AVMS rules. In order to build on what already exists and to diminish the amount of administrative and translation work that this could entail, the AVMS-Database of the EAO is considered to be an appropriate basis, as it contains – in English – the national stricter rules for the areas harmonised by the AVMSD.

**Recommendation 2:** ERGA supports the further development of any information sharing systems on national legislative frameworks to help raise awareness of different national interpretations of AVMS rules.

## III. Exchange of good practices:

ERGA is supportive of further informal cooperation and exchange of best practices. NRAs have submitted a range of proposals for areas where regulators could collaborate to develop common approaches based on their experiences. These included interpretations of the establishment criteria, experiences of implementing Article 3 (derogation from the principle of freedom of reception) and determining whether a service is “wholly or mostly” targeting a Member State.

**Recommendation 3:** ERGA will consider in the future how to foster a more common approach to the implementation of key areas of the framework for establishing territorial jurisdiction.

## 3.2 Non-legislative solutions that the Commission could implement

ERGA supports in principle the clarification of several aspects of the territorial jurisdiction framework under the AVMSD. In particular, this is sought on the application of the establishment criteria (Article 2), the possibility to restrict transmission (Article 3) and the anti-circumvention procedures (Article 4). There is a range of non-legislative instruments available to the Commission which could be possible solutions, including soft-law (Recommendations) and/or official guidance.

**Recommendation 4:** this ERGA report lists a number of non-legislative initiatives to clarify elements of the territorial jurisdiction framework under the AVMSD. ERGA would support being associated with these initiatives, should the European Commission make use of them.

### 3.3. Legislative solutions to amend the mechanisms that support the territorial jurisdiction framework

#### I. Article 2 – The primary establishment criteria

ERGA calls upon the Commission to take action to clarify the establishment criteria, in particular on concepts such as “editorial control”.

**Recommendation 5:** ERGA calls on the 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”.

#### II. Article 2 - The secondary establishment criteria

Views appear to be split on whether the secondary criteria should be amended to cover non-EU services delivered over technologies other than satellite (e.g. internet distribution). Several individual NRAs made suggestions as to how this could be achieved in practice.

**Recommendation 6:** ERGA could further explore whether the secondary jurisdiction criteria could be modified to cover non-EU services delivered over technologies other than satellite

#### III. Article 3 – Derogation from the principle of freedom of reception

ERGA calls on the Commission to make the derogation procedure more efficient, and to clarify certain terms in it. ERGA also supports the idea of having the same grounds for derogation on linear and on-demand services.

**Recommendation 7:** ERGA calls on the Commission to review and clarify the administrative procedure for derogating from the principle of freedom of reception under Article 3. In doing so the Commission should ensure that the procedure is practically enforceable and efficient, rather than formal and protracted.

**Recommendation 8:** ERGA supports the view that the same grounds for derogation should apply across all audiovisual media services. Further work should be carried out by ERGA to determine whether these grounds should be levelled up or down. Moreover, the fast track procedure of Article 3.5 should also apply to all audiovisual media services.

#### IV. Article 4.2 – The formal cooperation procedure

ERGA supports the extension of the application of the enhanced cooperation procedure (under article 4.2) to video-on-demand services.

**Recommendation 9:** ERGA considers that in a revised Directive, the formal cooperation procedure envisaged in Article 4.2 should also apply to on-demand services.

Considering that very few members have had an entirely positive result through the use of the formal cooperation mechanisms and that most of them have no providers falling under another Member State's jurisdiction who have willingly complied with their stricter rules, ERGA suggests that the procedure could be simplified and improved.

**Recommendation 10:** ERGA supports the view that the Commission should consider ways of improving the formal cooperation procedure outlined in Article 4.2.

## **V. Article 4.3 – The circumvention procedure**

ERGA members have limited experience of using the procedure, though a majority of them noted the difficulties in demonstrating deliberate circumvention. ERGA supports the idea that the circumvention procedure should be reviewed and clarified.

**Recommendation 11:** ERGA calls on the Commission to review, clarify and simplify the procedure regarding circumvention of stricter or more detailed rules adopted by a Member State.

ERGA consider that the anti-circumvention provision should also apply to on-demand service providers.

**Recommendation 12:** ERGA considers that in a revised Directive, the anti-circumvention provisions in Article 4.3 should also apply to on-demand service providers.

## **VI. Cooperation between regulators**

The concept of informal cooperation – being undefined in legislation – is understood in different ways, but highly valued by regulators.

**Recommendation 13:** ERGA members call upon the Commission to work with ERGA to ensure optimal cooperation between regulators on matters of territorial jurisdiction.

## **3.4 Legislative amendments which entail more fundamental modifications to the Directive**

### **I. Possible changes to the country of origin approach**

ERGA members have expressed a range of different viewpoints as to whether the country of origin approach should change, and if so in what areas and how. Many ERGA members support a country of origin approach overall but make suggestions for a “country of destination” approach in one or more specific areas. These include in relation to one or

more **content standards** obligations (e.g. protection of minors, categories of advertising) or **cultural promotion** mechanisms (e.g. content quotas or financial obligations). Some argue that it should only apply in the context of particular services, such as **services originating from countries outside the EU**, or **video-on-demand services**. Others suggest that the country of destination could be determined by referring to the **effects on audience, market, market shares and economic activity in the targeted country** when a market is targeted. There are also several objections from members to taking any kind of country of destination approach, with several NRAs expressing concerns about the implications for the free flow of media services and for media pluralism in the EU.

**Recommendation 14:** ERGA could consider further in-depth discussion on possible variations to the country of origin approach within the course of its future works.

## II. Harmonised licensing

Views were split on the need for a harmonised licensing framework, with several NRAs expressing views both in favour and against this. Views were also split on the desirability of a system of mutual recognition of decisions related to licence or authorisation revocation. Overall, NRAs seemed supportive of the idea of exchanging best practices in relation to licensing/authorisation procedures.

**Recommendation 15:** given the complexity of views, ERGA would support at this stage the on-going exchange of best practices among regulators in relation to licensing/authorisation procedures. This could be dealt with for instance within the ERGA Subgroup on *Creating Digital European Toolkit (DET) for efficient and flexible regulation* which has been created by ERGA Work Programme for 2016.

## CHAPTER 1 – The principles of the framework

### 1.1 The main principles and objectives of the AVMS Directive that have an effect in terms of territorial jurisdiction

This section discusses the main principles on which the AVMS Directive was built as regards the determination of territorial jurisdiction – that is, taking a broad definition, the regime used to determine which Member State is responsible for regulating a given audiovisual media service or service provider – as well as the effects of their implementation on the European audiovisual landscape.

It draws on a variety of sources including statistics and observations provided in the responses to a questionnaire circulated among ERGA Members in June 2015, and research published by the European Commission and the European Audiovisual Observatory.

Within the context of the assessment of the regulatory fitness of the current AVMS Directive, it seems necessary to go back to the principles which presided over the adoption of the country-of-origin approach and to the key concepts of its implementation, in order to be able to assess the current situation against them.

#### 1.1.1. The creation of a European single market for audiovisual media services

According to the European Commission's website <sup>5</sup>, the role of the European Union in the audiovisual field is to create a **single European market** for audiovisual media services.

Like the former *Television without Frontiers* (TVwF) Directive (Directive 89/552/CEE), which was adopted in 1989 and revised in 1997 and in 2007, the AVMS Directive aims at ensuring the free circulation of audiovisual media services within the territory of the European Union. Recital 104 of the AVMS Directive states the main goals of this legal instrument as follows: **“the creation of an area without internal frontiers for audiovisual media services whilst ensuring at the same time a high level of protection of objectives of general interest**, in particular the protection of minors and human dignity as well as promoting the rights of persons with disabilities.”

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<sup>5</sup> European Commission website – Digital Agenda for Europe (<https://ec.europa.eu/digital-agenda/en/audiovisual-and-other-media-content>)

The AVMS Directive seeks to achieve this through **the coordination of national legislation** in a designated range of areas. For each of these areas, the AVMS Directive provides a set of minimum common rules<sup>6</sup>. The coordinated areas are:

- prohibition of incitement to hatred;
- accessibility for people with disabilities;
- principles of jurisdiction (“country of origin” principle);
- events of major importance for society;
- promotion and distribution of European works and independent works;
- audiovisual commercial communications;
- protection of minors.

As for any other type of service, the core principles governing the European Single Market for audiovisual media services are the freedom to establish a company in another EU country (article 49 of the Treaty on the Functioning of the European Union (TFEU)) and the freedom to provide or receive services in an EU country other than the one where the company or consumer is established (article 56 TFEU). The achievement of the Single Market remains a constant objective of the European Commission, European Parliament and European Council. In this respect, the European Commission presented on 28 October 2015 a new Single Market Strategy to deliver a deeper and fairer Single Market that will benefit both consumers and businesses.

### **1.1.2. The freedom of establishment**

As underlined above, the AVMS Directive was built on the existing principles of the Single Market as they are stated in the European treaties. Articles 49 to 55 TFEU lay down the freedom of establishment as a fundamental right of the European Union. The freedom of establishment enables an economic operator (whether a person or a company) to carry out an economic activity in a stable and continuous way in one or more EU Member States. Pursuant to the treaties, EU companies have the freedom to establish themselves in other EU countries.

Recital 40 of the AVMS Directive recalls that media service providers benefit from the freedom of establishment instituted by the TFEU<sup>7</sup>.

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<sup>6</sup> Recital 11 of the AVMS Directive: “It is necessary, in order to avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area, that at least a basic tier of coordinated rules apply to all audiovisual media service [...]”

<sup>7</sup> Recital 40: “Articles 49 to 55 of the Treaty on the Functioning of the European Union lay down the fundamental right to freedom of establishment. Therefore, media service providers should in general be free to choose the Member States in which they establish themselves. The Court of Justice has also emphasised that ‘the Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established’.”



### **1.1.3. The free circulation of services**

The AVMS Directive aims at ensuring the freedom of circulation for audiovisual media services within the European Union, based on the principle of the internal market.

Article 56 of the TFEU lays down the freedom to provide services in the EU as a fundamental right of the European Union. The freedom to provide services has some features in common with the freedom of establishment (cf. point 1.2 *infra*) but the application of these two fundamental freedoms is mutually exclusive. The principle of freedom to provide services guarantees EU citizens and companies the freedom to provide services on the territory of another EU Member State than the one in which they are established. The general approach of the AVMS Directive is to promote the free circulation of services by setting minimum standards that a provider has to comply with in order to circulate their services freely within the EU. In the text of the Directive, this principle transcribes into the “freedom of movement and trade in television programmes” (Recital 8)<sup>8</sup> and in the “freedom of reception”, asserted in Article 3, paragraph 1 of that Directive.<sup>9</sup>

The TFEU foresees in Article 52 that Member States can restrict the provision of certain services in their territories, provided that they have a legitimate objective relating to the protection of public policy, public security or public health. Any restrictions must be necessary and proportionate to the aims they seek to achieve. This approach gave birth to the provisions of the AVMS Directive (Articles 3 and 4) related to the mechanisms for derogating from the freedom of reception and restricting transmission.

### **1.1.4. The need to take into account the cultural dimension of AVMS**

The media sector plays a key economic, social and cultural role in Europe. From a purely economic perspective, the audiovisual sector directly employs more than one million people throughout the EU and, in 2014, the size of the audiovisual market in the European Union was €106 billion<sup>10</sup>. Because of the increasing significance that it takes in the daily life of EU citizens as a major way to communicate information, ideas and opinions, media has an ever

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<sup>8</sup> Recital 8: “It is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole.”

<sup>9</sup> Article 3.1: “Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.”

<sup>10</sup> Source : European Audiovisual Observatory.

stronger impact on society as a whole. It is also vital to develop and preserve culture, education and democracy. Considering these multiple dimensions, European audiovisual media policy reflects several intersecting policy areas of the European Union, notably the internal market, economic policy (including industry and competition) and cultural policy.

Therefore, the legal basis for building European audiovisual media policy draws on multiple sources. This arises from the double nature – both cultural and economic – of audiovisual goods and services.<sup>11</sup> In this respect, one should recall that, pursuant to article 167 of the TFEU, the European Union is required to take cultural aspects into account in all its policies, in particular in order to respect and to promote the diversity of its cultures. The AVMS Directive aims to respect this principle by taking account of cultural diversity within the European Union through **minimum harmonisation**. In accordance with the fact that it is a Directive that provides for minimum standards, the AVMS Directive foresees, through Article 4, the possibility for Member States to “require media service providers under their jurisdiction to **comply with more detailed or stricter rules in the fields coordinated by this Directive** provided that such rules are in compliance with Union law”. This system aims to allow the Member States to pursue specific public policy targets and to respect cultural diversity among Member States, as well as the ability of their respective regulatory authorities to protect their citizens accordingly.

#### 1.1.5. The “country-of-origin” framework

Given the complexity of this environment, which combines various policy areas and legal bases, the legislators have sought to strike a regulatory balance in the AVMS Directive, by creating a border-free market for audiovisual media services, whilst giving the Member States the freedom to require media service providers under their jurisdiction to apply more detailed or stricter rules in the fields coordinated by the Directive. On this matter, Recital 50 of the Directive states that “it is necessary to make arrangements within a Union framework, in order to avoid potential legal uncertainty and market distortions and to reconcile the free circulation of television services with the need to prevent the possibility of circumvention of national measures protecting a legitimate general interest.”

