



***[Annex 1 to Final Report of Subgroup 3]***

**ERGA Subgroup 3 – Taskforce 1**

**“Changes to the material rules for audiovisual media services”**

***An overview document***

*(Deliverable 1 of ToR)*

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## Introduction

In 2018, ERGA Subgroup 3 produced the paper *ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive: Towards the application of the revised Directive by National Regulatory Authorities (NRAs)*, which addressed certain potential implementation issues in regard to the enforcement of relevant rules in the online environment, measures for supporting European works and territorial jurisdiction, and opened up lines of discussions about how these issues could be addressed in the future.

In 2019, Taskforce 1 within Subgroup 3 (which is dedicated to the implementation of the revised AVMS Directive) was designed to continue the work of the above-mentioned Subgroup 3 (2018) and elaborate on the revised material rules regarding *Incitement to violence or hatred and terrorist offences* (Article 6), *Protection of minors* (Article 6a), *Accessibility* (Article 7), *Findability* (Article 7a), *Signal integrity* (Article 7b), *Consumer protection* (in particular the rules on audiovisual commercial communications – Articles 11, 19, 20 and 23) and *Independence of the national regulatory authorities* (Article 30). The objective of the Taskforce was to give an overview of the changes to the material rules for audiovisual media services and possible approaches to emerging difficulties.

As output, the Taskforce has produced this overview document containing a few pages for each of the topics addressed. The document builds on the initial drafting exercises of the drafters of the Taskforce, the feedback received by the Taskforce members and the outcomes of the meetings which took place at Subgroup and Taskforce levels throughout the year.

For all topics within the remit of the Taskforce, the following aspects have been addressed:

- The meaning of the amendments compared to the previous rules.
- A presentation of and elaboration on already existing approaches of NRAs to monitor and enforce the respective rules.
- Proposals for an effective implementation of the respective rules.

## Incitement to violence or hatred and terrorist offences (Article 6)

### Changes to the rules

#### Incitement to violence or hatred (Article 6.1 a)

**Article 6** of Directive 2010/13/EU obliged all Member States to ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction did not contain any incitement to hatred based on race, sex, religion or nationality. Through Directive (EU) 2018/1808, the obligation is further extended to also include incitement to violence and is now tied to all of the grounds for hatred referred to in Article 21 of the Charter of Fundamental Rights of the European Union. **Article 6.1 a** in the revised Directive states that all Member States, without prejudice to the obligation of Member States to respect and protect human dignity, shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter<sup>1</sup>.

Article 21 of the Charter states that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall also be prohibited.

**Recital 17** of Directive (EU) 2018/1808 states that, in order to ensure coherence and legal certainty for businesses and Member States' authorities, the notion of 'incitement to violence or hatred' should, to the appropriate extent, be understood within the meaning of the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328, 6.12.2008, p. 55).<sup>2</sup>

**Recital 51** of Directive (EU) 2018/1808 states that the applicable fundamental rights, as laid down in the Charter, should be carefully balanced when taking the appropriate measures to protect the general public from content containing incitement to violence, hatred and terrorism (see Article 6.1 b below) in accordance with Directive 2010/13/EU. That concerns, in particular and as the case may be, the right to respect for private and family life and the protection of personal data, the freedom of expression and information, the freedom to conduct a business, the prohibition of discrimination and the rights of the child.

#### Public provocation to commit a terrorist offence (Article 6.1 b)

Through **Article 6.1 b** of Directive (EU) 2018/1808 all Member States also become obliged to take appropriate measures to ensure that audiovisual media services provided by media service providers under their jurisdiction do not contain any public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541<sup>3</sup>. **Recital 18** of Directive (EU) 2018/1808 states that it is important to protect the general public from incitement to terrorism, considering the evolution of the means by which content is disseminated via electronic communications networks. In order to ensure coherence and legal certainty for businesses and Member States' authorities, the notion of

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<sup>1</sup> Directive (EU) 2018/1808 contains a similar provision for video-sharing platform providers (Article 28b).

<sup>2</sup> See also the reports of the EU High Level Group on combating racism, xenophobia and other forms of intolerance (E03425), <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3425>.

<sup>3</sup> Directive (EU) 2018/1808 contains a similar provision for video-sharing platform providers (Article 28b).

‘public provocation to commit a terrorist offence’ should be understood within the meaning of Directive (EU) 2017/541.

According to Article 5 of Directive (EU) 2017/541 all Member States shall take the necessary measures to ensure that the distribution, or otherwise making available by any means, whether online or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in the Directive, where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally.<sup>4</sup>

#### Necessary and proportionate measures (Article 6.2)

**Article 6.2** in Directive (EU) 2018/1808 states that all measures taken for the purposes of Article 6 shall be necessary and proportionate and shall respect the rights and observe principles set out in the Charter.

#### Existing approaches to monitor and enforce the rules

Some Member States already have or will have systems in which the NRAs themselves have been given the competency and authority to, at least in part, handle cases regarding incitement to violence or hatred (see the Slovak and Danish examples below) and public provocation to commit a terrorist offence (see the French example below). Other Member States already have or will have systems in which such cases are handled solely by national authorities directly connected to the national criminal law system (for example the national Police and Prosecution Authorities). In these Member States the NRAs will not decide on whether the content is in breach of Article 6 in the AVMS Directive but will instead either hand over the complaint or refer the person to the national authorities, with competency and authority to decide on such matters. This is – at least currently – the case in for example Norway (see example below).

In **Slovakia**, the Council for Broadcasting and Retransmission is the competent authority to deal with incitement to hatred in broadcasting. Therefore, whenever the Council receives a complaint in this regard, it monitors the broadcast in question and decides whether it was in breach of the provisions of the Slovak Act on Broadcasting and Retransmission prohibiting incitement to hatred. However, the Council can only penalise the broadcaster. Other authorities, mainly the Slovak Police and Prosecution Authorities, can lead separate investigations in the matter since the content in the broadcasts can also constitute a criminal offence. Their investigations are usually directed against the physical person who expressed the words that may constitute incitement to hatred.

**Denmark** has a similar system to the Slovak system described above. In Denmark, the Radio and Television Board extends itself with two further members with special insight in cases regarding incitement to violence or hatred. One of these members is appointed by the Association of Danish Judges and the other member is an expert on criminal law and appointed by the Minister of Culture. The member who is appointed by the Association of Danish Judges acts as chair of the Board in these cases.

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<sup>4</sup> See also the reports of the High-Level Commission Expert Group on radicalisation (E03552), <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3552&NewSearch=1&NewSearch=1>.

In **France**, the Conseil Supérieur de l'Audiovisuel (CSA) has occasionally been confronted with cases of non-European TV channels making their content available in the EU via satellite up-links. Pursuant to Article 2.4 of the Directive, these channels fell under French jurisdiction while being established in a third country. The CSA has only had to make decisions regarding programmes which were said to be 'promoting terrorism' in relation to these specific cases. When the allegations were found to be substantiated, the CSA was able to require a satellite capacity provider to remind the content provider that it has to comply with French law. In case of repeated violations to the law, the CSA was able to eventually require the satellite operator to stop broadcasting the channel.

In **Norway**, incitement to hatred is regulated in the Criminal Code. It is either the Director General of the Public Prosecutors Office or the Public Prosecutor, in cooperation with the Norwegian Police Authority, that handles such cases. The Norwegian Media Authority (the NMA) has, at least at the moment, no formal or legal role in handling complaints regarding content that may contain incitement to hatred. If the NMA receives a complaint, it has the option to either hand over the complaint to the Police Authority or refer the person to file the complaint with the Police Authority.

### Potential implementation challenges related to the new Article 6

Due to the above-mentioned differences between Member States and their national systems in regard to the NRAs' competency and authority, complaints regarding content which may contain incitement to violence or hatred and/or public provocation to commit a terrorist offence may be dealt with differently in different Member States. It may therefore be more difficult to ensure as consistent of an implementation in all Member States in regard to Article 6 as it will be in regard to other parts of the Directive, as different national authorities will be involved in different Member States.

Another challenge in regard to a consistent implementation of Article 6 in all Member States is the fact that it may be difficult for all Member States to reach a common understanding of certain key notions of the Directive, in particular when it comes to approaching relatively new concepts such as 'public provocation to commit a terrorist offence'. Moreover, some Member States may, for example, have a lower threshold for what constitutes incitement to hatred than other Member States and actual content which may contain incitement to violence or hatred and/or public provocation to commit a terrorist offence may be judged differently in different Member States, depending on the cultural and political contexts. In addition to this, it may not be possible to assess these types of potential breaches independently from the cultural and political contexts in which the content is being disseminated and received. In regard to this type of content, the local contexts (particularly in non-European countries), as well as national rules on freedom of expression, may be key factors to consider, making these cases even more challenging for the NRAs to decide on. It may as a result be difficult for regulators, both on a national level and an EU-level, to draw a clear line between what may be depicted as for example 'hate speech' and 'terrorism'.

