Future Regulation of Cross-Border Audiovisual Content Dissemination: A Critical Analysis of the Current Regulatory Framework for Law Enforcement under the EU Audiovisual Media Services Directive and the Proposal for a European Media Freedom Act

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LANDESANSTALT FÜR MEDIEN NRW
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Preface

The European Union is based on core values. Yet, the protection of a free European media environment by independent regulatory authorities is getting more complex and is facing new challenges, especially with regards to the cross-border dissemination of audiovisual content.

With the Digital Services Act and the Digital Markets Act, before that the eCommerce and above all the AVMS Directive, and most recently with the proposal for a European Media Freedom Act (EMFA) the European Commission is complementing the legal framework aiming to protect democratic standards in the media and to strengthen law enforcement in the online world. These laws are necessary and while their importance is undisputed problems arise in their application. Therefore, solutions are urgently needed in view of the increasing importance of the cross-border distribution of audiovisual content.

In addition to questions of the distribution of competences between the various regulatory institutions, the independence of these institutions and the creation of coherence between the various legal acts, considerable difficulties continue to arise in practice in cross-border law enforcement. It is now up to the legislators to address these difficulties – also with a view to the currently discussed EMFA proposal.

The study conducted by the Institute of European Media Law (EMR) on behalf of the State Media Authority NRW addresses these challenges by providing an extensive analysis of the EU legal framework and pointing towards the need of amending the AVMS Directive.

I thank Prof. Dr. Mark D. Cole and his team for their excellent work and wish you, dear readers, an inspiring lecture.

Dr. Tobias Schmid
Director of the State Media Authority of North Rhine-Westphalia and European Affairs Commissioner of the Conference of Directors of the German Media Authorities (DLM)

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Executive Summary

Challenges of a Cross-border Media Landscape in the European Union

1. The reality of cross-border dissemination of audiovisual content – whether linear or non-linear – has raised fundamental questions regarding the applicable regulatory framework especially in recent times. This concerns various risks and phenomena that require effective responses in order to safeguard the fundamental values of the European Union (EU). In an increasingly multi-layered regulatory framework the challenge of the effective response is becoming more complex. Overarching issues of the allocation of powers between the EU and its Member States as well as the coherence of applicable rules for audiovisual content play an important role in that regard.

Risks and Fundamental Values

2. Mainly, it is about risks arising from the dissemination of illegal content, which can pose threats for the general public and the individual. Such audiovisual content is disseminated in different ways and digitalisation multiplies the 'playout channels', which at the same time means that recipients are addressed more intensively. Specifically, this involves content that is either prohibited in general or for certain ways of dissemination. Examples include content that is harmful for children and young persons but is made freely accessible to that age group, especially online, without adequate protection measures; inciting or disinforming content originating from third countries with manipulative intent, that threatens democratic decision-making and social cohesion in EU Member States; or content that contributes to hatred and radicalisation, which can have a particularly profound effect due to its audiovisual nature.
3. These phenomena jeopardise, in different contexts, fundamental values of the democratically constituted EU Member States, whose common constitutional traditions and the enshrinement of these values in the EU Treaties also form a catalogue of principles and values to be protected

at EU level. Among these are, in particular, fundamental rights, which must be actively protected by the Member States against violations. Human dignity as the paramount legal asset also in the EU, the protection of minors, freedom of expression and information as well as freedom of the media and media pluralism and the privacy of individuals are important elements. In addition, however, it is also the principles of democracy and the rule of law that must be defended against threats. From the point of view of EU citizens, who are recipients of and sometimes affected by audiovisual content, it is not a matter of making a precise distinction between the various risks. Rather, it is about the existence of an overall safe, free and diverse media landscape or audiovisual content environment, which shall be guaranteed by the Member States, irrespective of the means of dissemination or the provider disseminating.

4. However, from the perspective of regulation or law enforcement against such phenomena, the distinction is crucial as it impacts the question of jurisdiction, proportionality of regulatory mechanisms and the powers of the regulatory authorities. Therefore, from this perspective, the nature of the content, the way it is disseminated and the provider disseminating matter. In order to take stock of the situation, it is thus necessary to take a closer look at the existing legal framework and the way it is currently evolving.

The Existing Legal Framework and Recent Amendments

5. The EU has no explicit competence in the area of media law, especially because of the cultural dimension it encompasses. Consequently, in the past, Member States were left with a broad margin of manoeuvre to achieve their policy objectives in this area, which are shaped in particular by their respective constitutional frameworks. However, the far-reaching competences of the EU to regulate the single market, in which the media and other services based on audiovisual content play an important role as economic service, already led to legislative activities by the EU in the past due to the cross-border dimension of content dissemination and its access by recipients. The tension resulting from the two-fold nature of content as an economic and cultural matter persists, especially since the EU is bound to respect the diversity of its Member States and at the same time their national identities. The

allocation of powers and legislative abilities of the EU in the media sector resulting from this starting point, have already been described in detail in an earlier study. According to this, EU single market regulation must not supersede national cultural policy, and in order to create legal clarity, a distinct demarcation and at the same time coherence between the different levels and applicable rules are particularly important.

The Audiovisual Media Services Directive as the Heart of 'EU Media Law'

6. As an example of such a striving for coherence between economic and cultural regulation, the 'heart' of audiovisual content regulation at EU level lies in the Audiovisual Media Services Directive (AVMSD). This Directive achieves a minimum harmonisation to ensure free reception and free distribution of audiovisual services across borders, while maintaining significant leeway for Member States. The AVMSD already offers solutions to some of the risks mentioned, in particular the protection of minors and the general public from certain content as well as in the field of audiovisual commercial communication. It addresses the main audiovisual players, both the television and video-on-demand (VoD) providers acting under editorial responsibility and, since the last adaptation of the Directive in 2018, the video-sharing platform (VSP) providers organising the audiovisual content distributed through their services. With that, the Directive covers different means of disseminating audiovisual content, with some of its provisions only referring to certain types of dissemination.

Existing EU Platform Regulation with Relevance for the Audiovisual Sector

7. Due to legislative initiatives in recent years as elements of the proclaimed 'digital decade', in which the European Commission is (still) striving to make Europe "fit" for the digital age, the AVMSD is, however, no longer the only relevant and specific regulatory instrument governing audiovisual content. In particular, new elements of a more comprehensive platform regulation are relevant because either the players already addressed by the AVMSD at least partly fall under the different types of (new) definitions of platforms themselves, or because these platforms as intermediaries are of considerable importance for the

distribution and value chain of audiovisual content. In addition, the provisions addressing these new market players apply to providers competing for audience and advertising market shares with the service providers covered by the AVMSD. It is primarily the Digital Services Act (Regulation (EU) 2022/2065, DSA) that recently came into force and is applicable from February 2024 (except for some provisions which are applicable before), which is of relevance with its graduated catalogue of obligations for online platforms with more extensive requirements for very large online platforms when it comes to tackling illegal content, advertising and the protection of minors. In addition, relevant developments include the Digital Markets Act (Regulation (EU) 2022/1925, DMA), which also recently came into force and is applicable (partly earlier and partly later, but in large parts) in May 2023, with a number of specific obligations, for example on transparency and openness of interfaces for core platform services operated by gatekeepers, including inter alia online search engines and VSPs, as well as Regulation (EU) 2021/784 (TCO Regulation) combatting the dissemination of (also: audiovisual) terrorist content online with corresponding obligations for hosting service providers.

The Possible Future Regulatory Framework in Light of Current Legislative Proposals

8. Other relevant pieces of legislation are still in the legislative procedure but are equally relevant in terms of coherence in the audiovisual sector and in responding to various risk scenarios. The Proposal for a Regulation establishing rules to prevent and combat child sexual abuse (CSAM Regulation) addresses hosting service providers in a similar way as the TCO Regulation for a very specific area of (also: audiovisual) illegal content with risk assessment and mitigation obligations, which would extend to proactive detection obligations upon order. In contrast, the Proposal for a Regulation on the transparency and targeting of political advertising refers to obligations in the dissemination of political advertising (online as well as offline) irrespective of the type of service, and thus an area that is directly relevant to the media sector due to financing and editorial aspects. This is even more true for the Proposal for a Regulation establishing a common framework for media services in the internal market (European Media

Freedom Act, EMFA), which would not only amend the institutional framework of the AVMSD but also have a significant impact on the legal framework for the dissemination of audiovisual content more generally with additional rights and obligations for media service providers (and recipients).

Coherence of Law (Enforcement)?

9. These existing or proposed legal acts in the form of Regulations that are directly applicable throughout the EU thus reveal overlaps with the AVMSD and its national transpositions to varying degrees but including in areas for which the AVMSD deliberately leaves the Member States a margin of manoeuvre. For example, the AVMSD and DSA contain very similar (but not equally strict) obligations for VSPs in the context of labelling and complaint mechanisms for advertising and illegal content; the DMA imposes obligations to ensure transparency and non-discrimination of ranking systems, while the AVMSD encourages Member States to take measures to give prominence to audiovisual media services of general interest; both the TCO Regulation and the AVMSD oblige VSPs to take certain appropriate measures against (public) incitement to commit a terrorist offence; rules on comprehensive protection of editorial decisions and their independence in the EMFA could overlap with enforcement measures based on the AVMSD; and, conversely, the protection of (political) editorial content under the AVMSD could supersede restrictions from the proposed Regulation on political advertising. With a view to these potential overlaps, the legal acts usually only contain a more or less clear 'without prejudice' rule to ascertain their interrelation with the AVMSD.
10. The problem of possible overlaps becomes all the more relevant as these existing or proposed legal acts regularly introduce their own institutional system for monitoring and law enforcement or rely on an existing one, which is partly located at EU level with the European Commission and partly with different Member State regulatory bodies. However, intersectoral cooperation mechanisms with legally binding effects are mostly absent or only minimal. This makes responding to existing risk situations, i.e. law enforcement, complex. It is even more complex if it has a cross-border dimension, as is increasingly the case in the online sector. Against the backdrop of the (fundamental rights based)

expectation horizon of recipients with regard to media consumption which must be comprehensively safeguarded, the creation of a regulatory environment in which this expectation can be met with the existing and practically applicable framework for action, is an obligation also in the multi-level system between the EU and the Member States.

Aim of the Current Study

11. The aim of this study is to identify the existing and future challenges of regulating the dissemination of cross-border audiovisual content and to propose solutions. The starting point is an in-depth analysis of the relevant provisions of the AVMSD with regard to the scope of application, in particular the country-of-origin principle as well as the institutional structures. These are considered in light of the possibilities for cross-border enforcement and the Member States' possibilities for temporary derogations from the country-of-origin principle (Art. 3) and the prohibition of circumvention in case of stricter rules (Art. 4). The cooperation structures of the regulatory bodies within the European Regulators Group for Audiovisual Media Services (ERGA) are examined in detail and compared with other institutional systems. Problematic constellations identified in the process and illustrated by example scenarios, are then considered along different possible solutions in order to be able to deduct which steps should be taken in the future. The study concludes with considerations that need to be taken into account both in the continued application of existing and currently proposed or future regulation that should be achieved with regard to ensuring effective law enforcement in the cross-border dissemination of audiovisual content.

Scope of the AVMSD

12. As already its predecessor, the Television without Frontiers Directive (TwF Directive) of 1989, the AVMSD serves to guarantee cross-border transmission and reception of audiovisual offerings in the EU's single market. This continues to be based on minimum harmonisation by establishment of fundamental rules in the Directive to which providers in all Member States must adhere through the respective national imple-

mentation of the Directive, as well as the underlying country-of-origin principle, which subjects providers to the jurisdiction and thus regulatory competence of their Member State of establishment. The scope of application initially extended only to television, but in 2007 it was also extended to audiovisual media services on demand (VoD) in response to a correspondingly developing media landscape.

The 2018 Revision of the AVMSD

13. With the revision by Directive (EU) 2018/1808, the requirements of which were to be implemented by the Member States by 19 September 2020, the AVMSD was once again adapted to the circumstances of a media landscape that is perhaps developing even more rapidly. The significance of the reform lies in particular in the further extension of the scope of application to VSPs whose providers (as such), unlike television and VoD providers, do not editorially compile and distribute their own content, but organise third-party (user-generated) content at least to such an extent that the imposition of certain obligations concerning this content is justified. Further elements of the revision were about the jurisdictional criteria with regard to the country-of-origin principle, the amendment of the provisions on the protection of minors and against hate speech as well as their harmonisation for TV and VoD providers, the modernisation of promotion obligations with regard to European works, the tightening of qualitative and liberalisation of quantitative provisions on audiovisual commercial communication, the so-called signal integrity as well as the obligation of Member States to contribute to the promotion of media literacy. In addition and importantly, institutional and procedural rules were created, which in turn can have a significant impact on the overall appearance of media regulation in the future: so-called codes of conduct are emphasised as a new form of regulation within the framework of the generally strengthened self- and co-regulation, and the regulatory bodies are obliged to cooperate more closely.

Substantive Regulatory Scope: Extent and Limits of Enforcement under the AVMSD

14. Of particular relevance in the present context, however, are the substantive rules contained in the consolidated version of the AVMSD, as these ultimately determine which jurisdiction applies in the context of enforcement and how the scope of the country-of-origin principle is affected in each case. This determines which (cross-border) mechanisms can or must be applied. In particular, the prohibition of content inciting violence or hatred and of public incitement to commit terrorist offences (Art. 6) as well as the obligation to protect minors from content impairing their development (Art. 6a) are to be emphasised. Equally important are the qualitative restrictions (Art. 9(1)) in commercial communication, for example, prohibiting discrimination and such that violates human dignity.
15. The prohibitions mentioned first above leave the Member States little room for manoeuvre, so they are implemented comparatively uniformly on the national level. Nonetheless, these refer to a very specific area and in particular do not cover other forms of illegal or harmful content (e.g. hatred when it is not discriminating or content prohibited by criminal law). These areas remain reserved for other rules at Union or national level. Qualitative restrictions for commercial communication are equally specific in terms of substance but often integrated at national level into different regulatory systems with different supervisory structures, especially those of self- and co-regulation. The same applies to the protection of minors from harmful content, an area in which different traditional and long-established systems in the Member States continue to exist, which are characterised by differing ideas on the interpretation of undefined legal terms (e.g. 'detrimental to development'). Approaches on regulating the TV and VoD sector are also often different. Although the rules also apply to VSPs since 2018, with regard to user-generated content, only appropriate measures have to be taken by the providers, whereby the assessment of this appropriateness can be based on the list of possible (also technical) mechanisms to be implemented by VSPs as laid out in the Directive. Nonetheless, the decision is ultimately left to the Member States.

The Country-of-Origin Principle and Its Application under the AVMSD

16. Since the beginnings in the TwF Directive, the country-of-origin principle has been the cornerstone of the AVMSD and its goal to ensure the free movement of audiovisual content within the single market. Article 2 para. 1 AVMSD stipulates that a provider of audiovisual media services (linear or non-linear) that falls under the jurisdiction of a Member State must in principle 'only' comply with the rules of that Member State and, in the case of conformity with the legal system of this country of origin, may then also freely distribute its services to other Member States without being restricted by these receiving Member States or, for example, being subjected to a second licensing requirement.

Significance of Jurisdiction in the Context of the Country-of-Origin Principle

17. In order to ensure that these services nevertheless comply with certain basic rules that apply uniformly in all Member States, the AVMSD lays down such rules based on a minimum harmonisation to be implemented by the Member States. It further emphasizes the requirement that the Member State of jurisdiction must ensure compliance of the providers with these rules. In principle, jurisdiction is determined by the place of establishment, whereby the location of the media service provider's head office (Art. 2 para. 3) is decisive in different variations. Only if an establishment in an EU Member State cannot be determined according to the criteria laid down there, subsidiary technical criteria are applied to assign jurisdiction. This concerns the situation of third country services – as there is no relevant establishment within the EU (because otherwise para. 3 would be applicable) – for whom either the satellite uplink in a Member State or, subsidiary, a satellite capacity appertaining to an EU Member State is utilised by the provider of the transmission capacity (Art. 2 para. 4).

Exemptions from the Country-of-Origin Principle: Derogation Powers and Anti-Circumvention

18. When the country-of-origin principle was introduced, it was recognised that in addition to these situations already covered by minimum

harmonisation, there may be other public interests in the Member States, the endangerment of which by services not under their own jurisdiction must result in powers of these Member States to counteract. Therefore, the country-of-origin principle was designed as not being absolute. Member States have the possibility, under certain conditions and in compliance with the procedure provided for in the Directive, to temporarily derogate from the country-of-origin principle and to take measures against providers under the jurisdiction of another EU Member State (Art. 3). Furthermore, if they have adopted stricter rules than the minimum standard of the AVMSD for providers under their own jurisdiction, they can take action against media service providers under the jurisdiction of another Member State if these providers have established themselves in that other Member State with the purpose to circumvent the stricter rules of the Member State towards which its offer is primarily directed.

19. These exceptions have remained structurally the same in 2018. However, there were marginal clarifications made in the wording of the jurisdiction criteria. Above all, however, the rules were formulated in such a way that they now apply in the same way to linear and non-linear providers. Adjustments were also made to Art. 3 and 4 with the aim of streamlining the procedures.

Implementation Problems under the Country-of-Origin Mechanism …

20. However, it is not so much the attempted procedural improvements through the 2018 amendments that lead to the implementation problems described below, but rather changing circumstances in the media environment that were not or could not have been anticipated when the Directive was created in 1989 nor when discussing the 2018 revision, at least not to the intensity currently present.

… with Regard to Jurisdiction

21. Such difficulties firstly relate to the determination of jurisdiction. In accordance with the system of the AVMSD it is initially only directed at media services that are established in the EU with the consequence that the Directive or its national transpositions and the country-of-origin

principle only need to be applied in these cases. This establishment derives, for example, from the head office being in one Member State or – in the Directive there are also precautions for this situation – in the case of several establishments in different Member States and the head office is unclear or the establishment where decisions are taken that are relevant for the programme is different from the head office it is in that Member State in which the decisions relevant for the service are made. These differentiations serve the purpose of being able to create as far as possible for every constellation legal certainty if the jurisdiction issue within the EU is unclear between two or more Member States. In the past, the criteria have in principle proven to be suitable for creating this legal clarity.

22. In 2018, further clarification was provided by adding additional definitions and details concerning programme relevance and editorial decisions, which in result confirm previous interpretations. In addition, the introduction of a publicly accessible database on jurisdiction, which was demanded by the last revision, serves the purpose of final clarification, because conflicts between the Member States on the question of jurisdiction can become evident automatically during the creation of the entries for the database. Therefore, a procedure for resolving possible conflicts of jurisdiction was added that with involvement of ERGA leads to a final allocation of jurisdiction in such cases. This could become all the more important as examples have recently been observed of providers trying to disguise an establishment in one Member State in order to be subject to another jurisdiction.

… with Regard to non-EU Providers without a Link to the Single Market

23. It remains clear that the jurisdiction system established by the Directive was not designed for providers who broadcast from outside the EU and are thus outside the Single Market. In principle, only the Member States themselves are responsible for such offers, for example, in case they intend to take action against illegal content. However, the AVMSD makes the already presented exception that even if there is no establishment, a link to an EU Member State on the basis of technical aspects of transmission is sufficient to establish jurisdiction there. The aim of this connection to the use of a satellite ground station located on the territory of a Member State for the ”uplink” to the satellite or, secondar-

ily, a satellite capacity appertaining to a Member State for transmission, was in fact to prevent programmes that could be received within the EU from not being subject to any supervisory control because there is no establishment with the consequence of creating jurisdiction nor were there comparably harmonised rules for the use of satellite technology. In order to avoid that in such a case no Member State feels responsible for reacting to possible illegal content or that other Member States in practice cannot react against such content, although elsewhere in the EU (in the Member State responsible for it) there is the possibility of, at least, a technical interference against the service, this technical link to the EU Single Market, was addressed in the Directive.

… with Regard to non-EU Providers with only a technical (artificial) 'link' to the Single Market

24. However, now the problem arises that there are providers who deliberately try to get under the protective umbrella of the AVMSD-supported single market for audiovisual media services although being a non-EU service. They do so by "only" using a satellite capacity without subjecting themselves to the full media law regime of a Member State which would be the case with an establishment. In practice, only two Member States or more specifically two satellite providers located in those two states are the ones that can create the link through the satellite capacity. The administrative practice in those two states when it comes to the satellite providing companies differs until now. With regard to the satellite uplink criterion the problem is that the uplink can be volatile and is easily accessible, so that it can become unclear where jurisdiction lays if that link to a Member State changes quickly.

… with Regard to Limited Dissemination Channels

25. Finally, a problem is to be seen above all in the fact that these exceptional constellations only refer to a specific dissemination technique and that rules for dealing with non-EU providers in the online dissemination of audiovisual (media) content are missing or at least no connection is established between the exceptional suspension of retransmission by one Member State and possible legal consequences for all other

Member States in the sense of supporting measures to make the suspension effective. The substantive provisions of the AVMSD, however, make no such distinction between methods of dissemination, and from the perspective of recipients the question of how to react to possible illegal content cannot depend mainly on how this content is transferred to their end devices.

… with Regard to Issues of Coordination

26. In concrete terms, this observation means that in the case of a 'pure' non-EU provider, the competence for supervisory measures depends, on the one hand, on whether a Member State provides for substantive provisions and procedures for such constellations under its own legal framework and, on the other hand, on whether a Member State even regards a particular situation as being problematic. If, for example, a foreign provider that is not under the jurisdiction of an EU Member State disseminates (according to the respective national legal framework) illegal content in several EU Member States, then each of these Member States can take action against this provider on their own, provided that the national law foresees such a mechanism. There is then no coordinated approach between these states, unless such an approach can be established through bilateral or multilateral coordination, e.g. also within the framework of the ERGA, and only insofar as the respective national legal systems allow for comparable possibilities of reaction.
27. For example, in the case of economic sanctions imposed by the Council of the EU in response to Russia's war of aggression against Ukraine, with which certain Russian content providers were targeted because of their activities being regarded as propaganda and potentially endangering the security of EU Member States, a reaction (under media law) could have previously occurred in all affected states if no EU Member State had jurisdiction in the sense of the AVMSD. If such a jurisdiction in the EU existed, a reaction would in turn have depended on this one Member State, except for the application of one of the exceptional procedures under the AVMSD. In both cases, however, there would not necessarily have been the same result or effect in all Member States, although the offer was available and endangering "on" the single market for audiovisual content.

… with Regard to the Derogation Powers and Anti-Circumvention Mechanism

28. As far as jurisdiction of a Member State exists, this does likewise not automatically lead to the achievement of a standard of law enforcement that is satisfactory from the point of view of all (affected) Member States. This may result because there are different views on the problematic nature of a specific content item or, for example, because the treatment of certain service providers in the country of origin – especially those which only address the population of the country of origin to a very limited extent – does not have the same urgency as in the state at which the content is directed. But according to the country-of-origin principle the approach of the Member State with jurisdiction is decisive, as long as it fulfils its obligation to supervise media service providers' compliance with its own legal system and to react in the event of an infringement. Otherwise, that Member State could be requested by the European Commission, if necessary even in infringement proceedings, to ensure compliance with its duty to effectively implement the provisions of the AVMSD. Alternatively, the possibility of a (temporary) derogation from the country-of-origin principle was introduced for precisely these cases. By inclusion of the Member State of origin in the procedure that ultimately leads to deviating measures of the receiving state, it is intended to ensure that the interests of all Member States concerned can be safeguarded.
29. With establishing the participation of ERGA in the practical cooperation between the regulatory authorities, an important step was taken in the last AVMSD revision in order to come to more direct solutions in problem cases, both within and outside of the exceptional cases. This starting point has been taken up by ERGA, whose members have committed themselves in an agreement, the Memorandum of Understanding (MoU), to increased cooperation and mutual support. However, this MoU is dependent on the participation of the competent regulatory authorities and bodies and is not legally binding.

The Possibility of Member States to Derogate from the Country-of-Origin Principle in Practice

30. According to Art. 3 para. 1 AVMSD, Member States are only obliged to take into account the country-of-origin principle not to prevent retransmission or free reception of services in the fields coordinated by the Directive. Difficulties may already arise in determining whether a certain situation falls under the coordinated matters, for example, when it comes to harmful content such as disinformation, which is not regulated in itself by the Directive. Only if the AVMSD applies, the derogation procedure according to Art. 3 para. 2, 3 and 5 must be observed when taking measures against content originating from other Member States. This allows a temporary derogation from the principle of free retransmission if certain conditions are met – among others, serious violations of certain provisions of the AVMSD or serious and grave risks of harm to public health or public safety – and a complex, multi-step procedure – among others, involvement of the provider, the Member State with jurisdiction and the Commission – has been followed. Whether the derogation is compatible with EU law is ultimately decided by the Commission, whereby under the revised AVMSD ERGA plays an important role in the general assessment of this mechanism, as well as in every specific procedure, as the Commission has to seek the opinion of ERGA before taking its decision. This new procedure involving ERGA has so far been applied only once. The previous structure of the derogation procedure had also not led to more than a few application cases and the compatibility decisions of the European Commission in those cases were only issued in recent years.