With this in mind, the country-of-origin principle was put at the core of the AVMS Directive. This principle states that providers only need to abide by the rules of the Member State in which they are established rather than the rules of multiple countries – thus aiming to reduce the potential regulatory burden for service providers, especially those wishing to develop cross-border business. It is introduced in Article 2(1) of the Directive: “Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual

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<sup>11</sup> As recognised by the 2005 UNESCO Convention on cultural diversity, signed by the European Union in 2006.

media services intended for the public in that Member State”. Recital 33 provides further information on the interpretation of this article: “The country of origin principle should be regarded as the core of this Directive, as it is essential for the creation of an internal market. This principle should be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.” The authorities in each EU country must ensure all audiovisual media services originating there, according to the jurisdiction criteria set in the AVMS Directive, comply with their own national rules giving effect to the Directive. The system also ensures that broadcasters who are not established in the EU but make their services available to EU audiences via satellite are covered by the Directive. In these cases, jurisdiction over these services is determined when they use a satellite capacity appertaining to a Member State or if the uplink is located on the EU territory. In all other cases of services coming from third-countries, recital 54 of the Directive states that “Member States are free to take whatever measures they deem appropriate with regard to audiovisual media services which come from third countries and which do not satisfy the conditions laid down in Article 2, provided they comply with Union law and the international obligations of the Union”.

In order to maintain the regulatory balance evoked before, this system was completed by several mechanisms, such as procedures to restrict the freedom of reception in certain circumstances, and procedures to prevent deliberate circumvention of the stricter rules adopted by the Member States.

Looking at these main principles and objectives of the AVMS Directive from the point of view of territorial jurisdiction leads to a need to analyse the tensions that can arise between them. For instance, differences in the implementation of the AVMS Directive among the Member States – be it the result of different national interpretations of the Directive’s provisions or the possibility given by the AVMS Directive to Member States to adopt stricter rules in the areas coordinated by the Directive – inherently results in a certain un-level playing field for AVMS providers and opens up the possibility for forum-shopping behaviours. That may in turn lead to a global reduction of the level of protection for the European citizens.

According to their answers to the questionnaire that was circulated among the subgroup, **most regulators recognise that there is an inherent tension in the main principles that presided over the writing of the AVMS Directive.** Indeed, the Directive seeks to achieve a compromise between the industrial and economic aims of free establishment for providers and free circulation of services and the social/cultural aim of respecting cultural diversity among Member States and the ability of their respective regulatory authorities to protect their citizens accordingly, among others through the possibility for Member States to implement stricter or more detailed rules.

### 1.1.6. The reality of an internal market for audiovisual media services

Most of the respondents to the questionnaire agree on the fact that **the AVMS Directive – and in particular the implementation of the country-of-origin principle – has made cross-border broadcasting easier by relieving the providers from the administrative burden of complying with all the national frameworks**. Recital 34 of the AVMS Directive underlines that the country-of-origin principle aims at “promot[ing] a strong, competitive and integrated European audiovisual industry and enhanc[ing] media pluralism throughout the union” and that “pluralism of information should be a fundamental principle of the Union. Some regulators point out the fact that pan-European services remain an exception and that AVMS providers tend to adapt their services to the preferences of the local audiences, although several also note that this is primarily the result of current copyright regimes, that often remain national or regional in scope due to the principle of territorial protection of the copyrights. In this respect, some NRAs evoke the need for the “local touch”, which makes it difficult for transnational providers to offer exactly the same service in all countries, but it is difficult to find agreement as to what constitutes “sameness” in this context, and there is a need to further understand the nature of new services developing in the EU. Some respondents (4) also point out that the EU audiovisual market cannot be a true single market, since it is intrinsically **based on multiple linguistic and cultural areas and markets**.

## 1.2 The evolutions of the audiovisual sector having an impact on the question of territorial jurisdiction

This section discusses the changes that the sector has been undergoing since the last review of the Audiovisual Media Services Directive, in 2007, including media convergence, technological evolutions, the impact on the ways of consumption of audiovisual content, and other parameters in the organisation of the audiovisual media sector. A part of this analysis has already been carried out by ERGA through its works on material jurisdiction. In order not to duplicate the work that was already achieved, this section will therefore refer to the ERGA report on material jurisdiction in a converged environment<sup>12</sup> whenever it is possible and will focus on the impact of these changes on the issue of territorial jurisdiction.

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<sup>12</sup> ERGA report on material jurisdiction in a converged environment – ERGA 2015(12) – published on 26 January 2016, available at: <https://ec.europa.eu/digital-agenda/en/news/erga-report-material-jurisdiction-converged-environment>

### 1.2.1 Context: the effects of media convergence and the emergence of new forms of content provision and consumption in the audiovisual chain of distribution

The European Commission defines media convergence as “the progressive merger of traditional broadcast and internet services”<sup>13</sup>. More broadly, the word “convergence” has been used since the 1990s to refer to the progressive coming together of what were considered before as separate clusters of the economy: information technology (IT), electronic communications and media. Such a trend was made possible thanks to rapid technological developments over the past 20 years. A previous Green Paper of the European Commission<sup>14</sup> issued in 1997, already underlined the various dimensions of the concept of convergence, namely:

- the convergence of networks: networks which were used for telecommunications (including access to the Internet) are now widely used for broadcasting audiovisual media, and vice-versa (e.g. cable television networks);
- the convergence of devices: connected TV sets are now a common thing, and computers, smartphones and tablets give access to an always wider range of audiovisual content;
- the convergence of services: with the rapid technological evolutions, new forms of services emerge, mixing characteristics of the IT and media worlds, and are now available on a great variety of terminals.

In its first chapter, the ERGA report on material jurisdiction in a converged environment<sup>15</sup> gives a broad overview of the various developments that have been taking place over the last decade in the audiovisual media sector under the umbrella of convergence. On the offer side, the range of devices, services and platforms available for consuming audiovisual content has grown considerably, along with the services offered on them to audiences. Technological trends, with for instance the development of reliable high-speed telecommunication networks, have made it possible for an increasing number of content providers to deliver live and on-demand content in a reliable way. The arrival of affordable, easy-to-use equipment – both hardware and software – for producing and streaming on-line content and the openness of the internet have also lowered the barriers to enter and offer audiovisual content.

On the audiences’ side, the same ERGA report highlights the fact that, if linear TV remains the main way of watching audiovisual content, with still high levels of viewing across the

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<sup>13</sup> European Commission’s Green Paper “Preparing for a fully converged audiovisual world: growth, creation and value”

<sup>14</sup> European Commission’s Green Paper on the convergence of the telecommunications, media and information technologies sectors, and the implications for regulation – COM(97)623

<sup>15</sup> ERGA report on material jurisdiction in a converged environment – ERGA 2015(12) – published on 26 January 2016, available at: <https://ec.europa.eu/digital-agenda/en/news/erga-report-material-jurisdiction-converged-environment>

European Union, viewing of content on demand, as well as of new types of online audiovisual content, is growing rapidly, from a low base. The traditional TV set remains the most popular device to watch audiovisual content, but it is increasingly in competition with other devices, such as smartphones and tablets. Behavioral differences also appear between generations, with younger viewers more keen to watch online content, and to use other devices than the main TV set. In parallel, as the habits of the consumers regarding the ways they watch content are evolving, so are their expectations regarding the level of protection they would like to benefit from on audiovisual media services.

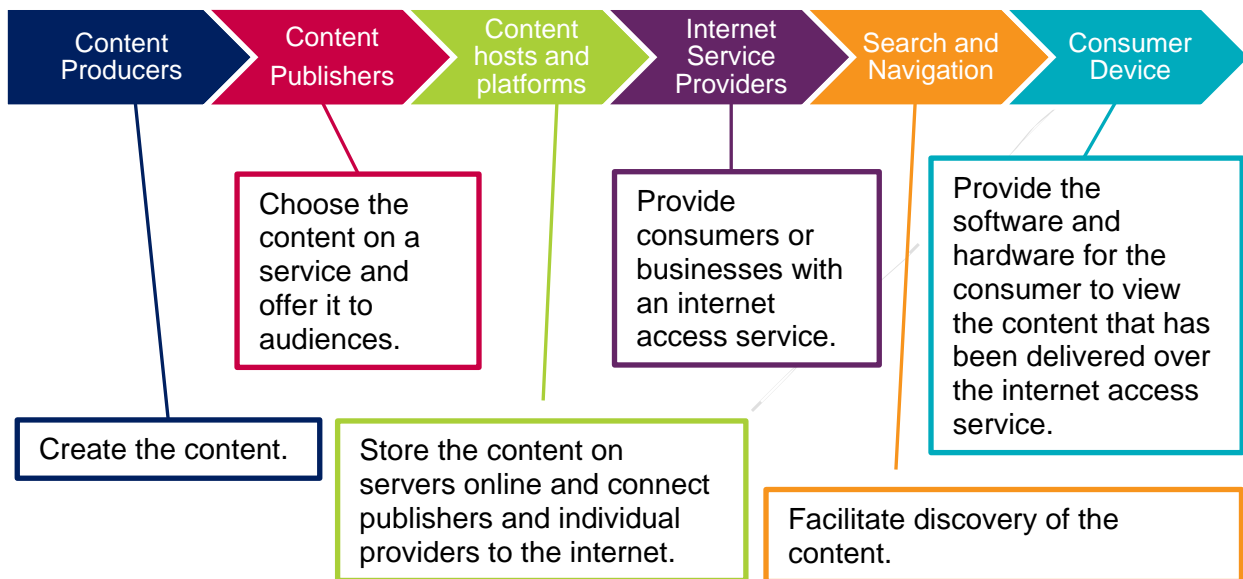
The report also points out the technological and business developments that have been supporting and enabling these innovations over the past ten years: fixed and mobile internet services capable of delivering high-quality audiovisual content are expanding continuously, as is the availability of connected devices on which audiovisual content can be viewed. The internet is used more and more as a delivery platform for audiovisual content, and both traditional and new players tend to propose innovating services in the audiovisual environment. The new landscape is also characterized by an increasing use of consumer data to personalise audiovisual services.

It has been observed that these changes in the ways audiovisual content is provided and consumed have had impacts on the structure of the audiovisual production and distribution market: the traditional media distribution chain, which used to rely mainly on a single distribution technology to a single type of device, has evolved and become more complex. It now includes a more diversified range of actors, who are sometimes involved in several steps of the supply chain, making the boundaries between those elements blur. Here are two illustrations taken from the ERGA report on material jurisdiction that make those evolutions more explicit:

## Traditional TV value chain



## Simplified online content distribution chain



From the point of view of territorial jurisdiction, the technological and business developments identified above have allowed the appearance of a range of new services, which have significantly altered viewing habits and have a number of new characteristics. For example they do not necessarily need a local establishment and are potentially accessible from anywhere, independent of where the service is established or physically/technically housed, thanks to the improvements of the physical telecommunication networks and the openness of the internet. The potential issues that can emerge from those evolutions in relationship with the territorial jurisdiction regime of the AVMS Directive are dealt with in the other parts of this report.

### **1.2.2 Context: general overview of the audiovisual production and distribution economic system from a territorial point-of-view**

Historically, the physical organisation of traditional distribution in the audiovisual sector in Europe has been characterised notably by the presence of mainly national players (for television channels and movie theatres for instance) and by the management of rights on a territorial basis (country-by-country or over the same linguistic or cultural area) with a view to maximise the related revenues. This business practice is correlated to the fact that AVMS providers tend to adapt their offers to the preferences and tastes of the local audiences, as underlined by some NRAs in their replies to the questionnaire used for this report. Those business practices have therefore required the physical presence of representatives of the international rights owners as closely as possible to the decision-making centres, particularly on the main European markets, which are an important source of revenues for them.

Research carried out by IDATE Consulting<sup>16</sup> show that service providers – both new and traditional players – tend to establish a local presence due to the necessity to be physically close to the rights owners. Indeed, negotiations for rights still take place on a local basis. In this respect, an approach by linguistic or cultural areas seems to be a common practice.

The emergence of big international players with worldwide reach in the distribution market could call these trends concerning physical organisation into question. Because of their size, these actors could incite the rights owners to negotiate rights on a worldwide scale, at least for content that has a high commercial potential at international level, therefore challenging the current business practices based on the territorial management of rights. Such a shift would have a major impact on the business model of many traditional players.

Besides the proximity with rights owners, other needs, more of a technical nature, can emerge, such as potential interconnection requirements with distribution networks or establishment of hosting capacities, and require a physical presence.

### **1.2.3 Different localisation strategies depending on the origins of the media service providers**

Beyond the matters of rights management and the historical links with traditional broadcasting, the study led by IDATE Consulting shows that a distinction can be made as regards the localisation strategies of the providers of new services, between those who are

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<sup>16</sup> Report by IDATE Consulting for the French Ministry for Culture and Communication on the offers and business strategies of transeuropean VoD and SVoD services, published on 17 February 2016, available at: <http://www.culturecommunication.gouv.fr/Politiques-ministerielles/Audiovisuel/Actualites/Etude-portant-sur-les-offres-et-les-strategies-commerciales-des-services-de-VaD-et-VaDA-transeuropeens>



from European origin and those who are based out of the European Union (mainly in North-America in the scope of the IDATE study).

On the one hand, even if they often have local offices in other Member States, and although there can be some exceptions, European AVMS providers tend to keep their headquarters in the country where the new services are founded, especially as some providers of these services were already “traditional” broadcasters and have therefore deeper local roots. On the other hand, AVMS providers who do not have European origins also do not have those historical ties: the new business models require less technical equipment and their place of establishment is therefore more flexible. It can be elected on different grounds, such as those identified in the replies of some NRAs: more favourable tax regimes, less strict audiovisual media regulation, better infrastructure, labour legislation, geographical location, advertisement revenues and other economic considerations as well as target audiences<sup>17</sup>. For instance, the study carried out by IDATE Consulting, which mainly focuses on a comparison between European and North-American services, shows in this respect that the tax system (and primarily the level of corporation tax and the possibilities for tax optimisation) plays an important role in the choice of establishment of North-American services.