### Proposals for an effective implementation of the new rules

As has been described above, complaints regarding content which may contain incitement to violence or hatred and/or public provocation to commit a terrorist offence may be dealt with and judged differently in different Member States. Most Member States will however have systems and/or cases similar to at least some other Member States and the NRAs could therefore benefit from an exchange of best practices when it comes to handling cases on a national basis and from

comparisons between concrete cases. For NRAs without the competency and authority to decide themselves on whether or not certain content is in breach of Article 6, it could be valuable to discuss and compare internal routines for handing over complaints regarding for example possible incitement to hatred to the competent national authorities. For NRAs with the competency and authority, it may be valuable to discuss and exchange views about national cases where the content's compatibility with Article 6 of Directive (EU) 2018/1808 was questioned, whether or not the content was later found to be in breach of the rules, and how the NRA decided to proceed. These discussions could build on past national cases, decisions by the European Court of Human rights and/or material already gathered by for example ERGA or EPRA. It may also be of interest to discuss issues relating to the freedom of speech vs. for example hate speech, as well as difficulties in regard to Article 6 that relate specifically to content provided in non-linear services. For the NRAs with competency and authority, it may also be valuable to discuss certain key notions of the Directive, such as 'public provocation to commit a terrorist offence', in order to ensure as consistent of an implementation as possible. These discussions could entail comparisons between terminology and definitions used in other forums, such as the Internet Governance Forum, and other EU legislation, such as the proposed EU regulation on preventing the dissemination of terrorist content online (COM/2018/640 final).

In addition to discussing relevant issues and cases in different ERGA-forums (subgroups, strategic sessions etc.), the DET could be used as a platform for the above-mentioned exchange of best practices to allow for an easy way to collect and share information and to keep the information up to date.

**Proposal 1:** ERGA members to exchange best practices with regard to national systems/the handling of complaints regarding content which may contain incitement to violence, hatred and/or public provocation to commit a terrorist offence to allow NRAs to draw inspiration from other Member States' systems.

**Proposal 2:** ERGA members to exchange views about national cases where content has been tried against Article 6 of Directive (EU) 2018/1808 to allow NRAs to draw inspiration from and make comparisons between concrete cases.

**Proposal 3:** ERGA members to discuss certain key notions of the Directive, in order to ensure as consistent of an implementation as possible.



## Protection of minors (Article 6a)

### Changes to the rules

Protection of minors' physical, mental or moral development (Article 6a.1)

**Article 6a.1** in Directive (EU) 2018/1808, setting out to protect minors from harmful media content, is applicable to both television broadcasts and on-demand audiovisual media services. Article 6a.1 is mainly a merger of Articles 12 and 27 of Directive 2010/13/EU, which applied to on-demand audiovisual media services and television broadcasts respectively. **Recital 20** of Directive (EU) 2018/1808 states that the appropriate measures for the protection of minors applicable to television broadcasting services should also apply to on-demand audiovisual media services as that should increase the level of protection<sup>5</sup>.

**Article 6a.1** of Directive (EU) 2018/1808 obliges all Member States to take appropriate measures to ensure that audiovisual media services provided by media service providers under their jurisdiction which may impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see them. Such measures may include selecting the time of the broadcast, age verification tools or other technical measures. They shall be proportionate to the potential harm of the programme. The most harmful content, such as gratuitous violence and pornography, shall be subject to the strictest measures. **Recital 20** states that this content, which may impair the physical, mental or moral development of minors, but is not necessarily a criminal offence, should be subject to the strictest measures such as encryption and effective parental controls, without prejudice to the adoption of stricter measures by Member States.

**Recital 51** of Directive (EU) 2018/1808 states that the applicable fundamental rights, as laid down in the Charter of Fundamental Rights of the European Union, should be carefully balanced when taking the appropriate measures to protect minors from harmful content in accordance with Directive 2010/13/EU. That concerns, in particular and as the case may be, the right to respect for private and family life and the protection of personal data, the freedom of expression and information, the freedom to conduct a business, the prohibition of discrimination and the rights of the child (see also below in regard to Article 6a.2-3).

It can be noted that Directive 2010/13/EU required all Member States to protect minors from content that could *seriously* impair the physical, mental or moral development of minors. The word *seriously* has been removed in Article 6a.1 of Directive (EU) 2018/1808, thus further extending the obligation to protect minors from harmful content.

It can further be noted that Article 6a.1 refers only to audiovisual media services (cf. the old Article 12) instead of television broadcasts or programmes (cf. the old Article 27), thus raising the question if the new Article 6a.1 is to be interpreted differently in regard to linear program services as programmes must be perceived as a narrower concept than audiovisual media services. Most likely this change is not intended to result in a labelling of audiovisual media services as such as harmful to minors. The programmes will still ultimately be the bearers of the potentially harmful content, which is also indicated through the use of the word 'programme' in the last sentence of the first paragraph in Article 6a.1.

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<sup>5</sup> Directive (EU) 2018/1808 contains other provisions applicable to audiovisual media services or video-sharing platforms that aim to protect minors. Such provisions, for example Article 20, are dealt with in more depth in regard to audiovisual media services in chapter X.

### Personal data (Article 6a.2)

**Article 6a.2** sets out to ensure that personal data of minors collected or otherwise generated by media service providers pursuant to Article 6a.1 shall not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising. This provision is new to the Directive.<sup>6</sup>

**Recital 21** of Directive (EU) 2018/1808 states that Regulation (EU) 2016/679 recognises that children merit specific protection with regard to the processing of their personal data. The establishment of child protection mechanisms by media service providers inevitably leads to the processing of the personal data of minors. Given that such mechanisms aim at protecting children, personal data of minors processed in the framework of technical child protection measures should not be used for commercial purposes.

### The provision of sufficient information about harmful content (Article 6a.3)

Article 27 of Directive 2010/13/EU contained a provision in regard to linear broadcasts, which obliged all Member States to ensure that programmes broadcasted in unencoded form which were likely to impair the development of minors were preceded by an acoustic warning or were identified by the presence of a visual symbol throughout their duration. Through **Article 6a.3** of the revised Directive all Member States become obliged to ensure that all media service providers provide sufficient information to viewers about content which may impair the physical, mental or moral development of minors. For this purpose, media service providers shall use a system describing the potentially harmful nature of the content of an audiovisual media service.

**Recital 19** of Directive (EU) 2018/1808 states that in order to empower viewers, including parents and minors, to make informed decisions about the content to be watched, it is necessary that media service providers provide sufficient information about the content's potential harm. This could be done, for example through a system of content descriptors, an acoustic warning, a visual symbol or any other means, describing the nature of the content.

For the implementation of Article 6a.3, Member States shall encourage the use of co-regulation as provided for in Article 4a.1 of Directive (EU) 2018/1808.

### Co-regulatory codes of conduct and self-regulation (Article 6a.4)

**Article 6a.4** in Directive (EU) 2018/1808 states that the Commission shall encourage media service providers to exchange best practices on co-regulatory codes of conduct. Member States and the Commission may foster self-regulation, for the purposes of Article 6a, through Union codes of conduct as referred to in Article 4a.2.

### Existing approaches to monitor and enforce the rules

As described above, an obligation to protect minors from potentially harmful content was included in Directive 2010/13/EU. Member States will therefore already have systems that fulfil at least some of the obligations in the new Article 6a.

One example of an existing system, which includes a requirement to inform the viewers of potentially harmful content, is the **Dutch** co-regulatory system Kijkwijzer, which was developed by the non-governmental institution NICAM. Kijkwijzer warns parents and educators of children up to a certain age whether a television programme or film may be harmful. Kijkwijzer does this firstly by

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<sup>6</sup> Directive (EU) 2018/1808 contains a similar provision for video-sharing platform providers (Article 28b).

giving an age recommendation. Pictograms are used to show the reason for the recommendation. Employees of the media service providers are trained and certified by NICAM so that they can classify the content using Kijkwijzer's symbols. Linear audiovisual media service providers that are not affiliated with NICAM may only broadcast programmes suitable for all ages. Kijkwijzer does not apply to commercial on-demand audiovisual media services, but nearly all on-demand audiovisual media service providers in the Netherlands participate in the system even though it is not mandatory. NICAM's work is monitored by the Dutch media authority the Commissariaat voor de Media, which annually evaluates the functioning of the system and reports to the government.

Another example of an existing approach is the **Norwegian** Audiovisual Programme Act, which requires that programmes made available to the general public are age classified and labelled with an age limit. In addition to public screenings and DVDs, the Act applies to both linear and on-demand audiovisual media services. The Norwegian Media Authority (the NMA) classify cinema films. All other programmes are age classified by the industry, for instance the broadcasters and the audiovisual media service providers. Classifications are obliged by law to be in accordance with guidelines issued by the NMA. Classifications shall be based on an assessment of whether the content of the audiovisual programme may be harmful to persons under the given age limit. There are six categories of age limits and in linear services there is a schedule-based system (watershed). Programmes with seriously harmful content may not be broadcasted on television, and on-demand services must implement technical measures to ensure that minors will not normally have access to such programmes. The NMA may by individual decision review age limits set by the industry and may also issue financial penalties or coercive fines for violation of the Act. These decisions may then be appealed to the Media Appeals Board.

Other existing methods used to protect minors from potentially harmful content throughout the Member States are for example the use of a mandatory pin protection and different age verification tools.<sup>7</sup>

### Potential implementation challenges related to the new Article 6a

Many of the challenges related to the provisions aiming to protect minors are not new to the Member States or the NRAs, and both ERGA and the European Audiovisual Observatory, among others, have written reports on the subject in regard to the previous Articles 12 and 27<sup>8</sup>. One continuous challenge in regard to a consistent implementation when it comes to the protection of minors is that different solutions regarding for example content information, schedule-based access restrictions and technical measures will exist in different Member States. Furthermore, specific content may be judged differently in different Member States, most often due to cultural differences, as some Member States will have a lower threshold for what constitutes *harmful* content than other Member States. Now that the obligation in Article 6a.1 is no longer restricted to what may *seriously* impair the development of minors these differences may become even greater. Due to these differences between Member States, it may be more challenging to ensure as

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<sup>7</sup> For more examples see the ERGA report *Report on the Protection of Minors in a Converged Environment*, 27 November 2015.