Limited Problem Solution through Derogation Powers

31. All the cases so far involved reactions by Baltic states against Russian-language programmes that were suspended from being broadcast for several months due to their content inciting hatred, which endangered social cohesion in the states concerned. These (few) cases have made two problematic issues clear. On the one hand, the triggering of the proceedings and the timeline result in the actual reaction to the infringement of the law only taking place considerably after the content objected to has been transmitted. The extent to which the urgency

clause that allows for an accelerated reaction by the Member State affected by a content according to the standards of Art. 3 can bring about improvements in the future still has to be seen. On the other hand, it is evident that even if the derogation procedure is successfully completed, an effective achievement of the objective of the measures is not guaranteed: the Member State particularly affected by the content can (exceptionally) take action against retransmission on its territory, but due to the wording of the provision, which is likely meant to be understood narrowly, but above all due to technical circumstances, this ultimately only applies to (domestic) terrestrial and cable retransmission. Reception capability in the case of transmission via a satellite will be unaffected of such measures unless the country of origin or another EU Member State, which may be able to influence a satellite provider, take measures for their part to remedy the situation. They are, however, not directly obliged by the AVMSD to do so under the provisions of the derogation procedure. This problem occurs just as well with online dissemination of the same content. The few cases of application in which the regulatory measures were considered compatible in each case are an expression of the weaknesses in the envisaged system, but also do not allow for a complete assessment of the possibilities of application yet due to the fact that there have been no interpretations by the CJEU yet. It is evident, however, that without a legislative amendment, the effectiveness of these procedures will probably remain limited.

Impact of the 2018 Amendments to the Directive on Issues Relating to the Derogation Powers

32. In this respect, the streamlining of the procedures that was planned with the amendments made in the last revision of the AVMSD 2018 has not resulted in any different outcome concerning the timeliness of reaction for a Member State impacted, not least because the procedural changes were partly accompanied by an actual extension of the time limits. The alignment of the procedural provisions for linear and non-linear offerings also did not change the fact that only a few constellations are covered by the procedure. The reaction to Russia's propaganda activities by means of the EU sanctioning regime as mentioned above, underlines the necessity of identifying a better possibility to react to problematic content in the media law system of the AVMSD. In this

respect, the introduction of further reaction possibilities provided for in the EMFA Proposal are not yet sufficient and should be placed in the context of the derogation provisions of the AVMSD. Here, the balance between the preservation of the country-of-origin principle and the protection of fundamental values in the Member States at which certain content is directed or which are particularly affected is of particular importance.

The Possibility for Member States to Adopt Stricter Rules and Measures against Circumvention

33. Similar conclusions can be drawn with regard to Art. 4 AVMSD. So far, there has only been one practical case of application in which a Member State unsuccessfully claimed that a provider under the jurisdiction of another (then still) EU Member State wanted to circumvent its own stricter rules on alcohol advertising and due to targeting this Member State had disregarded the prohibition of circumvention. In its examination within the framework of the procedure according to Art. 4 para. 2 to 4, the Commission concluded that the conditions of circumvention, as they existed under the AVMSD framework then, were not met. Even with the reduction of the requirements to provide evidence for the circumvention in the reformulation of the provision by the 2018 amendments, it is likely to remain difficult for Member States to successfully prove circumvention.

Only Limited Problem Solution through the Anti-Circumvention Mechanism

34. The first precondition for the application of the anti-circumvention mechanism is the existence of stricter rules, which are legitimate, for providers under their own jurisdiction compared to the minimum standard of the AVMSD. The exceptional application of these rules to other providers depends on the fact that they have directed their service entirely or largely to the territory of the Member State taking the measure and do not observe certain rules for the protection of general public interests, for example because the legal framework in their country of origin differs. The procedural steps require attempts to reach a solution in mutual consultation and include consultations

with the provider, Member States, ERGA and the Commission. Besides, the Contact Committee must also be involved in the procedure and a decision must be taken within specified deadlines.

35. In connection with the provision prohibiting circumvention, the AVMSD underlines the obligation of the Member States to effectively apply EU law. This obligation already results from the EU Treaty and the Treaty on the Functioning of the EU but Art. 4 para. 6 AVMSD explicitly requires that 'effective' compliance with the provisions of the Directive by media service providers is to be ensured by the respective countries of origin. Even though this is not a new provision of the AVMSD, the emphasis on this compliance measuring obligation should be seen as the need for a comprehensive guarantee of implementation, which requires effective law enforcement in practice. On the basis of this provision, potential problem cases leading to the application of Art. 3 or 4 could possibly be solved in advance in the future, if the Commission, invoking the effectiveness requirement, addresses possible law enforcement deficits by Member States in its role as Guardian of the Treaties and thus also of secondary European law.

The Institutional Structures under the AVMSD Compared to the Wider Legal Framework

36. The institutional system of the AVMSD provides for the establishment and design of regulatory authorities or bodies at Member State level. In this respect, Art. 30 to 30b were important additions in the 2018 revision, which determine the essential framework conditions for the regulatory institutions and, above all, for cooperation within the European network. Regulatory authorities or bodies are to be independent, work impartially, transparently and without being subject to instructions and be provided with sufficient financial and human resources, whereby responsibilities, powers and accountability duties must be clearly laid down in Member State law. The exchange of information with each other and with the Commission is aimed at enabling a more consistent application of the AVMSD and in particular of Articles 2, 3 and 4 within the EU. The previously already existing ERGA was institutionalised by the revised AVMSD and entrusted with certain specific tasks, which give it the role of a forum for cooperation, exchange of experience and best practices between its members. In addition, ERGA is supposed to

provide technical expertise to the Commission, in particular to issue opinions on specific technical and factual aspects upon request.

Cooperation of Regulatory Bodies under the AVMSD

37. Concrete procedures of cooperation outside the derogation and anti-circumvention mechanisms of Art. 3 and 4 as well as the obligation to inform a regulatory authority or body in another Member State by the one with jurisdiction if a given offer will be directed to this other Member State (Art. 30a para. 2) are governed by the AVMSD only in the case of cross-border requests for mutual assistance (Art. 30a para. 3). If the regulatory authority or body of the receiving Member State requests the regulatory authority or body of the country of origin to take action against a cross-border provider, the latter shall provide all necessary information and do "its utmost" to comply with the request within two months. The AVMSD does not lay down further cooperation mechanisms or a permanent exchange of information. However, more specific cooperation mechanisms and obligations arise from ERGA's MoU, which was agreed by its members in December 2020. Although this is not legally binding, it can be the basis for the establishment of future – then possibly in a legally binding form – procedures with which the problems described can be overcome in practice.

Comparison to the Institutional System of the DSA

38. The institutional system of the AVMSD should also be considered in comparison with other, possibly overlapping, legal instruments that take different approaches. The DSA, for example, provides for more concrete institutional arrangements for dealing with certain cross-border issues at European level. Although the designation and essential structuring of competent regulatory authorities or bodies according to the DSA is the responsibility of the Member States, too, one of these bodies is to be designated as the Digital Services Coordinator (DSC). The DSC is to be responsible for all matters relating to the application and enforcement of the DSA. The DSA establishes specific requirements for the DSC and directly assigns specific powers to it. Cooperation between the DSCs and with the Commission, including

mutual assistance and joint investigations, is also covered by procedural rules that provide for the participation of concerned DSCs from receiving Member States and, where appropriate, of the European Board for Digital Services (EBDS) that is established by the DSA as an independent advisory group consisting of the DSCs. The comparison with this institutional system in the possible further development of the AVMSD is particularly important because there are direct overlaps between the monitoring and law enforcement of the DSA and the AVMSD, or at least they are closely connected when dealing with illegal content. In addition, the media law provisions remain unaffected by the DSA, but it is not specified, for example, that for content-related aspects the respective national regulatory authorities within the meaning of the AVMSD are or will be the DSCs.

Comparison to the Institutional System of the EMFA

39. Even more significant in the comparison of institutional structures is the proposed EMFA. The institutionalisation of cooperation between the regulatory authorities and bodies in the European network would be continued and the AVMSD would be amended. The EMFA refers to the regulatory authorities or bodies established under Art. 30 AVMSD and assigns them the application of Chapter 3 of the EMFA as a task. ERGA is to be replaced by a European Media Services Board, which would continue to assemble the competent national regulatory authorities or bodies. Detailed tasks are assigned to this Board, whereby the current proposal gives the Commission an important role because it can make requests, expect it to act in agreement or give support to the Board for certain of its activities. The Commission itself is also entrusted with own tasks and would be given guideline powers for media regulation. Other proposed changes by the EMFA relate to structured cooperation mechanisms for (also accelerated) requests for mutual assistance and the exchange of information between regulatory bodies in the case of serious and grave risks, which are again separately addressed for VSPs.

Comparison to other Institutional Systems

40. Other systems of supranational cooperation, which are not in the direct context of media law but that should be comparatively analysed due to similar identified cross-border challenges, can be found in related sectors. This ranges from cooperation structures in competition law, in which the European Commission and the competition authorities of the Member States form the 'European Competition Network' (ECN) in the implementation of competition rules, which serves primarily for advisory purposes, the exchange of information and mutual administrative assistance in investigations, to electronic communications law, in which the Body of European Regulators for Electronic Communications (BEREC) can provide input to the regulatory authorities convened in it and also for binding decisions of the Commission with powers to issue opinions, to the law of the General Data Protection Regulation, which contains specific consistency and cooperation mechanisms that, among other things, grant the European Data Protection Board (EDPB) as the board of national data protection authorities binding decision-making powers in cross-border matters in certain cases.

Approaches to Solving Current Challenges

Approach for Solution: Dealing with non-EU Providers

41. In view of the described developments in the past years, possible approaches to solve challenges for an adequate response to cross-border content dissemination in the framework of the AVMSD need to be reflected. Responding to providers from third countries has proven a significant problem in several ways. On the one hand, a solution has to be found regarding the application of the technical jurisdiction criteria which allow for an easy access to the benefits of the Single Market rules without having a closer attachment to one of the EU Member States which would guarantee the respect of certain minimum requirements when creating editorial content. On the other hand, in view of these aspects the degree of harmonisation of the AVMSD is low which in turn leads to a more severe effect of the problem due to the increase in relevance of cross-border content dissemination. The issue of licensing

of linear audiovisual media services or the conditions, such as a notification requirement, for providers of non-linear services are matters left entirely to the Member States. Conversely, the legal consequence of admissibility under the law of one Member State – namely the limitation of possibilities of other Member States to involve themselves – follows directly from the Directive. It should be assessed whether minimum requirements in this context should not be harmonised in order to avoid that originally third country providers select market access in a Member State in which they can fulfil the licensing or other conditions, which they could not if they entered the market in another Member State to whom their service is directed. If not in this way, at least an easier application of the rule on prohibition of circumvention should be enabled.

Approach for Solution: Degree of Harmonisation in the AVMSD

42. Concerning the fulfilment of minimum requirements for the protection of minors or the general public by the different types of providers in the different types of services, it should be considered to lay down more concretely in the Directive which protective measures have to at least be taken. This would leave the Member State competence to provide for the details in its law untouched but follow the model that was now chosen for providers of VSPs.
43. The codification of certain conditions when disseminating content that is problematic for minors, such as e.g. what (age) restriction measures for pornographic content means, would allow for a joint standard in the enforcement of the law. Alternatively, in this context a more intensive assessment should regularly be made whether the measures actually foreseen by the Member States suffice for a proper ('actual') transposition of the obligations laid down at least in basic terms in the AVMSD itself.
44. Furthermore, the degree of harmonisation and the monitoring activities in the Member States need to be assessed in light of the dissemination of problematic content from state controlled or influenced providers that contain wrongful information or propaganda knowingly and with the intent of a destabilising effect. Here, too, there are so far no minimum standards laid down due to the allocation of power to the Member States for that question.

Approach for Solution: Standards for Audiovisual Content Disseminated in the EU – the Example of Content Standards in the UK

45. Binding standards counteracting problematic content have been included in media law frameworks already in the past, as the example of the former Member State United Kingdom shows. The regulatory authority in the UK is obliged by law to create 'broadcasting standards', which e.g. for news programmes require a minimum level of accuracy that in case of violation of the standard can result in a revocation of the licence. The Broadcasting Code puts in place detailed and extensive requirements, e.g. in the fifth section on news content for which not only accuracy but also impartiality of reporting and the prohibition of direct influence by the provider are laid down. On this basis there have already been final decisions including revocation of licences, most recently in the context of Russian providers that were under jurisdiction of the UK.

Approach for Solution: Safeguarding Independence – the Example of 'Staatsferne' from Germany

46. In Germany the principle of 'Staatsferne' (detachment from the state) was developed as an integral part of the constitutional principle of broadcasting freedom by the German Federal Constitutional Court as guarantee for freedom and independence of the media. The idea behind this approach is that all elements of the state and its power are subjected to control and criticism by the public and broadcasting media have a decisive role in informing the public due to its reach, current reporting and suggestive power. Therefore, this information needs to be free from any influence by the state. The Länder have an obligation to create a framework guaranteeing this, according to the Constitutional Court. They have done so in several ways in the applicable law with the aim to reach an independence of the programmes. On the one hand, independence of the providers shall be safeguarded by prohibiting certain types of influence or active participation in providers both in the setup and financing of public service broadcasting as well as the licensing of commercial providers and the actual work of the providers by ensuring editorial freedom. On the other hand, independence of the oversight bodies is safeguarded by a composition that is characterized by non-

state actors and a plural representation either of the internal control instances in the case of public service media or the media regulatory authorities for commercial media.

47. This needs to be taken into account when analysing whether such an approach of 'Staatsferne' could be mirrored at Union level. Such a notion in the context of oversight structures is already laid down in the AVMSD that requires since the last revision in its Art. 30 that independent regulatory authorities are installed and that there is an independence from instructions by other bodies and protects its members from undue dismissal. A common value of independence can be derived from this which could be further detailed in the future. Concerning the independence of media service providers it needs to be underlined that the conditions on the national audiovisual markets are still very different and that the structures have been shaped against the respective historical backgrounds. Therefore, there are very different models of financing and structure of public service broadcasters whereby a controlling influence of state bodies is avoided by provisions that differ in their strictness when it comes to the financing means. In that respect there are varied opinions of what constitutes 'state influence' on the level of the EU itself.
48. However, the concept of state neutrality finds an expression in the prevention of a dominant influence on the programme and thus on the formation of public opinion by state bodies, which is open to a common understanding based on common democratic considerations. Recital 54 of the AVMSD already picks up this aspect by underlining that it is essential that media services are able to inform individuals and the society as completely and with the highest level of variety and that, to this end, editorial decisions must remain free from any state interference or influence by national regulatory authorities or bodies, insofar as this is not a matter of mere law enforcement or the preservation of a legally protected right that is to be protected regardless of a particular opinion.

Approach for Solution: Independent Supervision through Co-Regulatory Systems – Examples from Media and Data Protection Law

49. Ensuring independence also plays a major role within some co-regulatory approaches in the media regulation of the Member States. Such

systems often exist in the area of the protection of minors in the media and advertising rules since the new version of the AVMSD 2018 increasingly covers VSPs, too. Such schemes regularly leave the development of standards, detailed rules and best practices to the industry. The extent to which regulatory bodies are involved in this process varies considerably and ranges from direct participation in the development of standards, to approval and review powers, to reserved powers of intervention if the self-regulatory rules prove to be ineffective. The AVMSD itself encourages Member States to establish such systems in many places, so that an examination of existing systems in the Member States and the experience gained from them is also valuable with regard to a possible future strengthening of such mechanisms in view of achieving independence from all possible different spheres of influence.

50. In this context, experiences gained in the area of data protection law can also be drawn upon because codes of conduct are laid down there as a regulatory instrument and possibility for EU-wide harmonisation in Art. 40 GDPR. The provision stipulates that certain stakeholder associations can develop codes of conduct ", in particular" on specific areas such as the transfer of personal data to third countries. These are submitted to and approved by the competent national data protection authority for an assessment of their compatibility with the GDPR, involving also the EDPB if a cross-border dimension is addressed. The codes of conduct must contain rules on their supervision by an independent body – independent of the supervisory activities of the data protection authorities – for which the GDPR also provides a framework. Individual data processors may adhere to the codes of conduct by means of contractual or other legally binding instruments. The EDPB provides further details via its guideline powers, thus ensuring additional coherence at EU level.
51. Although the data protection sector cannot be directly applied as a blueprint to the media sector, the fundamental right to the protection of personal data poses similar requirements for the independence of supervision to those found in media law, which is why conclusions could be drawn for future media regulation if the particularities of the audiovisual sector are taken into account. This also applies to the instrument of data protection-specific certification mechanisms, seals and marks pursuant to Art. 42-43 GDPR. These are intended to serve as documentation that the legal requirements of the GDPR are complied with in processing operations by data controllers and processors.

They are voluntary in nature with temporary certifications that do not change the legal responsibility of the processor, but visibly convey compliance to the outside world. The EDPB records all certification procedures and data protection seals and marks in a register and publishes them in an appropriate manner. The GDPR places special requirements on the professional expertise and independence of the certification bodies. In the context of media law, such systems with appropriate adaptations would be conceivable, for example, in the form of seals for media service providers that document compliance with media law standards (such as independence, compliance with editorial standards etc.) and could be repeatedly audited by an independent body with the involvement of media regulatory authorities or bodies or ERGA. This type of certification could be linked to certain safeguards against sanctions or other regulatory measures.

Comparability of Regulatory Bodies and Cooperation Systems

52. Institutional systems or specific elements of such systems in other contexts cannot typically be transferred to the framework of audiovisual media services as they are not established in view of specificities of the media sector (such as independence, pluralism or editorial freedom) nor necessarily apply the country-or-origin principle. As was shown, such systems, however, can provide a source for experiences obtained, especially if there are overlaps with the regulation of the media.

Lessons and Consequences from the DSA

53. An increasing regulatory convergence can be seen in an exemplary way for the relationship and comparability with the system of the DSA. The cooperation mechanism of the DSCs between each other could be considered as basis for further development in the AVMSD. Nonetheless, the approach chosen there is clearly a result of the horizontal regulation in the DSA and therefore not specific enough for the sectoral regulation of the media. In addition, on the supranational cooperation level there is a lack of rules that would connect the work of the EBDS with ERGA or other sectoral bodies. In the same way it is left to the Member States how they develop the cooperation within their regulatory frameworks.

For an improvement of the enforcement in the online dissemination a higher level of coordination should be aimed for.

Future Challenges in the EMFA

54. While EMFA in the proposed way would introduce structured cooperation mechanisms for mutual assistance (also in expedited procedures) and the exchange of information in case of serious and grave risks and extend these procedures to the rules laid down in the AVMSD, there is a lack of comparable requirements for the monitoring tasks of the Commission. Doubts can be cast concerning the coherence between the approach of EMFA and the existing system of the AVMSD, especially Art. 3 and 4, and how this will impact the independence of media oversight. It also needs to be discussed whether the opening of the AVMSD for the institutional aspects by the EMFA Proposal should not be combined with an adaptation of certain procedures and substantive provisions of the Directive.

Lessons and 'Blueprints' from Data Protection Law

55. Especially the design of oversight in data protection law can give valuable and transferable insights due to the coherence instruments in GDPR for dealing with cross-border cooperation which have already been applied in practice. Relevant are the involvement, tasks and powers of EDPB that could be a model for a similar application to ERGA. It would have to be considered, however, that the GDPR in contrast to AVMSD follows the market destination principle and therefore not only the authority of the Member State of establishment is competent – although being the lead authority – but other national authorities, too, for the control of cross-border data processing. In addition, the degree of harmonisation is higher in the GDPR than the AVMSD, the latter deliberately leaving a larger discretion for considering cultural specificities of the Member States. These aspects would have to be reflected in the establishment of new procedures.

Conclusions

56. The problems described in the study will necessitate an adaptation of the applicable legal framework in medium term. This will be needed to ensure a better fundamental rights based enforcement of the law in cases of cross-border dissemination of audiovisual content. In short term the agreement of joint minimum standards between the regulatory authorities and bodies of the Member States in the framework of ERGA is a path to be pursued to find answers to the most pressing difficulties of enforcement identified. One of these areas for coordination is the application of the 'technical criteria' which establish jurisdiction. In a future revision of the Directive it should be considered to give up these criteria or combine them with additional requirements that ensure some form of attachment to the legal order of the EU with regard to the editorial work of the provider concerned.
57. The principle of a media environment with providers that are independent from being controlled by the States is a fundamental element of this legal order as well as is the monitoring of content by bodies that are detached from the regular executive system of the state. Laying down minimum requirements in this respect in the coordinated law should be analysed as option for the future. Within this minimum framework Member States would be able to retain or design their own approach to this type of 'state detachment' in their national media laws. A broad interpretation of this 'distance' from the state is preferable and would mean that authorities that are subject to orders from the executive are included in the notion of not fulfilling this standard. With such a broad interpretation it would then be possible to react in a robust manner by those bodies to the further dissemination of services for which the media provider lacks independence or does not comply with minimum content standards. The aim of such reactions is the protection of the population in the EU Member States. Independence of media providers is connected to a relevant media pluralism which necessitates the creation of a framework that avoids undue dominance of specific providers.
58. Concerning enforcement in cross-border cases it is of utmost importance to consider the institutional form of oversight. In combination with the country-of-origin principle there need to be cooperation structures on European level, in which the authorities and bodies entrusted with the monitoring can jointly respond to certain challenges.

In addition, formalised and legally binding cooperation and joint decision-making should be achieved and further detailed in the law in future. ERGA created a framework for this cooperation with the internal Memorandum of Understanding that can serve as basis for the further evolution of the AVMSD or – as this will change the AVMSD according to proposed draft – the European Media Freedom Act. Such a development should consider relevant experience from other areas of law such as especially data protection in order to strengthen the enforcement of the law in the context of cross-border dissemination of audiovisual content in the future.

Zusammenfassung

Herausforderungen einer grenzüberschreitenden Medienlandschaft in der Europäischen Union

1. Die Realität der grenzüberschreitenden Verbreitung audiovisueller Inhalte – ob linear oder non-linear – hat gerade in jüngster Zeit grundlegende Fragen hinsichtlich des anwendbaren regulatorischen Rahmens aufgeworfen. Das betrifft verschiedene Risiken und Phänomene, die zur Sicherung der Grundwerte der Europäischen Union (EU) eine effektive Reaktionsmöglichkeit erfordern, was jedoch in einem immer vielschichtiger werdenden Regulierungsrahmen komplexer wird. Dabei spielen auch übergreifende Fragen zur Regulierungskompetenz zwischen der Europäischen Union und ihren Mitgliedstaaten ebenso wie zur Kohärenz der anwendbaren Regeln für audiovisuelle Inhalte eine wichtige Rolle.

Gefährdungslagen und Grundwerte

2. Vornehmlich geht es um Risiken, die durch die Verbreitung illegaler Inhalte entstehen, die Gefahren für die Öffentlichkeit und den Einzelnen hervorrufen können. Solche audiovisuellen Inhalte werden auf unterschiedlichen Wegen verbreitet und durch die Digitalisierung werden die „Ausspielwege" vielfältiger, was zugleich eine intensivere Adressierung der Rezipienten mit sich bringt. Konkret geht es um Inhalte, die entweder allgemein oder für eine bestimmte Art der Verbreitung verboten sind. Dazu zählen etwa entwicklungsbeeinträchtigende Angebote, die ohne angemessene Schutzmechanismen Kindern und Jugendlichen vor allem online frei zugänglich gemacht werden, aufhetzende oder desinformierende Inhalte, die beispielsweise aus Drittstaaten kommend in manipulativer Absicht die demokratische Willensbildung und den gesellschaftlichen Zusammenhalt in EU-Mitgliedstaaten bedrohen, oder zu Hass und Radikalisierung beitragende Inhalte, die aufgrund ihrer audiovisuellen Natur eine besonders tiefgreifende Wirkung entfalten können.