### **1.3 Description of the issues**

This chapter is intended to describe problems encountered by the ERGA members due to cross-border distribution of audiovisual media content. It also aims at depicting which stricter rules have been adopted by different Member States in accordance with Art. 4(1) of the AVMS Directive. The content of this chapter is based on what has been described in the responses to the questionnaire attached to this report. We follow here a thematic-orientated approach without distinguishing between the various legal grounds or mechanisms for the problem reported (i.e. differing interpretation of key aspects of the AVMS Directive or its scope of application, mere circumvention cases, etc.).

#### **1.3.1 Forum Shopping**

Many acknowledged the country of origin principle and the principle of freedom of establishment as part of the main driving force behind the development of the single market

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<sup>17</sup> COBA, a UK-based organisation representing commercial broadcasters (whose members are in majority subsidiaries of USA-based entertainment groups) carried out some research in 2013 on this topic, available at <http://coba.org.uk/coba-latest/coba-latest/2013/commercial-broadcasters-fuel-uk-global-tv-hub>.

of today. However, many NRAs expressed that these principles allow for forum shopping in the sense that an AVMS provider chooses to establish itself in a Member State in order to avoid either stricter regulation in certain areas or more active and effective monitoring by the NRA in general (while, at the same time, it appears extremely difficult to prove legally the intention of providers to circumvent stricter regulation with the mechanisms currently in place – see part 2.4.2 of this report). Several NRAs expressed a view that incentives for such forum shopping arise in particular whenever the activity of an AVMS provider does not require the AVMS service to be located in the territory of the affected consumers (AT, BE-CSA, CZ, DE, EE, FR, HR, SI, SK and NO). In this respect, CZ gave the example of satellite retransmission providers that choose to move their services to a country where the law does not regulate retransmission.

Some NRAs have stated that less strict audiovisual media regulation or less monitoring are only two of many reasons why an AVMS provider may choose to establish itself in a certain country. Favorable tax regimes, reliable and creative production sectors, labour legislation, geographical location, advertisement revenues and other economic considerations as well as target audiences might be important in other cases (AT, CY, DK, ES, FI, GR, IR, IT, LU, LT, NL, SI, UK, IS and NO). Less bureaucracy in general (GR and SI) and better evolved infrastructure (UK) have also been mentioned as possible reasons for establishment that do not relate to regulatory issues.

### **1.3.2 Difficulties with the enforcement of national stricter rules**

Approximately half of the NRAs expressed a view that the freedom of establishment has led or can lead to an unlevel playing field, or perhaps rather unfair competition, among different media services targeting or being established in different Member States (though there are different ways in which these concepts were understood). In many cases, the NRAs considered the fact that the Member States have chosen to adopt stricter rules in certain areas and that all audiovisual media services therefore do not have to comply with the same rules, as evidence of unfair competition. This occurs when national stricter rules are directly applicable on broadcasters established in the specific Member State, but not on broadcasters established in other countries, allowing some service providers to broadcast content targeting one Member State with stricter rules, which they would not be legally allowed to broadcast if they had been established in the targeted Member State. In this regard, some NRAs have pointed out this is an inherent tension in the AVMS Directive, which seeks to achieve a compromise between the aim of facilitating cross-border European content provision on the one hand, and the social and democratic aim of respecting cultural diversity among Member States on the other.

Many NRAs express the need to retain the freedom for Member States to adopt stricter rules in order to preserve cultural diversity, fulfill national objectives and public policy goals,

and to allow the Member States to protect their citizens accordingly, despite the fact that the rules cannot be applied to services not in their jurisdiction, even by means of the regulatory mechanisms described above.

### **1.3.2.1 Consumer protection, cultural diversity and pluralism**

The protection of consumers is a central aspect that is affected by content made available to citizens in one Member State by an AVMS provider established in another Member State or a non-EU country. This is particularly true in cases where the provider established in another Member State has a significant presence in the market of the targeted Member State in terms of audience share or share of the advertising market<sup>18</sup>. This predominantly concerns the protection of minors and the protection of consumers from audiovisual commercial communications prohibited under the stricter national rules of one Member State but allowed under the rules of another.

It has to be noted that not all of the areas mentioned hereafter have been reported by Regulatory Authorities specifically in connection with concrete cases or current procedures. Thus, the stricter rules described need primarily to be seen as areas where conflicts may arise in the future.

#### *i. Protection of Minors*

Many NRAs reported that they either had experience of or could foresee problems with the fact that either their national rules regarding protection of minors did not apply to service providers established in other Member States or that the mechanisms of the Directive allowing for the enforcement of those stricter rules in certain circumstances were perceived or assessed as difficult if not impossible to use. Besides mentioning general rules for the broadcasting of children's programmes (HU, IE, IT, MT, SI, UK, IS, SK and NO), due to differences in application of existing harmonized standards (the same applies to other harmonized standards regarding for example hate speech in Article 6 of the AVMS Directive), there are some areas where Member States have made use of the freedom to adopt stricter rules in accordance with Article 4 of the AVMS Directive. Some examples of such stricter rules are:

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<sup>18</sup> In this regard, the Belgian CSA carries out occasionally monitoring of services targeting the territory of the Federation Wallonia-Brussels. The June 2015 monitoring and the March 2016 one reported cases where some services do not abide by the AVMS Directive regarding rules on product placement, isolated advertisement, teleshopping, protection of minors, accessibility. A greater number of services – both linear and non-linear – do not respect the stricter rules of the Federation Wallonia-Brussels on advertising in children's programmes, separation of advertising, contribution to the production of audiovisual content, quotas on European works, protection of minors. Those services represent 32% of the TV audiences and 70% of the TV advertising market.

- advertising in children's programmes (BE-CSA, GR, SE and IS),
- involvement of minors in advertising (DK),
- broadcasting of combat sports (FR).

In other areas, the following particularities, *inter alia*, have been observed:

- specific rules regarding minors under the age of three (FR),
- specifically defined watershed periods (HR,<sup>19</sup> LV<sup>20</sup> and SI),
- different age-rating systems for programmes combined with detailed rules on watershed periods (HU).

Aside from this, some Regulatory Authorities reported that their country has adopted rules on advertising for HFSS products (GR, IE and LV), an area in which the AVMS Directive does not demand specific legislative action.

Other questions related to the protection of minors are addressed in the report on the protection of minors in a converged world, which was adopted by ERGA on 15 December 2015.<sup>21</sup> In this report, ERGA makes a recommendation that should ensure that minors are denied access to audiovisual media services that might seriously impair their development regardless of the origin of the content, the degree of parents' vigilance or whether the industry is able to provide protection tools. Given the borderless nature of content nowadays there should be a clear minimum standard for all Member States.

## ii. Audiovisual Commercial Communications and consumer protection

Regarding audiovisual commercial communications, there are several areas where Member States have adopted stricter rules.

Advertising for alcoholic beverages or spirits has for example been banned in certain Member States (AT, FR<sup>22</sup>, IE, PL<sup>23</sup>, SE<sup>24</sup>, HU<sup>25</sup>, NO and IS). Other examples of stricter product

<sup>19</sup> The Croatian regulator reported a case where the NRA with jurisdiction acted against the broadcaster as a programme was broadcast at 3 pm, not complying with the Croatian Ordinance on the Protection of Minors.

<sup>20</sup> The Latvian regulator reported a case where – after assessing breaches of a broadcaster established outside of its jurisdiction – it had contacted the respective NRA with jurisdiction. However, the latter replied that the reported infringement was not in breach with its national legislation.

<sup>21</sup> <https://ec.europa.eu/digital-agenda/en/news/erga-report-protection-minors-converged-environment>.

<sup>22</sup> In this regard, the French CSA reported a case where a cable media service was authorized in another Member State (in order to be notably broadcast in France), although France had refused to authorize it before because it did not comply with French stricter legislation regarding alcohol advertising. Despite being in contact with the other NRA, the media service is still active since the conditions to restrict its transmission or initiate the circumvention process are not met.

<sup>23</sup> With the exception of beer advertisements after 8 p.m.

<sup>24</sup> Sweden has an ongoing case regarding broadcasts from the UK targeting the Swedish market, which contain content in breach of the Swedish stricter rules regarding advertising and sponsoring.

<sup>25</sup> In Hungary, the ban regarding alcoholic beverages in Hungary since is only partial. According to Hungarian media act : 24.§ (2) Commercial communications pertaining to alcoholic beverages broadcast in media

related prohibitions and limitations concern gambling (DE, HU, IE, PL, as well as NO and IS), medical services (HR, SK), firearms (GR, HU, SK and NO) and goods in general whose production or marketing is illegal (HU).

Some Member States have opted for stricter rules on separation of advertising from editorial content (BE-CSA) and on the interruption of children's programmes (BE-CSA, DE, PL, SE, SK and NO).

Further cases where Member States have opted to adopt stricter rules are:

- Product placement (DE, DK, NL and SE)
- Prohibition on split-screen advertising (NO)<sup>26</sup> and
- Prohibition for news presenters to appear in advertising (LV, SE and SK)

As has been described above, Member States have had difficulties have had difficulties arising from the fact that either their stricter rules did not apply to services available in their countries but based in other Member States' jurisdictions or that the mechanisms of the Directive allowing for the enforcement of those stricter rules in certain circumstances were perceived or assessed as difficult if not impossible to use. Further details have been provided for in sections 2.3 and 2.4 regarding problems with cooperation and circumvention.

### *iii. Cultural Diversity, Pluralism and Accessibility*

Regarding the goal of the AVMS Directive to secure cultural diversity in the European audiovisual media market, some NRAs reported that their legislator has opted for stricter quotas for European works (BE-CSA, SI, EE and FR) among other things. More specifically, some Member States require their media service providers to broadcast a specific share of their programmes in the official national language (HR, EE, PL and SI).

Other Member States reported cases concerning stricter rules on accessibility (CZ, IE and UK) and the obligation to secure neutrality in news and current affairs programmes (LV and IE).

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services: *a)* shall not be aimed specifically at minors; *b)* shall not show minors consuming alcohol; *c)* shall not encourage immoderate consumption of such beverages; *d)* shall not depict immoderate alcohol consumption in a positive light and refraining from alcohol consumption in a negative light; *e)* shall not link the consumption of alcoholic beverages to enhanced physical performance or to driving; *f)* shall not create the impression that the consumption of alcoholic beverages contributes to social or sexual success; *g)* shall not claim that alcohol has therapeutic qualities or that the consumption of alcoholic beverages is a stimulant or a sedative, or that alcoholic beverages are a means of resolving personal conflicts; *h)* shall not create the impression that immoderate alcohol consumption may be avoided by consuming beverages with low alcohol content or that high alcohol content is a positive attribute of the beverage.

<sup>26</sup>In Norway, there is currently a consultation ongoing that suggests to allow split-screen and virtual advertising. The suggestion is put forward in order to create a more level playing field for Norwegian broadcasters compared to the broadcasters established in the UK.

### 1.3.2.2 Economic aspects

Several NRAs have reported that media services targeting their Member State while being delivered from another Member State may have negative effects on their national market. For example, this may relate to certain obligatory contributions to the production of audiovisual content which do not apply to service providers established in other countries. In a similar vein, certain advertising practices of broadcasters established in another Member State can lead to distortions in a national market.

#### *i. Incentives for Audiovisual Content*

Two NRAs (BE-CSA and FR) have reported that it poses problems to the national market whenever foreign broadcasters are not contributing to national funding schemes for the production of audiovisual works. Another NRA (HU) expressed that negative effects on national audiovisual media markets are to be expected in cases where broadcasters are using the country-of-origin principle to evade higher license fees or higher fines in the Member State they are targeting.

#### *ii. Market distortions*

Several NRAs have reported what they describe as severe market distortions in regards to advertising revenues<sup>27</sup>, in particular in cases where the AVMS provider established in another Member State has a significant presence in the national market. For example, in Ireland, opt-out advertising on UK based channels now accounts for over 30% of the total TV spend. NRAs have raised concerns that broadcasters established in other Member States attract high shares of marketing budgets of companies based in their country by specifically addressing their citizens (BE-CSA and FR, as well as NO)<sup>28</sup>. Another NRA has mentioned that potential negative economic effects may arise from foreign advertising (DE). It has also been specifically reported that the national advertising market in a country collapsed due to the fact that advertising in services established in other Member States was sold at half of the usual price (HR). In this respect, the table on the following page shows figures collected from

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<sup>27</sup> In this regard, the Belgian CSA reported that services targeting the territory of the Federation Wallonia-Brussels represent up to 32% of the TV audiences and 70% of the TV advertising market.

<sup>28</sup> A study made by the NMA showed that foreign betting companies used a total of 609 million NOK (approx. 66 million EUR) on advertisements for gambling on these channels. Norwegian betting companies with a licence used a total of 55 million NOK (approx. 6 million EUR) on channels established in other EU countries and a total of 127 million NOK (approx. 13.7 million EUR) on Norwegian broadcasters. According to this study, advertisements for gambling amounted to 6.2 % of all money spent on TV-advertisements from the period of 1 August 2014 until 30 July 2015.

the regulators for the shares of the audiences and advertising markets of the concerned countries which are captured by TV providers who are not established on their territory, giving an indication of their impact on the local markets:

**Impact of television services targeting European countries from another European country<sup>29</sup>**

Targeted country	NRA	Captured audience share	Captured advertising market share
Belgium	CSA	31,9%	69,9%
	VRM	4,3%	8,2%
Croatia	AEM	10%	2%
Denmark	RTB	21,3%	
Estonia	TRA	23,3%	28%
Ireland	BAI	50%	25%
Latvia	NEPLP	32,6%	
Lithuania	RTK	15,7%	4%
The Netherlands	CvdM	32,4%	
Norway	Medietilsynet	26,4%	38%
Poland	KRRiT	10%	8,5%
Slovenia	AKOS	14%	
Sweden	SPBA	49,2%	38%

<sup>29</sup> Data collected from the national regulatory authorities on a voluntary basis, as a first attempt to quantify the impact of television services targeting European countries from another European country in terms of audience reach and advertising market shares. Given that there is no common methodology for computing these figures, the aim is not to have a comparison between countries but rather to have indicative trends of the extent of this phenomenon country by country.