<sup>8</sup> See for example the ERGA activity report on *Protecting Children in Audiovisual Media Services - Current and Future Measures*, ERGA Workshop on 4 Oct 2017, the ERGA report on *Protection of Minors in the Audiovisual Media Services: Trends & Practices*, 19 April 2017, Cappello M. (ed.), and the European Audiovisual Observatory reports on *The protection of minors in a converged media environment*, IRIS plus, European Audiovisual Observatory, Strasbourg, 2015, Valais S. and *Comparative tables on the protection of minors in audiovisual media services*, IRIS bonus 2015-1, European Audiovisual Observatory, Strasbourg, 2015.

consistent of an implementation in regard to Article 6a as it will be in regard to other parts of the Directive.

Directive (EU) 2018/1808 furthermore requires that a special system is used to describe the potentially harmful nature of content. This may pose a challenge for both the viewers and the NRAs. If the systems used in the Member States are too diverse, it may cause difficulties for viewers to evaluate and compare content from different Member States, making it more difficult to make well informed decisions about which content to watch. For NRAs, this obligation, especially in regard to on-demand audiovisual media services, may cause at least some initial difficulties when it comes to determining the sufficiency of the information provided. As described above, Directive 2010/13/EU contained a provision regarding warnings etc. in linear broadcasts. Most NRAs will therefore have at least some experience deciding on whether providers of linear services have broadcast adequate information about a programme's potential harm. Deciding on whether a provider of an on-demand audiovisual media service has provided sufficient information will however be a new task to at least a majority of the NRAs. In addition to this, the above-mentioned changes in Article 6a.1 creates a further need for both the NRAs and the providers to balance an assessment of the potential harm with the level of protection offered to minors.<sup>9</sup>

Lastly, although protection of personal data of minors is not a new concept, the addition of Article 6a.2 into the provisions on protection of minors may cause challenges, especially for the providers of the audiovisual media services. Balancing the level of protection of minors in audiovisual media services and the protection of minors' personal data will most likely be a tricky question for the providers. How can the providers, for example, provide an age verification system while still protecting the personal data of the child and its caretaker (whose data will also need to be collected to verify that the child is old enough to access a particular site)?<sup>10</sup>

### Proposals for an effective implementation of the new rules

As has been described above, there may be different systems or regulations to protect minors in different Member States. What constitutes harmful content may also be judged differently due to Member States' cultural differences. What must be remembered when comparing the different national systems is, however, that even though the systems may look different and have different solutions to protect minors, they may still have very similar purposes and achieve common outcomes. The NRAs could consequently benefit from an exchange of best practices and case studies when it comes to technical measures, labelling systems, classification criteria, concrete cases etc. This would allow the NRAs to draw inspiration from other systems, to make comparisons between similar cases and to find actual similarities between systems that may, at least at the surface, look very different.

The discussions held and the information shared by the NRAs could include case studies on technical measures that have been deemed appropriate for on-demand audiovisual media services that are free for all users (for example those provided by PSBs), or descriptions of information which has been deemed sufficient in regard to Article 6a.3. The NRAs may for example discuss or share information

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<sup>9</sup> Note that assessing harmful content and the need for a research-based approach was the focus of a plenary session at the 49th EPRA meeting in Sarajevo in May 2019: <https://www.epra.org/attachments/sarajevo-plenary-1-protection-of-minors-in-the-online-world-introductory-document>.

<sup>10</sup> Note that these questions were discussed during a plenary session at the 50th EPRA meeting in Athens in October 2019: <https://www.epra.org/attachments/athens-plenary-1-protection-of-minors-in-the-digital-world-what-common-challenges-for-nras-and-dpas-background-paper>.

about cases concerning how and when symbols should be visible in the new systems describing the potentially harmful nature of the content in accordance with Article 6a.3. If possible, ERGA may organize workshops to discuss such matters with providers of audiovisual media services and other external stakeholders such as representatives from the academic world with knowledge of what constitutes harmful content for children. Member States could also discuss and share information about how the omission of the word *seriously* in Article 6a.1, and the further requirement to balance an assessment of harm with the level of protection applied, may have impacted their decisions in concrete cases and whether they have had to make any changes to their national systems or rules due to the changes in the Directive.

Even though most Member States will already have regulations and safety measures in place to prevent collection and treatment of children's personal data for marketing purposes, and although these regulations and safety measures may be handled by other national authorities than the NRAs overseeing audiovisual media services, it could be useful for ERGA members to initiate an interaction with industry stakeholders and deliver a report on the 'state of the art' technologies supporting efficient age verification in conformity with data protection laws.

In addition to discussing relevant issues and cases in different ERGA-forums (subgroups, strategic sessions etc.), the DET could be used as a platform for the above-mentioned exchange of best practices to allow for an easy way to collect and share information and to keep the information up to date.

**Proposal 1:** ERGA members to exchange best practices regarding appropriate measures taken in accordance with Article 6a.1 to allow NRAs to draw inspiration from other NRAs' systems and make comparisons between concrete cases.

**Proposal 2:** ERGA members to continue to identify existing industry practices and standards regarding age verification systems and to exchange views regarding the balancing of the level of protection of minors in audiovisual media services and the protection of minors' personal data (Article 6a.2).

**Proposal 3:** ERGA members to exchange best practices regarding systems describing the potentially harmful nature of content in accordance with Article 6a.3 to allow NRAs to draw inspiration from other NRAs' systems and make comparisons between concrete cases. This could include interaction with external stakeholders and experts, including researchers and academics, with knowledge of what constitutes harmful content for children.

## Accessibility (Article 7)

### Changes to the rules

**Article 7** of Directive 2010/13/EU obliged all Member States to encourage media service providers of both linear and non-linear audiovisual media services to ensure that their services were gradually made accessible to people with a visual or hearing disability. Through **Article 7.1** of Directive (EU) 2018/1808, the obligation is now stricter than before and contains more provisions. Whereas before, Member States were only obliged to encourage media service providers to make their services accessible, all Member States shall now ensure, without undue delay, that services provided by media service providers under their jurisdiction are made continuously and progressively more accessible to persons with disabilities through proportionate measures. Not only is the word 'encourage' replaced with the more strict and urgent wording 'ensure without undue delay', all media services shall now be accessible to persons with any kind of disability and not only to people with a visual or hearing disability (even though the latter are still in particular focus in the Directive in accordance with Recital 22).

**Recital 22** of Directive (EU) 2018/1808 states the following. Ensuring the accessibility of audiovisual content is an essential requirement in the context of the commitments taken under the United Nations Convention on the Rights of Persons with Disabilities. In the context of Directive 2010/13/EU, the term 'persons with disabilities' should be interpreted in light of the nature of the services covered by that Directive, which are audiovisual media services. The right of persons with an impairment and of the elderly to participate and be integrated in the social and cultural life of the Union is linked to the provision of accessible audiovisual media services. Therefore, Member States should, without undue delay, ensure that media service providers under their jurisdiction actively seek to make content accessible to persons with disabilities, in particular with a visual or hearing impairment. Accessibility requirements should be met through a progressive and continuous process, while taking into account the practical and unavoidable constraints that could prevent full accessibility, such as programmes or events broadcast in real time.

**Recital 23** of Directive (EU) 2018/1808 states that the means to achieve the accessibility of audiovisual media services should include, but need not be limited to, sign language, subtitling for the deaf and hard of hearing, spoken subtitles, and audio description. The Directive does not cover features or services providing access to audiovisual media services, nor does it cover accessibility features of electronic programme guides (EPGs). Therefore, the Directive is without prejudice to Union law aiming to harmonise the accessibility of services providing access to audiovisual media services, such as websites, online applications and EPGs, or the provision of information on accessibility and in accessible formats.

Through **Article 7.2** of Directive (EU) 2018/1808, all Member States also become obliged to ensure that media service providers report on a regular basis to the national regulatory authorities or bodies on the implementation of the measures referred to in Article 7.1. By 19 December 2022 and every three years thereafter, Member States shall report to the Commission on the implementation of Article 7.1.

The previously mentioned **Recital 22** further states that in order to measure the progress that media service providers have made in making their services progressively accessible to people with visual or hearing disabilities, Member States should require media service providers established on their territory to report to them on a regular basis.

Under **Article 7.3**, Member States shall encourage media service providers to develop accessibility action plans in respect of continuously and progressively making their services more accessible to persons with disabilities. Any such action plan shall be communicated to national regulatory authorities or bodies.

Furthermore, **Article 7.4** states that each Member State shall designate a single, easily accessible, including by persons with disabilities, and publicly available online point of contact for providing information and receiving complaints regarding any accessibility issues referred to in Article 7.

Lastly, under **Article 7.5**, Member States shall ensure that emergency information, including public communications and announcements in natural disaster situations, which is made available to the public through audiovisual media services, is provided in a manner which is accessible to persons with disabilities. **Recital 24** states that in some cases, it might not be possible to provide emergency information in a manner that is accessible to persons with disabilities. However, such exceptional cases should not prevent emergency information from being made public through audiovisual media services.

### Existing approaches to monitor and enforce the rules

As described above, an obligation to make media services accessible to persons with disabilities was already included in Directive 2010/13/EU. Member States will therefore, at least in regard to Article 7.1, have transposed this obligation into their national laws, whether it be through a regulatory system (see the Swedish and British examples below) or a co-/self-regulatory system (see the German example below). While some Member States have for example only set down a specific percentage of content which must be accessible to persons with disabilities, other Member States have already obliged their media service providers to report to the NRAs, develop action plans and/or make their services continuously and progressively more accessible.