3. Diese Phänomene gefährden in unterschiedlicher Weise Grundwerte der demokratisch verfassten EU-Mitgliedstaaten, deren gemeinsame Verfassungstraditionen und die Verankerung dieser Werte in den Verträgen der EU auch auf EU-Ebene einen Katalog zu schützender Prinzipien und Werte bilden. Dazu zählen insbesondere die Grundrechte, die von den Mitgliedstaaten aktiv vor Verletzungen bewahrt werden müssen. Wichtige Elemente sind insbesondere die Menschenwürde als überragendes Rechtsgut auch in der EU, der Schutz Minderjähriger, die Meinungs- und Informationsfreiheit ebenso wie die Medienfreiheit und der Medienpluralismus sowie die Privatsphäre der Individuen. Darüber hinaus sind es aber auch die Prinzipien der Demokratie und Rechtsstaatlichkeit, die gegen Bedrohungen zu verteidigen sind. Aus Sicht der Unionsbürgerinnen und -bürger, die Rezipienten und Betroffene von audiovisuellen Inhalten sind, kommt es dabei nicht auf eine genaue Unterscheidung zwischen den verschiedenen Risiken an. Vielmehr geht es um das Bestehen einer insgesamt sicheren, freien und vielfältigen Medienlandschaft bzw. audiovisuellen Inhalte-Umgebung, die unabhängig vom Verbreitungsweg oder dem Verbreitenden von den Mitgliedstaaten gewährleistet wird.
4. Aus Sicht der Regulierung bzw. Rechtsdurchsetzung gegenüber solchen Phänomenen ist die Unterscheidung aber von Bedeutung für die Frage der Zuständigkeit, der Verhältnismäßigkeit von Reaktionsmechanismen und der Befugnisse der Regulierungsbehörden. Deshalb kommt es aus dieser Perspektive auf die Art des Inhalts, der Verbreitung und des Verbreiters an. Daher ist zur Bestandsaufnahme der bestehende und sich gerade weiter entwickelnde Rechtsrahmen näher zu beleuchten.

Der bestehende Rechtsrahmen und jüngste Anpassungen

5. Die EU verfügt über keine unmittelbare Kompetenz im Bereich des Medienrechts, insbesondere wegen der davon mit erfassten kulturellen Dimension. Vielmehr verblieb den Mitgliedstaaten in der Vergangenheit konsequenterweise ein breiter Gestaltungsspielraum zur Erreichung der in diesem Bereich besonders vom jeweiligen Verfassungsrahmen geprägten Politikziele. Die weitreichenden Zuständigkeiten der EU zur Regulierung des Binnenmarkts, in dem die Medien und auch andere auf audiovisuelle Inhalte gestützte Dienste als Wirtschaftsgut eine bedeutende Rolle einnehmen, führten aber schon in der Vergan-

genheit aufgrund der grenzüberschreitenden Dimension der Inhalteverbreitung und des Inhaltezugangs durch Rezipienten zu legislativen Aktivitäten der EU. Das Spannungsverhältnis aufgrund der Dualität als Wirtschafts- und Kulturgut bleibt bestehen, zumal die EU der Vielfalt ihrer Mitgliedstaaten verpflichtet ist und dabei die nationale Identität zu beachten hat. Die daraus folgenden Kompetenzabgrenzungen und Rechtsetzungsmöglichkeiten der EU im Mediensektor sind bereits in einer früheren Studie eingehend dargestellt worden. Demnach darf die EU-Binnenmarktregulierung mitgliedstaatliche Kulturpolitik nicht verdrängen und für die Schaffung von Rechtsklarheit ist eine deutliche Abgrenzung sowie zugleich Kohärenz zwischen den unterschiedlichen Ebenen und anwendbaren Regelungen besonders wichtig.

Die Richtlinie über audiovisuelle Mediendienste als Herzstück des „EU-Medienrechts"

6. Ein Beispiel für ein solches Bestreben um Kohärenz zwischen Wirtschafts- und Kulturregulierung ist das „Herzstück" der Regulierung audiovisueller Inhalte auf EU-Ebene: die Richtlinie über audiovisuelle Mediendienste (AVMD-RL), mit der eine Mindestharmonisierung zur Gewährleistung von grenzüberschreitend freiem Empfang und freier Verbreitung audiovisueller Dienstleistungen bei Aufrechterhaltung bedeutsamer mitgliedstaatlicher Gestaltungsspielräume erreicht wird. Die AVMD-RL bietet bereits einen Lösungsansatz bezüglich einiger genannter Risiken, insbesondere beim Schutz Minderjähriger und der Allgemeinheit vor bestimmten Inhalten sowie bei der audiovisuellen kommerziellen Kommunikation. Sie adressiert die wichtigsten audiovisuellen Akteure, sowohl die unter redaktioneller Verantwortung agierenden Fernseh- und Video-on-Demand (VoD)-Anbieter als auch – seit der letzten Anpassung der Richtlinie 2018 – die die über ihre Dienste verbreiteten, audiovisuellen Inhalte organisierenden Video-Sharing-Plattform (VSP)-Anbieter. Grundsätzlich erfasst die Richtlinie damit unterschiedliche Verbreitungswege audiovisueller Inhalte, wobei manche Vorschriften sich nur auf bestimmte Arten der Distribution beziehen.

Bestehende EU-Plattformregulierung mit Relevanz für den audiovisuellen Sektor

7. Aufgrund von Gesetzesinitiativen in den vergangenen Jahren als Bestandteile der als solcher proklamierten „digitalen Dekade", in der die Europäische Kommission (weiterhin) bestrebt ist, Europa „fit" für das digitale Zeitalter zu machen, ist die AVMD-RL aber nicht mehr das einzige relevante und spezifische Regelungsinstrument bezüglich audiovisueller Inhalte. Insbesondere die neuen Elemente einer umfassenderen Plattformregulierung sind relevant, weil entweder die schon von der AVMD-RL adressierten Akteure jedenfalls zum Teil selbst unter die unterschiedlichen Plattformbegriffe fallen oder weil diese Plattformen als Intermediäre erhebliche Bedeutung für die Distributions- und Wertschöpfungskette audiovisueller Inhalte haben. Zudem gelten die diese neuen Marktteilnehmer adressierenden Vorschriften für Anbieter, die mit den von der AVMD-RL erfassten Diensteanbietern im Wettbewerb um Zuschauer- und Werbemarktanteile stehen. Es ist vor allem der kürzlich in Kraft getretene und (bis auf manche vorab anwendbaren Vorschriften) im Februar 2024 vollumfänglich Anwendung findende Digital Services Act (Verordnung (EU) 2022/2065, DSA), der mit seinem abgestuften Pflichtenkatalog für Online-Plattformen mit umfangreicheren Auflagen für sehr große Online-Plattformen beim Umgang mit illegalen Inhalten, der Werbung und dem Jugendschutz von Bedeutung ist. Zudem gehören zu den relevanten Neuerungen der ebenfalls kürzlich in Kraft getretene und (teilweise früher und teilweise später, aber in weiten Teilen) im Mai 2023 anwendbare Digital Markets Act (Verordnung (EU) 2022/1925, DMA) mit einer Reihe von spezifischen Pflichten etwa zur Transparenz und Schnittstellenoffenheit für von Gatekeepern betriebene zentrale Plattformdienste, die u.a. Online-Suchmaschinen oder VSPs umfassen, sowie die Verordnung (EU) 2021/784 (TCO-Verordnung) zur Bekämpfung der Verbreitung (auch: audiovisueller) terroristischer Online-Inhalte mit entsprechenden Pflichten für Hostingdiensteanbieter.

Der mögliche zukünftige Regelungsrahmen im Lichte aktueller Rechtsakt-Vorschläge

8. Weitere relevante Gesetzesvorhaben befinden sich noch im Legislativprozess, sind aber für den Kohärenzaspekt nicht minder relevant bezüglich des audiovisuellen Sektors und der Reaktion auf verschiedene Gefährdungslagen. Der Vorschlag für eine Verordnung zur Festlegung von Vorschriften zur Prävention und Bekämpfung des sexuellen Missbrauchs von Kindern (CSAM-Verordnung) addressiert Hostingdiensteanbieter ähnlich wie die TCO-Verordnung für einen ganz bestimmten Bereich von illegalen (auch: audiovisuellen) Inhalten mit Risikobewertungs- und Risikominderungspflichten, was bis zu proaktiven Aufdeckungspflichten auf Anordnung reichen würde. Demgegenüber bezieht sich der Vorschlag für eine Verordnung über die Transparenz und das Targeting politischer Werbung diensteunabhängig auf Pflichten bei der Verbreitung von politischer Werbung (online wie offline) und damit einen Bereich, der wegen Finanzierungs- und redaktionellen Gesichtspunkten für den Mediensektor unmittelbar relevant ist. Das gilt noch mehr für den Vorschlag für eine Verordnung zur Schaffung eines gemeinsamen Rahmens für Mediendienste im Binnenmarkt (Europäisches Medienfreiheitsgesetz/European Media Freedom Act, EMFA), der die AVMD-RL im institutionellen Bereich nicht nur ändern soll, sondern mit darüber hinausgehenden Rechten und Pflichten für Mediendiensteanbieter (und Rezipienten) deutliche Auswirkungen auf den Rechtsrahmen für die Verbreitung von audiovisuellen Inhalten haben würde.

Kohärenz der Rechts(durch)setzung?

9. Diese bestehenden oder vorgeschlagenen Rechtsakte in Form von EU-weit unmittelbar geltenden Verordnungen weisen damit auch in unterschiedlichem Maße Überschneidungen zur AVMD-RL bzw. deren nationaler Umsetzung auf – auch in Bereichen, in denen die AVMD-RL den Mitgliedstaaten bewusst einen Gestaltungsspielraum belässt. So enthalten AVMD-RL und DSA sehr ähnliche (aber nicht gleich strenge) Pflichten für VSPs im Kontext von Kennzeichnungs- und Beschwerdemechanismen für Werbung und illegale Inhalte; der DMA enthält Pflichten zur Transparenz und Diskriminierungsfreiheit von Ranking-

Systemen, während die AVMD-RL die Mitgliedstaaten zu Maßnahmen zur angemessenen Herausstellung audiovisueller Mediendienste von allgemeinem Interesse ermutigt; sowohl TCO-Verordnung als auch AVMD-RL verpflichten VSPs zum Ergreifen bestimmter angemessener Maßnahmen gegen die (öffentliche) Aufforderung zur Begehung einer terroristischen Straftat; Regeln zum umfassenden Schutz von redaktionellen Entscheidungen und deren Unabhängigkeit im EMFA könnten sich mit Rechtsdurchsetzungsmaßnahmen auf Basis der AVMD-RL überschneiden; und, in umgekehrter Richtung, könnte der Schutz (auch politischer) redaktioneller Inhalte nach der AVMD-RL Restriktionen aus dem Verordnungsvorschlag für politische Werbung überlagern. In der Regel enthalten die Rechtsakte mit Blick auf diese potentiellen Überschneidungen lediglich eine mehr oder minder klare „Bleibt unberührt"-Regelung für das Verhältnis zur AVMD-RL.

10. Die Problematik möglicher Überschneidungen wird umso relevanter, da diese bestehenden oder vorgeschlagenen Rechtsakte regelmäßig ein eigenes institutionelles System zur Kontrolle und Rechtsdurchsetzung einführen oder sich auf ein vorhandenes stützen, das teilweise auf EU-Ebene bei der Europäischen Kommission angesiedelt ist und teilweise bei verschiedenen mitgliedstaatlichen Regulierungseinrichtungen. Dabei sind aber meist keine oder nur minimale intersektorale Kooperationsmechanismen mit bindender Wirkung enthalten. Das macht die Reaktion auf bestehende Gefährdungslagen, also die Rechtsdurchsetzung, komplex. Sie ist noch komplexer, wenn sie grenzüberschreitende Bezüge aufweist, wie es im Online-Bereich häufig und in zunehmendem Maße der Fall ist. Vor dem Hintergrund der beschriebenen (grundrechtlich) berechtigten Erwartungshaltung der Rezipienten in Bezug auf einen umfassend zu sichernden Medienkonsum muss es aber um die Schaffung eines regulatorischen Umfelds – auch im Mehrebenensystem zwischen der EU und den Mitgliedstaaten – gehen, in dem dieser Erwartungshaltung mit dem tatsächlich existierenden und umsetzbaren Handlungsrahmen entsprochen werden kann.

Ziel der vorliegenden Studie

11. Ziel dieser Studie ist es, die bestehenden und künftigen Herausforderungen der Regulierung grenzüberschreitend verbreiteter audiovisueller Inhalte aufzuzeigen und sie Lösungsvorschlägen zuzuführen.

Ausgangspunkt ist dabei eine eingehende Analyse der relevanten Regeln der AVMD-RL, was ihren Anwendungsbereich, insbesondere das in ihr verankerte Herkunftslandprinzip, sowie das institutionelle Gefüge betrifft. Diese werden im Lichte der grenzüberschreitenden Rechtsdurchsetzungsmöglichkeiten und der mitgliedstaatlichen Möglichkeiten zu temporären Abweichungen vom Herkunftslandprinzip (Art. 3) und dem Umgehungsverbot bei Vorliegen strengerer Regeln (Art. 4) betrachtet. Dabei werden die Kooperationsstrukturen der Regulierungseinrichtungen innerhalb der Gruppe der europäischen Regulierungsbehörden für audiovisuelle Mediendienste (ERGA) intensiv beleuchtet und mit anderen institutionellen Systemen verglichen. Hierbei ermittelte Problemlagen, illustriert durch Beispielszenarien, werden anschließend entlang unterschiedlicher Lösungsansätze untersucht, um Ableitungen zu ermöglichen, welche Schritte zukünftig gegangen werden sollten. Die Studie schließt daher mit schlussfolgernden Erwägungen, die sowohl bei der Weitergeltung bestehender als auch aktuell vorgeschlagener oder anzustrebender Regulierung im Hinblick auf die Gewährleistung einer effektiven Rechtsdurchsetzung bei der grenzüberschreitenden Verbreitung audiovisueller Inhalte zu beachten sind.

Anwendungsrahmen der AVMD-RL

12. Wie bereits ihr Vorgänger, die Richtlinie „Fernsehen ohne Grenzen" (TwF-Richtlinie) von 1989, dient die AVMD-RL dazu, die grenzüberschreitende Übertragung und den grenzüberschreitenden Empfang von audiovisuellen Angeboten im EU-Binnenmarkt zu gewährleisten. Diese erfolgt weiterhin auf Basis einer Mindestharmonisierung, also der Festlegung von Grundregeln in der Richtlinie, an die sich Anbieter in allen Mitgliedstaaten aufgrund der jeweiligen nationalen Richtlinienumsetzung halten müssen, sowie des tragenden Herkunftslandprinzips, das die Anbieter an die Rechtshoheit und damit regulatorische Zuständigkeit ihres Niederlassungsmitgliedstaates bindet. Der Anwendungsbereich erstreckte sich zunächst nur auf das Fernsehen, wurde aber 2007 auch auf audiovisuelle Mediendienste auf Abruf (VoD) als Reaktion auf die sich entsprechend entwickelnde Medienlandschaft erweitert.

Die Revision der AVMD-RL 2018

13. Mit der Revision durch die Richtlinie (EU) 2018/1808, deren Vorgaben durch die Mitgliedstaaten bis zum 19. September 2020 umzusetzen waren, wurde die AVMD-RL erneut an die Gegebenheiten einer sich vielleicht noch rascher entwickelnden Medienlandschaft angepasst. Die Bedeutung der Reform liegt insbesondere in der neuerlichen Erweiterung des Anwendungsbereichs auf VSPs, deren Anbieter (als solche) anders als Fernseh- und VoD-Anbieter nicht eigene Inhalte redaktionell zusammenstellen und verbreiten, sondern fremde (nutzergenerierte) Inhalte zumindest so weit organisieren, dass eine Auferlegung bestimmter Pflichten im Zusammenhang mit diesen Inhalten gerechtfertigt ist. Weitere Elemente betrafen die Konkretisierung von Zuständigkeitskriterien bezüglich des Herkunftslandprinzips, die Veränderung der Vorgaben zum Jugendschutz und zur Hassrede sowie deren Angleichung für Fernseh- und VoD-Anbieter, die Modernisierung der Förderpflichten im Hinblick auf europäische Werke, die Verschärfung qualitativer und Liberalisierung quantitativer Werbebestimmungen, die sog. Signalintegrität sowie die Verpflichtung der Mitgliedstaaten, zur Medienkompetenzförderung beizutragen. Zudem wurden insbesondere institutionelle und formelle Regelungen geschaffen, die wiederum gewichtige Auswirkungen auf das Gesamterscheinungsbild von Medienregulierung in der Zukunft haben können: es werden sog. Verhaltenskodizes im Rahmen der insgesamt gestärkten Selbst- und Ko-Regulierung als neue Regulierungsform betont und die Regulierungseinrichtungen werden zu einer stärkeren Zusammenarbeit verpflichtet.

Der materielle Regelungsgehalt: Reichweite und Grenzen der Rechtsdurchsetzung unter der AVMD-RL

14. Von besonderer Relevanz im vorliegenden Kontext sind aber die materiellen Regelungen, wie sie sich aus der konsolidierten Fassung der AVMD-RL ergeben, da es letztlich von diesen abhängt, welche Zuständigkeit im Rahmen der Rechtsdurchsetzung besteht und wie die Reichweite des Herkunftslandprinzips dabei jeweils ist. Daraus ergibt sich, welche (grenzüberschreitenden) Mechanismen zur Anwendung kommen können bzw. müssen. Insbesondere die Verbote von zu Gewalt oder Hass aufstachelnden Inhalten und von öffentlichen Aufforderung-

en zur Begehung terroristischer Straftaten (Art. 6) sowie die Pflicht zum Schutz der Jugend vor entwicklungsbeeinträchtigenden Inhalten (Art. 6a) sind hervorzuheben. Ebenso sind aber auch die qualitativen Werbebeschränkungen (Art. 9 Abs. 1), zum Beispiel zum Verbot von Diskriminierungen und die Menschenwürde verletzender audiovisueller Kommunikation, relevant.

15. Die erstgenannten Verbote lassen den Mitgliedstaaten kaum Gestaltungsspielraum, sind also national vergleichsweise einheitlich umgesetzt, beziehen sich aber auf einen sehr spezifischen Bereich und erfassen insbesondere nicht andere Formen illegaler oder schädlicher Inhalte (z.B. Hass außerhalb von Diskriminierungen, strafrechtsrelevante Inhalte). Diese bleiben nach wie vor anderen Regeln auf Unions- oder nationaler Ebene vorbehalten. Die qualitativen Werbebeschränkungen sind inhaltlich ebenso spezifisch, aber auf nationaler Ebene häufig in unterschiedliche Regulierungssysteme mit unterschiedlichen Aufsichtsstrukturen eingebunden, vor allem solche der Selbst- und Ko-Regulierung. Gleiches gilt für den Jugendmedienschutz, bei dem es nach wie vor unterschiedlich tradierte und lange gewachsene Systeme in den Mitgliedstaaten gibt, die zudem noch von unterschiedlichen Vorstellungen der Ausfüllung unbestimmter Rechtsbegriffe (bspw. „entwicklungsbeeinträchtigend") geprägt sind. Auch sind Herangehensweisen für den Fernseh- und VoD-Bereich häufig verschieden. Die Regelungen gelten entsprechend zwar seit 2018 auch für VSPs, in Bezug auf nutzergenerierte Inhalte sind aber lediglich angemessene Schutzmaßnahmen von den Anbietern zu treffen, wobei die Beurteilung dieser Angemessenheit anhand einer in der Richtlinie beispielhaft aufgeführten Liste möglicher (auch technischer) Mechanismen der VSPs vorgenommen werden kann, aber letztlich den Mitgliedstaaten vorbehalten ist.

Das Herkunftslandprinzip und seine Anwendung unter der AVMD-RL

16. Seit den Anfängen in der TwF-Richtlinie ist das Herkunftslandprinzip Grundpfeiler der AVMD-RL und des Bestrebens, den freien Verkehr von audiovisuellen Inhalten innerhalb des Binnenmarkts zu gewährleisten. Art. 2 Abs. 1 AVMD-RL legt hierzu fest, dass ein (linearer oder nonlinearer) Anbieter audiovisueller Mediendienste, der unter die Rechtshoheit eines Mitgliedstaates fällt, im Prinzip „nur" den Regelungen dieses Mitgliedstaates entsprechen muss und im Falle der Konformität

mit der Rechtsordnung dieses Herkunftslandes seine Dienste dann auch frei in andere Mitgliedstaaten verbreiten kann, ohne dabei von diesen Empfangsmitgliedstaaten eingeschränkt oder z.B. einer nochmaligen Zulassung unterworfen zu werden.

Die Bedeutung der Rechtshoheit beim Herkunftslandprinzip

17. Zur Gewährleistung, dass diese Dienste dennoch bestimmten, in allen Mitgliedstaaten einheitlich geltenden Grundregeln entsprechen, legt die AVMD-RL solche auf Basis einer von den Mitgliedstaaten umzusetzenden Mindestharmonisierung fest und stellt das Erfordernis auf, dass deren Einhaltung durch den Mitgliedstaat mit Rechtshoheit sicherzustellen ist. Die Rechtshoheit bestimmt sich dabei grundsätzlich nach dem Ort der Niederlassung, wobei hierfür der Sitz der Hauptverwaltung des Mediendiensteanbieters (Art. 2 Abs. 3) in unterschiedlichen Varianten maßgeblich ist. Nur wenn nach den dort niedergelegten Kriterien eine Niederlassung in einem EU-Mitgliedstaat nicht festgestellt werden kann, sind subsidiär technische Anknüpfungspunkte heranzuziehen, namentlich ob bei solchen Drittstaatsangeboten – da es an einer maßgeblichen Niederlassung innerhalb der EU fehlt (andernfalls Einschlägigkeit des Abs. 3) – ein Satelliten-Uplink in einem Mitgliedstaat oder nachrangig die einem EU-Mitgliedstaat zugeordnete Satellitenkapazität beim Anbieter der genutzten Übertragungskapazität verwendet wird (Art. 2 Abs. 4).

Ausnahmemöglichkeiten vom Herkunftslandprinzip: Abweichungsbefugnis und Umgehungsverbot

18. Schon bei der Einführung des Herkunftslandprinzips wurde anerkannt, dass es neben diesen durch die Mindestharmonisierung bereits erfassten Situationen weitere öffentliche Interessen in den Mitgliedstaaten geben kann, deren Gefährdung durch nicht unter eigener Rechtshoheit stehende Dienste durch entsprechende Handlungsbefugnisse dieser Mitgliedstaaten begegnet werden kann. Daher wurde das Herkunftslandprinzip nicht als absolut geltend ausgestaltet. Die Mitgliedstaaten haben unter bestimmten Bedingungen und unter Einhaltung des in der Richtlinie vorgesehenen Verfahrens die Möglichkeit, temporär vom

Herkunftslandprinzip abzuweichen und Maßnahmen gegen unter der Rechtshoheit eines anderen EU-Mitgliedstaates stehende Anbieter zu ergreifen (Art. 3). Außerdem können sie, wenn sie für die unter eigener Rechtshoheit stehenden Anbieter strengere Regeln als den Mindeststandard der AVMD-RL erlassen haben, gegen einen Mediendiensteanbieter unter der Rechtshoheit eines anderen Mitgliedstaates vorgehen, wenn dieser sich nur deshalb dort niedergelassen hat, um die strengeren Regeln des Mitgliedstaats, auf den sein Angebot hauptsächlich ausgerichtet ist, zu umgehen.

19. Diese Ausnahmeregelungen sind 2018 der Struktur nach gleich geblieben. Jedoch gab es in der Formulierung marginale Klarstellungen zu den Rechtshoheitskriterien. Vor allem wurden aber die Regeln so gefasst, dass sie nun einheitlich in gleicher Weise für lineare und nonlineare Anbieter gelten. Auch wurden mit dem Ziel einer Straffung der Verfahren Anpassungen in den Art. 3 und 4 vorgenommen.

Implementierungsprobleme unter dem Herkunftslandmechanismus …

20. Es sind aber weniger die versuchten Verfahrensverbesserungen durch die Anpassungen 2018, die zu den nachfolgend dargestellten Implementierungsproblemen führen, sondern vielmehr sich verändernde Gegebenheiten in der Medienumgebung, die weder bei Schaffung der Richtlinie 1989 noch bei der Revision 2018, jedenfalls nicht in der Intensität wie sie sich jetzt darstellen, bedacht wurden oder werden konnten.