## CHAPTER 2 – The mechanisms of the Directive

### 2.1 Problems: Determining territorial jurisdiction (Article 2 of the Directive)

ERGA Members have considerable experience in applying the primary jurisdiction criteria as set out in Article 2(3) of the Directive. Most confirmed that the criteria are relevant to the services for which they are responsible and work well. But a significant number stated they had encountered difficulties in applying the criteria and considered they were no longer effective. Several described disputes between NRAs over jurisdiction, which had been experienced by six members of ERGA. Fewer ERGA members had experience of applying the secondary, or “technical”, jurisdiction criteria set out in Article 2(4) of the Directive. However, the understanding of those who did have experience of applying these criteria was extensive, and allows us to draw some key observations of the problems involved.

#### 2.1.1 Primary jurisdiction criteria (determining EU establishment)

**Applying the criteria:** 16 NRAs said that they considered the criteria to be clear, or that they had not encountered significant problems in interpreting them (AT, BE-VRM, CY, CZ, DE, FI, HU, IE, LU, MT, PL, SI, ES, SE, SK, IS). One noted that while they had not encountered interpretation issues in applying the criteria themselves, there had been differences of opinion with other European authorities (LU).

Ten NRAs stated they had encountered difficulties applying the primary establishment criteria. The key themes to emerge were (i) a perceived lack of clarity in relation to the criteria themselves (ii) enforcement challenges around verifying information and (iii) uncertainty in how to apply the criteria in the context of certain business models (i.e. those where different elements of the business are split among Member States). The following specific problems were identified:

- **Lack of clarity and harmonisation of certain criteria:** Five NRAs stated they had encountered different national interpretations of what constitutes the location where “editorial decisions” or “decisions” are taken (BE-CSA, HR, IT, LT). NO considered the criteria to be too vague in principle. One had experience of a lack of clarity over which specific operations constitute “effective control over the selection and organisation of programmes”, which has led to contested jurisdiction (BE-CSA) and ultimately to litigation (Case C-517/09 – Marie-Louise Crock vs. RTL Belgium).

There were also different national understandings of what constitutes a “significant part of the workforce” and which activities of a workforce would constitute “the pursuit of the audiovisual media” (IT, LT, UK).



- **Challenges in enforcing the criteria:** Some NRAs expressed difficulties to verify the information provided by broadcasters about the location of editorial control (CZ, DK, NO, SE (especially in relation to non-EU providers falling under its jurisdiction by virtue of the secondary criteria), SK). There were also challenges arising from the ease with which a head office can be easily located in any Member State. In the case of small providers (including on demand or adult services), there can often be only one person responsible for the schedule or catalogue of programmes, and decisions can be made for an entire year without any further day-to-day involvement (NL).
- **Different parts of a business being located in multiple countries:** Five NRAs expressed concerns about situations where the head office, place where editorial decisions are taken, and place where a significant part of the workforce are based are in different countries (FR, LT, NO, BE CSA, SE). Two responses also noted difficulties in establishing the jurisdiction of some channels due to the fact that they operate the same service using different names or branding in multiple countries (EE, NO, SE).

### 2.1.2 The secondary jurisdiction criteria (determining Member State Jurisdiction)

Two NRAs indicated that they had no experience in applying the secondary establishment criteria (BE-CSA, PL) i.e. in relation to non-EU service providers using EU uplinks or satellite capacity. Two stated that they have experience of the criteria but either noted that they had not experienced any problems in terms of enforcement (SI), or did not indicate whether they had (ES).

One NRA (UK) has had requests from non-EU providers, who make their services available by IP, to be licensed or authorised in the UK. This could be to give legitimacy to their services, for example if they want to be distributed on mainstream set-top boxes. The UK noted that while this could offer some consumer reassurance, the licensing of non-EU services accessible online could raise a multitude of jurisdictional difficulties.

**Applying the criteria:** Among the challenges in applying the secondary criteria that were identified among those that do have experience of providers established outside the EU using a satellite uplink in their territory were:

- A lack of common understanding of the satellite footprint criteria (FR).
- Difficulties caused when satellite operators are established in a Member State that does not regulate retransmission and do not consider it as broadcasting (CZ and SK).
- Difficulties in establishing whether services are already registered in another Member State, with instances of broadcasters being unaware of registration requirements, or whether they are already registered elsewhere (SE, UK).

- Instances where more than one satellite broadcasts a service, making it difficult to apply the subsidiary criteria which come into play due to the requirement to contact numerous different parties in different countries (FR).
- One NRA pointed out instances of providers believing they are uplinked in one Member State, when in fact the uplink provider has sub-contracted the work to a provider in another Member State without the broadcaster's knowledge (UK). Another (FR) highlighted the volatility of the uplink criteria: location can "migrate" from state to state to state easily and can take only weeks to change. This makes multiple jurisdiction a risk, and makes enforcement and sanctioning difficult.
- A lack of immediate knowledge over who is broadcasting what content on transponders that are rented out by wholesalers, leading to a need to maintain constant dialogue with the satellite operator (LU).
- Providers using EU uplinks and satellite capacity and creating multiple channels broadcasting the same content under different branding (EE, SE).

**Enforcement challenges:** a range of problems were noted. These included difficulty in identifying and contacting the provider established outside the EU (IT, SE), or a lack of willingness to cooperate on the part of such providers (IT). Other challenges noted included the delay in communications with companies outside the EU, for example leading to late payment of fees (UK).

Two NRAs that have non-EU services targeting their Member State, but registered in another Member State, expressed concerns about the lack of effective monitoring of these services, and the risk that the goals of the AVMS Directive and national legislation may not be fulfilled in these circumstances (LT, LV). Other responses noted a lack of understanding about local regulatory requirements (CY, UK), and some confusion among non-EU providers as to what the rules in the EU are, particularly if services change uplink provider (UK). Another NRA highlighted what they feel is a lack of mechanisms to enforce rules on non-EU providers (EE).

France has developed an enforcement framework for dealing with services broadcast using Eutelsat satellites. It has made arrangements with Eutelsat for serious breaches of its rules that warrant taking a service off air, and also for less serious breaches.

The German authorities have had experience of a dispute with a non-EU provider within German jurisdiction by virtue of the secondary criteria (uplink) but this related to the status of the service in relation to German domestic regulation, and not specifically to the application of the Directive. The Dutch regulator noted an instance of an unlicensed non-EU service falling under Dutch jurisdiction was eventually removed from the relevant satellite (but it is noted it was still able to be received through overspill).

**Domestic rules and non-EU services:** the majority of respondents (24) reported that they had never experienced a situation when they were unable to enforce their domestic rules on

a service provider that was outside EU jurisdiction (AT, BE-CSA, BE-VRM, CY, CZ, DE, DK, FI, FR, HR, HU, IT, IE, LU, LV, MT, NL, PL, SI, ES, SE, SK UK, IS, NO).

Of those few that had experienced this kind of problem, one NRA (LT) stated the problem was not resolved.

The UK had experienced repeated instances of video on demand service providers moving to other jurisdictions in the EU, or choosing to base themselves outside the EU altogether resulting in an inability for the UK to enforce its domestic rules on the protection of minors, while another (FR) noted the ease of changing jurisdiction in light of new technologies.

### **2.1.3 Are the establishment criteria still effective?**

Seven NRAs expressed a view that in general the establishment criteria are no longer effective to meet the realities of today's market (BE-CSA, LV, LT, PL, SI, ES, SE). Five others expressed their view that the primary criteria need at least an update (NL, CY, DK, FR, IT). SI noted there were many services coming from third countries (i.e. non-EU) that were not delivered by satellite and therefore not subject to the Directive. Some also noted difficulties that arise (or could arise in future) in instances where there appears to be more than one location where editorial decisions are taken (EE, LT, SE). One NRA noted that while they have not experienced a situation where their broadcast licensees have split editorial functions, they have with on demand providers (UK).

On the other hand, four NRAs argued that the primary establishment criteria were still effective (DE, HU, IE, MT). One respondent (UK) noted that it is difficult to determine whether the criteria fit the realities of today's market, as many companies have structured their businesses around the criteria, and may simply change their structures to align with any new rules. Another argued that they generally have their uses but will need amendments to clarify them to reflect today's realities (GR, IT).

Six respondents had experienced cases of disputed jurisdiction, or enquiries from another Member State about the basis on which they had licensed or authorised a particular service (BE-CSA, EE, LT, LU, ES, UK). One respondent noted that this has a tendency to occur in situations where the licensee has some local staff in the Member State where the service is receivable (UK).

One response (EE) noted difficulties that can arise from different applications of the jurisdiction criteria, such as the ability of some providers to get a licence from a Member State despite questions raised over whether the editorial decisions about this audiovisual media services are in fact taken in that Member State and evidence of double jurisdiction (i.e. a licence from more than one MS).

## 2.2 Problems: Freedom of reception, exceptions and derogations (Article 3 of the Directive)

There is limited experience among ERGA members of applying the procedure in the Directive to derogate from freedom of reception (as set out in Article 3 of the Directive), and almost no NRAs have given consideration to how they would apply the concept of a “manifest[], serious[], or grave[]” breach of articles 27 or 6 of the Directive . For those who have followed the procedure, or at least given it serious consideration, key criticisms to emerge relate to the **timeframe** for each stage of the procedure, as set out in Article 3(2), the **lack of an emergency procedure** and the lack of clarity over what is meant by “**an amicable settlement**”.

### 2.2.1 Application of the derogation procedure

The majority of NRAs have had no experience in applying the derogation provisions (AT, BE-CSA, BE-VRM, CY, CZ, DK, EE, ES, FI, FR, GR, HR, IE, LU, LV, MT, NL, SE, SI, SK IS). Only a small number of regulators have experience of the procedure under the AVMS Directive, with others having used the equivalent procedure under the Television without Frontiers Directive.

The Italian AGCOM has successfully applied the derogation procedure in the context of a channel broadcasting pornography, which it considered to repeatedly broadcast content which was seriously harmful to minors development. The decision was not appealed. The UK has also made a proscription order<sup>30</sup> against a foreign service containing material it considered would seriously impair the development of minors. However, this was in 2005 before the AVMS Directive came into force. The Secretary of State was satisfied the order was compliant with equivalent provisions in the TVwF Directive. Norway has also used the procedure under the TVwF Directive on two occasions in 1998 and in 2003, against channels broadcasting pornography.

The Lithuanian NRA stated that it has taken two decisions to restrict the rebroadcasting of certain parts of non-EU services licensed in another Member State, and had difficulties in imposing the decision on a platform provider.

PL cited instances where they believed that Article 27 was breached, but did not take the decision to initiate the derogation procedure. FR has considered it but did not take action due to the high test that needs to be met. DE noted that it did seek to use the procedure but that the case was never concluded due to it being prolonged by repeated requests for information from the Commission. One NRA noted unsuccessful attempts to take action in

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<sup>30</sup>This term refers to the UK’s domestic provisions in place to enable it to derogate from the principle of freedom of transmission.

relation to what it considered to be serious breaches of the provisions on protection of minors (HU) (see below).

**Manifest, serious and grave:** Few NRAs had experience of applying the concept of “manifest, serious and grave”. FI interprets the provision as “repeatedly and clearly guilty of ethnic agitation under the Criminal code” or “grossly violating compliance with the age limit of an audiovisual programme” but does not report any problems or experiences in applying these terms). FR noted that, because these terms relate to a restriction of freedom of expression they necessarily interpret them restrictively, in accordance with recital 43 of the AVMS Directive<sup>31</sup>. Only HU gave specific examples of the kind of content they considered would meet this test, such as “explicit display of sexuality in programmes that target younger audiences”, “usage of obscene expressions, swearing related to genital organs, proliferation of offensive expressions in programmes that target younger audiences” or “programmes that encourage or glamorise the use or abuse of [...] alcohol or drugs.”

### 2.2.2 Is the procedure effective?

Two members expressed a view that the procedure has proved effective but could be improved further (IT, LT). Four respondents (EE, DE, HU, LT) expressed concern over the length of time the procedure takes. Three NRAs argued that the procedure has not proved effective (EE, HU, PL). One (HU) argued that it is almost impossible to suspend a broadcast as many run for short periods of time (e.g. two-four months) but during that period might be broadcast every single day.

Two respondents expressed concerns that the procedure does not allow for immediate action to protect national security and the public interest in emergency situations (EE, LV), and that extending the provision of Art.3 (5), which allows Member States to move forward in urgent cases, to also cover linear services should be considered (DE). The Latvian regulator has also encountered a situation where it would have envisaged restricting reception, but did not take action on account of the provisions in the AVMS Directive. One NRA cautioned that the 15-day deadline can be difficult to meet due to NRAs governance arrangements, even if the need for a short deadline in cases of great urgency is understandable (SE).