In **Sweden**, media service providers must arrange their services in such a way that they are accessible to persons with disabilities through subtitling, sign language interpretation, audio description, spoken subtitles or other similar techniques. The Swedish PSBs have quantitative and gradually increasing requirements for their media services and/or programs. The same applies to media services of other providers under Swedish jurisdiction that have a viewer time share of one percent or more. There are no quantitative requirements for media services with a viewer time share of less than one percent, but their providers shall still promote accessibility through the use of at least one of the abovementioned techniques, and increasingly more programs should be made accessible each year. All media service providers are also obliged to report on how they fulfil the requirements each year and to provide an action plan/information about the measures they have taken to make their media services or programs more accessible to persons with disabilities. A media service provider who has not fulfilled the requirements may be ordered to do so. Such an order may be subject to a conditional fine.

In **the United Kingdom**, television broadcasters are required to deliver a certain proportion of their programmes with subtitles, signing and audio description to ensure that those with hearing and visual impairments can understand and enjoy television programmes. The percentage of accessible



programming for subtitling, audio description and signing rises gradually over the course of ten years. Ofcom's Code on Television Access Services sets out the criteria for determining which channels should provide access services, and what targets they should meet. Channels are exempted on the basis of limited benefits to the audience or an inability to afford the requirements. For those purposes, domestic channels with an audience share (all UK households, all times) of 0.05 percent or above are, as a general rule, required to provide access services. They are also obliged to report on the fulfilment of this requirement.

In **Germany**, all nationwide broadcasters should commit to increasing accessibility over their existing commitments within their technical and financial capabilities in accordance with the German Interstate Broadcasting Treaty. There is no binding legal obligation, but rather an expressed expectation of a gradual increase of inclusive broadcasting offers. In 2013 the German media authorities began constant monitoring of the offers of commercial broadcasters for persons with disabilities. In these evaluations, commercial broadcasters should highlight their existing commitments as well as their future plans on how to increase accessibility to their programmes. The survey period is from September to December on an annual basis. The sixth monitoring was conducted at the end of 2018. Generally, the 14 media authorities focus on the monitoring of the offers of commercial broadcasters for persons with disabilities (the steering effect), accompanied by regular exchange and dialogue with the broadcasters, interest groups of persons with disabilities and the Federal Government Commissioner for matters relating to persons with disabilities.<sup>11</sup>

### Potential implementation challenges related to the new Article 7

As has been exemplified above, the structure of the national systems may vary depending on whether the Member States have introduced regulatory or co-/self-regulatory systems. These structural differences may, depending on how the rules are applied, present a challenge when it comes to a consistent implementation of the rules in all the different Member States. In addition to these structural differences, one of the main challenges in regard to a consistent implementation in all Member States is the fact that the Directive does not state the percentage of content that should be made accessible to persons with disabilities. Thus, the quantitative obligations can vary from one Member State to another, depending on the national laws regulating media services. Furthermore, the Directive does not include its own definition of 'persons with disabilities', which could result in different interpretations and definitions in different Member States<sup>12</sup>. Member States may also have different rules in regard to whether the same obligations should apply to all media service providers irrespective of their viewer timeshare or costs, or if it should only apply to those media service providers or media services that fulfil certain criteria, as is the case in for example Sweden and the UK (see above). The obligations may also need to be different for different providers, as all types of techniques will not be available on all types of platforms and the providers of the audiovisual media content may not always be able to decide how their content is made accessible. The Member States may also need to consider different challenges met by their media service providers. Some NRAs and

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<sup>11</sup> For further examples, see the comparative background paper produced by the EPRA Working group on accessibility in Athens in October 2019: <https://www.epra.org/attachments/athens-wgiii-accessibility-background-document>.

<sup>12</sup> As stated above, Recital 22 only states that "In the context of Directive 2010/13/EU, the term 'persons with disabilities' should be interpreted in light of the nature of the services covered by that Directive, which are audiovisual media services". The NRAs may however find guidance in other legislative acts such as the Convention on the Rights of Persons with Disabilities; <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>.



their providers may meet challenges of a more financial nature (e.g. lack of funds), while others may face issues of a more technical nature (e.g. audience share measurements).

Another challenge that may arise in relation to the new Article 7 is connected to the new obligation to designate a single online point of contact. Some Member States may choose to designate the NRA itself as the point of contact, while other Member States may designate a different authority or perhaps a disability organization as the point of contact. In the latter case especially, there may be disputes as to which authority or organization is responsible for either designating and/or maintaining the point of contact. Furthermore, it may become necessary to decide which authorities or organizations need to have access to the point of contact since the authority or organization responsible for dealing with complaints (most often the NRA) needs to receive them in a reasonable time in order to be able to deal with them satisfyingly.

In addition to the above, a potential challenge related to the new Article 7 may arise from the new obligation set down in Article 7.5. In accordance with what is stated in Recital 24, it may prove difficult to provide all information in accessible form in as short of a time frame as is available in emergency situations.

### Proposals for an effective implementation of the new rules

As described above, Member States will, at least in regard to Article 7.1, already have national systems or rules regarding accessibility obligations in place. While some Member States only have quantitative obligations, other Member States already have systems that include several of the new obligations in Article 7. Thus, there are already Member States with direct knowledge of how to, for example set up a reporting system, or how to encourage the providers of audiovisual media services to set up a self-regulatory system. By exchanging best practices, it may be possible to have fairly uniform approaches in the Member States, despite there possibly being structural differences, as Member States can learn from one another. Discussions held and information shared by the Member States could, for example, include case studies of decisions on the percentage of content accessible to persons with disabilities, descriptions of criteria for determining which services should provide access services, descriptions of reporting obligations and the drawing up of action plans as guidelines for the media service providers. The exchange of information could also include descriptions of cases where a media service provider's fulfilment of the obligations was questioned by the NRA, as well as discussions on how 'persons with disabilities' are defined in the different Member States and how the different groups' needs are met through the obligations set up in the different national systems (sign language caters to the need of certain groups, while audio description caters to others, for example). Furthermore, it may be of interest to the NRAs to discuss and compare possible limitations for the different providers of audiovisual media services, especially non-linear providers, to decide how and through which techniques their content is made accessible on different platforms. The sharing of best practices could also include information on national systems for designated points of contact and good examples of how emergency information is made available to persons with disabilities. It may also be of interest to the NRAs to discuss different types of systems, whether it be regulatory or co-/self-regulatory systems, as this may inspire Member States to review their existing systems from a different point of view. Lastly, it may also be of interest to discuss and compare whether financial support from the state is given to the providers of the media services and the results of such funding.

In addition to discussing relevant issues and cases in different ERGA-forums (subgroups, strategic sessions etc.), the DET could be used as a platform for the above-mentioned exchange of best

practices to allow for an easy way to collect and share information and to keep the information up to date.

**Proposal 1:** ERGA members to exchange best practices with regard to national systems or rules dealing with accessibility requirements for media service providers to allow NRAs to draw inspiration from other NRAs' systems and make comparisons between concrete cases.

## Findability (Article 7a)

### Changes to the rules

**Article 7a** of Directive (EU) 2018/1808, stating that Member States may take measures to ensure the appropriate prominence of audiovisual media services of general interest, is new to the Directive. The provision is voluntary, as is stated directly in the text, and allows Member States to introduce rules regarding prominence, or what is often referred to as findability.

**Recital 25** of Directive (EU) 2018/1808 states that Directive 2010/13/EU is without prejudice to the ability of Member States to impose obligations to ensure the appropriate prominence of content of general interest under defined general interest objectives such as media pluralism, freedom of speech and cultural diversity. Such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in accordance with Union law. Where Member States decide to impose rules on appropriate prominence, they should only impose proportionate obligations on undertakings in the interests of legitimate public policy considerations.

### Existing approaches to monitor and enforce the rules

Although there are few Member States that already have rules on findability and existing approaches to monitor and enforce such rules there are some existing approaches. Some of these are described below.

In **the French speaking part of Belgium**, audiovisual media service providers could, if found necessary, have to guarantee that the user gets access to fair and non-discriminatory EPGs, in which certain programs are available. Along these lines, the Government can set conditions under which access by the users to the services through the EPG is ensured in compliance with pluralism and non-discriminatory principles. Moreover, the PSB is under a duty to endeavour to position two channels at the top of each distributors' EPG, while a third channel is expected to occupy one of the first nine places. In **the Flemish region of Belgium**, the Flemish Government can impose conditions on 'service providers' (i.e. distributors) concerning the installation, access or presentation of EPG's, if necessary, to ensure access for the consumer to a clearly specified amount of digital channels available in the Flemish Community. The Flemish Government has not issued a Decree to specify such conditions, which means that the rules have been without practical consequence so far. In **Germany**, programme listings within EPGs need to occur in a non-discriminatory manner. Lastly, In **the United Kingdom** a set of designated linear channels that must deliver a range of content that fulfils *public service* objectives (all of the BBC channels, the Channel 3 services, Channel 4, Channel 5, S4C and local TV channels) must be given 'appropriate prominence' on licensed EPG services; this ensures that audiences can easily find and watch services that provide a societal benefit, which in turn supports the sustainability of the PSB system. The UK recently updated rules on appropriate prominence for PSB channels within EPGs and have also recommended that new legislation is put in place to ensure PSB media remains prominent 'beyond the EPG' on smart TVs, streaming sticks and other online TV platforms.

### Potential implementation challenges related to the new article 7a

One aspect to consider when it comes to rules on findability and a consistent implementation of the rules is the fact that Article 7a is voluntary for all Member States. Some Member States will therefore, due to a variety of national public policy reasons, introduce (or may already have – see examples above) systems or rules that ensure the appropriate prominence of audiovisual media

services of general interests (in some cases these will be more specifically focused on channels that deliver content of ‘public value’ (aka PSBs)), while other Member States may choose not to introduce such systems or rules. In regard to a consistent implementation it may therefore be more interesting to look at questions of consistency in Member States that do choose to introduce rules on findability rather than a consistency throughout all Member States. Such a comparison may show that there is no actual consistency between existing national rules, without this necessarily being a problem.