… bei der Bestimmung der Rechtshoheit

21. Solche Schwierigkeiten beziehen sich zunächst auf die Festlegung der Rechtshoheit. Diese richtet sich entsprechend der Systematik der AVMD-RL – mit der Folge, dass es auch nur in diesen Fällen zur Anwendung der Richtlinie bzw. ihrer nationalen Umsetzung und Berücksichtigung des Herkunftslandprinzips kommen muss – zunächst nur an niedergelassene Mediendienste. Diese Niederlassung ist etwa im Falle der Hauptverwaltung in einem Mitgliedstaat gegeben oder – auch dafür hat die Richtlinie Vorsorge getroffen – im Fall mehrerer Niederlassungen in unterschiedlichen Mitgliedstaaten bei unklarer Hauptverwaltung oder bei Auseinanderfallen der für die programmlichen Entscheidun-

gen zuständigen Niederlassung von derjenigen der Hauptverwaltung in dem Mitgliedstaat, in dem die für das jeweilige Angebot relevanten Entscheidungen getroffen werden. Diese Differenzierungen dienen dazu, möglichst jede Konstellation rechtssicher erfassen zu können, wenn die Zuständigkeit innerhalb der EU zwischen zwei oder mehr Mitgliedstaaten unklar sein sollte. Die Kriterien haben sich in der Vergangenheit grundsätzlich als geeignet erwiesen, um diese Rechtsklarheit zu schaffen.

22. 2018 wurden zur weiteren Klarstellung definitorische Konkretisierungen der Programmrelevanz und redaktionellen Entscheidungen angefügt, die die bisherige Auslegung bestätigen. Zudem diente die mit der Revision eingeführte Etablierung einer öffentlich zugänglichen Datenbank zur Rechtshoheit der abschließenden Klärung, weil bei der Erstellung der Einträge auch Konflikte zwischen den Mitgliedstaaten über die Zuständigkeitsfrage automatisch zutage treten. Daher ist ergänzend ein Verfahren zur Lösung möglicher Zuständigkeitskonflikte geschaffen worden, das unter Einbeziehung der ERGA in solchen Fällen eine endgültige Zuordnung herbeiführt. Dies könnte umso mehr an Bedeutung gewinnen, als gerade in letzter Zeit Beispiele zu beobachten sind, bei denen Anbieter versuchen, eine Niederlassung zu verschleiern, um einer anderen Rechtshoheit zu unterfallen.

… in Bezug auf EU-ausländische Anbieter ohne Verknüpfung mit dem Binnenmarkt

23. Klar ist weiterhin, dass die von der Richtlinie geregelte Zuständigkeitsordnung nicht für Anbieter konzipiert war, die aus dem EU-Ausland senden und sich damit außerhalb des Binnenmarkts befinden. Für solche Angebote sind grundsätzlich nur die Mitgliedstaaten selbst zuständig, etwa wenn sie gegen unzulässige Inhalte vorgehen wollen. Jedoch ist hiervon in der Richtlinie die bereits erwähnte Ausnahme gemacht worden, dass auch bei Nichtvorliegen einer Niederlassung eine aufgrund technischer Aspekte bei der Verbreitung bestehende Verknüpfung mit einem EU-Mitgliedstaat genügt, um dort eine Rechtshoheit zu begründen. Ziel dieser Anknüpfung an die Nutzung einer auf dem Territorium eines Mitgliedstaats befindlichen Satelliten-Bodenstation für die „Aufwärtsstrecke" (Uplink) zum Satelliten bzw. nachrangig einer einem Mitgliedstaat zugeordneten Satellitenkapazität

für die Übertragung, war eigentlich, zu verhindern, dass innerhalb der EU empfangbare Programme keinerlei aufsichtlicher Kontrolle unterliegen, weil es an einer Niederlassung mit der Folge der Ausübung der Rechtshoheit fehlte und für die Nutzung der Satellitentechnologie keine entsprechend harmonisierten Regeln vorlagen. Um zu vermeiden, dass sich in einem solchen Falle kein Mitgliedstaat für die Reaktion auf eventuell rechtswidrige Inhalte zuständig fühlt bzw. andere Mitgliedstaaten praktisch nichts gegen solche Inhalte unternehmen können, obwohl andernorts in der EU (in dem dafür zuständigen Mitgliedstaat) zumindest ein technischer „Zugriff" auf das Angebot möglich wäre, wurde in der Richtlinie die technische Verknüpfung in den EU-Binnenmarkt geregelt.

… in Bezug auf EU-ausländische Anbieter mit nur technischem (künstlichem) „Link" zum Binnenmarkt

24. Jedoch stellt sich jetzt das Problem, dass es Anbieter gibt, die bewusst versuchen, als Nicht-EU-Angebot unter den Schutzschirm des AVMD-RL-gestützten Binnenmarktes für audiovisuelle Mediendienste zu gelangen, indem sie „nur" eine Satellitenkapazität nutzen, ohne sich durch eine Niederlassung der vollständigen medienrechtlichen Ordnung eines Mitgliedstaates zu unterwerfen. In der Frage der Satellitenkapazität sind in der Praxis lediglich zwei Mitgliedstaaten bzw. zwei dort gelegene Satellitenanbieter betroffen, wobei die Verwaltungspraxis sich in diesen beiden Staaten (bislang) unterschiedlich darstellt. Bezüglich des Satelliten-Uplink-Kriteriums ist das Problem, dass der Uplink volatil sein kann und zudem einfach zugänglich ist, so dass es zu einer Unklarheit bei sich schnell ändernder Anknüpfung an einen Mitgliedstaat kommen kann.

… in Bezug auf nur begrenzte Übertragungswege

25. Schließlich ist aber vor allem ein Problem darin zu sehen, dass sich diese Ausnahmekonstellationen nur auf eine bestimmte Verbreitungstechnik beziehen und Regelungen zum Umgang mit Nicht-EU-Anbietern bei der Online-Verbreitung von audiovisuellen (Medien-)Inhalten fehlen bzw. eine Verbindung zwischen der ausnahmsweisen Aussetzung der Weiterverbreitung durch einen Mitgliedstaat und der

Rechtsfolge für alle anderen Mitgliedstaaten bezüglich Maßnahmen zur Stützung dieser Aussetzung nicht hergestellt wird. Bei den materiellen Vorschriften der AVMD-RL wird dagegen keine Unterscheidung zwischen Verbreitungsarten gemacht und auch aus der Perspektive von Rezipienten kann es bei der Frage der Reaktion auf mögliche illegale Inhalte nicht entscheidend darauf ankommen, wie diese Inhalte auf ihre Endgeräte transferiert werden.

… vor dem Hintergrund von Koordinierungsfragen

26. Konkret bedeutet dieser Befund, dass bei einem „reinen" Nicht-EU-Anbieter die Zuständigkeit für aufsichtliche Maßnahmen einerseits davon abhängt, ob ein Mitgliedstaat nach seinem eigenen Rechtsrahmen dafür materielle Bestimmungen und Verfahren vorsieht und andererseits, ob in einem bestimmten Fall überhaupt eine Problemkonstellation aus Sicht dieses Mitgliedstaates gegeben ist. Wenn also etwa ein nicht unter Rechtshoheit eines EU-Mitgliedstaates stehender ausländischer Anbieter – nach dem jeweiligen nationalen Rechtsrahmen – rechtswidrige Inhalte in mehreren EU-Mitgliedstaaten verbreitet, dann kann jeder dieser Mitgliedstaaten für sich genommen gegen diesen Anbieter vorgehen, sofern das nationale Recht ein entsprechendes Verfahren vorsieht. Zugleich fehlt es dann aber an einer koordinierten Herangehensweise, sofern diese nicht durch bi- oder multilaterale Abstimmungen, z.B. auch im Rahmen der ERGA, hergestellt werden kann und auch nur soweit die jeweiligen nationalen Rechtsordnungen vergleichbare Reaktionsmöglichkeiten zulassen.
27. Etwa beim Beispiel der im Rahmen der Wirtschaftssanktionen des Rates der EU in Reaktion auf den russischen Angriffskrieg gegen die Ukraine ergriffenen Maßnahmen bezüglich bestimmter russischer Inhalteanbieter aufgrund von als Propaganda eingestuften und zu potentieller Gefährdung der Sicherheit in EU-Mitgliedstaaten führenden Aktivitäten, hätte es zuvor bei Nichtvorliegen einer Zuständigkeit eines EU-Mitgliedstaates zu einer (medienrechtlichen) Reaktion in allen betroffenen Staaten kommen können. Soweit eine Rechtshoheit gegeben ist, wäre wiederum eine Reaktion von diesem Mitgliedstaat abhängig, außer im Rahmen der Ausnahmetatbestände. In beiden Fällen wäre es aber nicht notwendigerweise zum gleichen Ergebnis bzw. Effekt in allen Mitgliedstaaten gekommen, obwohl das Angebot gleich-

sam „auf" dem Binnenmarkt für audiovisuelle Inhalte verfügbar und gefährdend war.

… bei der Abweichungsbefugnis und innerhalb des Umgehungsverbots

28. Soweit eine Rechtshoheit eines Mitgliedstaates besteht, führt auch diese nicht automatisch zur Erreichung eines Rechtsdurchsetzungsstandards, der aus Sicht aller (betroffenen) Mitgliedstaaten zufriedenstellend ist. Dies kann daran liegen, dass unterschiedliche Auffassungen über die Problematik eines Inhalts bestehen oder etwa im Herkunftsland die Behandlung bestimmter Angebote – insbesondere solcher, die nur in sehr eingeschränktem Maße die Bevölkerung des Herkunftslands ansprechen – nicht die gleiche Dringlichkeit besitzt wie in dem Staat, auf den die Inhalte ausgerichtet sind. Jedoch ist dann nach dem Herkunftslandprinzip die Herangehensweise des die Rechtshoheit innehabenden Staates entscheidend, solange dieser seiner Pflicht genügt, die Einhaltung der eigenen Rechtsordnung durch Mediendiensteanbieter zu kontrollieren und im Falle eines Verstoßes zu reagieren. Andernfalls könnte der Mitgliedstaat durch die Europäische Kommission gegebenenfalls in einem Vertragsverletzungsverfahren dazu angehalten werden, seiner effektiven Umsetzungspflicht der Vorgaben aus der AVMD-RL nachzukommen. Alternativ ist genau für diese Fälle die Möglichkeit der (temporären) Abweichung vom Herkunftslandprinzip eingeführt worden, mit der durch die Einbeziehung des Ursprungsmitgliedstaates im Verfahren, das am Ende zu abweichenden eigenen Maßnahmen des Empfangsstaates führen kann, sichergestellt werden soll, dass die Interessen aller betroffenen Mitgliedstaaten gewahrt werden können.
29. Mit der Etablierung der Beteiligung der ERGA bei der praktischen Zusammenarbeit zwischen den Regulierungsbehörden ist hier ein wichtiger Schritt in der letzten AVMD-Revision gemacht worden, um sowohl innerhalb als auch außerhalb der Ausnahmeverfahren zu direkteren Lösungen in Problemfällen zu kommen. Dieser Ansatz ist von der ERGA aufgegriffen worden, deren Mitglieder sich in einer Vereinbarung, dem Memorandum of Understanding (MoU), zu verstärkter Zusammenarbeit und gegenseitiger Unterstützung verpflichten. Dieses MoU basiert jedoch auf der Mitwirkung der zuständigen Regulierungsbehörden und -stellen und ist nicht rechtsverbindlich.

Die Möglichkeit der Mitgliedstaaten zur Abweichung vom Herkunftslandprinzip in der Praxis

30. Mitgliedstaaten sind nach Art. 3 Abs. 1 AVMD-RL nur im durch die Richtlinie koordinierten Bereich zur Berücksichtigung des Herkunftslandprinzips und der damit einhergehenden Vorgabe, die Weiterverbreitung bzw. den freien Empfang nicht zu unterbinden, verpflichtet. Es können sich schon bei dieser Frage Abgrenzungsschwierigkeiten ergeben, ob ein bestimmter Sachverhalt unter den koordinierten Bereich fällt, etwa wenn es um problematische Inhalte wie Desinformation geht, die für sich genommen in der Richtlinie nicht geregelt sind. Nur bei Einschlägigkeit der Richtlinie ist bei Maßnahmen gegen aus anderen Mitgliedstaaten stammende Inhalte das Abweichungsverfahren nach Art. 3 Abs. 2, 3 und 5 zu beachten. Dieses erlaubt die vorübergehende Abweichung vom Prinzip der freien Weiterverbreitung, wenn bestimmte Bedingungen erfüllt sind – u.a. schwerwiegende Verletzungen bestimmter Bestimmungen der AVMD-RL oder ernsthafte und schwerwiegende Gefahren der Beeinträchtigung für die öffentliche Gesundheit oder öffentliche Sicherheit – und ein komplexes, mehrstufiges Verfahren – u.a. Einbindung des Anbieters, des Rechtshoheits-Mitgliedstaates und der Kommission – eingehalten worden sind. Ob die Abweichung mit dem Europarecht vereinbar ist, entscheidet letztlich die Kommission, wobei nach der neugefassten AVMD-RL die ERGA eine wichtige Rolle sowohl bei der generellen Bewertung dieses Mechanismus als auch bei einem konkreten Verfahren spielt, da die Kommission vor ihrer Entscheidung eine Stellungnahme der ERGA einzuholen hat. Dieses neue Verfahren mit Einbeziehung der ERGA ist bislang erst einmal angewandt worden. Aber auch die vorherige Ausgestaltung des Abweichungsverfahrens ist nur in wenigen Fällen zur Anwendung gekommen, die erst in den vergangenen Jahren zu solchen Vereinbarkeitsentscheidungen der Europäischen Kommission geführt haben.

Nur begrenzte Problemlösung über die Abweichungsbefugnis

31. In allen bisherigen Fällen ging es um Reaktionen baltischer Staaten gegen russischsprachige Sender, die aufgrund ihrer zu Hass aufstachelnden Inhalte, die den gesellschaftlichen Zusammenhalt in den betroffen-

en Staaten gefährdeten, jeweils für einige Monate an der Verbreitung gehindert wurden. Diese (wenigen) Fälle haben zweierlei deutlich gemacht: zum einen ist das Auslösen des Verfahrens und die zeitliche Abfolge dergestalt problematisch, dass die eigentliche Reaktion auf den Rechtsverstoß erst erheblich nach der Ausstrahlung des beanstandeten Inhalts erfolgt. Inwieweit die Dringlichkeitsklausel, die eine beschleunigte Reaktion des von einem Inhalt nach den Maßstäben des Art. 3 betroffenen Mitgliedstaates ermöglicht, hier Verbesserungen in der Zukunft erbringen kann, muss sich noch erweisen. Jedoch zeigt sich zum anderen, dass auch bei erfolgreichem Abschluss des Ausnahmeverfahrens keine effektive Zielerreichung garantiert ist: Der durch den Inhalt besonders betroffene Mitgliedstaat kann zwar gegen die Weiterverbreitung auf seinem Territorium (ausnahmsweise) vorgehen, dies bezieht sich aber wegen des wohl eng zu verstehenden Wortlauts der Vorschrift, vor allem aber aufgrund technischer Gegebenheiten, letztlich nur auf die (innerstaatliche) terrestrische und Kabelweiterverbreitung. Die Empfangbarkeit bei der Übertragung über einen Satelliten bleibt bestehen, wenn nicht der Herkunftsstaat oder ein anderer EU-Mitgliedstaat, der möglicherweise auf einen Satellitenanbieter einwirken kann, ihrerseits Maßnahmen zur Abhilfe ergreifen, wozu sie nicht direkt aus den Vorschriften zum Abweichungsverfahren verpflichtet sind. Diese Problematik gilt erst recht für eine Online-Verbreitung der gleichen Inhalte. Die wenigen Anwendungsfälle, bei denen die regulatorischen Maßnahmen jeweils als vereinbar angesehen wurden, sind zwar Ausdruck der Schwachstellen im vorgesehenen System, lassen aber auch aufgrund bislang fehlender gerichtlicher Stellungnahmen hierzu keine vollständige Bewertung der Anwendungsmöglichkeiten zu. Es zeigt sich aber, dass ohne eine legislative Anpassung die Wirksamkeit dieser Verfahren vermutlich beschränkt bleibt.

Auswirkungen der Richtlinien-Änderungen 2018 auf die Probleme bei der Abweichungsbefugnis

32. Die geplante Straffung der Prozeduren mit den Anpassungen in der letzten Revision der AVMD-RL 2018, die aber tatsächlich teilweise mit einer Verlängerung der zeitlichen Fristen im Ablauf einherging, hat keine Veränderung an der späten Reaktionsmöglichkeit für einen betroffenen Mitgliedstaat gebracht. Auch die Vereinheitlichung der Ver-

fahrensbestimmungen für lineare und non-lineare Angebote ändert nichts daran, dass nur wenige Konstellationen vom Verfahren erfasst werden. Die Reaktion auf Propagandaaktivitäten Russlands durch das Sanktionsregime der EU unterstreicht sogar noch die Notwendigkeit der Prüfung einer besseren Reaktionsmöglichkeit auf problematische Inhalte im medienrechtlichen System der AVMD-RL. Insoweit sind die bislang im EMFA-Vorschlag vorgesehenen weiteren Reaktionsmöglichkeiten noch nicht ausreichend und sollten in den Zusammenhang mit den Abweichungstatbeständen der AVMD-RL gesetzt werden. Dabei ist die Balance zwischen der Wahrung des Herkunftslandprinzips und dem Schutz fundamentaler Werte in den Mitgliedstaaten, an die bestimmte Inhalte ausgerichtet oder die davon besonders betroffen sind, von besonderer Bedeutung.

Die Möglichkeit der Mitgliedstaaten zum Erlass strengerer Regeln und Maßnahmen gegen eine Umgehung

33. Ähnliche Schlussfolgerungen lassen sich in Bezug auf Art. 4 AVMD-RL ziehen. Hier gab es bisher überhaupt nur einen praktischen Anwendungsfall, bei dem ein Mitgliedstaat (erfolglos) geltend gemacht hat, dass ein unter Rechtshoheit eines anderen (damals noch) EU-Mitgliedstaates stehender Anbieter die eigenen, strengeren Regeln zu Alkoholwerbung habe umgehen wollen und aufgrund der Ausrichtung an diesen Mitgliedstaat das Umgehungsverbot missachtet habe. Die Kommission kam in ihrer Prüfung im Rahmen des Verfahrens nach Art. 4 Abs. 2 bis 4 zu dem Ergebnis, dass die (damaligen) Voraussetzungen der Umgehung nicht gegeben waren. Auch mit der leichten Reduktion der Anforderungen an die Beweisführung durch die Revision 2018 dürfte es weiterhin für Mitgliedstaaten schwer sein, den Umgehungstatbestand zu belegen.

Nur begrenzte Problemlösung über das Umgehungsverbot

34. Voraussetzung für die Anwendung des Umgehungsverbots-Tatbestandes ist zunächst das Vorliegen (zulässiger) strengerer Regeln für die eigener Rechtshoheit unterliegenden Anbieter im Vergleich zum Mindeststandard der AVMD-RL. Die ausnahmsweise Anwendung

dieser Vorschriften auf andere Anbieter hängt davon ab, dass diese ihren Dienst ganz oder größtenteils auf das Hoheitsgebiet des die Maßnahme ergreifenden Mitgliedstaates ausgerichtet haben und bestimmte Vorschriften zum Schutz allgemeiner öffentlicher Interessen nicht beachten, etwa weil der Rechtsrahmen im Herkunftsland vom eigenen abweicht. Die Verfahrensschritte bedingen wiederum den Versuch, in gegenseitiger Absprache zu einer Lösung zu kommen, bevor neben Anbieter, Mitgliedstaaten, ERGA und Kommission auch der Kontaktausschuss im Verfahren einzubeziehen ist und innerhalb vorgegebener Fristen zu entscheiden ist.

35. Im Zusammenhang mit dem Umgehungsverbot unterstreicht die AVMD-RL die sich bereits aus dem EU-Vertrag und dem Vertrag über die Arbeitsweise der EU ergebende Pflicht der Mitgliedstaaten zur effektiven Anwendung des Europarechts. Art. 4 Abs. 6 verlangt dazu ausdrücklich, dass die „tatsächliche" Einhaltung der Richtlinienbestimmungen durch die Mediendiensteanbieter von den jeweiligen Herkunftsstaaten sicherzustellen ist. Auch wenn es sich dabei nicht um eine neue Vorschrift der AVMD-RL handelt, ist die Hervorhebung als umfassende Gewährleistung der Umsetzung zu sehen, die eine effektive Rechtsdurchsetzung in der Praxis erfordert. Auf Basis dieser Vorschrift könnten zukünftig Problemfälle, die zur Anwendung von Art. 3 oder 4 führen, möglicherweise im Vorfeld gelöst werden, wenn die Kommission unter Berufung auf das Effektivitätsgebot eventuelle Rechtsdurchsetzungsdefizite bei Mitgliedstaaten in ihrer Rolle als Hüterin der Verträge und damit auch des sekundärrechtlichen Europarechts angeht.

Die institutionellen Strukturen nach der AVMD-RL und im Vergleich mit dem weiteren Rechtsrahmen

36. Das institutionelle System der AVMD-RL sieht die Einrichtung und Ausgestaltung von Regulierungsbehörden oder -stellen auf mitgliedstaatlicher Ebene vor. Diesbezüglich sind die Art. 30 bis 30b seit der Revision 2018 wichtige Erweiterungen, die die wesentlichen Rahmenbedingungen für die Regulierungseinrichtungen und vor allem auch die Zusammenarbeit im europäischen Verbund festlegen. Regulierungsbehörden oder -stellen sollen unabhängig sein, unparteiisch, transparent und weisungsfrei arbeiten und mit ausreichenden finanziellen und personellen Mitteln ausgestattet werden, wobei Zuständigkeiten,

Befugnisse und Rechenschaftspflichten eindeutig im mitgliedstaatlichen Recht gesetzlich festgelegt sein müssen. Der Informationsaustausch untereinander und mit der Kommission soll eine konsistentere Anwendung der AVMD-RL und insbesondere der Artikel 2, 3 und 4 innerhalb der EU ermöglichen. Die bereits bestehende ERGA wurde durch die Änderung in der AVMD-RL institutionalisiert und mit bestimmten Aufgaben betraut, die ihr die Rolle als Forum für die Zusammenarbeit, den Austausch von Erfahrungen und Best Practices zwischen ihren Mitgliedern gibt. Daneben soll sie technischen Sachverstand für die Kommission bereitstellen und insbesondere auf Anfrage Stellungnahmen zu bestimmten technischen und faktischen Aspekten abgeben.

Zusammenarbeit der Regulierungsbehörden unter der AVMD-RL

37. Konkrete Verfahren der Zusammenarbeit außerhalb der Abweichungs- und Umgehungsverbotsmechanismen der Art. 3 und 4 sowie der Pflicht zur Information einer Regulierungsbehörde oder -stelle in einem anderen Mitgliedstaat durch diejenige mit Rechtshoheit, wenn das Angebot auf diesen anderen Mitgliedstaat ausgerichtet werden soll (Art. 30a Abs. 2), regelt die AVMD-RL nur für den Fall grenzüberschreitender Abhilfeersuchen (Art. 30a Abs. 3). Ersucht die Regulierungsbehörde oder -stelle des Empfangsmitgliedstaates diejenige des Sendemitgliedstaates, Maßnahmen gegen einen grenzüberschreitend agierenden Anbieter zu ergreifen, soll letztere alle notwendigen Informationen zur Verfügung stellen und „alles in ihrer Macht Stehende" tun, um dem Ersuchen innerhalb von zwei Monaten nachzukommen. Weitere Kooperationsmechanismen oder einen ständigen Informationsaustausch regelt die AVMD-RL nicht. Jedoch ergeben sich spezifischere Kooperationsmechanismen und Zusammenarbeitspflichten aus dem MoU der ERGA, auf das sich deren Mitglieder im Dezember 2020 geeinigt haben. Dieses ist zwar nicht rechtlich verbindlich, kann aber die Basis sein für die Etablierung künftiger – dann gegebenenfalls rechtsverbindlicher – Verfahren, mit denen dargestellte Probleme in der Praxis überwunden werden können.