One response highlighted the lack of clarity in knowing what an “amicable settlement” entails, and when it can be considered to have been reached (SE). One regulator noted that the current procedure gives rise to the possibility that a decision to derogate could be taken,

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<sup>31</sup>Recital 43: “Under this Directive, notwithstanding the application of the country of origin principle, Member States may still take measures that restrict freedom of movement of television broadcasting, but only under the conditions and following the procedure laid down in this Directive. However, the Court of Justice has consistently held that any restriction on the freedom to provide services, such as any derogation from a fundamental principle of the Treaty, must be interpreted restrictively.”

and then it could subsequently transpire that it was incompatible with EU law, but only after the programme service has been suspended (NL).

## **2.3 Problems: formal cooperation (Article 4.2 of the Directive)**

This section discusses problems related to the enhanced cooperation procedure provided for in Article 4.2. Generally speaking, experiences have not produced desired results, although they have been constructive and at times partially satisfactory; and the “wholly or mostly” test has been difficult to apply. The spread of views on informal forms of cooperation is discussed in section 2.5.

### **2.3.1 Experience and views of formal cooperation under Article 4**

13 NRAs believe that the formal cooperation procedure is a suitable means of addressing the challenges posed by the ability of Member States to impose stricter rules domestically (BE-VRM, CZ, DK, HR, IT, LV, LU, MT, NL, ES, IS, SK, NO). Two responses stated they have no experience of formal cooperation (AT and CY). Three regulators stated that informal cooperation seems more effective (HR, HU and IE), and one noted it was too inflexible and difficult to use (EE).

One NRA stated that it has proved effective, albeit in the context of a breach of an AVMS minimum standard (advertising limits) (SI). Two noted that in their experience, the procedure runs smoothly and promotes cooperation, but that broadcasters generally choose not to comply with the rules of the country of reception, and the results are therefore not always satisfactory (SE and UK).

One noted that the procedure does not provide the regulator with the possibility of taking effective measures when the outcome is disputable (PL). Two noted that the procedure can be time consuming (PL and SI), and does not have the same effect of educating providers about domestic law as direct enforcement by the regulator in the country of reception would (PL).

**The “wholly or mostly” test:** SE felt that while circumvention is difficult to prove, the wholly or mostly test has not been difficult to apply – albeit because in that instance all parties had agreed (if that was not the case, difficulties could be foreseen). Four NRAs noted that while the wholly or mostly test is subject to different national interpretations, some aspects, such as whether the programming or advertising is clearly targeting one Member State as opposed to several, can be taken into consideration (IT, SI, UK, NO). Another respondent

(NL) referred to the difficulty in applying the test in the context of services targeting multiple jurisdictions.

### **2.3.3 Outcomes of formal cooperation**

One NRA noted that it had made a formal cooperation request, which was rejected by the service provider in spite of a very constructive set of exchanges with the regulator in the country of reception (UK).

NO has also completed a formal cooperation procedure with Spain and the UK in relation to services targeting Norway with advertisements for gambling products and services. In the case of Spain, the process was successful, with the broadcasters voluntarily agreeing to remove such advertising.

15 NRAs (BE-CSA, CY, CZ, DK, EE, FR, GR, HU, IT, LV, MA, UK, SE, SI, SK) declare that they have no providers falling under another Member State's jurisdiction but available in their country, who have willingly complied with their stricter rules. Of these, 10 NRAs have faced cases where they tried unsuccessfully to enforce stricter rules through cooperation routes, due to AVMS falling under another Member States jurisdiction that has not adopted the same rules (problems arising from the ability to apply stricter rules are dealt with in more detail in Section 2.4).

Six NRAs have experienced instances where providers under another Member State's jurisdiction have voluntarily complied with some requirements in the receiving Member State. In Poland this is done in the context of a self-regulatory agreement on advertisements and sponsorship messages concerning food and drink products which are not suitable for children. One respondent (UK) noted an instance where one of its licensees changed its scheduling policy by way of a compromise following a formal cooperation request from another Member State.

Three stated that they have experienced situations where they notified the competent regulator that an AVMS receivable in their country had broadcast material that would have breached the rules in that country of destination, but that the competent regulator in those cases concluded that the content did not contravene the national rules in the country of origin (HU, LT and LV).

### **2.3.4 Monitoring and assessing complaints in relation to services targeting other Member States.**

Five NRAs cited language barriers and difficulties and costs associated with finding interpreters, as well as cultural differences as challenges that can arise when monitoring or

assessing complaints in relation to AVMS that fall under their jurisdiction but target another Member State (IT, LU, SE, UK and NO). In some cases, there were also disputes about whether or not the receiving Member State had stricter rules, or whether the two Member States in question simply disagreed about the application of the same rules (e.g. incitement to hatred).

## **2.4 Problems: circumvention (Article 4.3 of the Directive)**

Very few NRAs have experience of applying the provisions of Article 4.3. Those that have, have been unable to demonstrate deliberate circumvention, but more widely the process is perceived as difficult if not impossible.

### **2.4.1 Experiences of the procedure**

17 NRAs have no experience of attempting to prove deliberate circumvention (BE-VRM, CY, CZ, DE, EE, FI, FR, GR, HR, IE, IT, LU, LT, SI, SK, IS, NO). Most of them (9 – CY, CZ, FI, GR, IT, LU, MA, SI, BE-VRM) haven't faced cases of AVMS falling under another member state's jurisdiction. NO is currently considering using the procedure in Article 4 relating to deliberate circumvention, but is not certain if it will be possible to prove such circumvention, in particular given the difficulty of obtaining the relevant information from the broadcasters and also the difficulty of proving the intent to circumvent the stricter rules.

Only one (SE) had, at the time of writing, chosen to proceed with a formal notification to the Commission under article 4.4, but the procedure was withdrawn before the Commission could rule on it (the case is still on-going, with Sweden considering renotification). The Austrian NRA had also experienced two cases of trying to prove circumvention, but in both cases the Austrian licenses were surrendered before formal proceedings began. The Hungarian authority has also made an unsuccessful attempt to prove deliberate circumvention, which it believes failed as it did not receive any cooperation from the Member State responsible for the service. BE-CSA initiated a circumvention assessment procedure, but suspended it in July 2015 because in the meantime, the AVMS had migrated to another jurisdiction.

One NRA reported a successful application of the procedure under the TVwF Directive. In 1994, the Netherlands proved deliberate circumvention by a channel claiming Luxembourg jurisdiction. In that case (C-23/93), the Court of Justice ruled that Member States retain the right to take measures against broadcasters established in another Member State, whose activity is entirely or principally directed towards its own territory, when establishment has been set up with the aim of circumventing the rules.



## **2.4.2 Proving circumvention**

18 NRAs believe that it is difficult or very difficult to prove circumvention (AT, BE-CSA, CZ, DE, DK, EE, FR, IT, NL, PL, SE, UK, CY, GR, LT, SI, SK, NO) with two (UK, NO) noting the legal difficulties in proving intent. HU considered it inappropriate to assign subjective intention to a legal person (i.e. an AVMS provider) and saw this as partly responsible for the difficulties in applying this provision of the Directive. One NRA argued that while the burden of proof is high, proving circumvention is possible, for example by looking at whether a media service provider has a history of trying to evade a particular regulation or whether it has tried to obtain a licence in the country targeted before. Another NRA noted that it is relatively easy for AVMS providers to fashion evidence to suggest that they had legitimate reasons for choosing to establish themselves in a particular Member State, which are difficult for NRAs to disprove even if they are false (LU).

## **2.5 Problems: informal cooperation**

Informal cooperation works well and NRAs have considerable experience of it, finding it flexible enough to result in positive outcomes. However, some note that it is insufficient to meet some of the current problems arising from territorial jurisdiction.

### **2.5.1 Outcomes of informal cooperation**

Although the contributions of the NRAs have not always stated differentiated cases between formal and informal forms of cooperation, some regulators have shared the outcomes of their experience of informal cooperation.

Five NRAs have experience of situations where the regulators that licence services targeting their Member State acted upon problems when made aware of them by the receiving NRA (LT, PL, SI, NO, SE).

Two experienced situations where at the time of writing no action had been taken after they signalled problems on a service falling within another Member State and available in their country (IT, SI).

Another (FR) referred to their positive experiences in reaching a compromise on sports broadcasts as a result of informal cooperation with two other Member States. Another noted that a broadcaster in their jurisdiction willingly agreed to discuss tailoring material to meet some regulatory requirements in the country of reception (CZ). Two others (IE, NL) noted the voluntary implementation of some local requirements by cross-border broadcasters.

### 2.5.2 Views of informal cooperation

22 regulators considered that informal cooperation under the AVMS Directive has proved valuable (AT, BE-VRM, CY, CZ, DE, DK, FI, HR, HU, IE, IT, LT, LV, MT, NL, PL, SE, SI, SK, UK, IS, NO), with many regulators citing the benefits it brings in terms of sharing knowledge and expertise about national legislative frameworks. A large majority of those who have had positive experience of informal cooperation cited EPRA and/or other regional cooperation networks as particularly valuable.

Several regulators expressed the view that informal cooperation (SI, EE, FR, BE-CSA) was not sufficient to meet the challenges of the current problems of jurisdiction. Another believes that it is rarely effective in dealing with challenges created by stricter rules and domestic priorities (FR).



## **CHAPTER 3 – Solutions**

A wide range of proposals has been made by ERGA members to ensure an effective jurisdiction framework. Indeed this may require a combination of solutions: changes to the Directive, non-legislative actions by the Commission and NRA-led initiatives within ERGA. For this reason, this chapter reports on the various proposals which have been organised as follows:

1. Non-legislative solutions that ERGA could implement that do not necessitate legislative change;
2. Non-legislative solutions that the Commission could implement without changing the legislation;
3. Legislative solutions to amend existing mechanisms to improve the current territorial jurisdiction framework;
4. Views on additional forms of formal cooperation between NRAs and Member States;
5. Legislative solutions that would require more fundamental changes to the Directive.

Some of the proposals are more widely supported across NRAs than others. We represent the full range of views here, but also draw conclusions, identify areas of common ground and, wherever possible, make recommendations. Those conclusions and recommendations which have emerged from common consensus are also given in the Executive Summary at the beginning of the report.

ERGA also recognizes further work is required to assess the viability/benefits of some of the proposals. ERGA anticipates that its Subgroup 1 on the AVMS Directive Review will take some of this work forward during 2016.

### **3.1 Non-legislative solutions that ERGA could implement**

It is timely and important to consider what ERGA could implement to contribute to the effective implementation of the current AVMSD provisions that govern territorial jurisdiction.

This chapter does not exclusively discuss solutions for ERGA to implement itself, it also takes into account any type of solutions to be implemented among its members on a bilateral or multilateral basis, or whose implementation can be facilitated by external resources (for example, through the information system of the European Audiovisual Observatory).

#### **3.1.1 Common information system on services and providers**

Territoriality is a central concept in the European regulatory framework for the audiovisual sector. Articles 2, 3 and 4 of the AVMS Directive – which establish the various principles

governing territorial jurisdiction of AVMS – are the main provisions for which “*Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive [...] in particular through their competent independent regulatory bodies*”.

Article 2(d) of the European Commission Decision establishing ERGA entrusts it with a role “*to cooperate and provide its members with the information necessary for the application of the Directive 2010/13/EU, as provided for in Article 30 of the Directive 2010/13/EU, in particular as regards articles 2, 3 and 4 thereof*”.

Transparency and free access to information are prerequisites of effective regulation. In order to avoid conflicts regarding jurisdiction, a majority of regulators (AT, BE-VRM, BE-CSA, CR, CY, CZ, DE, DK, EE, FR, GR, HU, IT, LV, LU, MT, NL, PL, SE, UK, SI, SK) support the idea of **establishing a common information system in order to foster cross-border cooperation and prevent multiple licensing**. Many (BE-CSA, CZ, CY, GR, HU, NL, SE) consider that such a system would save time and money, and would allow regulators to have access to up-to-date information.

The ability to have quick access to data and to establish quickly where a service is licensed, or under which jurisdiction it falls, is fundamental to the effective implementation of the Directive. This is particularly important in the context of the procedures that the Directive provides in Article 4 for instance, which offers Member States the optional opportunity to mitigate any tensions that can arise from the operation of the country-of-origin regulatory mechanisms framework.

To ensure quick, easy access to information, several regulators (CZ, DE, GR, HU, NL, SK, UK) suggest developing a **common database** to share information on providers and services, including which jurisdiction they fall under. Many suggest extending or **improving the MAVISE database** (UK, NL, DE, SE). We welcome that a project with this aim has been proposed by the European Audiovisual Observatory in collaboration with the European Platform of Regulatory Authorities (EPRA).

An improved database could usefully contain, for each AVMS, the national jurisdiction that it falls under, and some of the information stated in recital 42 of the Directive<sup>32</sup>: the language of the service, the origin of the television advertising and/or subscription revenues – in accordance with business confidentiality – and the existence of programmes or advertising breaks targeted specifically at the public of a Member State. Audience data for each service in each Member State could also be considered. Such information would help ensure that viewers are able to efficiently register complaints about audiovisual media services available in their Member State, irrespective of the country of origin. This could also provide access to information that would help identify any cases of circumvention of stricter national rules (GR, HU, CZ).

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<sup>32</sup> Recital 42: “A Member State, when assessing on a case-by-case basis whether a broadcast by a media service provider established in another Member State is wholly or mostly directed towards its territory, may refer 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, one NRA (DK) underlined the potential administrative costs of maintaining such a database. Another NRA (UK) suggested that such a system should begin its life as a voluntary one, in order to assess its efficacy. It was also noted that differences in regulators' respective information gathering powers may make it difficult for all regulators to gather the same type of information in relation to media service providers under their jurisdiction.