Another challenge in regard to a consistent implementation when it comes to Article 7a is the fact that it may be difficult for Member States to reach a common understanding of certain key notions of the Directive. Both Article 7a and Recital 25 contain words or concepts that can be applied differently by different Member States. What constitutes *appropriate prominence* and *proportionate obligations* may for example differ from Member State to Member State. Member States may also identify different general interest objectives relevant for rules on findability. Depending on which audiovisual media services are identified as being of general interest, the rules on findability may also be applicable to different types of services in different Member States. Some Member States may for example only view services provided by PSBs or services containing ‘public service’ content as services of general interest, while other Member States may also include services provided by commercial broadcasters with content of general interest (as the examples above show, the currently existing national rules apply to linear PSB-services). Once again, these differences between national systems or rules may make it difficult to ensure a consistent implementation in regard to Article 7a in Member States with rules on findability. As mentioned above inconsistencies between national rules may however not be a problem, since the provision itself is voluntary.

### Proposals for an effective implementation of the new rules

As described above, Article 7a is voluntary, which means that some Member States will have rules on findability, while others will not. In addition to this, Article 7a and Recital 25 contain words or concepts that will most likely be applied and understood differently in different Member States. The Member States that do choose to introduce rules on findability may still have systems similar to at least one other Member State and the NRAs could therefore benefit from an exchange of best practices. This would allow the NRAs to draw inspiration from other systems and to make comparisons between similar cases. For Member States debating whether to introduce rules on findability, such shared experiences could also be useful as inspiration or guidance.

For Member States with rules on findability, it may be valuable to discuss certain key notions of the Directive, in order to possibly reach a common understanding. One possible topic for discussion could be a further exploration of the difference between ‘public service’ content and ‘general interest’ content in order to perhaps reach some consistency in regard to what these concepts entail. It could in relation to this topic also be of interest to further discuss the difference between ‘general interest’ and ‘public interest’, and how that ties into the findability obligations. Another possible topic for discussion could be how to define ‘findability’ in a way that doesn’t stymie innovation. The discussions held and the information shared by the NRAs could furthermore include discussions on and descriptions of which general interest objectives have been found relevant for rules on findability, which audiovisual media services the rules apply to, what has been deemed as appropriate prominence and proportionate obligations and the reasoning behind any such findings and decisions. The exchange of best practices could build on already existing resources, including material gathered by for example EPRA<sup>13</sup>.

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<sup>13</sup> <https://www.epra.org/>.

In addition to discussing relevant issues and cases in different ERGA-forums (subgroups, strategic sessions etc.), the DET could be used as a platform for the above-mentioned exchange of best practices to allow for an easy way to collect and share information and to keep the information up to date.

**Proposal 1:** ERGA members to exchange best practices regarding measures taken to ensure the appropriate prominence of audiovisual media services of general interest in accordance with Article 7a to allow Member States to draw inspiration from other Member States and make comparisons between national systems/concrete cases.

**Proposal 2:** ERGA members to discuss certain key notions of the Directive, in order to possibly reach a common understanding.

## Signal integrity (Article 7b)

### The new rules

Directive 2018/1808/EU (“Directive”) introduces Article 7b, which establishes that “Member States shall take appropriate and proportionate measures to ensure that audiovisual media services provided by media service providers are not, without the explicit consent of those providers, overlaid for commercial purposes or modified”.

For that purpose, “Member States shall specify the regulatory details, including exceptions, notably in relation to safeguarding the legitimate interests of users while taking into account the legitimate interests of the media service providers that originally provided the audiovisual media services”.

Recital 26 of the Directive gives further details stating that “[i]n order to protect the editorial responsibility of media service providers and the audiovisual value chain, it is essential to be able to guarantee the integrity of programmes and audiovisual media services supplied by media service providers. Programmes and audiovisual media services should not be transmitted in a shortened form, altered or interrupted, or overlaid for commercial purposes, without the explicit consent of the media service provider”.

*According to the above-mentioned Recital, the consent of the media service provider is not required in cases of overlays solely initiated or authorised by the recipient of the service for private use, such as overlays resulting from services for individual communications. Furthermore, “control elements of any user interface necessary for the operation of the device or programme navigation, such as volume bars, search functions, navigation menus or lists of channels, should not be covered”, as well as legitimate overlays, such as warning information, general public interest information, subtitles or commercial communications overlays provided by the media service provider. Recital 26 also states that without prejudice to Article 3, par. 3, of Regulation 2015/2120 of the European Parliament and the Council, “data compression techniques which reduce the size of a data file and other techniques to adapt a service to the distribution means, such as resolution and coding, without any modification of the content, should not be covered either”. Moreover, “measures to protect the integrity of programmes and audiovisual media services should be imposed where they are necessary to meet general interest objectives clearly defined by Member States in accordance with Union law. Such measures should impose proportionate obligations on undertakings in the interest of legitimate public policy considerations”.*

### Existing approaches concerning signal integrity

A contribution from Member States that have already adopted rules and/or practices regarding signal integrity at a national level would be particularly useful. Indeed, sharing national experiences could contribute to implement regulatory measures to protect editorial responsibility and integrity of programmes.

In the Flemish Community of Belgium an article concerning signal integrity (article 180) was introduced in the Media Act in 2013. This provision imposes an obligation on media service providers to obtain the explicit consent of broadcasters when offering functionalities to watch programmes in a modified way to end-users. Remunerations paid by media service providers to broadcasters, as a result of this, have to be used to invest in Dutch-language European productions.

However, the role of the NRA (VRM) is limited to organizing mediation if negotiations fail and when requested by the broadcaster and/or media service provider involved (which so far never happened) or to handling complaints in absence of negotiations (e.g. the joint complaint of three Flemish broadcasters against a so-called ‘collaborative video recorder’ provider using and modifying the broadcasters’ signals without permission).

Article 180, as stated in the explanatory notes to the Media Act, was aimed to protect the editorial responsibility and programme schedule of the broadcaster. The adoption was however also linked to discussions about ‘ad-skipping’ possibilities and loss of ad-revenues for broadcasters.

In this context concerns about signal integrity could for example also be ‘pause button ads’ or ‘programme suggestions’ on the menu screen by media service providers.

### Potential implementation challenges related to the new Article 7b

Article 7b aims to protect the editorial responsibility of media service providers. For this purpose, the provision establishes that audiovisual media services provided by media service providers should not be overlaid for commercial purposes or modified without the explicit consent of those providers.

In order to ensure the implementation of the provision, Article 7b entrusts Member States with the duty to adopt measures aiming at regulating such consent and the related exceptions.

In this regard, the Directive points out the need for Member States to balance the interests of media service providers, who originally provided the services, with the interests of users.

However, the provision might lead to diverging outcomes at a national level. Indeed, while Article 7b states the need for the explicit consent of media service providers, it does not provide Member States with any indications as to how to set out the related “regulatory details”. Indeed, this might represent a significant challenge for competent national Authorities and might entail the risk of affecting the harmonized implementation of the Directive.

In light of the above, it is crucial that the NRAs exchange views and best practices on the possible actions taken on signal integrity issues. Besides, it is important to further analyse the issue of commercial communications modifying the content of a programme. Such an analysis could focus on gaining a better understanding of the type of modification (for instance the shortening of programs), the changing of the content or the use of different overlay techniques.

An exchange of views and experiences could also be beneficial when addressing questions such as: (i) would commercial communications, which scroll at the bottom of the television screen, require consent in the same way as the ones overlaying the content and (ii) which types of commercial communications (spot advertising, teleshopping, sponsorship, etc.), could be considered to modify or alter the content and consequently require a consent-

It might also be interesting to gather information about the views of broadcasters and right holders on this matter. If Member States have already started to collect such information, it could be possible to build on or include any such collections.

As an aid to the different means of cooperation, the Digital European Toolkit (DET) might be used as a platform for exchanging best practices, collecting and sharing information and to keep the information up-to-date.

## Proposals for an effective implementation of the new rules

As described above, Member States will have to implement the provisions set out in Article 7b.

Even if it may often be the case that the consent becomes part of a private agreement/contract between a media service provider who provides contents and a media service provider who broadcasts contents, the competent NRAs might still be in a position to provide the parties with guidelines and/or recommendations to ensure that such agreements/contracts would enhance the protection of the editorial responsibility of the media service providers as well as the protection of the end users.

In light of the Flemish experience described above, Member States might reflect on the possibility for NRAs (or other competent bodies) to play a role of mediator if negotiations between the above-mentioned parties fail, when requested by either party involved, or to handle complaints in the absence of negotiations.

Lastly, it may also be of interest for NRAs to consider how new techniques for overlaying and modifying content might in fact affect media content. In this regard, the NRAs could share their experiences of new overlaying techniques developed in regard to commercial communications.

**Proposal 1:** ERGA members should exchange best practices with regard to national systems/rules/cases dealing with signal integrity in accordance with Article 7b, in order to allow Member States to draw inspiration from other Member States and make comparisons between different national systems and experiences. The views of broadcasters and right holders could also be collected on this matter.