Vergleich mit dem institutionellen System des DSA

38. Das institutionelle System der AVMD-RL ist auch im Vergleich zu anderen, möglicherweise überlappenden Rechtsakten zu sehen, die von anderen Ansätzen ausgehen. So sieht etwa der DSA konkretere institutionelle Regeln für die Behandlung bestimmter grenzüberschreitender Sachverhalte auf europäischer Ebene vor. Zwar liegt auch hier die Benennung und wesentliche Ausgestaltung zuständiger Regulierungsbehörden oder -stellen bei den Mitgliedstaaten. Allerdings ist hiervon auch eine als Koordinator für digitale Dienste (KDD, nach der engl. Bezeichnung Digital Services Coordinator nachfolgend DSC) zu benennen, der für alle Fragen im Zusammenhang mit der Anwendung und Durchsetzung des DSA zuständig ist und an den spezifische Anforderungen gestellt und dem spezifische Befugnisse unmittelbar vom DSA zugewiesen werden. Auch die Zusammenarbeit zwischen den DSCs und mit der Kommission einschließlich gegenseitiger Amtshilfe und gemeinsamer Untersuchungen ist durch Verfahrensregeln abgedeckt, die eine Beteiligung von betroffenen DSCs aus Empfangsmitgliedstaaten und ggf. auch des durch den DSA geschaffenen Europäischen Gremiums für digitale Dienste (EGDD) als unabhängige Beratungsgruppe bestehend aus den DSCs vorsehen. Der Vergleich mit diesem institutionellen System bei der möglichen Weiterentwicklung der AVMD-RL ist deshalb besonders wichtig, weil sich direkte Überschneidungen zwischen der Überwachung und Rechtsdurchsetzung des DSA und der AVMD-RL ergeben oder diese zumindest beim Umgang mit illegalen Inhalten eng verbunden sind. Zudem bleiben die medienrechtlichen Bestimmungen durch den DSA unberührt, es ist aber etwa nicht vorgegeben, dass für inhaltsbezogene Aspekte die jeweiligen nationalen Regulierungsbehörden im Sinne der AVMD-RL die DSCs sind bzw. werden.

Vergleich mit dem institutionellen System des EMFA

39. Noch bedeutsamer ist beim Vergleich der institutionellen Strukturen der vorgeschlagene EMFA. Die Institutionalisierung der Zusammenarbeit zwischen den Regulierungsbehörden und -stellen im europäischen Verbund würde darin fortgesetzt und dabei auch die AVMD-RL geändert. Der EMFA bezieht sich auf die nach Art. 30 AVMD-RL ein-

gerichteten Regulierungsbehörden oder -stellen und weist ihnen die Anwendung des dritten Kapitels des EMFA als Aufgaben zu. Die ERGA soll durch ein Europäisches Gremium für Mediendienste (Gremium) ersetzt werden, in dem weiterhin die Regulierungseinrichtungen zusammengeschlossen wären. Diesem Gremium werden ausführliche Aufgaben zugewiesen, wobei der derzeitige Vorschlag der Kommission eine wichtige Rolle gibt, weil sie gegenüber dem Gremium Ersuchen, Einvernehmen oder Unterstützung anfordern bzw. geben kann, wovon bestimmte Aktivitäten abhängen. Die Kommission selbst ist ebenfalls mit eigenen Aufgaben betraut und würde eine Leitlinienbefugnis bei der Medienregulierung erhalten. Weitere vorgeschlagene Änderungen durch den EMFA beziehen sich auf strukturierte Kooperationsmechanismen für (auch beschleunigte) Abhilfeersuchen und den Informationsaustausch zwischen den Regulierungseinrichtungen bei ernsthaften und schwerwiegenden Gefahren, die für VSP nochmals gesondert ausgestaltet sind.

Vergleich mit anderen institutionellen Systemen

40. Andere Systeme supranationaler Kooperation, die zwar nicht im unmittelbar medienrechtlichen Kontext stehen, aber deren rechtsvergleichende Analyse sich aufgrund ähnlicher festgestellter grenzüberschreitender Herausforderungen lohnt, finden sich in verwandten Sektoren. Das reicht von Kooperationsstrukturen im Wettbewerbsrecht, in dem die Europäische Kommission und die Wettbewerbsbehörden der Mitgliedstaaten bei der Umsetzung der Wettbewerbsvorschriften das „Netzwerk der europäischen Wettbewerbsbehörden" (European Competition Network, ECN) bilden, das vorwiegend zu Beratungszwecken, zum Informationsaustausch und der gegenseitigen Amtshilfe bei Ermittlungen dient, über das Recht der elektronischen Kommunikation, in dem das Gremium europäischer Regulierungsstellen für elektronische Kommunikation (GEREK) mit Befugnissen zu Stellungnahmen auf die ihm angeschlossenen Regulierungsbehörden und auch verbindliche Entscheidungen der Kommission einwirken kann, bis hin zum Recht der Datenschutz-Grundverordnung, das spezifische Kohärenz- und Kooperationsmechanismen enthält, die unter anderem dem Europäischen Datenschutzausschuss (EDSA) als Gremium der nationalen

Datenschutzbehörden in bestimmten Fällen verbindliche Entscheidungsbefugnisse in grenzüberschreitenden Angelegenheiten einräumen.

Lösungsansätze für aktuelle Herausforderungen

Lösungsansatz: Umgang mit Drittstaatsanbietern

41. Aufgrund der geschilderten Entwicklungen insbesondere in den vergangenen Jahren stellt sich die Frage nach möglichen Lösungsansätzen, um auch auf die Herausforderungen beim Umgang mit grenzüberschreitender Inhalteverbreitung im Rahmen des AVMD-RL-Systems adäquat reagieren zu können. Dabei ist der Umgang mit Anbietern aus Drittstaaten in mehrerlei Hinsicht ein zentrales Problem. Einerseits bedarf es einer Lösung hinsichtlich der einfachen Inanspruchnahme der technischen Zuständigkeitskriterien, um in den Schutzbereich der Binnenmarktregeln zu gelangen, ohne durch eine engere Verbindung zu einem EU-Mitgliedstaat auch die Gewähr bestimmter Mindestbedingungen bei der Erstellung redaktioneller Inhalte zu erfüllen. Andererseits ist gerade insoweit der Harmonisierungsgrad der AVMD-RL gering, was angesichts der Zunahme der Relevanz der Grenzüberschreitung bei der Inhalteverbreitung zu einer Verschärfung der Probleme führt. So ist etwa die Frage der Zulassung linearer audiovisueller Mediendienste bzw. die Bedingungen etwa einer Anzeigepflicht für die Anbieter non-linearer Dienste vollständig den Mitgliedstaaten vorbehalten, während die Rechtsfolge des Vorliegens einer solchen Zulässigkeit im Recht eines Mitgliedstaates – namentlich die Beschränkung der Einwirkungsmöglichkeiten anderer Mitgliedstaaten – unmittelbar aus der Richtlinie folgt.
42. Es ist daher zu prüfen, ob nicht Mindestanforderungen auch in dieser Hinsicht einer Harmonisierung zuzuführen sind, um zu verhindern, dass Drittstaatsanbieter den Marktzugang dort suchen, wo sie den Bedingungen entsprechen, während sie diese bei Aufnahme der Tätigkeit in einem anderen Mitgliedstaat, auf den das Programm eigentlich ausgerichtet ist, nicht würden erfüllen können. Mindestens aber ist für solche Fälle die Praxis des Umgehungsverbotstatbestandes handhabbarer zu machen.

Lösungsansatz: Harmonisierungsgrad der AVMD-RL

43. Auch hinsichtlich der Erfüllung bestimmter Mindestanforderungen beim Schutz der Jugend oder der Allgemeinheit durch die unterschiedlichen Anbieter in den unterschiedlichen Angeboten ist unabhängig von der mitgliedstaatlichen Zuständigkeit für die genauere Ausgestaltung in Erwägung zu ziehen, in ähnlicher Weise, wie es nunmehr für VSP-Anbieter vorgesehen ist, in der Richtlinie zu konkretisieren, welche Maßnahmen mindestens als Schutzmechanismen vorzusehen sind. So würde die Kodifizierung bestimmter Bedingungen bei der Verbreitung von für Minderjährige problematischen Inhalten wie z.B. die Bedeutung von (Alters-)Zugangsbeschränkungen bei pornographischen Angeboten einen gemeinsamen Standard bei der Rechtsdurchsetzung erreichbar machen. Andernfalls wäre hier eine intensivere Prüfung vorzunehmen, ob tatsächlich ergriffene Maßnahmen der Mitgliedstaaten (bzw. der jeweils zuständigen Regulierungsbehörden oder -stellen) ausreichend sind, um eine ausreichende („tatsächliche") Umsetzung der in der Richtlinie zumindest dem Rahmen nach vorgegeben Handlungspflichten zu bilden.
44. Ebenso stellt sich die Frage nach dem Harmonisierungsgrad bzw. der Aufsichtstätigkeit in den Mitgliedstaaten bei der Verbreitung problematischer Inhalte von staatlich kontrollierten oder beeinflussten Anbietern, die bewusst und mit dem Ziel einer destabilisierenden Wirkung Falschinformationen bzw. Propagandainhalte verbreiten. Auch hier fehlt es mit Blick auf die Zuständigkeit der Mitgliedstaaten an der Festlegung bestimmter Mindeststandards, deren Erfüllung zur Bedingung gemacht werden kann, um eine Weiterführung eines Angebots zu erlauben.

Lösungsansatz: Standards für in der EU verbreitete audiovisuelle Inhalte – das Beispiel der Content Standards im Vereinigten Königreich

45. Verbindliche Standards, mit denen der Verbreitung problematischer Inhalte entgegengewirkt werden kann, sind medienrechtlichen Ordnungen nicht fremd, wie etwa ein Blick in das nicht mehr zur EU gehörende Vereinigte Königreich zeigt. Die dortige Regulierungsbehörde ist gesetzlich verpflichtet „broadcasting standards" zu statuieren, die etwa für Nachrichtenprogramme ein Mindestmaß an genauer

Berichterstattung vorsehen und im Falle einer Nichtbeachtung auch zum Widerruf einer Zulassung führen können. Der dazu erlassene Broadcasting Code setzt detaillierte und weitreichende Anforderungen, etwa im fünften Abschnitt zu den Nachrichteninhalten neben der Genauigkeit auch die Unparteilichkeit der Berichterstattung und das Verbot der Beeinflussung durch den Anbieter. Auf dieser Basis ist es in der Vergangenheit bereits zu rechtskräftigen Maßnahmen bis hin zum Lizenzentzug gekommen, zuletzt im Zusammenhang mit russischen Anbietern, die unter Rechtshoheit des Vereinigten Königreichs agierten.

Lösungsansatz: Gewährleistung von Unabhängigkeit – das Beispiel der Staatsferne aus Deutschland

46. In Deutschland gilt zur Gewährleistung der Freiheit und Unabhängigkeit des Rundfunks das Prinzip der Staatsferne, das vom Bundesverfassungsgericht (BVerfG) unmittelbar als Verfassungsprinzip aus der Rundfunkfreiheit des Grundgesetzes abgeleitet wird. Dem liegt der Gedanke zugrunde, dass die Staatsgewalt in allen ihren Teilen der Kontrolle und Kritik durch die Allgemeinheit unterliegt, wobei dem Rundfunk wegen seiner besonderen Breitenwirkung, Aktualität und Suggestivkraft eine entscheidende Rolle bei der Information der Öffentlichkeit zukommt, die deshalb frei von jeder staatlichen Einflussnahme sein muss. Das zu gewährleisten gehört nach dem BVerfG zur Aufgabe des Staates, sodass die Länder diesen Ausgestaltungsauftrag in zahlreichen einfachgesetzlichen Regelungen implementiert haben, die die Unabhängigkeit des Programms gewährleisten sollen. Das betrifft insbesondere zwei Aspekte: einerseits die Unabhängigkeit der Veranstalter, die durch Einflussnahme- und Beteiligungsverbote sowohl bei der Einrichtung/Finanzierung (öffentlich-rechtlicher Rundfunk) oder Zulassung (privater Rundfunk) als auch beim Betrieb (redaktionelle Freiheit) sichergestellt wird, und andererseits die Unabhängigkeit der Aufsicht, die durch die staatsferne und plurale Besetzung der Aufsichtsgremien (öffentlich-rechtlicher Rundfunk) bzw. staatsferne und plurale Strukturen der Medienaufsichtsbehörden (privater Rundfunk) sichergestellt wird.
47. Dies ist bei der Frage zu beachten, inwieweit dieses Verständnis der „Staatsferne“ auch auf Unionsebene widergespiegelt werden kann. Staatsferne Aufsichtsstrukturen sind bereits in der AVMD-RL angelegt.

Art. 30 fordert seit der letzten Revision insbesondere die Einrichtung unabhängiger Regulierungsbehörden und legt Bestimmungen zur Weisungsfreiheit von deren Mitgliedern und zum Schutz vor vorzeitiger Abberufung fest. Daraus ist eine gemeinsame Wertvorstellung zur Unabhängigkeit ersichtlich, deren weitere Konkretisierung in der Zukunft möglich scheint. Im Hinblick auf die Unabhängigkeit der Mediendiensteanbieter ist allerdings hervorzuheben, dass die Bedingungen auf den nationalen audiovisuellen Märkten noch sehr unterschiedlich sind und auch die jeweiligen Strukturen von den unterschiedlichen historischen Hintergründen geprägt sind. So bestehen sehr unterschiedliche Modelle der Finanzierung und Struktur des öffentlich-rechtlichen Rundfunks, wobei in unterschiedlich starkem Umfang eine bestimmende Einflussnahme staatlicher Organe durch die Art der Finanzierung ausgeschlossen wird. Insoweit bestehen auch unterschiedliche Vorstellungen darüber, was „staatliche Einflussnahme" auf EU-Ebene zu bedeuten hat.

48. Das Konzept der Staatsferne findet aber einen Ausdruck in der Verhinderung eines dominierenden Einflusses auf das Programm und damit auf die öffentliche Meinungsbildung durch staatliche Stellen, das auf der Grundlage gemeinsamer demokratischer Erwägungen einem einheitlichen Verständnis zugänglich ist. So greift bereits jetzt Erwägungsgrund 54 der AVMD-RL diesen Aspekt auf, indem unterstrichen wird, dass es unerlässlich ist, dass Mediendienste in der Lage sind, den Einzelnen und die Gesellschaft möglichst umfassend und vielfältig zu informieren und dazu redaktionelle Entscheidungen frei bleiben müssen von jeder staatlichen Einmischung oder Beeinflussung durch nationale Regulierungsbehörden oder -stellen, soweit es dabei nicht um den bloßen Gesetzesvollzug oder die Wahrung eines gesetzlich geschützten Rechts geht, das unabhängig von einer bestimmten Meinung zu schützen ist.

Lösungsansatz: Unabhängige Kontrolle durch Ko-Regulierungssysteme – Beispiele aus dem Medien- und Datenschutzrecht

49. Die Gewährleistung von Unabhängigkeit spielt auch innerhalb von einigen Ko-Regulierungsansätzen in der Medienregulierung der Mitgliedstaaten eine große Rolle. Solche Systeme gibt es häufig im Bereich des Jugendmedienschutz- und Werberechts, seit den Neuerun-

gen der AVMD-RL 2018 vermehrt unter Einbeziehung der VSPs. Sie überlassen regelmäßig der Industrie die Entwicklung von Standards, Detailregeln und bewährten Praktiken. Inwiefern in diese Prozesse auch Regulierungseinrichtungen eingebunden werden, ist durchaus unterschiedlich und reicht von einer unmittelbaren Beteiligung bei der Entwicklung von Standards über Genehmigungs- und Prüfbefugnisse bis hin zu vorbehaltenen Eingriffsbefugnissen, soweit die selbst geschaffenen Regeln sich als ineffektiv erweisen. Die AVMD-RL selbst ermutigt die Mitgliedstaaten an vielen Stellen zur Etablierung solcher Systeme, sodass eine Betrachtung bestehender Systeme in den Mitgliedstaaten und daraus gewonnener Erfahrungswerte auch im Hinblick auf eine mögliche zukünftige Stärkung solcher Mechanismen im Blick auf die Verwirklichung von Unabhängigkeit unterschiedlicher Einflusssphären lohnt.

50. Dabei können auch Erfahrungen aus dem Bereich des Datenschutzrechts herangezogen werden, wo Verhaltenskodizes als Regelungsinstrument und Möglichkeit EU-weiter Harmonisierung in Art. 40 DS-GVO niedergelegt sind. Die Vorschrift sieht vor, dass Interessenverbände Verhaltensregeln „insbesondere" zu bestimmten Bereichen wie der Übermittlung personenbezogener Daten an Drittstaaten erarbeiten können. Diese werden der zuständigen nationalen Datenschutzbehörde zur Prüfung der Vereinbarkeit mit der DS-GVO vorgelegt und genehmigt, wobei der EDSA einzubinden ist, falls grenzüberschreitende Sachverhalte betroffen sind. Die Verhaltenskodizes müssen Regeln zu ihrer Überwachung durch eine unabhängige Stelle enthalten – unabhängig von der Aufsichtstätigkeit der Datenschutzbehörden – für die die DS-GVO ebenso Rahmenbedingungen vorsieht. Einzelne Datenverarbeiter können sich den Verhaltensregeln mittels vertraglicher oder sonstiger rechtlich bindender Instrumente anschließen. Der EDSA legt hierzu Näheres über seine Leitlinienbefugnisse fest, gewährleistet also zusätzlich Kohärenz auf EU-Ebene.
51. Wenngleich der Datenschutzsektor nicht unmittelbar auf den Mediensektor übertragen werden kann, stellt das Grundrecht auf Schutz personenbezogener Daten ähnliche Anforderungen an die Unabhängigkeit der Aufsicht wie im Medienrecht, weshalb von dort Schlussfolgerungen unter Berücksichtigung von Besonderheiten des audiovisuellen Sektors für die Medienregulierung der Zukunft gezogen werden könnten. Dies gilt auch für das Instrument der datenschutzspezifischen Zertifizierungsverfahren, Datenschutzsiegel und -prüfzeichen nach Art. 42 f.

DS-GVO. Diese sollen dem Nachweis dienen, dass die gesetzlichen Anforderungen der DS-GVO bei Verarbeitungsvorgängen von Verantwortlichen oder Auftragsverarbeitern eingehalten werden. Es handelt sich dabei um freiwillige Verfahren mit zeitlich begrenzten Zertifizierungen, die nicht die rechtliche Verantwortlichkeit der Verarbeiter verändern, aber Compliance nach außen sichtbar transportieren. Der EDSA nimmt alle Zertifizierungsverfahren und Datenschutzsiegel und -prüfzeichen in ein Register auf und veröffentlicht sie in geeigneter Weise. Besondere Anforderungen stellt die DS-GVO dabei an die fachliche Expertise und Unabhängigkeit der Zertifizierungsstellen. Im medienrechtlichen Kontext wären solche Systeme mit entsprechenden Anpassungen dabei etwa in Form von Siegeln für Mediendiensteanbieter denkbar, die die Einhaltung medienrechtlicher Standards (wie Unabhängigkeit, Einhaltung redaktioneller Standardsetc.) dokumentieren und wiederholt von einer unabhängigen Stelle unter Einbindung der Regulierungsbehörden oder -stellen oder der ERGA geprüft würden. Solche Zertifizierungen könnten mit bestimmten Schutzmechanismen gegen Sanktionen oder andere regulatorische Maßnahmen verbunden werden.

Vergleichbarkeit von Regulierungseinrichtungen und Kooperationssystemen

52. Institutionelle Systeme oder einzelne Elemente aus anderen Kontexten sind in der Regel nicht ohne weiteres auf den AVMD-Rahmen übertragbar, da sie nicht medienspezifische Besonderheiten (wie Unabhängigkeit, Pluralismus, redaktionelle Freiheit) berücksichtigen (müssen) oder nicht auf dem Herkunftslandprinzip basieren. Wie aufgezeigt, können solche anderen Systeme im AVMD-Kontext als Erfahrungsquelle dienen, insbesondere wenn sich Schnittmengen mit der Medienregulierung ergeben.

Lehren und Konsequenzen aus dem DSA

53. Ausdruck der zunehmenden (Regulierungs-)Konvergenz ist das Verhältnis zum und die Vergleichbarkeit mit dem DSA. Die dort vorgesehenen Kooperationsmechanismen der DSCs untereinander können zwar einerseits als Grundlage für Überlegungen unter der AVMD-

RL herangezogen werden, sind aber andererseits in ihrem Ansatz, der auf die Bedürfnisse des horizontalen Regelungswerks DSA abgestimmt ist, nicht spezifisch genug für eine sektorale Regulierung des Mediensektors. Zudem fehlt es bei der supranationalen Kooperationsebene an Regelungen, die beispielsweise die Arbeit des EGDD mit der der ERGA oder anderen sektoralen Gremien verbinden würden, ebenso wie es den Mitgliedstaaten überlassen wird, wie sie die Zusammenarbeit innerhalb ihres Regelungsrahmens ausgestalten. Für eine Verbesserung der Rechtsdurchsetzung im audiovisuellen Bereich, insbesondere bei der Online-Verbreitung, wäre eine möglichst koordinierte Herangehensweise anzustreben.

Künftige Herausforderungen im EMFA

54. Während der vorgeschlagene EMFA strukturierte Kooperationsmechanismen für (auch beschleunigte) Abhilfeersuchen und den Informationsaustausch bei ernsthaften und schwerwiegenden Gefahren festlegt und diese auf die Regeln der AVMD-RL erstreckt, fehlt es an einer solchen Erstreckung oder Einbindung bei der Aufsichtstätigkeit durch die Kommission. Kohärenzbedenken ergeben sich insbesondere im Hinblick darauf, in welchem Verhältnis der EMFA-Ansatz zu bestehenden Systemen der AVMD-RL (insbesondere den Art. 3 und 4) steht und was das für die Unabhängigkeit der Medienaufsicht bedeutet. Zudem ist zu diskutieren, ob die Öffnung der AVMD-RL durch die institutionellen Aspekte des EMFA nicht auch mit einer Anpassung bestimmter Prozeduren und materieller Vorschriften in der AVMD-RL verbunden werden müsste.

Lehren und „Blaupausen" aus dem Datenschutzrecht

55. Insbesondere die konkrete Ausgestaltung im Datenschutzrecht kann wertvolle und übertragbare Erkenntnisse bereitstellen, weil auch dort Fälle grenzüberschreitender Kooperation existieren und innerhalb der DS-GVO-Kohärenzmechanismen bereits durchlaufen wurden. Das gilt insbesondere für Einbindung, Aufgaben und Befugnisse des EDSA, die in ähnlicher Weise möglicherweise auch innerhalb der ERGA umgesetzt werden könnten. Beachtet werden muss dabei aber zum einen,

dass die DS-GVO, anders als die AVMD-RL, dem Marktortprinzip folgt und daher die Behörde des Niederlassungsmitgliedstaates nicht allein, sondern nur federführend neben anderen nationalen Behörden bei grenzüberschreitend agierenden Datenverarbeitern zuständig ist. Zum anderen weist die DS-GVO auch einen stärkeren Harmonisierungsgrad auf als die AVMD-RL, die bewusst mehr Spielraum für kulturelle Belange der Mitgliedstaaten offen lässt. Diese Aspekte müssen innerhalb der Etablierung neuer Verfahren berücksichtigt werden.

Schlussfolgerungen

56. Die aufgezeigten Probleme bedürfen mittelfristig einer Anpassung im anwendbaren Rechtsrahmen, um eine bessere grundrechtsgebundene Rechtsdurchsetzung auch in grenzüberschreitenden Fällen der Verbreitung audiovisueller Inhalte zu ermöglichen. Kurzfristig ist über den Weg der Vereinbarung gemeinsamer Mindeststandards zwischen den Regulierungsbehörden und -stellen der Mitgliedstaaten im Rahmen der ERGA eine Verbesserung bei den als besonders drängend erkannten Durchsetzungsschwierigkeiten zu suchen. Dazu zählt insbesondere der Umgang mit den „technischen Kriterien", die eine Rechtshoheit begründen, bevor bei einer weiteren Revision die Streichung dieser Möglichkeit zu erwägen oder sie mit zusätzlichen Anforderungen einer auch redaktionellen Anbindung an den Rechtsraum der EU zu versehen ist.
57. Das Prinzip einer Medienlandschaft, die von von staatlicher Kontrolle unabhängigen Anbietern geprägt ist, ist ebenso fundamental wie die staatsferne Kontrolle von Inhalten. Hierbei ist zu prüfen, wie in der Zukunft Mindestanforderungen im koordinierten Recht ausbuchstabiert werden können, innerhalb dessen die Mitgliedstaaten ihre je eigene Ausprägung im nationalen Medienrecht beibehalten bzw. ausgestalten können. Ein weites Verständnis einer Distanz vom Staat, die auch bei weisungsgebundenen Behörden fehlt, ist im Sinne einer strukturellen Sicherung der Medienfreiheit zu bevorzugen. Zugleich ermöglicht diese Herangehensweise dann aber hinsichtlich fehlender Unabhängigkeit der Mediendiensteanbieter oder der Nichterfüllung inhaltlicher Mindeststandards eine robuste Reaktionsmöglichkeit gegen die weitere Verbreitung solcher Dienste, um dem Schutz der Bevölkerung in den EU-Mitgliedstaaten sicherzustellen. Die Unab-

hängigkeit der Mediendiensteanbieter steht dabei auch im Zusammenhang mit einem relevanten Medienpluralismus, sodass Rahmenbedingungen geschaffen werden müssen, die eine übermäßige Dominanz einzelner Anbieter verhindern.