**Recommendation 1:** ERGA believes a common information system on media services licensed in each Member State can play an important role in ensuring the effective implementation of the framework for determining territorial jurisdiction. ERGA notes that work led by the European Audiovisual Observatory and EPRA is underway, and underlines ERGA's commitment to supporting this initiative.

### **3.1.2 Common information system on national legislative frameworks, especially stricter rules in Member States**

Article 4 enables Member States to make formal requests for broadcasters which are licensed in another Member State but "wholly or mostly" targets their territory to comply with more detailed or stricter rules of general public interest in their country. When the procedure is initiated, the NRA in the "country of origin" has a responsibility to request that the broadcaster comply with those rules of general public interest in the country of destination.

To support this procedure, two regulators (BE-CSA, LU) suggest fostering transparency by making every NRA aware of the stricter rules that should apply in other Member States. This exchange of information could be achieved through a database mapping the national rules in all Member States, building on existing resources developed by organisations including the European Audiovisual Observatory. Two authorities (FI, UK) highlighted the amount of administrative work this could entail, in particular in Member States where competence for enforcing rules derived from different provisions of the Directive is spread across different authorities. FI and SE also highlighted the large quantity of translation work required to support such a system, and the UK and SE noted the potential challenges in understanding the cultural differences and context of application of such rules across Member States.

**Recommendation 2:** ERGA supports further the development of any information sharing systems on national legislative frameworks to help raise awareness of different national interpretations of AVMS rules.

### 3.1.3 Common approach and exchange of good practices

Every element of the territorial jurisdiction framework provided for by the AVMSD allows for a degree of interpretation. As a result, there can be differences among Member States that lead to conflicts.

To help mitigate this, there were a number of areas where regulators thought an exchange of best practices would be helpful:

- First, concerning the primary establishment criteria (art.2.2), four NRAs declare that they have encountered difficulties in determining the location where editorial decisions are made, pointing out that this can be due to the limited amount of information the AVMS provider discloses. Generally, regulators acknowledge that there is room to **develop common approaches** to avoid divergent applications of concepts such as “effective control” (regarding the subject and the level of control). In this perspective, Member States could also share information about licensing procedures in order to help mitigate the possibility that conflicts over jurisdiction could arise.
- Second, with regards to derogations from the principle of free circulation of services, many respondents noted that procedures and conditions should be improved to enable efficient and quick reactions. In this respect, NRAs suggest there should be greater informal contact between regulators and, exchange of best practices by getting feedback from regulators that have experience of using this procedure.
- Finally, several NRAs (NL, SI, UK) have argued that the procedures described in article 4 would benefit from a common approach to determine whether a service is “wholly or mostly” targeting a Member State. As a first step, ERGA could stimulate **the exchange of good practices between NRAs** on that subject. Thereafter, ERGA could gather NRAs contributions with a view to adopting internal guidelines. On this matter, one NRA proposes to develop a **code of conduct** by which regulators that grant licenses to providers “wholly or mostly” targeting other Member States commit to inform the NRA in the country of destination when such licences have been granted. Such sharing of information before licenses are granted is referred to in recital 95 of the AVMSD, which states that “where licensing procedures are provided for in national law and if more than one Member State is concerned, it is desirable that contacts between the respective bodies take place before such licences are granted.”

How to enforce and facilitate the exchange of best practices can be explored further within the ERGA subgroup on *Creating Digital European Toolkit (DET) for efficient and flexible regulation* which has been created by ERGA Work Programme for 2016.

**Recommendation 3:** ERGA will consider in the future how to foster a more common approach to the implementation of key areas of the framework for establishing territorial jurisdiction.

### **3.1.4 Cooperation with providers and third-countries**

The possibility to put a non-European AVMS under a Member State's jurisdiction – whether it is under the current Directive (satellite uplink or capacity), or in the context of any possible extension to other technologies – raises many challenges for NRAs when the non-European AVMS does not have any decisional structure in Europe.

One regulator argued that the procedure could be made more efficient through enhancing cooperation with broadcasters in non-EU countries. This would be important when a non-European AVMS is licensed in another Member State from where it broadcasts content infringing national rules in the country of destination.

One regulator (NL) indicated that priority should be given to strengthening cooperation with non-EU countries, another suggest to apply such an approach to all the countries represented within EPRA (UK).

## **3.2 Non-legislative solutions from the Commission**

### **3.2.1 The non-binding instruments available to the Commission**

Since the introduction of the first Television without Frontiers (TVwF) Directive in 1989, the regulatory framework for audiovisual media services has undergone several modifications. While each revision has improved the efficiency of regulation in the short term, the pace of change in the audiovisual environment has always brought about a need for clarification of certain concepts and definitions.

Examples of outputs that the Commission has produced with a view to providing that clarity for NRAs in their regulatory tasks include:

- Interpretative communication on televised advertising - <http://eur-lex.europa.eu/legal-content/FR/TXT/?uri=URISERV%3A124102>
- Revised Guidelines for Monitoring the Application of Articles 16 and 17 of the Audiovisual Media Services (AVMS) Directive (on the promotion of European and independently produced works) – <https://ec.europa.eu/digital-agenda/en/news/revised-guidelines-monitoring-application-articles-16-and-17-audiovisual-media-services-avms>
- Doc AVMSD (2015) 4 regarding the application by MS of article 3 §2 and article 4 of the AVMS Directive.

Besides binding instruments such as Directives, Regulations or Decisions, the Commission is able to adopt non-binding acts. Some of these are provided for in the Treaty on the Functioning of the European Union (TFEU) (e.g. Recommendations, notices, guidelines), while others are not (e.g. Communications, white and green papers, codes of conduct).

According to a European Parliament resolution of 4 September 2007 on the institutional and legal implications of the use of "soft law" instruments (ref. 2007/2028 INI), non-binding acts can be used as preparatory instruments when they are expressly provided for in the treaties, or if their role is limited to explaining how the Commission is going to carry out an assessment. However, those instruments cannot generate new obligations. The different types of binding acts that the Commission can adopt can be generally grouped into 3 categories:<sup>33</sup>

- a) preparatory acts (green and white papers, action plans...);
- b) interpretative and decisional acts; and
- c) acts aiming at improving coordination and harmonisation.

Below we discuss categories b) and c).

## **B) Interpretative and decisional acts**

When adopting these acts (guidelines, communications, orientations), the Commission has a duty to clearly define the scope of its assessment, to ensure transparency and to safeguard principles such as equal treatment, legal certainty, legitimate confidence and proportionality. Those principles are binding for the Commission since it must respect the guidelines it defines for itself. Interpretative and decisional acts legally cannot deviate from binding provisions (directives, rules and decisions).

## **C) Acts improving coordination or harmonisation**

- Recommendations may be adopted if the Commission doesn't consider it necessary to adopt secondary legislation, if some Member States may have reason to not follow a maximum harmonisation approach, or if there's a need for flexibility in regulating an ever-evolving sector. Member States are able to deviate from Recommendations but are required to satisfy the Commission that they have legitimate reasons for doing so.
- Opinions are statements on a specific matter made without imposing any legal obligations on the entity to whom it is addressed. This is usually part of a process leading to a binding act.

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<sup>33</sup> « Classification des actes de droit non contraignant de l'Union européenne », N. de Sadeleer, sous la direction d'I. Hachez, Y. Cartuyvels, H. Dumont, Ph. Gérard, Fr. Ost et M. van de Kerchove, *Les sources du droit revisitées - Volume 1 : Normes internationales et constitutionnelles*, P.U.S.L. – Anthemis, Bruxelles, 2013



- Incentive measures, orientation and indicators.
- Encouragement of self- and co-regulation.

### 3.2.2 Options for non-legislative guidelines to clarify procedures

A majority of NRAs have expressed the view that there is a **need for clarification regarding several aspects of the process for establishing territorial jurisdiction**. This section reports on non-legislative actions the Commission could consider for this purpose. Some of the solutions suggested could prove efficient in themselves, could serve as transitional measures before any changes to the Directive come in to force, or could be complementary to other reforms.

Guidelines from the Commission are interpretative acts which may form a part of a package of solutions.

Of course, the collective experiences of ERGA's members of interpreting the rules could also constitute a source of inspiration for the Commission when considering non-legislative action.

Members have identified three specific areas where guidelines could prove efficient:

- a) The primary establishment criteria for determining jurisdiction (article 2.3)
- b) The possibility to restrict transmission (article 3)
- c) The possibility to adopt stricter or more detailed rules and to prevent those rules from being circumvented (article 4)

#### **A) On the enforcement of the primary criteria determining the applicable jurisdiction (article 2.3)**

As noted above, we have observed differences in the way in which the establishment criteria have been interpreted at a national level, and some regulators have encountered challenges in applying them in the context of new services and business models. Several NRAs (BE-CSA, HR, IT, LT, NO, NL) ask for clarification<sup>34</sup> of the following criteria:

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<sup>34</sup>This approach involves interpretative guidance on the existing criteria, and is therefore included in this section of the report. But it could also require legislative adaptation to the establishment criteria. So for a fuller discussion please see Chapter 3.3.

- “editorial decisions” (to be harmonised with “editorial responsibility” (Article 1.1.c): what kind of decisions are concerned: decision on schedule or catalog – one a year – or high level decision on programmes, information – day to day) (NL, HR);
- “significant part of the work force” (IT, LT);
- “effective control”: nature and real location of the effective control (BE-CSA, NO).

Two NRAs argued that the problems identified in relation to the current jurisdiction criteria would be eliminated if the criteria were more strictly followed (EE, HR).

### **B) On the possibility to restrict transmission (article 3)**

Regarding the current procedure for derogating from the principle of freedom of reception, the implementation difficulties have constituted key factors in some unsuccessful attempts to use this procedure.

Accordingly, clarification was sought on the following concepts:

- To explain aspects of the procedure (for instance, what an amicable settlement entails) (SE);
- To clarify what information needs to be submitted to the Commission in order to notify the alleged infringement.

### **C) On the possibility to adopt stricter / more detailed rules and to prevent the circumvention of those rules (article 4)**

Half of the ERGA Members (14) reported that they are confronted with cases where stricter rules have been set in their Member State, but cannot be applicable to AVMS available in their country when the latter fall under another Member State’s jurisdiction that has different rules.

While the article 4 procedure lays down a number of conditions that must be met for requesting compliance with stricter rules and potentially taking further measures on the concerned media service providers (should deliberate circumvention be proven), NRAs suggested that the Commission should clarify the following questions (HU, UK, BE-CSA)

#### At the stage of establishing the circumvention:

- When can a NRA consider that an AVMS is “wholly or mostly” targeting the audience of its MS? (HU)
- What kind of evidence would be necessary to prove that there is circumvention (UK)?

#### At the stage of the enforcement of stricter or more detailed rules:

- How can the NRA of the country of origin request that broadcasters follow the stricter or more detailed rules of the country of destination, when, according to article 4.2 b, Member States only are entitled to request that broadcasters to voluntarily comply with general interest rules at its discretion; see. *“the Member State having jurisdiction shall*

*request the broadcaster to comply with the rules of general public interest (art 4.2.b)” (BE-CSA)*

At the stage of dealing with complaints:

- What kind of procedural guidelines should NRAs use to handle cross-border content complaints?(UK)

**Recommendation 4:** This ERGA report lists a number of non-legislative initiatives to clarify elements of the territorial jurisdiction framework under the AVMSD. ERGA would support being associated with these initiatives, should the European Commission make use of them.

### **3.3 Proposals for legislative amendments to existing mechanisms to address deficiencies**

We set out the options below as proposed in the response to ERGA’s preliminary call for suggestions. Some might on the face of it involve small, practical changes that could be implemented without further analysis. It should be noted, however, that others will need to be analysed further: assessed for practical workability and the potential for regulatory gaming (and how that could be avoided); and reviewed for all possible implications and potential for being counter-productive. Indeed, some suggestions are presented as topics for further work and not as finalised proposals for change.

#### **3.3.1 Solutions for Article 2: determining jurisdiction**

##### ***A) The primary jurisdiction criteria (determining EU establishment)***

Many NRAs proposed further harmonisation or clarification of the **primary establishment criteria**. These touched upon a set of common problems in identifying “real” establishment and understanding the nature of editorial control over a service.

**Proposals focused on two broad areas: clarifying the concept of editorial control (including tools to tackle split or shared functions); and the possible introduction of new criteria.**

##### **Clarity on the meaning of “editorial control”: applying existing criteria**

- BE-CSA called for a more precise approach to defining the concept of “editorial control” of the selection and organisation of programmes (e.g. the selection and organisation of programmes should not consist merely of a general and timely decision, but relate to major editorial decisions), the nature of (i.e. determining who in a service provider can exercise effective control on a daily basis, e.g. programme

director, editor etc.), and the location of - i.e. the workplace they usually work not to where they meet occasionally - effective control particularly when it appears to be shared by different entities or across different Member States.

- NO also proposed that the usual working place of the person (s) taking the decision could be the locus of editorial responsibility. BE-CSA proposed that clarity could also be achieved by giving special weight to either the “significant part of the workforce” criterion or the “effective and stable economic link” criterion, when the actual location where editorial decisions are made is uncertain or shared between two or more states.
- HR proposed that media services should formally set out which person in their service is the “editor in chief” and this could provide the appropriate level of reliable evidence for the regulator. The UK noted that this proposal could run the risk of gaming, though HR advanced that gaming may already occur and more precise criteria could alleviate this.
- CZ proposed revising the jurisdiction criteria to reflect the “real origin of broadcast”. In cases where a major influence is exercised by major shareholders or owners based in a different country where the editorial decisions are taken, they should be taken into account if they influence indirectly the content of the broadcast.
- NL suggested to focus on additional criteria to determine “where the broadcaster has the centre of its activities.” Relevant questions might be: is it the place where the schedule is approved (which can possibly take place once a year at the headquarters of the parent company)? Or should it instead be the place where subsidiary decisions are taken on a daily basis by high level officials employed as “programme directors, editors in chief, programme managers, channel managers”? These activities are not necessarily carried out on the same location, and NL proposes that the latter would be less susceptible to gaming. NL proposed more guidance on these kinds of issues might be sufficient to solve the problems with disputed jurisdiction<sup>35</sup>.