## Commercial communications (Articles 9, 10, 11, 19, 20 and 23)

### Changes to the rules

#### Article 9

The modification of Article 9 produces mainly the consequences that are listed below:

- Article 9.2 extends the rules, set out in Article 22, for audiovisual commercial communications of alcoholic beverages, also to on-demand audiovisual media services.
- Article 9.3 encourages the use of co-regulation and self-regulation to improve the provisions regarding inappropriate audiovisual commercial communications for alcoholic beverages and to reduce the exposure of minors to this type of commercial communications. For the same reason (reducing exposure of minors), Article 9.4 recommends the use of co-regulation and self-regulation also regarding the exposure of children to commercial communications for unhealthy food and beverages.

#### Article 10

Article 10 paragraph 2, extends the prohibition of sponsorship already provided for tobacco producers to also include “electronic cigarettes and refill containers”

Article 10 paragraph 4, states that Member States may prohibit the sponsorship of children's programmes and that Member States may choose to prohibit the showing of a sponsorship logo during children's programmes, documentaries and religious programmes.

#### Article 11

##### Product placement

The modification of Article 11.2 in Directive (EU) 2018/18 implements a change in principle: from a prohibition principle (with a major exception if the Member States allowed it which all did) to a general authorization with few exceptions.

Product placement is allowed in all audiovisual media services, except in 4 categories of programs : news and current affairs, consumer affairs programs, religious programs and children's programs.

Article 11.3 has been slightly reworded with no consequences.

In Article 11.4, electronic cigarettes and refill containers are added to the perimeter of prohibition of product placement in event programs.

#### Article 19

##### Isolated television advertising and teleshopping

Article 19.2, on isolated television advertising and teleshopping, is rewritten to be more explicit. The former Directive stated that “isolated advertising and teleshopping spots, other than in transmissions of sports events, shall remain the exception”. The new Article specifies that “isolated television advertising and teleshopping spots shall be admissible in sports events. Isolated television advertising and teleshopping spots, other than in transmissions of sports events, shall remain the exception”.

This change of wording emphasizes that isolated advertising and teleshopping spots are possible in sports events.

## Article 20

### Insertion rules

The architecture of the insertion rules remains unchanged. A stricter rule of insertion is included, however, which states that children's programs no longer can be interrupted by teleshopping, only by advertising.

## Article 23

### Proportions of television advertising and teleshopping

Article 23 sets out the proportion of television advertising and teleshopping allowed. The article is modified in the following way (modifications in bold): « 1. The proportion of television advertising spots and teleshopping spots within the period between 6.00 and 18.00 shall not exceed 20 % of that period. The proportion of television advertising spots and teleshopping spots within the period between 18.00 and 24.00 shall not exceed 20 % of that period.

2. Paragraph 1 shall not apply to:

- (a) announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes or with programmes and audiovisual media services from other entities belonging to the same broadcasting group;
- (b) sponsorship announcements;
- (c) product placements;
- (d) neutral frames between editorial content and television advertising or teleshopping spots, and between individual spots ».

These are the main changes regarding commercial communications. Consequently, the hourly criterion is abolished. Two separate time slots are introduced to calculate the allowed proportion of advertising. No more than 20 % of broadcasting time between 6.00 and 18.00 and between 18.00 and 24.00 can be dedicated to advertising and teleshopping spots.

Recital 41 balances broadcasters and advertisers' interests with consumer protection: "It is important that broadcasters have more flexibility and are able to decide when to place advertising in order to maximise advertisers' demand and viewers' flow. It is also necessary, however, to maintain a sufficient level of consumer protection in that regard because such flexibility could expose viewers to an excessive amount of advertising during prime time".

Finally, it should be noted that there is no longer quantitative limit of advertising between midnight and 6 AM. If there is not normally a lot of advertising during the night, there may, for example, be advertising around specific sports events (Soccer World championship, Super Bowl, Olympic games etc.) or cultural ones (The Oscars ceremony for example) when such programs are broadcast during the night in Europe and may attract a significant audience. Consumers watching these programs during the night would therefore no longer be 'protected' in terms of the quantity of ads they would see. Similarly, teleshopping spots could be broadcast all night long which is today not allowed in some Member States.

## Exclusions from the calculation

The list of announcements and audiovisual commercial communications not included in the advertising time period is extended to:

- announcements made by the broadcaster in connection with programs and audiovisual media services from other entities belonging to the same broadcasting group;
- neutral frames between editorial content and television advertising or teleshopping spots, and between individual spots.

The second exception is a way to overturn CJEU case law *Sanoma v. Viestintävirasto* (Judgment of the CJEU (Fourth Chamber) of 17 February 2016, *Sanoma Media Finland Oy-Nelonen Media v. Viestintävirasto*, Case C-314/14). In *Sanoma v. Viestintävirasto*, the CJEU clarified the definition of advertising especially regarding so-called “black seconds”, that is, black images preceding and following each of the advertising spots. These “black seconds”, which are inserted between the various spots of a television advertising break or between that break and the television program which follows it, had to – due to the wording in the Directive - be included in the maximum time for the broadcasting of television advertising per clock hour (20 %)

The new directive states that these “black seconds” or “neutral frames” shall not be included in the allowed advertising time. According to Recital 42, this exclusion ensures that the advertising time is not impacted and that revenues generated from the advertising are not negatively affected. This recital however defines “neutral frames” in a broader way than the CJEU case law. The recital includes the “neutral frame” between the program and the first television or teleshopping spot of the break, whereas the case law does not.

## Potential implementation challenges

### Article 9

The national regulatory authorities should promote the use of co-regulation and the fostering of self-regulation through codes of conduct adopted at national level. This means to make sure that the main stakeholders are involved in the process at national level and setting up a monitoring system in order to evaluate the achievement of abovementioned code.

### Article 10

No significant implementation challenges were identified.

### Article 11

#### Product placement

As all Member States already allowed product placement, no major challenges should arise. Nevertheless, in those Member States where stricter rules on product placement have been introduced (like in France, where product placement is only allowed in cinematographic works, audiovisual fictions and music videos) would have to modify their rules if they want to allow product placement in more categories of programs. They would accordingly need to list these categories of programs, reconcile divergent interests and ensure that there remains a balance between the

development of product placement and consumer protection. For example, allowing product placement in entertainment programs would need to accommodate the editorial responsibility and revenue control of the broadcaster, the producers' economic interests and consumer protection.

#### Article 19

##### Isolated television advertising and teleshopping

No significant implementation challenges were identified.

#### Article 20

##### Insertion rules

The prohibition of teleshopping in children's programs will require a change in national rules if it was allowed before. One practical challenge may be to understand and clearly define what "children's programs" are, in particular given that the notion of 'children' is not defined harmoniously across Europe.

#### Article 23

##### Proportions of television advertising and teleshopping

When implementing this new rule, broadcasters may need to change their software scheduling and monitoring tools. Since this rule gives more flexibility to the broadcasters, they may change their marketing strategy, for example selling more than 20 % of broadcasting spaces during the prime time.

This may likely require national regulatory authorities to assess whether their monitoring system remains fit for purpose. For instance, there are different ways how 'neutral frames' are today being integrated into the calculation of the overall amount of advertising. Now that the Directive provides that 'neutral frames' shall be excluded from the calculation, there is a question as to whether NRAs should come up with an average 'standard' duration of neutral frames.

#### Proposals for an effective implementation of the new rules

**Proposal 1:** ERGA members to exchange best practices regarding which program categories within product placement will be allowed, on the basis of relevant national case studies.

**Proposal 2:** ERGA members to exchange best practices regarding the monitoring method and tools they use to calculate the overall amount of TV advertising.

## Independence of the national regulatory authorities (Article 30)

One of the most important innovations of the amended Directive is the introduction of an explicit provision on the independence of the national regulatory authorities in the audiovisual sector.

Article 30 of Directive 2010/13/EU merely made a passing reference to the independent national regulatory authorities in the audiovisual sector, without obliging explicitly the Member States to provide for such authorities and to guarantee their independence. Furthermore, that article made no mention of the competences and features of those national independent authorities and did not specify the requirements that had to be met in order for a national regulatory authority to be considered as independent.

On the contrary, there already existed at EU level specific legislative provisions on the independence of the competent national regulatory authorities in several other sectors.<sup>14</sup>

Following its amendment by Directive 2018/1808/EU, Article 30 of Directive 2010/13/EU now provides the following:

- It imposes on the Member States the obligation to designate national regulatory authorities and/or bodies, legally distinct from the government and functionally independent of their respective governments and of any other public and private body.
- It requires the Member States to ensure that those national regulatory authorities and/or bodies shall exercise their powers impartially and transparently and in accordance with the objectives of the Directive.
- It stipulates that those national regulatory authorities and/or bodies shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing EU law. However, it is expressly stated this shall not prevent supervision in accordance with national constitutional law.
- It obliges the Member States to clearly define in law the competences and powers of those national regulatory authorities and/or bodies, as well as the ways of making them accountable.
- It requires the Member States to ensure that national regulatory authorities and/or bodies shall have adequate financial and human resources and enforcement powers to carry out their functions effectively and to contribute to the work of ERGA. Member States must also ensure that national regulatory authorities and/or bodies are provided with their own annual budgets, which shall be made public.
- It obliges the Member States to lay down in their national law the conditions and the procedures for the appointment and dismissal of the heads of national regulatory authorities and/or bodies or the members of the collegiate body fulfilling that function, including the duration of the mandate. The applicable procedures must be transparent, non-discriminatory and guarantee the requisite degree of independence. The head of a national regulatory authority or body or the members of the collegiate body fulfilling that function within a national regulatory authority or body may be dismissed if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance at national level. A dismissal decision must be duly justified, subject to prior notification and made available to the public.
- It imposes on the Member States the requirement to ensure that effective appeal mechanisms exist at national level. The appeal body may be a court and it must be independent of the parties involved in the appeal. Pending the outcome of the appeal, the decision of the national

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<sup>14</sup> Such provisions existed in particular in the areas of data protection (Article 28 (1) of Directive 95/46/EC – see now the much more detailed Articles 51-54 of Regulation 2016/679/EU), energy (Article 35 of Directive 2009/72/EC) and electronic communications (Article 3 of Directive 2002/21/EC). Those provisions served in essence as the legislative model for the drafting of the new Article 30 of Directive 2010/13/EU.

regulatory authority and/or body shall stand unless interim measures are granted in accordance with national law.