58. Bei der Rechtsdurchsetzung in grenzüberschreitenden Fällen ist die Ausgestaltung der Aufsicht in ihrer institutionellen Dimension entscheidend. Besonders wichtig ist es, dass im Zusammenspiel mit dem Herkunftslandprinzip Kooperationsformen auf europäischer Ebene bestehen, bei der die für die Aufsicht zuständigen Behörden und Stellen bestimmte Herausforderungen gemeinsam bewältigen können und zugleich formalisierte sowie – für die Zukunft weiter auszugestaltende – rechtlich verbindliche Mechanismen zur Zusammenarbeit und gemeinsamen Entscheidungsfindung bestehen. Die ERGA hat mit dem internen MoU einen ersten solchen Rahmen geschaffen, der als Basis für die Weiterentwicklung in der AVMD-RL oder den diese (nach dem Entwurf) voraussichtlich ändernden EMFA genommen und mit Erfahrungen aus anderen Rechtsbereichen wie insbesondere dem Datenschutz abgeglichen werden kann, um die Rechtsdurchsetzung bei der grenzüberschreitenden Verbreitung audiovisueller Inhalte in der Zukunft zu stärken.

List of Abbreviations

AfP	Zeitschrift für Medien- und Kommunikationsrecht
AG	Advocate General
Art.	Article
AVMS	audiovisual media service(s)
AVMSD	Audiovisual Media Services Directive
BBC	British Broadcasting Corporation
BEREC	Body of European regulators for Electronic Communication
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
C-	Case-
cf.	confer/conferatur (Latin) / compare
CFR	Charter of Fundamental Rights of the EU
CiTiP	Centre for Information Technology and Intellectual Property
CJEU	Court of Justice of the European Union
CMPF	Centre for Media Pluralism and Media Freedom
COM	Communication
COO	country-of-origin
CSAM	child sexual abuse material
CULT	Committee on Culture and Education
DMA	Digital Markets Act
DPA	Data Protection Authority
DPC	Data Protection Commissioner
DSA	Digital Services Act
DSC(s)	Digital Services Coordinator(s)
DSM	Digital Single Market (Directive)

e.g.	exempli gratia (Latin) /for example, for instance
EAO	European Audiovisual Observatory
EBDS	European Board of Digital Services
EBMS	European Board of Media Services
EC	European Community
ECD	e-Commerce Directive
ECHR	European Convention on Human Rights
ECLI	European Case Law Identifier
ECN	European Competition Network
ECtHR	European Court of Human Rights
ed./eds.	editor/s
EDPB	European Data Protection Board
EDPS	European Data Protection Supervisor
EEC	European Economic Community
EECC	European Electronic Communications Code
EMFA	European Media Freedom Act
EMR	Institute of European Media Law
EP	European Parliament
EPRS	European Parliamentary Research Service
ERGA	European Regulators Group for Audiovisual Media Services
et al.	et alia (Latin) / and others
et seq.	et sequens (Latin) / and the following
EU	European Union
EUR	Euro
Europol	European Union Agency of Law Enforcement Cooperation
EUV	Vertrag über die Europäische Union
GDPR	General Data Protection Regulation
GmbH	Gesellschaft mit beschränkter Haftung
GVBl.	Gesetz- und Verordnungsblatt

HBI	Hans-Bredow-Institut
HLEG	High Level Expert Group
IAP	Internet Access Provider
i.e.	that is
IJLIT	International Journal of Law and Information Technology
IMCO	Committee on the Internal Market and Consumer Protection
IMI	Internal Market Information System
INHOPE	International Association of Internet Hotlines
IPR	Internet Policy Review
IViR	Institute for Information Law
JIL	Journal of Internet Law
JIPITEC	Journal of Intellectual Property, Information Technology and Electronic Commerce Law
lit.	litera (Latin) / letter
MoU	Memorandum of Understanding
MStV	Medienstaatsvertrag
no./nos.	number/s
NRA(s)	National Regulatory Authority(ies)
NRW	North Rhine-Westphalia
NTD	notice and take down
OECD	Organisation for Economic Co-operation and Development
Ofcom	Office of Communications
OJ/OJEU	Official Journal of the European Union
OJ C	Official Journal – Information and Notices
OJ L	Official Journal – Legislation
p.	page
pp.	pages
para.	paragraph

REC	Recommendation
S.R.L.	Société à Responsabilité Limitée / limited liability company
Sec.	Section
SMIT	Studies in Media, Innovation and Technology
subpara.	subparagraph
SWD	Staff Working Document
TCO	Terrorist Content Online (Regulation)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TIC	Twitter International Company
tv	television
TwFD	Television without Frontiers Directive
UCPD	Unfair Commercial Practices Directive
UFITA	Archiv für Medienrecht und Medienwissenschaft
UK	United Kingdom
US	United States
UvA	University of Amsterdam
v.	versus
VLOP(s)	very large online platform(s)
VLOSE(s)	very large online search engine(s)
VoD	Video on Demand
Vol.	Volume
VSP(s)	video-sharing platform(s)
VUB	Vrije Universiteit Brussels
VVA	Valdani Vicari & Associati
ZRP	Zeitschrift für Rechtspolitik

A. Introduction

In recent years, and even in the very recent months in particular, it has become apparent that the dissemination of audiovisual content with a cross-border dimension within Europe and from outside to Europe raises fundamental questions about whether and how regulatory authorities can respond to such content in case of an issue. This question is pertinent for content in television and on-demand audiovisual media services as well as for content disseminated via video sharing platforms. The challenges stem from the division or allocation of competences between the European Union and the Member States with regard to media-law-related activities[1] and the question of whether existing procedures for dealing with illegal content are operational from the viewpoint of regulatory authorities charged with supervision of the audiovisual content dissemination in a Member State.

When examining challenges related to the dissemination of audiovisual content, the core element is the European Union's Audiovisual Media Services Directive (AVMSD)[2]. It has undergone significant changes by a recent revision in 2018; now the implementation of the new rules on national level must prove itself in practice. Especially Arts. 2 to 4 of the AVMSD, which determine the state with jurisdiction over audiovisual media service providers and possibilities to exceptionally deviate from the basic principle of jurisdiction of the country of origin, are crucial. In addition, territorial jurisdiction and powers for supervising audiovisual content from service providers not established in an EU Member State have become particularly relevant.

When searching for answers to these fundamental issues, the focus stays on the AVMSD, but it is no longer sufficient to look only at that and the

1 Extensively on this aspect *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector; see also in light on the online environment specifically *CMPF/CiTiP/IViR/SMIT,* Study on media plurality and diversity online, p. 1 et seq.

2 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, pp. 1–24.

E-Commerce Directive (ECD)[3] as in the past. In the meanwhile, a complex network of rules at EU and national level has to be taken into account. This development towards new building stones on EU level has become even more intensive with the entry into force of the two Regulations from the EU's Digital Services Act Package, the Digital Markets Act (DMA)[4] and, in the current context especially relevant, the Digital Services Act (DSA)[5]. The DSA imposes a series of obligations on online actors who are intermediaries for audiovisual content, following a graduated approach of responsibility in dealing with, and in the context of, illegal content which includes audiovisual content. Due to intersections of the AVMSD with the DSA, it is of special interest how the country-of-origin principle laid down in the AVMSD plays out with the market location principle the DSA follows in its territorial scope. This is also linked to a requirement to establish the necessary supervisory structures, which to a large extent is left to the Member States. By 17 February 2024 at the latest, when the relevant rules of the DSA will become applicable, the Member States must designate a/several competent authority/authorities under the DSA and one of them as Digital Services Coordinator (DSC), who will play a central role in the DSA and in national and supranational supervisory cooperation. While the Member States are currently in the process of meeting this challenge, which necessarily must take into account specificities of content and media-related approaches to supervision, further proposals of the European Commission are on the table, which in case of adoption will further impact the regulation of the audiovisual sector and supervisory structures, which in turn determine the effectiveness of enforcement.

The most important current Proposal linked to the dissemination of audiovisual content is the Proposal for a European Media Freedom Act

3 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, pp. 1–16.

4 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, pp. 1–66.

5 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) OJ L 277, 27.10.2022, pp. 1–102.

(EMFA)[6], which was published on 16 September 2022. At this stage it is still a Proposal, the controversial discussion of which in the legislative procedure has only just started, but it potentially will have a significant effect in addressing challenges of cross-border dissemination of audiovisual content in the future, depending on whether a final text will be adopted and what it will look like. One of the key elements of the EMFA are the proposed institutional and cooperation elements. When assessing audiovisual content and deciding on possible measures against its dissemination, the institutional dimension plays an important role, as do the procedures foreseen. The requirement of a supervision that is independent of the state or the guarantee of a reaction to possibly problematic content which is neutral and detached from state orders necessitates institutional guarantees of independence of the decision-making bodies. This does not only apply in a domestic context, in which Member States have the competence to structure and allocate powers to the concerned bodies, but also in cross-border situations and (possible) cooperation schemes on a supranational level.

Certain questions arising from the cross-border dissemination of audiovisual content in Europe have been addressed in detail in previous studies, on which this present study builds. Firstly, there was a focus on identifying problems arising from the (then existing) legal framework with a focus on the deficiencies posed by the E-Commerce Directive.[7] Secondly, there was a study that analysed options of the EU on developing a future framework for the online content dissemination and assessed the proposal for a DSA in light of the value for better solutions.[8] Based on the findings of those studies, their presentation in several stakeholder meetings and conferences and in response to more concrete announcements for legislative plans of the European Commission, which materialised in the publication of the EMFA Proposal, the State Media Authority of North Rhine-Westphalia has tasked the Institute of European Media Law (EMR) with a follow-up study focussing now on the most pressing areas for reform of the regulatory framework especially in view of issues that have surfaced in the application of the AMVSD-framework. As the recent revision is still in the phase of being "newly" applied in the Member States and in cooperation structures

6 Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, COM/2022/457 final.

7 *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content.

8 *Cole/Etteldorf/Ullrich,* Updating the Rules for Online Content Dissemination.

and as experiences with implementation are being discussed, as the authors have developed in detail in a research for the CULT Committee of the European Parliament[9], this is the time to look ahead on which answers are necessary after the recent and proposed reform stages in order to have a functioning AVMSD also in the future. Preliminary results of the study were presented at the conference "safeguarding freedom – securing justice" on 17 November 2022.[10] In addition to the already published Executive Summaries,[11] this publication gives the reader access to the full study and the first assessment of the EMFA Proposal as well as proposals for further development.

The study is structured as follows: the starting point is an overview of the challenges resulting from the "cross-border media environment in the EU", after which an in-depth analysis of the relevant provisions of the currently applicable AVMSD with regard to the scope, in particular the country-of-origin principle, as well as its institutional structures follows. These are considered in light of the possibilities for cross-border enforcement and the Member States' possibilities for temporary derogations from the country-of-origin principle (procedure under Art. 3 AVMSD) and for measures

9 Cf. *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive. While the analysis of the European Commission is still pending, the Committee on Culture and Education of the European Parliament already published a draft report on the implementation of the revised Audiovisual Media Services Directive (2022/2038(INI)) on 17 November 2022. See on this also the Amendments to the Draft report, Petra Kammerevert (PE738.565v02–00). For an overview see also *EPRS,* Transposition of the 2018 Audiovisual Media Services Directive. Implementation in Action.

10 Cf. *Cole*, Answers from Academia – a legal analysis (presentation available at https://www.die-medienanstalten.de/fileadmin/user_upload/Veranstaltungen/2019/2019_11_12_Safeguarding_Freedom/Cole_Answers_from_Academia_2019-11-12.pdf). The conference was organised by the German Media Authorities in cooperation with the Media Authority of North Rhine-Westphalia, the EMR and the Representation of the State of North Rhine-Westphalia to the European Union; see for more details https://www.die-medienanstalten.de/veranstaltungen/termin?tx_news_pi1%5Bnews%5D=4751&cHash=8a99243f2fa49d8435e5b6593b49dbfd.

11 A long version can be found in English (https://www.medienanstalt-nrw.de/fileadmin/user_upload/NeueWebsite_0120/Presse/Pressemitteilung/Gutachten_ExSum_lang_EN_Cole_2023_2.pdf) and German (at https://www.medienanstalt-nrw.de/fileadmin/user_upload/NeueWebsite_0120/Presse/Pressemitteilung/Gutachten_ExSum_lang_DE_Cole_2023.pdf), a short version in English (https://www.medienanstalt-nrw.de/fileadmin/user_upload/NeueWebsite_0120/Presse/Pressemitteilung/Gutachten_ExSum_kurz_EN_Cole_2023.pdf) and German (https://www.medienanstalt-nrw.de/fileadmin/user_upload/NeueWebsite_0120/Presse/Pressemitteilung/Gutachten_ExSum_kurz_DE_Cole_2023.pdf).

against circumvention in case of stricter rules of a targeted Member State without jurisdiction (procedure under Art. 4 AVMSD). The cooperation structures of the regulatory bodies within the European Regulators Group for Audiovisual Media Services (ERGA) are examined in detail and compared with other institutional systems. Problematic constellations identified in the process are illustrated by exemplifying scenarios, which are then considered along different possible solutions in order to be able to deduct which steps should be taken in the future. The study concludes with considerations that need to be taken into account in the continued application both of existing and of currently proposed or future regulation that should be achieved with regard to ensuring effective law enforcement in the cross-border dissemination of audiovisual content.

B. Challenges of a Cross-Border Media Environment in the EU

I. Current Risks and Rising Phenomena

Media consumption is an integral part of the everyday life of citizens, no matter in what form, no matter via which distribution channel and no matter for what purpose – entertainment, information or other – it takes place. Media consumption defined in this way is essential for the political decision-making process and thus a foundational element of democracy. While the scope of consumption has increased over the past decades, which is due not only to societal developments but also to technologisation and globalisation of the media landscape creating new access opportunities and new actors, the associated risks have likewise risen. And in regard to the risks, too, their increasing relevance results from factors that come with technologisation and globalisation: Formerly passive consumers are becoming active participants in the media distribution chain, whether by sharing content or even creating it; new players and media formats continue to enter the market; the possibilities of the online environment make access and distribution of content easier, cheaper and more widely available, with national borders hardly playing a role any more.[12] This does not mean that many of the current risks did not already exist before, but they were certainly less widespread, had less impact on a broader scale and therefore were less noticeable.[13]

The different phenomena that are contributing to the risks are diverse – and numerous – and could each be analysed in detailed studies. Their common core is that they concern the dissemination of illegal and harmful content; however, it is not very relevant here to distinguish between these two terms from a societal perspective and to describe the problems they created. Specifically, this involves content that is either prohibited in general or for certain ways of dissemination. Examples include content that is harmful for children and young persons but is made freely accessible to

12 *de Streel/Husovec*, The e-commerce Directive as the cornerstone of the Internal Market.

13 See specifically on issues of media pluralism *CMPF/CiTiP/IViR/ SMIT*, Study on media plurality and diversity online; cf. for risks and harms online *Woods/Perrin*, Online harm reduction – a statutory duty of care and regulator, p. 35.

that age group, especially online, without adequate protection measures. Phenomena span from hate, discrimination, violence and incitement to such behaviour; terrorist content and radicalisation; disinformation, targeted disinformation campaigns and propaganda; content violating human dignity and child sexual abuse material; to content that is specifically harmful only to certain groups, such as pornography or other content that can impair the development of minors.

Recent developments, especially crimes with a terrorist background, the Corona pandemic – associated not only with an increase in disinformation on the pandemic and vaccinations but also with an increase in online crime, such as COVID-19-related scams and exchange of child sexual abuse material[14] – and the Russian war of aggression against Ukraine, have once again underlined, and in some cases even intensified, the danger that such risks create.

Audiovisual content, regardless of who creates it, distributes it and via which distribution channel it reaches the consumer, has a special impact due to various factors. Audiovisual formats are more immersive for the viewer, which is related to cognitive processes.[15] They are ascribed a high degree of credibility – people believe more in what they can see and hear, and a certain standard of production evokes trust, regardless of whether both aspects are still justified against the background of the current state of technology which has facilitated production also for lay persons. Audiovisual formats imprint more deeply on the consciousness – even when they are viewed unconsciously. Consequently, audiovisual content is attributed a high degree of relevance for opinion-forming, which has been acknowledged by courts adjudicating about the relevance of content in the context of freedom of expression.[16] Finally, the multiplication of 'playout channels' for such audiovisual content results in recipients being addressed more intensively.

14 *Europol*, Pandemic profiteering: how criminals exploit the COVID-19 crisis, March 2020, see: https://www.europol.europa.eu/publications-documents/pandemic-profiteering-how-criminals-exploit-covid-19-crisis. On the other hand, the pandemic has weakened the traditional audiovisual sector (cf. *Cabrera Blázquez et al.*, The European audiovisual industry in the time of COVID-19; *Carlini/Bleyer-Simon*, Media Economy in the Pandemic: A European Perspective), which in its function as public watchdog serves usually as counterbalance to risks such as disinformation.

15 See Flash Eurobarometer 469, Final Report, 2018, pp. 23 et seq.

16 ECtHR, no. 17207/90, *Informationsverein Lentia a.o./Austria*, para. 38.

II. Fundamental Values of the European Union and Allocation of Powers

The way these risks are addressed by the regulatory framework applicable to the dissemination of audiovisual content depends on whether and to what extent they are associated with an impairment of – possibly even constitutionally – protected interests of individuals and the underlying values of states. This question may differ in detail depending on different (constitutional) traditions, and especially in a global dimension it might lead to a different understanding of the required level of protection of individuals and the society. When it comes to the Member States of the EU, however, it is necessary to recall that, irrespective of a possible diversity in approaches in the different Member States, the EU itself is based on a uniform basic understanding of certain rights and values, which are the yardstick for responding to risks in the Single Market. As has been extensively demonstrated in previous studies,[17] the common constitutional traditions of the Member States and the enshrinement of these values in the EU Treaties form a catalogue of principles and values demanding to be safeguarded.

The fundamental rights contained in the Charter of Fundamental Rights of the EU (CFR)[18], in the European Convention on Human Rights of the Council of Europe (ECHR)[19] and in the provisions of national constitutional law of the Member States provide the legal framework that is binding for both the EU and the individual Member States. This impacts both the design of the rules for and the protection of the media landscape. In light of the risk phenomena described above, human dignity as the paramount legal asset in the EU, the protection of minors, freedom of expression and information, media freedom and pluralism, and the privacy of individuals are important elements of this framework. Illegal and harmful content, for example of a terrorist, radicalising nature or such as being capable of impairing development, affects these constitutionally protected positions of Union citizens in different ways and intensities. Although the actors in

17 *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp. 53 et seq.; *Cole/Etteldorf/Ullrich,* Updating the Rules for Online Content Dissemination, pp. 81 et seq.

18 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

19 European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

the context of illegal and harmful content dissemination are regularly not the addressees of the fundamental rights protection framework, because the duty to protect fundamental rights directly only applies to state actors, the fundamental rights are still of highest relevance: fundamental rights give rise to responsibilities of public actors to serve as guarantor of the rights. In the context of content dissemination this applies predominantly to the Member States,[20] which have duties to ensure a media environment in which recipients can engage in the consumption of content while their fundamental rights are respected and pluralist information sources are available. The extent to which active duties to implement measures in the sense of a duty to regulate arise from fundamental rights depends on the intensity of the impairment and the actual fundamental right that is concerned by the infringement. This duty to protect extends not only to the state as such – and thereby to the legislative power – but also to regulatory authorities, which in the media sector must be independent of the state to guarantee state-independent oversight of content dissemination. These authorities are nonetheless regularly bound by fundamental rights under Union and national law and are obliged to act in the interests of recipients in order to contribute to the goal for safeguarding their fundamental rights position.[21]

It should be emphasised that neither the scope of fundamental rights nor the interests of recipients call for a differentiation according to the type of risk, its format, origin or originator. Rather, the issue is about the objective of protection, i.e. the existence of an overall safe, free and diverse media landscape or audiovisual content environment, which shall be guaranteed by the Member States, irrespective of the means of dissemination or the provider disseminating. Of course, these interests need to be reconciled with possibly conflicting interests that are likewise protected by fundamental rights. These include the freedom of information to access content, the freedom of opinion and the freedom of the media to disseminate content. In addition, other rights, such as freedom of property and freedom of profession of the content creators and distributors, can be affected by

20 *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector, Chapter C.

21 Specifically for the online area see *Petkova/Ojanen (eds.)*, Fundamental Rights Protection Online; see also *Lehofer*, EuG: Keine Nichtigerklärung der Sanktionen gegen RT France; *Lehofer*, Überwachen, Blocken, Delisten – Zur Reichweite der EU-Sanktionen gegen RT und Sputnik.

the regulatory framework. When it comes to fundamental rights balancing, in the proportionality assessment the category of content does become relevant in light of the measures allowed to respond to it. Certain type of content enjoys little to no protection against limiting measures – likely this is content that violates human dignity, for example[22] – or only a limited protection, which means it is more easy to justify measures to respond to the risks created[23] – likely this would include, in view of potential societal damage, disinformation campaigns, for example[24] – or which is only protected against measures in certain contexts, thereby being confronted with a graduated approach – likely this can relate to pornographic content which allows for different reaction measures depending on which age group is to be protected, for example.[25]

Beyond fundamental rights there are related and accompanying fundamental principles and values of the EU and the Member States that need to be defended against violations. According to Art. 2 TEU, the Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. The Union's aim is to promote peace, its values and the well-being of its peoples (Art. 3(1) TEU), and it shall combat social exclusion and discrimination and promote social justice and protection of the rights of the child (Art. 3(3) subpara. 1 TEU). The role of the EU in that regard relates to both defending the foundational values against external influences and to guarantee their validity within the EU. For that reason, the values are not merely commitments in a preamble

22 Cf. on this, for example, CJEU, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, ECLI:EU:C:2004:614.

23 Cf. on this in the context of the ban of RT programmes in Europe *Ó Fathaigh/ Voorhoof*, Case Law, EU: RT France v. Council: General Court finds ban on Russia Today not a violation of right to freedom of expression.

24 *McGonagle*, "Fake news": False fears or real concerns?, p. 208; *Colomina et al.*, The impact of disinformation on democratic processes and human rights in the world; *Sardo*, Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights.

25 See on this *Cappello (ed.)*, The protection of minors in a converged media environment, pp. 53 et seq.

but have a direct impact in that their (assumed) violation can lead to infringement proceedings against Member States.[26]

Although this protective task gives the EU an active role, at the same time its activity range is limited. Art. 3(6) TEU demands that the Union pursues its objectives by appropriate means but within the competences which are conferred upon it by the Treaties. The existing competence framework allocates powers along the enumeration principle; therefore the conferral of powers is limited. A uniform framework of fundamental rights and values at EU level is not to be understood as a possible basis for a legislative competence of the EU to act in every protective way possible. Although the EU has comprehensive competences in the area of regulating the economy and especially in the context of the single market and thus also with regard to the regulation of media as economic operators, there are also clear limitations relevant in this context: the EU must respect the cultural sovereignty of the Member States and is therefore limited, for example, when it comes to regulating media and content dissemination in their dimension as cultural assets, which holds especially true with regard to ensuring media pluralism, as has been shown extensively in a previous study.[27] Consequently, in the past, Member States were left with a broad margin of manoeuvre to achieve their policy objectives in the area of media, which are shaped in particular by their respective constitutional frameworks. This approach was even confirmed in the context of issues concerning a transnational dimension in the single market for media content by the Court of Justice of the European Union (CJEU). In a recent case on the German regional advertising ban for nation-wide broadcasting, the Court highlighted again with reference to its long-standing jurisprudence that Member States should be accorded a certain, depending on context even significant, margin of appreciation with regard to the implementation of the objective of respect for media pluralism. In effect this means that the fact of less strict rules being imposed by one Member State in comparison to another Member

26 See in detail *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp. 83 et seq.; for an overview of the handling of the mechanism of Art. 7 TEU see *Diaz Crego/Manko/van Ballegooij*, Protecting EU common values within the Member States.