On a wider note, GRGR highlighted that if different/new types of services were brought into the scope of the Directive, then the establishment criteria may need to adapt to reflect that.

## New criteria

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<sup>35</sup> NL provides support for this discussion by citing case C-56/96 of the European Court of Justice of 5 June 1997, which held that “*It follows from the foregoing that Article 2(1) of the Directive is to be interpreted as meaning that a television broadcaster comes under the jurisdiction of the Member State in which it is established. If a television broadcaster is established in more than one Member State, the Member State having jurisdiction over it is the one in whose territory the broadcaster has the centre of its activities, in particular where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together*”.

14 NRAs consider that the primary establishment criteria may not be relevant in today's market (CY-GR-LV-PL-SI-BE-CSA) or that it may be timely to consider updating them in response to technological developments and changes in consumption habits or market structure (LT, NL, SE, CR, DK, EE, FR, IT). For example:

- DE suggested that new criteria should be considered as a way of ensuring that non-EU services using different new distribution methods (including internet) fall into a Member State's jurisdiction.
- Two members made suggestions specifically in relation to non-linear services. FR suggested amended criteria could take account of which country is "wholly or mostly" targeted by these services. HU proposed to use "actual place of economic activity" as a primary criteria for services which have a European office but whose parent company may be based outside Europe<sup>36</sup> (citing Recital 19 of the e-commerce Directive<sup>37</sup> and the case of Factortame Ltd vs Secretary of State for Transport).<sup>38</sup>
- CY considered that fundamental revision is needed of the criteria for establishment of a non-linear service whose parent company might be outside the EU.

**Recommendation 5:** ERGA calls on the 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".

## ***B) The secondary jurisdiction criteria (determining Member State jurisdiction)***

### **Existing secondary criteria for satellites**

In general, these were found to be working well and members believed they continue to be relevant. Only a few members have had extensive experience in the application of the "secondary" or "technical criteria" in Article 2(4). FR, in particular, suggested that the questions of satellite overspill, and how to determine jurisdiction in case of simultaneous broadcasts by many satellites could be clarified. FR also considers that abolishing the criterion of the location of the uplink and adopting as sole criterion the State hosting the satellite capacity

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<sup>36</sup>This approach, on the face of it, involves a technical change to the establishment criteria, hence is included in this section of the report. But it also clearly has potential for broader effects – moving to a Country of Destination principle, i.e. a fundamental change in the nature of AV regulation in the EU – so for a fuller discussion please see Chapter 3.5.

<sup>37</sup>This states that "the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity".

<sup>38</sup>The ECJ held that "the concept of establishment [...] involves the actual pursuit of economic activity through a fixed establishment..."

used by the extra-European channel in question could be a solution. Such a choice would have the advantage of coping with the issue of the volatility of uplinks.

### **New secondary criteria for other technologies**

No NRAs reported problems applying their domestic legislation to non-EU services delivered through services other than satellite (e.g. via the internet).

There was however some support in principle for **considering new secondary criteria** to ensure that all instances of non-EU audiovisual services in the EU market are covered by the AVMS framework, regardless of the distribution network used (BE-CSA, LU, GR, CY, HR, SI). For example:

- LU suggested that under a future AVMS framework the location of servers or the targeted audience could be used as secondary criteria in relation to providers using technologies other than satellite (LU).
- GR proposed that secondary criteria could be extended to include the location of the internet hosting service provider or CDN operator that the service provider uses to deliver their service.
- LV suggested that non-EU services registered in one Member State but targeting the audience of another should be required to register in the receiving Member State.<sup>39</sup>
- HR says jurisdiction should be determined not by reference to the satellite capacity used – or indeed any technology-related criteria – but by virtue of whether advertising is taken in a particular market (i.e. advertising market presence should be a secondary criterion for determining jurisdiction).

DK, NL, DE, FR, IT, IS and the UK expressed cautious support, agreeing that **options should be explored** for how to deal with such services. DE said it was not certain whether a technical reference point is possible in the case of online distribution (which does not always have a “central physical starting point”) – but agreed that technical developments call for an adaptation of secondary criteria. FI warned that the scope of the Directive should not be automatically extended to cover new technologies without a thorough impact assessment.

The UK also encouraged ERGA to carefully consider the consequences of the introduction of new criteria and proposed instead a voluntary registration scheme for non-EU services who wanted to come within the umbrella of EU regulation (to address the problem of unregulated non-EU services available in the EU). In a related vein, CY proposed that for internet delivered services, authorisation should only be given to services that provide

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<sup>39</sup>This approach, on the face of it, involves a technical change to the establishment criteria, hence is included in this section of the report. But it also clearly has potential for broader effects – moving to a Country of Destination principle, i.e. a fundamental change in the nature of AV regulation in the EU – so for a fuller discussion please see Chapter 3(4).

effective age authorisation for content potentially harmful to minors and a general statement stating that the service denounces terrorism.

Finally, one member (EE) proposed that focusing secondary criteria on one form of distribution does not sufficiently guarantee the principles of technological neutrality or legal certainty. EE suggests that though one option could be to extend the secondary criteria to other forms of technical delivery, it may be more efficient if they are **done away with altogether**, suggesting that focusing attention on getting the primary criteria right could capture all relevant services.

EE also suggested in this context that a definition of transmission/retransmission and broadcasting/rebroadcasting should be included in the Directive to clarify when a service constitutes an original service, and what alterations to a service (e.g. insertion of local advertising) would enable the local version of a service to still qualify as a rebroadcast/retransmission.

**Recommendation 6:** ERGA could further explore whether the secondary jurisdiction criteria could be modified to cover non-EU services delivered over technologies other than satellite.

### 3.3.2 Proposed solutions for Article 3: derogation in cases of violations of articles 6 or 27

In relation to the Article 3 provisions (derogation from freedom of transmission and reception), ERGA members proposed solutions in two areas: the **grounds for derogating** and the **administrative procedures involved**.

#### *A) Grounds for derogation*

##### **Aligning rules for Linear and Non Linear**

In light of convergence 14 NRAs suggested that the same grounds for derogation should apply across all audiovisual media services, rather than being differentiated between linear and on demand services (AT, BE-CSA, CY, DK, EE, ES, DE, GR, HR, LV, LU, MT, NL, SK, UK). However a minority opposed this (BE-VRM, FR, IT) citing reasons including the proactivity of users in the on demand space. And others had not formed a strong view on this issue (DK, HU, SE, IS, NO).

##### **New grounds**

A small number of NRAs suggested that new grounds could be introduced, with some making specific suggestions, including:

- public or national security and incitement to war (LT),
- public order, stability and national security (EE),
- the promotion of cultural and linguistic diversity (BE-CSA),
- broadening the concept of “incitement to hatred” to cover race, sex, religion and nationality, political beliefs and sexual orientation; as well as other public policy grounds (public security, health) (GR).

Others (IT, UK) supported exploring the **idea of introducing new grounds for derogation in principle**, provided the priorities are well defined and do not leave any room for possible abuses, or do not fundamentally undermine the Country of Origin Framework.

And others were **opposed to the idea of new grounds for derogation** being included under a future framework, arguing that all of the important grounds already seem to be covered (AT, BE-VRM, HR, DE, LU, SI). Some (ES, SE) did not express a firm view. SE did however note that national rules of the Member States may not allow identical rules for all types of services.

## ***B) Administrative Procedures for Derogation***

SE suggested that the procedure should be outlined in more detail in the Directive or through guidelines.

EE, LV, NL, and PL all made suggestions that referred to swifter action in emergency situations. DE proposed to extend the provision of Art.3 (5) which allows MS to move forward in urgent cases to linear services. EE wants the procedures to be improved by including an easy and fast way to restrict transmission, specifically of services that EE referred to as not provided by “ordinary media service providers” (described as those acting as tools of aggressive disinformation and political destabilisation aiming to undermine the political situation in the country targeted) in times of crisis.

There were many calls for the procedures to be more practically enforceable and effective and less formal and protracted (EE, DE, FR, GR, NL, SI). The UK suggested that the timeframes may warrant a review. GR suggested Paragraph 2(b)<sup>40</sup> should be removed to make the procedures faster and more effective and proposed that the NRA should be able to contact the competent NRA and the Commission directly to notify them of the alleged infringements and measures it intends to take. DE also suggested efficiency could be improved with more explicit rules regarding the information (evidence) required to support a case for derogation, and regarding the duration of the Commission’s analysis in reaching a decision. NL also mentioned the need for a quick reaction from the Commission regarding

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<sup>40</sup> Article 3(2)(b) makes it a condition of derogation that during the previous 12 months the broadcasters has manifestly seriously and gravely infringed the provisions of Article 27(1) or (2) (protection of minors) and/or Article 6 (prevention of hate speech) **on at least two occasions**.



the acceptability of the measures was essential to avoid uncertainty about the possibility that the measures could subsequently be deemed incompatible with EU law.

**Recommendation 7:** ERGA calls on the Commission to review and clarify the administrative procedure for derogating from the principle of freedom of reception under Article 3. In doing so the Commission should ensure that the procedure is practically enforceable and efficient, rather than formal and protracted.

**Recommendation 8:** ERGA supports the view that the same grounds for derogation should apply across all audiovisual media services. Further work should be carried out by ERGA to determine whether these grounds should be levelled up or down. Moreover, the fast track procedure of Article 3.5 should also apply to all audiovisual media services.

### 3.3.3 Solutions for Article 4.2: formal cooperation procedure

*This section discusses suggestions for amendments to the enhanced cooperation procedure provided for in Article 4.2. The spread of views on the benefits of formal and informal forms of cooperation are discussed in section 3.4.*

Most NRAs argued that the formal cooperation procedure (and the process for challenging circumvention of stricter rules) should also apply to video on demand services (BE-CSA, HR, CZ, DK, DE, IT, LV, LU, NL, IS, NO). FR and BE-CSA have already taken this approach domestically. BE-CSA noted that improving formal cooperation would be a positive step, but would be ineffective if it is not accompanied by an improvement in the anti-circumvention provisions. GR agreed it would be a good idea but difficult to manage in practice.

Some called for the formal cooperation procedure to be simplified (SI, NL, UK). NL suggested there should be safeguards to allow fast action if formal cooperation was necessary. The UK suggested that removing the “wholly or mostly” test as a pre-requisite for formal cooperation (but maintaining it for circumvention) could make it easier to activate. BE-CSA note that if the procedures ensuring compliance with stricter rules could not be simplified (see below), after the step of the “wholly or mostly test”, the Directive should provide more explicit support to implement and control the compliance with the stricter rules of the country of destination, if a mutually satisfactory solution was reached to respect these rules.

**Recommendation 9:** ERGA considers that in a revised Directive, the formal cooperation procedure envisaged in Article 4.2 should also apply to video-on-demand services.

**Recommendation 10:** ERGA supports the view that the Commission should consider ways of improving the formal cooperation procedure outlined in Article 4.2.

### **3.3.4 Solutions for Article 4.3: derogation in cases of circumvention of stricter rules in certain Member States**

ERGA members have had limited experience of using the procedures under Article 4 to demonstrate deliberate circumvention of stricter rules by an AVMS. This meant that problems or proposed solutions were difficult to articulate in detail. Generally, however, the majority of NRAs (17) acknowledged the difficulty of successfully proving deliberate circumvention, and particularly that it would be *difficult* or *very difficult* to prove the intention to circumvent stricter rules of a targeted Member State in which it is not established).

#### ***A) Burden of proof and evidence base***

BE-CSA observed that the necessity to prove circumvention is a hurdle questioning the possibility to enforce the procedure. Along this line, BE-CSA proposed to replace the burden of proving the existence of circumvention through the obligation to justify the impact of services on a targeted market, in terms of audience share and revenue, or on the effective functioning of competition and cultural policy objectives, or on the level of media pluralism.

The UK felt that it is still important to demonstrate intention (because intentionality was implicit in the notion of circumvention, and because punitive measures were envisaged if circumvention could be shown) but that it would be helpful to identify the kind of evidence that would be critical to establish whether circumvention has taken place. It was suggested that this could include the nature of the stricter rule, the factual assessment as to whether the service is wholly or mostly directed towards the receiving Member State, the history of the service, and the proportionality of the measure taken by the Member State seeking to prove circumvention.

HU proposed that evidence should be based on clearly defined, objective criteria such as the organisation of a company's undertakings, the feasibility of broadcasting a programme in the target Member State, the organisation and orientation of programmes, place of production and the language of the programme (move from Recital 42) and felt that this was particularly relevant for smaller countries with a distinctive language.

#### ***B) Role of competent regulator***

The UK, supported by DE, suggested that the host regulator could also be required to investigate whether its own rules are being breached, in order to potentially resolve the

situation in a mutually satisfactory manner prior to escalation. It could also gather evidence to support the “wholly or mostly” test and help the complainant NRA build a case for circumvention. SE noted that some NRAs may not be able to request or disclose such information in relation to business models of providers under their jurisdiction.