Contrary to its predecessor, the new article imposes explicitly on the Member States the obligation to provide for the existence in the audiovisual sector of national regulatory authorities enjoying functional independence in the performance of their powers. It also specifies some of the requirements stemming from the concept of that functional independence, as concerns in particular the appointment and removal of the heads or the members of the collegiate body of those national regulatory authorities as well as the adequacy of their personnel and financial resources.

Some parts of the new article leave some leeway as concerns the implementation and practical enforcement of the new provisions. A benefit of this leeway for national governments could be that it allows them to accommodate the new requirements in accordance with the legal tradition and the institutional framework of each national jurisdiction. However, it may also lead to interpretative difficulties especially during the implementation process of the Directive.

While the case law has already provided important clarification about the content of functional independence and the specific requirements that this imposes in practice, there are still several issues that remain unclear as regards in particular the application of the new provisions on the adequacy of the human and the financial resources of the national regulatory authorities and the appointment and removal of their heads/members.

In the following section, reference will be made to the judicial interpretation of the concept of independence and of the practical requirements stemming from its existence. That is important in order to understand the direction that must be given to the implementation procedure, at least as concerns those issues that have already been clarified by case law.

In the last section, an attempt will be made to underline some of the implementation challenges that the open language of the new provision is likely to give rise to.

### Decodifying the requirements of independence in the audiovisual sector

While all case law has developed thus far in relation to national regulatory authorities outside the audiovisual sector (see Annex 1 to this paper), it is nevertheless apparent that that it introduces general principles applicable in all circumstances. As a result, it is possible to draw useful conclusions as to the specific obligations that the revised Directive imposes on the Member States concerning features and competences of the national regulatory authorities coming within the Directive's scope of application.

## 1. Existence of complete political independence

The mere classification of a regulatory authority as independent under national law does not suffice, if it is not accompanied by specific legislative provisions that guarantee it in practice.<sup>15</sup>

The existence of functional independence is an essential condition in order for a national regulatory authority to satisfy the criterion of independence.

However, functional independence is not by itself sufficient to protect that authority from all external influence that is liable to have an indirect effect on the performance of its powers.<sup>16</sup> National law must not annul in practice that functional independence by allowing the exercise of scrutiny and supervision over the activities of the national regulatory authority. Even the mere risk of exercising political

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<sup>15</sup> Case C-53/03 Syfait, ECLI:EU:C:2005:333.

<sup>16</sup> Case C-614/10 Commission v Austria, ECLI:EU:C:2012:631.

influence over a national regulatory authority could hinder the independent performance of its tasks and give rise to a suspicion of partiality.<sup>17</sup>

It is prohibited *inter alia* to create a service-related link between the central administration and the national regulatory authority by appointing State officials as members of that regulatory authority and to confer on the government an unconditional right to be informed at all times of all aspects of the activities of a national regulatory authority. It is also prohibited to structurally integrate a regulatory authority within the central administration, creating an organizational overlap that carries a risk of influence over the performance of the tasks assigned to that authority.<sup>18</sup> It is further prohibited for the national government and the legislature to intervene, in order to suspend and annul an act of a national regulatory authority.<sup>19</sup>

On the contrary, the absence of any parliamentary control over the national regulatory authorities is inconceivable as it serves the principle of democracy to impose upon those regulatory authorities the legislative obligation to report their activities to the parliament.<sup>20</sup>

Furthermore, it is not required by the Member States to guarantee to their regulatory authorities the same quality of independence that EU law provides with respect to national central banks particularly as concerns their financing.<sup>21</sup>

## 2. Appointment and removal from office

Member States are in principle free to set the duration of the term of office of the board members of the national regulatory authorities. The appointment of those members can be made by both the parliament and the government.<sup>22</sup> It seems that appointment by the head of state is also acceptable.<sup>23</sup>

However, the appointment procedures must guarantee in practice the independence of those members. Arguably, this means *inter alia* that the mandate of the appointed members must not be tied to electoral cycles and that their selection must be made with the widest possible consensus in order to reflect the best possible representation.

However, once that term of office has been set the Member State concerned is obliged to respect it and cannot compel the office to be prematurely vacated except for overriding and objectively verifiable reasons specifically laid down in advance in national law.<sup>24</sup>

That is also the case in the event that such a premature removal from office is the result of an institutional reform that leads to the introduction of a new model of national regulatory authority. Such an institutional reform cannot be prevented for the sole reason that it will lead to the premature termination of the term of the appointed board members, given that Member States enjoy institutional autonomy as regards the organization and the structuring of their national regulatory authorities provided that these meet the organizational and operational requirements set by the applicable EU law provisions. However, Member States are required to lay down rules (possibly by means of transitional provisions) which guarantee that such a premature termination will not jeopardize the independence and impartiality of the persons concerned.<sup>25</sup>

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<sup>17</sup> Case C-518/07 *Commission v Germany*, ECLI:EU:C:2010:125.

<sup>18</sup> Case C-614/10 *Commission v Austria*, ECLI:EU:C:2012:631.

<sup>19</sup> Case C-560/15 *Europa Way Srl and Persidera SpA*, ECLI:EU:C:2017:593.

<sup>20</sup> Case C-518/07 *Commission v Germany*, ECLI:EU:C:2010:125.

<sup>21</sup> Case C-240/15 *Autorità per le Garanzie nelle Comunicazioni*, ECLI:EU:C:2016:608.

<sup>22</sup> Case C-518/07 *Commission v Germany*, ECLI:EU:C:2010:125.

<sup>23</sup> See to this end Article 53(1) of Regulation 2016/679/EU concerning the appointment of the members of the national data protection authorities.

<sup>24</sup> Case C-288/12 *Commission v Hungary*, ECLI:EU:C:2014:237.

<sup>25</sup> Case C-424/15 *Xabier Ormaetxea Garai and Bernardo Lorenzo Almendros*, ECLI:EU:C:2016:780.

### 3. Human resources and financing

National regulatory authorities and/or bodies must have sufficient manpower, in order to effectively perform their functions. They must have their own staff members and it is therefore not sufficient for that personnel to be made available to them by the central administration. That would create an organizational overlap and prevent them from operating above all suspicion of partiality.<sup>26</sup>

National regulatory authorities and/or bodies must also have their own public annual budgets. That budget must be enough to ensure the satisfactory performance of the tasks assigned to them in an independent and impartial manner.

However, national regulatory authorities and/or bodies may be subject to provisions of national law applicable to public finances and in particular to provisions for limiting and streamlining public authority spending. It is clearly noted in the Directive that the independence of those regulatory authorities shall not prevent the exercise of supervision in accordance with national constitutional law. The application of national provisions on public finances can therefore be considered as impairing the independence of the national regulatory authorities only if there is specific evidence that they impose upon them such financial constraints that prevent them from exercising their functions in an effective way.<sup>27</sup>

#### Implementation challenges and things to consider

Given the above, it is apparent that both the Directive and the relevant case law leave considerable institutional autonomy to the Member States to structure and organize their national regulatory authorities in accordance with the independence requirements. That inevitably leaves several issues open to interpretation, as concerns the implementation of those requirements into national law. Some of these issues concern:

1. The operational autonomy of the national regulatory authorities and/or bodies concerning in particular their capacity to exercise effective control over their budget and the selection procedures of their staff members. As already noted, the Member States are required to ensure that their national regulatory authorities have their own annual budget and adequate financial and human resources to carry out their functions in an effective manner. However, several issues remain unclear:
  - Does the concept of independence require that the national independent authorities and/or bodies should (also) have their own funds, completely separate from those of the public budget? Or is it also acceptable to be completely public funded, so long as their funding remains in any event adequate to ensure the effective exercise of their powers?
  - What is the measure of control that the concept of independence requires to be exercised by the national regulatory authorities and/or bodies over the allocation and execution of their budget? To what extent is it permissible for the government to interfere in the preparation and approval of the budget? Once the budget is allocated, is the national regulatory authority and/or body concerned autonomous in its implementation subject of course to the existence of an objective and reliable mechanism for the ex post external approval of its financial statements?
  - Should the national regulatory authorities exercise control over their recruitment procedures, in order to be in a position to choose the candidates that are best suited for the effective performance of their functions? Or is it acceptable to be made subject to the general civil service procedures prescribed by national law, as long as they can

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<sup>26</sup> Case C-614/10 *Commission v Austria*, ECLI:EU:C:2012:631.

<sup>27</sup> Case C-240/15 *Autorità per le Garanzie nelle Comunicazioni*, ECLI:EU:C:2016:608.



decide their internal organization and ascertain the number and the categories of employees they are interested in?

2. It is expressly required that the procedures for the appointment the heads of national regulatory authorities and/or bodies or the members of the collegiate body fulfilling that function should be based on the principles of transparency and equality. What are the particular requirements of transparency? Does this also imply, for example, the existence of a public procedure for the expression of interest?
3. National law must lay down the conditions for the appointment of the heads of national regulatory authorities and/or bodies or the members of the collegiate body fulfilling that function. Those conditions must guarantee the requisite degree of independence. Arguably, this presupposes the existence of incompatibility rules and rules against conflicts of interests and possibly the introduction of cooling off periods for the appointed members. What should be the content of those rules?