27 See extensively *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector. Concerning the most recent proposal for a legislative act impacting the media regulation cf. *Ory*, Medienfreiheit – Der Entwurf eines European Media Freedom Act, p. 23 et seq.

State does not make the latter's rules disproportionate.[28] In addition, the margin of appreciation extends to determining whether there is a pressing social need which may justify a restriction on the freedom of expression and to concerning the exercise of balancing conflicting interests.[29]

In light of the increasing relevance of the cross-border dimension of content dissemination and reception, the far-reaching powers of the EU to regulate the single market, in which the media and other services using audiovisual content play an important role as economic service, have led to a broad extension of legislative activities by the EU in the more recent past. The tension resulting from the two-fold nature of content as an economic and cultural matter persists, especially since the EU is bound to respect the diversity of its Member States and, above all, their national identities which often are characterised by the way foundational elements of democracy are approached, such as the regulatory framework for the media as opinion building factor. Accordingly, EU single market regulation may not supersede national cultural policy, and, in order to create legal clarity, a distinct demarcation, and at the same time coherence, between the different levels and applicable rules is particularly important.

III. Regulatory Approaches – Existing and Planned

Against the background of the risk phenomena described above and their consideration in light of fundamental rights and the distribution of powers between Member States and the EU, in the following an overview of the relevant legal framework relevant for the dissemination of (audiovisual) content is provided. The legal framework below the level of fundamental values and rights is characterised by the fact that, in contrast to the interests and (legitimate) expectations of recipients protected by fundamental rights, a distinction according to the type of content, its form, creator, distributor and distribution channel is very important here in addition to the relevance for the balancing between fundamental rights protection and appropriate limiting measures. This applies both to the legislative level, which is composed of a network of horizontal and sectoral legal acts at EU and national level that address different types of illegal content or

28 Case C-555/19, *Fussl Modestraße Mayr GmbH v SevenOne Media GmbH, ProSiebenSat.1 TV Deutschland GmbH, ProSiebenSat.1 Media SE*, ECLI:EU:C:2021:89, para. 75.

29 Ibid., para. 91, 93.

conduct, and, as a consequence, to the level of actual law enforcement by regulatory authorities in application of these respective rules.[30] In addition, this framework is currently evolving, which must be taken into account when considering the future regulation of cross-border dissemination of audiovisual content.

1. Existing Regulatory Approaches

The 'heart' of audiovisual content regulation at EU level lies in the AVMSD. This Directive achieves a minimum harmonisation for the rules concerning the sector in order to ensure free distribution and reception of audiovisual-content-based services across borders while maintaining significant leeway for Member States. The AVMSD already offers solutions to some of the risks mentioned, in particular the protection of minors and the general public from certain content as well as in the field of audiovisual commercial communication.[31] It addresses the main audiovisual players, both the television and video-on-demand (VoD) providers acting under editorial responsibility and, since the last adaptation of the Directive in 2018, the video-sharing platform (VSP) providers organising the audiovisual content distributed through their services. With that, the Directive covers different means of disseminating audiovisual content, with some of its provisions only referring to certain types of dissemination.

Due to legislative initiatives in recent years introduced as different elements of the proclaimed 'digital decade', in which the European Commission is (still) striving to make Europe "fit" for the digital age, the AVMSD is, however, no longer the only relevant and specific regulatory instrument governing audiovisual content. In particular, new elements of a more comprehensive platform regulation are relevant either because the players already addressed by the AVMSD at least partly fall in addition under the different types of (new) definitions of platforms themselves or because these platforms as intermediaries are of considerable importance for the distribution and value chain of audiovisual content. In addition, the provisions addressing these new market players apply to providers competing for audience and advertising market shares with the service providers covered by the AVMSD.

30 See for a detailed analysis of the regulatory framework *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, pp. 53 et seq.

31 See in detail below C.II.

It is primarily the DSA, which recently entered into force and will become fully applicable from February 2024 (except for some provisions which are applicable before), that is of relevance with its graduated catalogue of obligations for online platforms.[32] This graduated response foresees more extensive requirements for very large online platforms when it comes to tackling illegal content, advertising and the protection of minors in comparison to other intermediaries.[33] This Regulation is aimed at fully harmonising the rules applicable to intermediary services in the internal market with the objective of ensuring a safe, predictable and trusted online environment, addressing the dissemination of illegal content online and the societal risks that the dissemination of disinformation or other content may generate, while fundamental rights enshrined in the Charter are effectively protected in this online environment.[34]

However, although the Regulation revolves around 'illegal' content by tying several obligations for intermediary services to this category, when it comes to defining what is illegal (and what not), the DSA does not contain any according substantive rules. Rather, illegal content is defined as 'any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law' (Art. 3 lit. (a) DSA). Recital 12 clarifies that this scope covers illegal content, products, services and activities and applies to content, irrespective of its form, that is either itself illegal (such as illegal hate speech or terrorist content and unlawful discriminatory content) or is rendered illegal in view of the fact that it relates to illegal activities. Examples include the sharing of images depicting child sexual abuse, the unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, the sale of products or the provision of services infringing consumer protection law, the non-authorised use of copyright protected material, the illegal offer of accommodation services or the illegal sale of live animals. In contrast, an eyewitness video of a potential crime should not be considered to constitute illegal content merely because it depicts an illegal act, insofar as recording or disseminating such a video to the public

32 Extensively *Ullrich*, Unlawful Content Online: Towards a New Regulatory Framework for Online Platforms.

33 Cf. also *Lomba/Evas*, Digital services act. European added value assessment.

34 Recital 9 DSA.

is not illegal under national or Union law. Thus, the DSA clearly requires a legal basis outside the DSA to qualify content as illegal, at least for its own regulatory scope and catalogue of obligations (e.g. transparency obligations or notice and action mechanisms), which are then connected to a detailed enforcement and cooperation system laid down in the Regulation.

This flexible approach to a definition is important and appropriate, especially in view of the fact that the DSA is a horizontal and cross-sectoral legal instrument with direct applicability in the Member States, which must maintain coherence with other legal acts and, above all, Member State legislative and regulatory competences. When it comes to the question of coherence, the definition issue for illegal content is not a problem at least in those cases where there is a harmonised and clear statement on illegality in the other piece of EU law or if there is a uniform understanding about illegality of the specific content in national law (for example in criminal law).[35] This is quite evident when the case concerns terrorist content, child abuse material, content that infringes copyright or the sharing of private images without the consent of the person concerned. Here, there is not only a uniform EU-wide determination of the illegality of such content but also additional specific rules that different distributors already have to observe or will have to observe in the near future in connection with obligations concerning those categories of content.

Although the Digital Markets Act (DMA), as the other part of the Digital Services Act Package, will have considerable relevance for the audiovisual sector, too, as it imposes obligations on gatekeepers concerning audiovisual content in a competitive context, from which media providers will potentially benefit in many respects, this Regulation is less relevant in relation to the dissemination of illegal content and enforcement issues.[36] The rule laid down in Art. 5(5) DMA may turn out to have increased relevance in the present context in the future in that it can impact visibility of content. According to this provision, gatekeepers shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself in comparison to similar services or products of a

35 Cf. on the regulatory framework of the EU governing certain kinds of illegal content in the online sector *de Streel et al.*, Online Platforms' Moderation of Illegal Content Online; *de Streel/Husovec*, The e-commerce Directive as the cornerstone of the Internal Market; *Hoffmann/Gasparotti*, Liability for online content.

36 *Cole*, Overview of the impact of the proposed EU Digital Services Act Package on broadcasting in Europe, pp. 22 et seq.; *Cole*, in: Cappello (ed.), Unravelling the Digital Services Act package, pp. 81 et seq.

third party. In addition, the gatekeeper has to apply transparent, fair and non-discriminatory conditions to such ranking. Since this rule extends, for example, to core platform services such as search engines or video-sharing platform services and also protects media content in this regard, it has an impact on the visibility of audiovisual content for the (potential) viewer, at least to a certain extent. However, the way the rule is stipulated, it neither favours certain content that has added social value nor does it exclude illegal content explicitly or regulate its distribution.

For terrorist content, Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online[37] contains various obligations for hosting services. This includes, in particular, accelerated response periods to (cross-border) deletion orders from competent authorities, technical and content-related measures and transparency obligations. The proposed Regulation laying down rules to prevent and combat child sexual abuse (CSAM Regulation)[38] in case of adoption would also provide for similar obligations for child abuse material. According to the Proposal, not only risk assessment obligations would be imposed on hosting services but also (active) risk mitigation obligations in relation to child abuse material which would be contained within their offerings. This goes as far as the possibility of imposing so-called detection orders with which hosting providers would be obliged to actively search and detect such content.

In addition to the fact that copyright law is already strongly harmonised across the Union especially in the online context, combined with an extensive jurisprudence of the CJEU, Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive)[39]– has introduced even more concrete and strict obligations for certain platform providers. According to Art. 17 DSM Directive, online content-sharing service providers shall be liable for copyright infringements by their users if they have not made best efforts to obtain authorisation of the respective right holder and to ensure unavailability of protected works in case they

37 Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, OJ L 172, 17.5.2021, pp. 79–109.

38 Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse, COM/2022/209 final.

39 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, pp. 92–125.

did not obtain such authorisation and, in any event, acted expeditiously to remove copyright infringements on knowledge.

Finally, with the General Data Protection Regulation[40] there is an EU-wide uniform and detailed framework of rules on the processing of personal data and related rights and obligations, based on the fundamental right to privacy, which also extends to the dissemination of images and video material. The lack of a legal basis for data processing, which in the case of dissemination of images and videos of individuals regularly will have to be based on consent, leads to the illegality of the processing (in this case: the dissemination) and, as a result, to deletion obligations for those involved in the dissemination, although liability privileges must be observed in the case of intermediary services before notification.

However, the example of the GDPR also provides a good demonstration of potential application problems of the broad approach to "illegality" due to a lack of a specific definition in the DSA itself, which arise when there is either no EU-wide harmonisation or such harmonisation leaves extensive room for manoeuvre for the Member States. If the publication of images takes place in the context of news reporting, i.e. data processing for journalistic purposes, where a broad definition of this term is to be assumed, then the media privilege pursuant to Art. 85 GDPR is at stake. Without going into detail at this point,[41] this provision requires specific rules in the Member States in relation to data processing for the journalistic work. As a result, very different structures both with regard to the scope of the permissibility of such processing for journalistic purposes and the extent of applicability of the rules of the GDPR and with regard to very different supervisory systems (for example, by media regulatory authorities, by self-regulatory bodies of the press, by internal bodies in the case of broadcasters etc.) have been put in place.[42] But other diverse applications of GDPR rules can lead to a similar unclear situation even if the publication was clearly not done in the context of journalistic purposes: the GDPR contains an opening clause for Member States to provide by law for a

40 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, pp. 1–88.

41 See on this from a media-related perspective *Cappello (ed.)*, Journalism and media privilege.

42 Cf. on this in detail *Cole/Etteldorf*, The implementation of the GDPR into national law in light of coherence and consistency (forthcoming), Chapter III.

lower age to give consent to data processing by information society services as the age limit foreseen in the GDPR, which in the Regulation is set at 13 years and the deviation allowed to be at most to 16 years.[43] This has led to very different rules across the EU as the majority of Member States (18) have used this opportunity to apply a different age range; in result the age of 16 years is relevant in Germany, Croatia, Hungary, Luxembourg, the Netherlands, Poland, Romania, Slovakia and, due to the relevant service providers establishment in that Member State importantly, Ireland, while in the other Member States it is 13 (Belgium, Denmark, Estonia, Finland, Latvia, Malta, Portugal, Sweden), 14 (Austria, Bulgaria, Cyprus, Spain, Italy, Lithuania) or 15 years (Czech Republic, Greece, France).[44]

Similar observations can be drawn with regard to the AVMSD, which determines the "illegality" of certain content or the way of distribution of certain content, which is also relevant in the context of the DSA. While the prohibitions of terrorist content, of content inciting violence and discriminatory hatred or of certain audiovisual communications are relatively clear, the obligation to protect minors from content impairing their development is rather vague and has led to the maintenance of different systems and assessment standards in the Member States (see in detail below, C.II). In addition, the protection of minors in the media is also affected by the fact that content harmful to minors is often not illegal per se but only when it is made available to minors or unsuitable age groups. Due to the broad definition of the DSA, which also takes into account "the nature of distribution" when assessing illegality, content that is impairing to development should also fall under this category, but the concrete conditions depend on different national rules (as is also the case in the AVMSD), which is already difficult due to the lack of harmonised age limits and generally due to different traditions in the understanding of developmental impairment risks for development, which is certainly not uniform throughout the EU.[45] In addition, and supplementing secondary EU legislation, rules in Member States also address – differently – the

43 Article 8(1) GDPR. See on this also *Cole/Etteldorf*, The implementation of the GDPR into national law in light of coherence and consistency (forthcoming), Chapter IV, A.

44 See *TIPIK Legal*, Report on the implementation of specific provisions of Regulation (EU) 2016/679.

45 See extensively of current international standards and developments with regard to the protection of minors in the media *Ukrow/Cole/Etteldorf*, Stand und Entwicklung des internationalen Kinder- und Jugendmedienschutzes.

illegality of certain content, for example within the framework of national laws in broadcasting or media law or in criminal law.

Finally, there is content for which it is widely acknowledged that it is harmful, but the illegality of which is not (yet) laid down explicitly in a law, or at least not uniformly throughout all the EU Member States. This includes, for example, disinformation, which does not cross the threshold of incitement or propaganda, or mobbing, which does not cross the threshold of discriminatory hate speech or criminally relevant coercion/stalking. Here, only a few Member States have partial regulations, such as France on disinformation in the context of elections[46] or Italy in the context of cyberbullying[47]. This does not mean that intermediary services, for example, cannot take measures against such content via their content policies – which they actually regularly do and which the DSA seeks to recognise.[48] But if it is not illegal content, the various obligations of the DSA and the enforcement regime are not applicable.[49]

All these rules are not only relevant in the context of the DSA but also describe an essential part of the legal framework for the dissemination of audiovisual content overall. The legal framework is further supplemented by other instruments which, although they regularly do not entail any binding legal consequences for the dissemination of content, are nevertheless relevant for the regulatory regime. In this light certain initiatives on EU level can be mentioned, such as the EU Internet Forum against terrorist propaganda online, the Code of Conduct on countering illegal hate

46 LOI n° 2018–1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information, OJ France no. 0297, 23.12.2018. See on this *Etteldorf*, in: MMR-Aktuell 2021, 443156.

47 Law of 29.3.2017 no. 17, Disposizioni a tutela dei minori per la prevenzione ed il contrasto del fenomeno del cyberbullismo, Gazzetta Ufficiale General Series n. 127 of 6.3.2017. See on this *Ukrow/Cole/Etteldorf*, Stand und Entwicklung des internationalen Kinder- und Jugendmedienschutzes, Chapter E.V.3.c.

48 *de Streel et al.*, Online Platforms' Moderation of Illegal Content Online.

49 Content moderation outside of content being qualified illegal by law is, on the other hand, seen critically in light of threats for journalistic content being interfered by platforms. See on this e.g. *Papaevangelou*, The relationship between journalists and platforms in European online content governance: A case study on a "non-interference principle".

speech online[50], the 2018 Code of Practice on Disinformation[51], which was updated by the 2022 Strengthened Code of Practice on Disinformation[52],[53] the Alliance to better protect minors online under the European Strategy for a better internet for children[54], the WePROTECT global alliance[55] to end child sexual exploitation online and several initiatives in the field of consumer protection[56].

2. Planned Regulatory Approaches

The regulatory framework for the media or rather content dissemination, including audiovisual content, is continuing to change. The EU is reacting to current threats with new legislative initiatives and instruments.

There is the aforementioned proposal for a CSAM Regulation, which has met with strong criticism because of the proposed investigation obligations for hosting providers,[57] which could involve a search of communication content and thus considerable intrusion into privacy. In addition, the European Commission has also proposed a Regulation on the transparency

50 Code of Conduct on countering illegal hate speech online, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

51 2018 Code of Practice on Disinformation, https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation.

52 2022 Strengthened Code of Practice on Disinformation, https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation.

53 See on these instruments already extensively *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, pp. 152 et seq.

54 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A Digital Decade for children and youth: the new European strategy for a better internet for kids (BIK+), COM/2022/212 final.

55 https://www.weprotect.org/.

56 For example, the Joint Action of the consumer protection cooperation network authorities, the Memorandum of understanding against counterfeit goods, the Online Advertising and IPR Memorandum of Understanding, the Safety Pledge to improve the safety of products sold online etc.

57 Cf. for example the Recommendation of the German Bundesrat of 5.9.22, Printed Papers 337/1/22, https://www.bundesrat.de/SharedDocs/drucksachen/2022/0301-0400/337-1-22.pdf?__blob=publicationFile&v=1.

and targeting of political advertising[58] at the end of 2021. The Proposal aims to lay down harmonised transparency obligations for providers of political advertising and related services to retain, disclose and publish information connected to the provision of such services and wants to establish harmonised rules on the use of targeting and amplification techniques in the context thereof. This essentially includes labelling requirements for political advertising, the establishment of notice mechanisms, the collection of information on the conditions and background of political advertising and their possible disclosure to authorities. In this context, the interesting question can be raised whether a lack of labelling of the content as political advertising could constitute 'illegal content' in the sense of the DSA, which, as mentioned, does not only refer to the content as such but also the way in which it was disseminated when assessing its potential illegal nature.

This question is relevant in the case of the labelling obligations for audiovisual commercial communication stemming from the AVMSD, too, but it plays a less decisive role in that context, as the DSA itself imposes labelling obligations for advertising. In the context of the proposed Regulation on political advertising, however, the question takes on a different nuance insofar as the intended definition of political advertising (depending on the outcome of the legislative procedure) is very broad and does not – like the concept of advertising – necessarily presuppose a financial advantage on the part of the advertiser.[59] Rather 'political advertising' means the preparation, placement, promotion, publication or dissemination, by any means, of a message by, for or on behalf of a political actor, unless it is of a purely private or a purely commercial nature, or of a message which is liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour. The latter alternative ("a message […] which is liable to influence […]") can be interpreted in such a way that it also covers reporting on topics of political interest in the context of elections.

Analysing how this relates to the DSA, the connecting factor for harmfulness in this case is – in contrast to content that is capable of impairing the development of minors – not the content (the advertising may be perfectly lawful in itself) but a condition unconnected to the content itself

58 Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, COM/2021/731 final.

59 See on the existing, very different national approaches *Cappello (ed.)*, Media coverage of elections: the legal framework in Europe.

(the lack of labelling). However, this is comparable to situations in which a legal content is accessible in a way – namely without required access restrictions – that the condition of how it is disseminated makes it illegal. In principle, such an interpretation, depending on the final outcome of the proposed text, would be conceivable in the future for content covered by the Regulation proposal. In any case, the proposal includes in its scope the distribution of audiovisual content regardless of the distributing medium and distributor. 'Political advertising publisher' can mean any natural or legal person that broadcasts, makes available through an interface or otherwise brings to the public domain political advertising through any medium. As mentioned, the legislative process is still ongoing with the Council having agreed on its General Approach on 13 December 2022[60] and the European Parliament following with a common position adopted on 2 February 2023[61].

Finally, regarding the list of current proposals, the EMFA, which was suggested by the European Commission in September 2022, could, if adopted, have an even more fundamental impact on the dissemination of audiovisual content and the audiovisual and media sector per se.[62]

In a very brief recollection at this point, the Proposal comes as a harmonising Regulation and not as a Directive. It lays down common rules aiming at the proper functioning of the internal market for media services, and as an essential element it would see the establishment of the European Board for Media Services (EBMS or – as foreseen in the Proposal itself without an abbreviation – simply: "the Board") to replace ERGA. In addition, the quality of media services and the conditions for their functioning shall be preserved. More precisely, this aim is to be achieved by a variety of rules including on the rights of recipients of media services and the providers, safeguards for the independent functioning of public service

60 Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising – General approach, ST 16013 2022 REV 1.

61 Amendments adopted by the European Parliament on 2 February 2023 on the proposal for a regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, P9_TA(2023)0027.

62 See for an overview and a first assessment *Voorhoof*, The European Media Freedom Act and the protection of journalistic sources: still some way to go; *Tambini*, The democratic fightback has begun: the European Commission's new European Media Freedom Act; *Cantero Gamito*, The European Media Freedom Act (Emfa) as Meta-Regulation; *Ory*, Medienfreiheit – Der Entwurf eines European Media Freedom Act, p. 23 et seq.

media, certain duties for news providers and, most importantly, a complex framework for regulatory cooperation in the context of the provision of media services including rules on independence of media authorities or bodies. This proposed institutional setup and cooperation framework will be dealt with in more detail further below (see on the institutional system below, D.II.2.).

With regard to substantive rules, Art. 3 of the EMFA stipulates that recipients of media services in the Union shall have the right to receive a plurality of news and current affairs content, produced with respect for editorial freedom of media service providers, to the benefit of the public discourse. The underlying idea of this commitment follows from the fundamental rights of Art. 11 CFR and Art. 10 ECHR as interpreted by the CJEU and the ECtHR. However, this provision of the EMFA is obviously not to be understood in the sense of an executable legal right of recipients, which they could claim before a court vis-à-vis providers of services or even state powers at large, but rather as an objective, a goal to be reached, whereby the legitimate interests of the users are the justification for the regulatory activity itself. Recital 6 refers in the context of the "right of recipients" as included in Art. 3 of the proposal to the necessity that a minimum level of protection of service recipients should be ensured in the internal market, which is the reason for proposing harmonisation of certain aspects of the relevant national rules for media services. Therefore, Art. 3 needs to be seen in the context and in connection with Art. 4 laying down rights of media services providers, Art. 5 laying down safeguards for public service media providers and Art. 6 laying down obligations for news providers.

Art. 4(1) EMFA creates a right that is similar in its consequences to the provision in Art. 3(1) AVMSD but is not limited to audiovisual media service providers as in the latter framework: media service providers shall have the right to exercise their economic activities in the internal market without restrictions other than those allowed under Union law. Such a right of economic freedom already follows from the freedom to provide services and has been detailed by a dedicated case law of the CJEU.[63] The proposed provision does not, however, contain a specific jurisdiction rule or restrictions framework but refers more generally to restrictions that can be imposed if they are in line with EU law. This includes, as Recital 13

63 *Cole*, in: AfP 2021, 1, 1 et seq.; extensively *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector.

underlines, measures applied by "national public authorities", i.e. not only national regulatory authorities in charge for the media sector. Art. 4(2) contains specific rules in the context of editorial freedom and thus, unlike Art. 4(1), actually has a cultural-democratic 'stamp' on it. Member States, including their national regulatory authorities and bodies, shall not interfere in, or try to influence in any way, editorial policies and decisions by media service providers, shall not detain, sanction, intercept, make subject to surveillance or search and seizure, or inspect media service providers and shall not deploy spyware in any device or machine used by media service providers[64]. Again, this protection already arises from Art. 10 ECHR, and the scope of protection for that aspect of the fundamental right goes even beyond the reference in the EMFA Proposal if one considers the interpretation of the ECtHR.[65] As for other elements of the EMFA Proposal, the reiteration seems to have the aim of ensuring a compliance in EU Member States as deriving from specific secondary law – beyond a fundamental rights basis – and of making it subject to regulatory oversight.

In that sense Member States shall, according to Art. 4(3), establish an independent authority or body to deal with complaints about infringements of Art. 4(2). Whether this body has to be different from the regulatory authorities, addressed in Art. 4(2) as the ones that may not impede the journalistic work, is not entirely clear from the provision. Going beyond

64 This last part of the provision in para. 2 is obviously to be read in light of the developments surrounding the Pegasus software. According to Amnesty International's investigative research, a number of governments, including European countries such as Hungary and Poland, are alleged to have used the surveillance software "Pegasus" from the Israeli cyber security company NSO Group to monitor electronic devices and their communication connections (e.g. various messenger services). According to a list of persons monitored published by Amnesty International, not only suspected terrorists and criminals but also journalists, politicians and lawyers were affected. The case is currently being investigated by a special committee of enquiry of the European Parliament (see https://www.europarl.europa.eu/doceo/document/TA-9-2022-0071_DE.html).