### ***C) Administrative procedure***

SE stated that there is a need for the procedure to be outlined in greater detail in the AVMS Directive, with codified rules to determine the assessment of circumvention at an earlier stage. FR and NO suggested the procedure could be simplified to enable Member States to make a case.

BE-CSA noted that if the procedures ensuring compliance with stricter rules could not be simplified (see below), the Directive should provide more explicit support to implement the stricter rules of a country of destination in case where deliberated circumvention is proved.

DE suggested that, in cases where both the regulator of the licensing Member State and the regulator of the targeted Member State share serious concerns about a possible deliberate circumvention, a fast track procedure could be foreseen that would allow a quick and efficient regulatory intervention.

Many NRAs considered that the anti-circumvention provisions should also apply to video on demand services (AT, BE-CSA, CZ, DK, DE, HR, IT, LU, LV, NL, SK, IS, NO). IS did not have a strong opinion.

**Recommendation 11:** ERGA calls on the Commission to review, clarify and simplify the procedure regarding the circumvention of stricter or more detailed rules adopted by a Member State.

**Recommendation 12:** ERGA considers that in a revised Directive, the anti-circumvention provisions in Article 4.3 should also apply to video on demand service providers.

### **3.3.5 Cooperation between Member States and their national regulators**

It is clear that ERGA members value informal cooperation with fellow regulators highly. A wide range of networks and bilateral relationships have developed over many years,

including the EPRA network (mentioned by many as invaluable) and regional groups such as CERF<sup>41</sup>. Informal cooperation – since it has not been defined in legislation – means different things to different people: from sharing of experience and best practice, to exchange of information about specific services, to a route to solve specific cross-border broadcasting problems (even when resulting from the “stricter rules” tension).

**Points of view are split regarding the need to describe in more detail the concept of cooperation as used in the Directive:** while some NRA’s (AT, CZ, DK, DE, LT, SK and UK) believe it should stay as it is to leave room for informal cooperation, others (BE-CSA, CY, EE, HR, HU, IT, MT and PL) would welcome more formalisation of legal grounds and cooperation procedures in the Directive, to get further guidance and specify the respective roles of the NRAs and the Member States.

Some members were in favour of enshrining informal cooperation in more detail under a new AVMS Directive, in one way or another (EE, HR, CY, FR, HU, PL, UK and NO). LU stated that they would not be opposed to more detailed cooperation mechanisms under a new Directive. CY proposed that cooperation should be systematic on specific issues of particular interest to particular networks. Its scope could be widened, including closer coordination and exchange of information on problematic non-national services, especially non-EU. HU proposed that the AVMS Directive should strengthen the rules of cooperation, introduce an effective monitoring system for services “wholly or mostly” targeting other Member States, and include a requirement for “timely handling of complaints” from one NRA to another. FR proposed enhanced cooperation between regulatory authorities.

EE suggested that several provisions of the Directive should be modified to create better cooperation between regulators which takes into account the interests of the countries targeted. NO suggested establishing a cooperation obligation for regulators to provide regulators in another Member State with the information necessary in order to determine jurisdiction.

Several others valued the flexibility of informal cooperation and opposed any additional detail in the Directive (AT, DE, DK, and IE) – even though, for example, DK believed fast replies and easy information was essential for information cooperation. AT argued that informal cooperation would be preferable for on-demand services. GR noted that cooperation is best when simple and quick. The UK did not oppose the idea of affirming or raising the status of informal cooperation (potentially even in the Directive) but warned that too detailed a set of procedures could make mechanisms too rigid and exclude new forms of cooperation. FI also argued that any new formal cooperation mechanism should not create an undue administrative burden on NRAs.

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<sup>41</sup>The Central European Regulatory Forum, created in 2009. Members include Czech Republic, Poland, Hungary, Romania, Slovakia, Serbia, Slovenia and Croatia).

BE-CSA argued that the Directive should require that jurisdictional disputes are handled between NRAs, to ensure independent, specialist and effective input results that is more difficult to achieve between Member States.

**Recommendation 13:** ERGA members calls upon the Commission to work with ERGA to ensure optimal cooperation between regulators on matters of territorial jurisdiction.

### 3.4 Legislative amendments which involve more fundamental modifications to the Directive

This section considers legislative solutions that would require more fundamental changes to the AVMS Directive. We broadly group these into three categories:

1. Proposals and views on possible changes to the country of origin approach, introducing a country of destination principle for certain rules
2. Harmonised licensing framework
3. Other solutions (e.g. harmonisation of certain minimum standards or procedures, systems of mutual recognitions, and examining the framework under ECD)

#### 3.4.1 Possible changes to the country-of-origin approach

There was a variety of proposals made by those NRAs that favoured changes to the country of origin approach in one or more areas. These included an approach that would help Member States to impose stricter **content standards** rules in one or more specific areas (whether they be to protect minors, restrict advertising categories and/or help prevent the dissemination of misleading news content). Others wanted to be able to impose stricter rules about national **content quotas** or financial **obligations**. In both cases, respondents reasoned that this approach was justified because those particular rules – and those rules alone – were in the public/national interest or in order to create a level playing field.

The specific proposals made were:

- LV proposed that the rules of the country of destination should only be applied in cases where content originated in “third countries” i.e. non-EU;
- IT proposed applying the rules of the country of destination only for non-EU non-linear services, arguing that the country of origin framework might not be appropriate to the online space due to challenges with defining appropriate secondary criteria; FR took a similar approach, but to non-linear services generally.

- NO<sup>42</sup> said applying the rules of the country of destination was justified only for “public interest” content standards rules (e.g. advertising);
- DE considered that parafiscal measures do not fall within the scope of the AVMS Directive, as a consequence of which the country-of-origin principle does not apply, and that this should be clarified in Recital 19;
- PL supported a full country of destination approach for all services, as well as greater harmonisation of rules, while BE-CSA proposed combining both principles;
- NL: for non-EU only, and via cooperation and coordination with ex-EU services and countries, not regulation.

There were also different views on how to determine which Member State is the actual country of destination:

- BE-CSA, HR, SI, FR said the country of destination could be determined by reference to effect on market/market share/economic activity;
- HU, NO: that it could be determined by the language used;

Others argued that the country of origin principle could be maintained as long as the jurisdiction country is determined by reference to which country is being targeted. Example: FR proposed “the modification of the **establishment criteria** to take into account the cases where AMVS target wholly or mostly another country than the one where their providers are established”.

BE-CSA also favours this approach and presented two alternative options, to be considered when an AVMS is established/licensed in one Member State but satisfies to the “wholly or mostly targeting” test and attracts a significant audience in another Member State:

- The first option would consist in simplifying the approach to the current procedure and fostering a direct application of the stricter rules, moving away from the “mutually satisfactory solutions”: when the NRA in the country of destination requests the regulator in the country of origin to enforce its stricter or more detailed rules where the service is provided:
  - Step i) the NRA in the country of destination asks the NRA of origin to apply directly those stricter rules;
  - Step ii) either the NRA in the country of origin is enforcing those stricter rules;
  - Step iii) if the NRA of origin does not enforce the stricter rules after a specific deadline, the NRA of destination is empowered to apply its rules, after

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<sup>42</sup>NO position is that the procedures and criteria for derogating from the country of origin principle and to adopt appropriate measures according to Article 4.3 might be illusory if the criteria of circumvention in Article 4.3(b) is enforced too strictly. This might undermine national policies on general issues such as the protection of public health and/or the protection of consumers. For NO, there should be a possibility to derogate from the country of origin principle where it is necessary for the protection of public health or the protection of consumers.

(alternatively) a compliance validation for these stricter rules with Union Law with the European Commission.

- The second option consists in combining two principles of attribution of jurisdiction: the enforcement of the country of origin principle would be reserved for certain rules related to the notification of services, both European and non-European, while the principle of the country of destination would be applied for enforcing other content obligations.

Other countries, however, objected to taking any kind of country of destination approach:

- AT anticipated difficulties in determining jurisdiction in the case of non-EU services offered in multiple countries;
- DE: although supportive of strengthening the efficiency of procedures in cases of deliberate circumvention, DE also clearly gave the view that COD would lead to renationalisation of media regulation which runs counter to the values of the Single Market and raises serious questions about the achievement of major public policy goals like the free flow of information and media pluralism in the EU;
- CZ: considered that it would be hard to foresee the consequences of such changes;
- EE: argued that focus should instead be on tightening jurisdiction criteria and raising harmonised rules;
- LU: expressed concern that it could restrict the free movement of services;
- GR and UK: believed this would fundamentally undermine the objective of the single market, introducing significant restrictions to the free provision of audiovisual services across the EU, and would also could damage freedom of expression and pluralism in media, cumbersome for broadcasters.

In summary, many ERGA members support a country of origin approach overall but make suggestions for a “country of destination” approach in one or more specific areas. These include in relation to one or more **content standards** obligations (e.g. protection of minors, categories of advertising) or **cultural promotion** mechanisms (e.g. content quotas or financial obligations). Some argue that it should only apply in the context of particular services, such as **services originating from countries outside the EU**, or **video-on-demand services**. Others suggest that the country of destination could be determined by referring to the **effects on audience, market, market shares and economic activity in the targeted country** when a market is targeted. However, there are also several objections from members to taking any kind of country of destination approach, with several NRAs expressing concerns about the implications for the free flow of media services and for media pluralism in the EU.

**Recommendation 14:** ERGA could consider further in-depth discussion on possible variations to the country of origin approach within the course of its future works.

### 3.4.2 A harmonised licensing framework

A number of NRAs **supported the idea to introduce a more harmonised licensing framework** (e.g. with EE proposing that a harmonised framework could be based strictly on the application of the primary criteria), while they and others supported **a system of mutual recognition of decisions related to licence/authorisation revocation** (BE-CSA, BE-VRM, CY, DK, EE, IT, LT, LV, MT, PL, SI). One NRA (DK) noted that it could create a heavy administrative burden on NRAs, however. One or two members did not express a strong view as to whether or not either harmonised licensing or mutual recognition would be a good idea (LU, IS). HR specifically stated it supported a harmonised licensing framework but not mutual recognition (which would in any event need very careful wording were it to work). Similarly GR, which supported a harmonised licensing framework, noted that mutual recognition of a ban could be interpreted as a restriction of free movement of services.

Others **did not see the need for a harmonised approach** to licensing and argued that mutual recognition of decisions would not be desirable (AT, CY, CZ, DE, FR, HU, IE, NL, SE, SK, UK); reasons were not always given but NL noted that it would be difficult for such a system to take full account of cultural and social diversity within the EU, bearing in mind factors other than the establishment criteria that can inform a decision as to whether to grant a licence. The UK also noted that Member States should be given flexibility to determine licensing frameworks in order to reflect national conditions such as the size of their audiovisual market, and the institutional model of the NRA. The UK also expressed concerns about the implications of a system of mutual recognitions for the free movement of services in the EU. SE expressed hesitation about a harmonised framework in the light of recital 20 of the AVMSD.<sup>43</sup>

**Recommendation 15:** given the complexity of views, ERGA would support at this stage the on-going exchange of best practices among regulators in relation to licensing/authorisation procedures. This could be dealt with for instance within the ERGA Subgroup on *Creating Digital European Toolkit (DET) for efficient and flexible regulation* which has been created by ERGA Work Programme for 2016.

### 3.4.3 Other solutions

Those proposals for solutions were evoked by one or several NRAs during the works on this report. They are mentioned here to give a comprehensive state of the spread of views expressed by the regulators during the works.

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<sup>43</sup>Recital 20 “No provision of this Directive should require or encourage Member States to impose new systems of licensing or administrative authorisation on any type of audiovisual media service.”



**Greater Harmonisation of minimum standards:** Seven NRAs (CY, HU, IT, LT, MT, NO, PL) raised the idea of greater harmonisation of one or more areas of the Directive as a possible solution for mitigation of the tensions that can arise from the operation of the country of origin framework. Two expressed a positive view but stated it would be secondary to changes in the overall operation of the framework (BE-CSA, FR). Others (DE, NL) consider that further harmonisation may not be practical. Others (AT) did not express a strong view.

**Lessons from other legal EU frameworks:** One NRA (IT) highlighted that the e-Commerce Directive also sets out a framework for establishing territorial jurisdiction. Under the country of origin or "internal market" clause, an operator is deemed to be established in the country where it actually pursues an economic activity through a fixed establishment. The e-Commerce Directive provides for exceptions to this principle, and it may be useful to examine these exceptions in more depth, in particular looking at the extent to which similar exceptions could be applied in a future audiovisual regulatory framework.

**Mutual Recognition of Stricter Rules:** One NRA (BE-CSA) suggested introducing a system of mutual recognitions of stricter rules among Member States. This would imply for the Directive to state that the member states shall ensure that the service providers under their jurisdiction respect the more detailed or stricter rules adopted by the member state which their service is wholly or mostly targeting (with or without the need to prove that the service provider has established itself out of this member state to circumvent those rules). This kind of mechanism where the directive assigns to the country of origin the duty to control the respect of another member state's rules already exists in Article 14.3 of the Directive concerning events of major importance for the society.<sup>44</sup>

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<sup>44</sup>In this provision, the directive states that *"Member States shall ensure, by appropriate means within the framework of their legislation, that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters after 18 December 2007 in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State (...)"*. In a press release of 15 October 2007 (IP/07/1493), the Commission has summarized article 14.3, saying that *"On the basis of the principle of mutual recognition, Member States must ensure that broadcasters under their jurisdiction respect the lists of other Member States notified to the Commission, which have to be compatible with Community Law"*. In the envisioned measure, the revised Directive could also provide that the compatibility of the more detailed and stricter rules with Community Law should be checked by the Commission before being granted the possibility.