## Annex 1 - Understanding the notion of independence: the relevant case law of the Court

The independence of the competent national regulatory authorities was specifically guaranteed in several other Directives applying outside the audiovisual sector. As a result, the notion of that independence was interpreted judicially in the context of preliminary references made by the national courts and infringement actions brought against Member States for introducing national legislation contravening the independence of the national regulatory authorities.

### **1. Case C-53/03 Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE, ECLI:EU:C:2005:333**

The case concerned the independence of the Greek Competition Authority.

National law provided that the members of that authority enjoyed personal and operational independence and were bound in the exercise of their duties only by the law and their conscience.

However, it was concluded that the said authority was not truly independent for the following reasons:

- Firstly, because it was subject to ministerial supervision. This implied that the minister was empowered within certain limits to review the lawfulness of its decisions.
- Secondly, because there were no particular safeguards in respect of the dismissal and the termination of the appointment of its members. That system did not appear to constitute an effective safeguard against undue intervention and pressure from the executive (the government and its competent ministers) on the members of the authority.

### **2. Case C-518/07 Commission v Germany, ECLI:EU:C:2010:125**

Infringement action was brought against Germany for incorrectly transposing into national law the requirement of “complete independence” of the supervisory authorities responsible for ensuring the protection of personal data (Article 28 (1) of Directive 95/46) by subjecting those authorities to State scrutiny.

It was concluded that the concept of independence implies a decision-making power completely free from any direct and indirect external influence on the supervisory authority, coming not only by the supervised bodies but also by the State. It was stressed to this end that the mere risk that the scrutinising authorities could exercise a political influence over the decisions of the supervisory authorities could hinder the independent performance of the tasks assigned to those authorities and give rise to suspicion of partiality.

However, it was clearly underlined that the absence of any parliamentary influence over the independent administrative authorities is inconceivable. That means inter alia that:

- The management of those independent authorities may be appointed by the parliament or the government.
- The legislature may impose an obligation on the supervisory authorities to report their activities to the parliament.

### **3. Case C-614/10 Commission v Austria, ECLI:EU:C:2012:631**

Infringement actions were brought against Austria for incorrectly transposing into national law the requirement of “complete independence” of the supervisory authorities responsible for ensuring the protection of personal data (Article 28 (1) of Directive 95/46).

It was concluded that the national data protection authority concerned enjoyed functional independence, given that national law provided that its members were independent and not bound by instructions of any kind in the performance of their duties. It was noted that the existence of functional independence is an essential condition in order for a national regulatory authority to satisfy the criterion of independence. However, such functional independence is not by itself sufficient to protect that authority from all external influence because the concept of independence prohibits not only direct but also indirect influence which is liable to have an effect on the decisions of the supervisory authority. The applicable national legislation precluded the supervisory authority concerned from being capable of being regarded as performing its duties free from all indirect influence. That was mainly because:

- Austrian law required that the managing member of the national supervisory authority must be a federal official. That created a service-related link between the managing member and the federal authority, which allowed the activities of that managing member to be supervised by his hierarchical superior. This could hinder in practice the operational independence of the supervisory authority, given that the evaluation of the managing member by his hierarchical superior for the purposes of encouraging his promotion could lead to a form of prior compliance on the part of that managing member. Moreover, by reason of the links that the managing member had with the political body the supervisory authority was not above all suspicion of partiality.
- The supervisory authority was structurally integrated with the departments of the Federal Chancellery, which made the necessary equipment and staff available to its office. While it was not necessary to give the supervisory authority a separate budget in order to be able to satisfy the criterion of independence, the existence of such an organizational overlap between the supervisory authority and the federal state carried a risk of influence over the decisions of the supervisory authority and prevented that latter authority from being above all suspicion of partiality.
- Austrian law afforded the Federal Chancellor the unconditional right to be informed at all times by the chairman and the managing member of all aspects of the activities of the national supervisory authority. That was liable to subject the supervisory authority to indirect influence and precluded that authority from being capable of being regarded as operating in all circumstances above all suspicion of partiality.

#### **4. Case C-288/12 Commission v Hungary, ECLI:EU:C:2014:237**

Infringement actions were brought against Hungary for prematurely terminating the term of office of the data protection supervisor, following an institutional reform that led to the creation of a new model of national data protection authority.

It was concluded that Member States are in principle free to set both the institutional model of their national regulatory authorities and the duration of the term of office of their members. However, once that term has been set the Member State concerned must respect it and cannot compel the office to be vacated before the expiry of that term except for overriding and objectively verifiable reasons. If it were permissible for every Member State to compel a supervisory authority to vacate office before serving its full term in contravention of the rules and safeguards established in that regard by the legislation applicable, the threat of such premature termination to which that authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority which is incompatible with the requirement of independence. That is true even where the premature termination of the term served comes about as a result of the restructuring of the institutional model, which must be organized in such a way as to meet the requirement of independence laid down in the applicable legislation. Moreover, in such a situation the supervisory

authority cannot be regarded as being able to operate in all circumstances above all suspicion of partiality.

#### **5. Case C-240/15 *Autorità per le Garanzie nelle Comunicazioni v Istituto Nazionale di Statistica - ISTAT and Others*, ECLI:EU:C:2016:608**

The case concerned the decision of the Italian legislature to apply to independent authorities the provisions on public finances and in particular of certain provisions for limiting and streamlining public spending. The question was whether that legislation was precluded by the principles of impartiality and independence of the national regulatory authorities laid down in Article 3 of the Electronic Communications Framework Directive (Directive 2002/21/EC).

It was noted that the Framework Directive imposes the requirement that in order to guarantee the independence and the impartiality of the national regulatory authorities the Member States are to ensure that those regulatory authorities have adequate financial and human resources to enable them to carry out the tasks assigned to them. However, it was concluded that nothing in that Directive indicates that compliance with those requirements precludes a national regulatory authority being subject to provisions of national law applicable to public finances and in particular to provisions for limiting and streamlining public authority spending. It was stressed in this respect that the Directive expressly provides that the independence of those regulatory authorities shall not prevent the exercise of supervision in accordance with national constitutional law. That implies in turn that national regulatory authorities may properly be made subject to certain rules of budgetary monitoring by the national parliament, which includes being subject to ex ante measures that control public spending. Such control measures can therefore not be deemed to impair the independence and impartiality of the national regulatory authorities, unless it can be established that they may prevent them from satisfactorily carrying out the tasks assigned to them or that they are contrary to the conditions imposed on the Member States to ensure that the national regulatory authorities have to a sufficient degree the independence and impartiality required by the Directive. As concerns the specific case, the applicant had adduced no specific evidence to that effect but had rather asserted in general terms that the provisions concerned were detrimental to its financial autonomy and consequently its independence. Moreover, it could not be justifiably claimed that the Directive requires Member States to guarantee to their national regulatory authorities the same quality of independence that EU law provides with respect to national central banks.

#### **6. Case C-424/15 *Xabier Ormaetxea Garai and Bernardo Lorenzo Almendros v Administración del Estado*, ECLI:EU:C:2016:780**

The case concerned the premature termination of the term of office of the board members of the national regulatory authority in the telecommunications sector, following an institutional reform that led the creation of a new national regulatory authority that undertook all the tasks previously carried out in various sectors by several other national regulatory authorities. The question was whether the Framework Directive requires that the national regulatory authorities coming within its scope of application should have an independent structure that does not form part of another entity and whether an institutional reform such as the one involved in the main proceedings could lead to the premature termination of the term of office of the members of an abolished national regulatory authority.

As concerns the first question, it was recalled that EU law does not specify the bodies to which the Member States must entrust the regulatory tasks assigned to their national regulatory authorities. Member States enjoy institutional autonomy as regards the organization and the structuring of their national regulatory authorities and are in principle allowed to assign to a multisectoral body the tasks previously carried out by another regulatory authority, provided that the new authority meets in the

performance of those tasks the organizational and operational requirements set by the applicable EU law provisions.

As concerns the second question, it was noted that the Directive requires that the members of a national regulatory authority may be dismissed only if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance in national law. The attainment of the objective of strengthening the independence and impartiality of the national regulatory authorities would be jeopardized if it were possible to bring to an immediate and premature end the term of office of the members of the collegiate body running the regulatory authority in question merely as a result of an institutional reform such as that at issue in the main proceedings. If that were permissible, the risk of immediate dismissal on grounds other than those laid down in advance by national law may give rise to reasonable doubt as to the neutrality of the national regulatory authority concerned and its imperviousness to external factors. While an institutional reform of the national regulatory authorities cannot be prevented for the sole reason that it will lead to the premature termination of the term of office of the appointed board members, Member States are nevertheless required to lay down rules which guarantee that this dismissal does not jeopardize the independence and impartiality of the persons concerned.

#### **7. Case C-560/15 Europa Way Srl and Persidera SpA v Autorità per le Garanzie nelle Comunicazioni and Others, ECLI:EU:C:2017:593**

The case concerned inter alia the question whether the Framework Directive precludes the suspension by a ministerial order and the subsequent annulment by the national legislature of an ongoing selection procedure for the allocation of radio frequencies conducted by the competent national regulatory authority.

It was stressed that the Directive provides for the possibility of supervision in accordance with national constitutional law and specifies that only appeal bodies are to have the power to suspend and overturn the decisions of the competent national regulatory authorities. It was concluded that the independence of such a regulatory authority would be jeopardized if external bodies such as the government and the national legislature were permitted to suspend and to annul an ongoing selection procedure conducted under the auspices of that authority, other than in the cases of supervision and appeal referred to in the provisions of the Directive.