65 *Voorhoof*, The proposal of a European Media Freedom Act and the protection of journalistic sources: still some way to go, pp. 2 et seq., even critically points out that Art. 4(2)(b),(c) and (3) are not corresponding to the protection of journalistic sources as provided in Art. 10 ECHR and the case law of the ECtHR guaranteeing the right of journalists to protect their sources. He critics that guarantees of source protection at the level of media service providers, producing and broadcasting news and journalistic content, should not be less than the guarantees of source protection that can be invoked by (individual) journalists and (employed or freelance) media-workers in application of Art. 10 ECHR.

journalistic work in general, an enhanced protection for the independent functioning of public service media is foreseen: Art. 5 stipulates that public service media shall provide a wide range of information and opinions to the recipients in an impartial manner and contains requirements on the composition and protection of their boards[66] (transparency and protection against discrimination in the appointment procedures and conditional protection against dismissal) as well as on the allocation of resources. To monitor compliance with these requirements, Member States shall also establish independent monitoring authorities or bodies. As the title of the provision suggests ("Safeguards for the independent functioning of public service media providers"), Art. 5 does not contain any rules on the establishment or exact functioning of the public service media, for example independence requirements. This results from the explicit assignment for these aspects of organising public service media (at least for the broadcasting sector) to the Member States not only viewing the competence allocations but also in light of the so-called Amsterdam Protocol.[67]

Art. 6 EMFA contains specific duties for those media service providers that offer news and current affairs content. They include information obligations vis-à-vis the general public on ownership structures; this goes beyond the existing optional provision of Art. 5 para. 2 AVMSD, which has so far hardly been applied in the Member States[68] in the form of binding legal provisions. Furthermore, news providers shall take measures that they deem appropriate with a view to guaranteeing the independence of individual editorial decisions. This aims, in particular, at guaranteeing that editors are free to take individual editorial decisions in the exercise of their professional activity and at ensuring disclosure of any actual or potential conflict of interest by any party having a stake in media service providers that may affect the provision of news and current affairs content. This is a far-reaching approach although it would leave a lot of space on how this goal would be achieved.

66 Art. 5(2) refers to "head of management and the members of the governing board of public service media providers". However, the design of public service media varies considerably in the Member States, especially with regard to structural issues (see e.g. *Dragomir/Söderström*, The State of State Media). Whether the provision therefore extends to the possibly analogous application according to meaning and purpose to existing (different) structures or requires the creation of the addressed structures is not clearly indicated.

67 Protocol on the system of public broadcasting in the Member States, OJ C 340, 10.11.1997, p. 109.

68 See *Cappello (ed.)*, Transparency of media ownership.

Additionally, in the following chapters there are further elements that are being addressed, among others a rule on how providers of very large online platforms shall deal with providers of media services that are created under editorial control and therefore operate within existing regulatory frameworks. This provision can be seen as a first supplementary rule to DSA, which still has to become applicable. There are rules which have an impact on the financial situation of media services providers, both in connection with concentration rules and with allocation of state funds via advertising or the way that audience measurement tools have to be designed and applied. The substantive rules of the EMFA therefore do not specifically address the dissemination of audiovisual content specifically. Several of the rules aim at addressing some of the problem areas described above, but they do so to a limited extent and – except for the institutional dimension – without amending the currently applicable legislative framework for audiovisual media services, namely the AVMSD. Some of the more general goals, such as the introduction of certain structural requirements for public service media or the guarantee of editorial freedom for news media, can have an indirect effect against instrumentalising media for the purposes of disinformation or state-driven propaganda. However, the relevance of these aspects in relation to foreign (non-EU-based) providers, which is one of the most pressing issues identified recently, is limited, and that context is only addressed concerning institutional cooperation specifically proposed in Art. 16 of the EMFA. The role of intermediaries, which are an important element of the public opinion forming process, is only included to a very limited extent.[69] Nonetheless, the institutional changes proposed by the EMFA with an amending effect for the AVMSD concerning the rules on ERGA and the cooperation mechanisms between the national regulatory authorities are very important for the question of reacting to the dissemination of illegal or harmful audiovisual content across borders, which is why they will be analysed in more detail below.

69 See on this aspect *Seipp/Helberger/de Vreese/Ausloos*, Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law. The authors describe how the nature of opinion power is changing and shifting from news media to platforms and how this needs to be addressed in regulation. In light of the EMFA, they conclude that the rules on empowering a resilient media are just first approaches, which need to be scrutinised further and in detail, but that they may provide elements for a media concentration law in new style.

3. Consistency and Coherence?

As shown, there is a multitude of rules that directly or indirectly deal with the dissemination of audiovisual content. This applies to both the EU and national level. Consistency and coherence of the current and future legal framework are therefore essential – also in view of an effective protection of the fundamental rights of recipients.[70]

In order to assess the coherence of the legal framework for the dissemination of audiovisual content, the AVMSD as the core element of regulation at EU level combined with its implementation in the Member States should be the starting point.[71] In the past, this ruleset was rarely the subject of debates about its interaction with other legal acts mainly due to three aspects. Firstly, from the very beginning the AVMSD (then still the Television without Frontiers Directive (TwFD)) was intended to achieve minimum harmonisation in order to enable and facilitate the cross-border transmission of television services in the internal market, so that it established a concise but limited sector-specific framework of rules which therefore did not correlate with other rules. Secondly, the AVMSD as sectoral law did not overlap with other clearly distinguishable sectoral approaches, and only more recently horizontal legislative acts regulating the EU Digital Single Market have become more relevant in the context of the AVMSD. Thirdly, the AVMSD is at the heart of Union 'media law', i.e. in an area in which the EU has only limited competences in comparison to the retained competences of the Member States.[72] A general provision detailing its relationship to other legal acts – besides Art. 4(7) AVMSD, which explicitly laid down a rule-exception relationship towards the e-Commerce Directive[73] – was not regarded as a necessary inclusion. Where overlaps

70 See on this in *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, pp. 118 et seq.; *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, pp. 40 et seq.; in light of the EMFA: *Cantero Gamito*, Consistent Regulatory and Self-Regulatory Mechanisms for Media Freedom in the Digital Single Market, pp. 4 et seq.; critically also *Dreyer/Heyer/Seipp/Schulz*, The European Communication (Dis)Order.

71 Cf. on this and the following *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, pp. 40 et seq.

72 On the latter aspect extensively *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector.

73 This provision will need to be adapted to the entry into force of the DSA in a future amendment.

could occur, the other legal acts (passed later than the TwFD and most of them referring to some very specific areas such as tobacco advertising, copyright, advertising for medical products or technical aspects leaving aside content issues) clarified their relationship to the AVMSD in their own provisions by giving this Directive precedence.[74]

In the recent past, however, this situation has fundamentally changed, essentially attributable to the (still progressing) convergence of the media landscape and to the rise of digitalisation and globalisation.[75] While the AVMSD continues to follow the approach of minimum harmonisation, the spectrum of rules and of the actors addressed has been significantly expanded with the last revision in 2018. Furthermore, several changes to existing legal acts and proposals for new ones have changed the 'regulatory environment' in which the AVMSD is situated in. This leads to more obvious tensions because these other acts either address the same players as the AVMSD or address the distributors (or: intermediaries) of, and gateways to, audiovisual content. This applies not only to the rules contained in the AVMSD but also to the rules which the AVMSD deliberately omitted, so that Member States' media regulation can fill them within their leeway for regulatory action in those fields.

Especially the DSA has many potential points of overlap with the AVMSD as it regulates the distribution channels for (audiovisual) content and the competitors of audiovisual media service providers concerning audience and advertising markets.[76] Some players – especially VSPs, but possibly also audiovisual media services that offer content online in a com-

74 For example, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, pp. 36–68), Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.6.2003, pp. 16–19), Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 217, 5.8.1998, pp. 18–26), Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, pp. 15–21).

75 See also *Cornils*, Designing Platform Governance: A Normative Perspective on Needs, Strategies, and Tools to Regulate Intermediaries, pp. 73 et seq.

76 Cf. on the relevance of the DSA for the broadcasting sector also in light of the AVMSD *Cole*, Overview of the impact of the proposed EU Digital Services Act Package on broadcasting in Europe, pp. 8 et seq.

parably designed manner – are addressed by both sets of rules imposing obligations on them in (partly) a very similar manner. For example, according to Art. 26(2) DSA, an online platform (which could be a VSP) is obliged to provide users with a function with which they can declare whether the content they upload constitutes or contains commercial communications, while Art. 28b(3) AVMSD obliges Member States to ensure that VSPs comply with the rules on commercial communication of the AVMSD (Art. 9), stating that measures shall consist (inter alia) of "having a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications as far as they know or can be reasonably expected to know". This means that AVMSD and DSA are applicable in parallel to exactly the same situations. The rules of the AVMSD are fleshed out by the Member States in their national law, leaving them rooms for manoeuvre. Some Member States have used this margin, while others rely on the list of appropriate measures that VSPs can take as they are mentioned in the Directive (see below C.II.).[77]

The DSA is in contrast stricter and, as a Regulation, directly binding while obliging foreign and EU providers to the rules harmonised on EU level. Similar conclusions can be drawn regarding the above-mentioned labelling obligations of providers (both audiovisual media services and VSPs) under Art. 9 AVMSD and the transparency of advertising under Art. 26(1) DSA, for which the AVMSD rule leaves Member States the space on how to achieve the goal. A further example concerns Art. 6 and 6a AVMSD, according to which Member States shall ensure that audiovisual media services and (in conjunction with Art. 28b) VSP providers take appropriate measures to protect, inter alia, minors from content impairing their physical, mental or moral development and the general public from content containing incitement to violence or hatred, which for VSPs may include establishing and operating transparent and user-friendly flagging and reporting mechanisms. The DSA, in turn, does not impose directly active obligations (e.g. deletion or blocking), but it achieves this indirectly by obliging hosting providers to set up notification procedures, which in turn can result in knowledge about illegal content giving rise to liability.

Depending on the interpretation of 'illegal content' under the AVMSD as described above, this structure could lead in the end to the situation that

77 In general on consistency of VSP regulation *Sorban*, The video-sharing platform paradox – Applicability of the new European rules in the intersection of globalisation and distinct Member State implementation.

audiovisual content of an audiovisual media service provider that is distributed on a corresponding online service is legal under the AVMSD (or the respective national frameworks) but needs to be treated as illegal under the DSA. In other words, as under the AVMSD the category of harmful content encompasses content that may impair the development of minors but is not per se illegal (see below C.II.2.), proportionate measures have to be taken to ensure that minors do not normally see this content. The DSA on the other hand does not make a comparable reference to harmful content, only referring to illegal content. This also applies concerning enforcement where Art. 8, for example, refers to actions against illegal content by the relevant national authorities. The question arises whether harmful content under the AVMSD could constitute illegal content under the DSA. If such content is made available without adequate safeguards and is as such violating the AVMSD and its applicable national transpositions, such content should be understood as being illegal under the DSA.

Similar examples can be invoked with regard to the other legal instruments mentioned above. For VSPs, it may not seem clear which rules prevail in case of possible overlaps with their obligations stemming from combatting content covered by Art. 28b in conjunction with Art. 6(1)(b) AVMSD (public provocation to commit a terrorist offence) and requiring appropriate (technical) measures from them on the one hand and their obligations to fight against terroristic content under Art. 5 TCO Regulation on the other hand. Similarly, risk mitigation obligations in relation to child abuse material under the CSAM Proposal could after enactment potentially overlap with Art. 28b in conjunction with Art. 6 and 6a AVMSD. Additionally, both sets of rules address (at least indirectly) issues of media literacy and the protection of minors in (online) media.[78] The proposed Regulation on political advertising with its potentially wide scope also requires compliance by audiovisual media services and VSPs. Concerning the EMFA Proposal,[79] it is not very clear from the draft how new information obligations for news providers (Art. 6 EMFA Proposal) interact with information

78 See on these aspects Draft opinion of the Committee on Culture and Education for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse (COM(2022)0209 – C9–0174/2022 – 2022/0155(COD)), 18.10.2022, https://www.europarl.europa.eu/doceo/document/CULT-PA-737365_EN.pdf.

79 Arguing for a more complementary approach in the EMFA *Cantero Gamito*, The European Media Freedom Act (Emfa) as Meta-Regulation.

obligations applicable to any type of audiovisual media services (Art. 5(1) AVMSD) in the way they have been transposed nationally. Other questions of overlap[80] could concern how rules on market concentration (Art. 21 et seq. EMFA Proposal) relate to existing national rules[81] on transparency of media ownership in transposition of the AVMSD (Art. 5(2) AVMSD).[82] Requests for enforcement of obligations by VSPs sent from one national regulatory authority to another as foreseen in Art. 14 EMFA Proposal are closely connected with the general VSP obligations according to Art. 28b AVMSD which again are dependent on the respective national transposition.

This brief illustration of overlaps and areas of potential tension serves the purpose to show that more attention needs to be given on how to resolve these interactions on regulatory level in order to create not only coherence but also legal certainty for providers and the regulatory authorities when enforcing the law. Until now, most of the mentioned legal instruments only rely on a simple 'without prejudice'-rule when it comes to stating their interrelation to the AVMSD and other secondary law. Art. 2(4) DSA, for example, states that the DSA is without prejudice to the rules laid down by other Union legal acts regulating other aspects of the provision of intermediary services in the internal market or specifying and complementing this Regulation, in particular Directive 2010/13/EU. At first glance, this appears to give a clear priority in the relationship in the sense of a primary lex specialis (AVMSD) versus a lex generalis (DSA), but a closer look reveals the watering down of this seemingly clear rule: for example, Recital 68 no longer speaks of 'without prejudice' but of the DSA "complementing" the AVMSD, and Recital 10 stipulates that, to the extent that Union legal acts (such as the AVMSD) pursue the same objectives as those laid down in this Regulation, the rules of this Regulation should apply in respect of issues that are not addressed or not fully addressed by those other legal acts

80 See on this in general but not specifically with regard to the EMFA Proposal *Pisarkiewicz/Polo*, Old and new media: the interactions of merger control and plurality regulation.

81 Extensively *CMPF/CiTiP/IViR/ SMIT*, Study on media plurality and diversity online, pp. 202 et seq.

82 See on this *Cappello (ed.)*, Transparency of media ownership; *Cappello (ed.)*, Media ownership – Market realities and regulatory responses; On national implementation cf. *Deloitte/SMIT*, Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD), pp. 127 et seq.; cf. also *Seipp/Helberger/de Vreese/Ausloos*, Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law.

or for which those other legal acts leave Member States the possibility of adopting certain measures at national level. This reads more like a collision rule, which ultimately gives priority to the DSA and leads to the fact that supervisory authorities need to elaborate on the purpose of the specific rule of the AVMSD before taking action themselves or turning the matter to the Digital Services Coordinator in their Member State (if the DSC differs from the authority).

Similarly, the Political Advertising Proposal contains in its Art. 1(4)(f) a 'without prejudice'-rule to the AVMSD as well while at least picking up possible tensions in Recitals 58 and 60 by suggesting that Member States "may designate, in particular", the national regulatory authorities or bodies under Article 30 AVMSD for the oversight of the proposed Regulation and pointing to ERGA in light of making the best use of existing cooperation structures. The CSAM Proposal also contains the rule that it shall not affect the rules laid down by the AVMSD, whereby Recital 7 CSAM Proposal, differently worded, again speaks of "without prejudice". The TCO Regulation is clearer: According to Art. 1(5), the TCO Regulation generally shall be "without prejudice" to the AVMSD, and specifically the latter shall "prevail" when a situation concerns audiovisual media services as defined by the AVMSD. This collision rule is put in more concrete terms in Recital 8 by stating that in conflict situations AVMSD has primacy. At the same time, nonetheless, the obligations of other providers, particularly VPSs under the TCO Regulation, shall remain unaffected. Finally, the EMFA would amend the AVMSD with regard to institutional structures, but there is no general 'shall-not-affect rule' in relation to the substantive provisions of the AVMSD, while explicitly only institutional rules of the AMVSD are being changed. On the other hand, Art. 1(2) provides for such a clarification vis-à-vis the DSA, so that shortcomings of the already uncertain relationship with the AVMSD could be further fostered after enactment of the EMFA.

IV. Scenarios for Illustration

The following (fictitious) scenarios are introduced to illustrate pressing issues when applying the currently valid law. They pick up in a more concrete form the challenges described above. Subsequently, in this study they will be used in the concluding sections to demonstrate how changes to the legal framework could improve the situation on how to tackle these types of situations.

Scenario 1:

Provider X operates an online platform XYXYX as a website on which users can freely upload audiovisual content generated by them. The content made available is exclusively of a pornographic nature, which is the focus of the platform's design and description. The platform offers the content in a categorised manner, includes search functions and makes recommendations for specific content to users entering the platform. The text content of the website is entirely in the language of EU Member State B including for the majority of the titles and descriptions of the videos, which are created by the users when uploading the content. Before users accessing the platform XYXYX can watch a video for the first time, they are asked to confirm that they are at least 18 years old by clicking the button "OK" following the text box indicating this question; there are no further measures foreseen for age verification or limitation of access to any of the content made available on XYXYX. The imprint of the website lists company X as provider of the website, which has its registered office in EU Member State A. In EU Member State B, the website is available under the top-level domain of ".b" (XYXYX.b).

Scenario 2:

Broadcaster C is based in State D, which is located outside of Europe. It is directly financed by State D, and it is openly communicated that D has the power to take editorial decisions over the programme of C. C does not have any other subsidiaries or offices within or outside of the EU. C broadcasts in its linear offer a daily programme dealing with current medical and health issues. In several of these programmes, persons declared as medical experts for the field spoke repeatedly about findings that Corona vaccinations cause serious damage to health. This is done without reference to any scientific evidence. They further spread the theory that governments of EU Member States are aiming to reduce population numbers by mandating the use of the vaccinations. Senior management staff of C have publicly declared that government representatives of State D decided on the content of these programmes and selected the 'experts' to be invited. The linear offer of C is broadcast both via satellite operated by a provider in a EU Member State and via a live stream on the internet, which runs on C's own servers. In both ways the offer is available in EU Member State E and the programmes in question have corresponding subtitles in the national language of E.

As a result of those broadcasts there has been considerable unrest among the population of E, and a considerable decline in the vaccination rate in the population could be observed compared to the situation before the programmes were broadcast.

Scenario 3:

Provider F operates a social media platform on which users can network with each other and share content in various forms (text, images, audio, video, combinations thereof) with each other and with the general public. The website on which the platform is operated is accessible in all Member States of the EU, but under different top-level domains. F has its headquarters in state G which is located outside Europe. It operates a European branch in EU Member State H, in the offices of which the design of the offer is decided in a binding manner for the offer as it is put on the market in the EU area under all the top-level domains which are available in the EU Member States, namely those with a country-specific top-level domain. User I, who registered himself as user on the platform with a valid email address under a pseudonym, shares a video which is publicly available and not only to registered users of the platform. In the video he can be seen masked and armed with a rifle and calls in an electronically distorted voice for an attack on the head of government of State J, which is an EU Member State. The real name or even place of residence of the user are not made known on the platform. The video in question is shared multiple times by other users and subsequently spreads widely over the whole network across different EU Member States.

C. The Audiovisual Media Services Directive (AVMSD): The Status Quo

I. The Latest 2018 Revision in a Nutshell

The latest revision of the AVMSD took place in 2018 and was initiated by a Green Paper on media convergence[83]. This Green Paper had raised the question of the timeliness of the existing regulation – which had last been amended in 2007 and codified in 2010 into Directive 2010/13/EU – and in 2016 resulted in a proposal by the European Commission with concrete adjustments to several important elements of the Directive including its scope of application. After an intensive two-year trilogue process, during which significant changes were made to the original text at the initiative of the European Parliament and the Council,[84] the negotiation process ended with the publication of Directive (EU) 2018/1808/EU in the Official Journal of the EU on 14 November 2018.

The significance of this latest reform lies, among other things, in the next step of extending the scope of application to the category of video-sharing platforms (VSP), which were introduced as a new addressee of the Directive.[85] The extensions were made in consideration of the need to adapt the provisions to new technical conditions, in particular in the form of the growing importance of the internet and the convergence of media. Additionally, changes in recipient behaviour and new conditions on the advertising market were further drivers for the revision.

Subsequently, the rules already applicable to video-on-demand services since the previous revision in 2007 were aligned closer with those applic-

83 Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, COM/2013/0231 final.

84 A detailed comparison of the proposed changes both to the recitals and substantive provisions in the Common Approach by the Council and to the Position of the European Parliament in a synopsis to the original proposal of the Commission and the final outcome can be found at *Institute of European Media Law (EMR)*, DSA synopsis (version of 19.05.2022), https://emr-sb.de/synopsis-dsa/.

85 In more detail on this *Valcke/Lambrecht*, The evolving scope of application of the AVMS Directive; more general *Broughton Micova*, The Audiovisual Media Services Directive.

able to the television (linear services) sector, although they were not completely merged. VSPs by contrast are – besides being defined – subjected to certain similar provisions, for example in the area of protection of minors and the general public as well as advertising, but by a separate section from which these other rules are only referenced. The VSP rules recognise that, unlike audiovisual media service providers, VSPs do not (in that function) provide their own content and, as intermediaries, only have limited influence on that content, but also that they are still susceptible to rules due to their organisational control in the way the content generated by others is disseminated and brought to the attention of the consumers.[86]

The new rules of the AVMSD 2018 do not only concern the (more intensive) inclusion of existing and new players but also cover a variety of substantive changes and additions, such as some minor change in wording concerning the jurisdiction criteria with regard to the country-of-origin principle, the significant change of the provisions on the protection of minors and against hate speech, the modernisation of the promotion obligations for European works[87], the tightening of qualitative, and the liberalisation of quantitative, advertising provisions, the so-called signal integrity and the obligation of the Member States to contribute to the promotion of media literacy. In addition, institutional and formal procedural rules were introduced, which in turn have important effects on the overall shape of media regulation. This concerns not only the provisions on the competent regulatory authorities of the Member States, including a commitment to stronger cooperation between these bodies, but also additional dimensions of regulation namely by including self- and co-regulatory approaches, which are encouraged and strengthened by the new rules. Formally such approaches include the use of so-called codes of conduct. These innovations with regard to the institutional structure and cooperation mechanisms, which are especially relevant concerning the approach to

86 In more detail on this *Kukliš*, Video-sharing platforms in AVMSD: a new kind of content regulation; see on the implementation of the provisions for VSPs *Deloitte/SMIT*, Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD), pp. 25 et seq.; *EAO*, Mapping report on the rules applicable to video-sharing platforms – Focus on commercial communications; *EAO*, Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online.

87 In more detail on this *Apa/Gangemi*, The promotion of European works by audiovisual media service providers; *Psychogiopoulou*, The Audiovisual Media Services Directive and the promotion of European works: cultural mainstreaming revisited.

(cross-border) dissemination of audiovisual content, are discussed in more detail below (see D.I).

II. Illegal Content under the AVMSD

In principle the AVMSD still follows the approach of minimum harmonisation as originally foreseen when the Directive was created in 1989. Nonetheless, in the meanwhile the AVMSD has expanded to contain a variety of rules declaring certain content or its dissemination in a certain way to be illegal. It is necessary to analyse these substantive rules in more detail as they are of particular relevance for the question of enforcement concerning audiovisual content. Only those situations that fall within the coordinated field of the AVMSD are covered by the country-of-origin principle and the accompanying rules that require from Member States to guarantee free reception and dissemination and only allow for derogation when following the procedures foreseen in Art. 3 AVMSD. The same applies to the anti-circumvention rule of Art. 4 AVMSD which only limits a Member State if the stricter rules adopted by it concern the coordinated field by the AVMSD. The scope of the rules of the AVMSD also determine whether there are (potential) overlaps with other rules at EU or Member State level and whether and how the relationship between these needs to be clarified in the future for law enforcement purposes.

The most relevant provisions in the present context are those concerning the protection of the general public from certain illegal content (Art. 6), the protection of minors from content that is harmful to them (Art. 6a) and certain qualitative advertising restrictions (Art. 9).

1. Incitement to Violence or Hatred based on Discrimination

According to Art. 6(1) AVMSD, Member States shall ensure that audiovisual media services 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 of Fundamental Rights of the EU. These grounds are 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. Art. 6(1) thus contains an incitement element and a discrimin-

ation element, and only for these situations with a cumulative fulfilment of both elements the rule of the AVMSD applies, which is the case in a comparable way in the self-regulatory approaches for platforms in this area at EU level (EU Code of conduct on countering illegal hate speech online). In other words, content, even if it is repulsive, glorifies violence, is harmful or intensely defamatory, is excluded from the scope of application if it lacks an element of discrimination listed therein. The reason for this threshold is that the AVMSD with this provision aims to protect the general public from lasting dangers, which are only regarded as given if there is not only an incitement to a reaction against persons from a certain group or against the group itself but also this incitement is grounded in one of the specific discrimination reasons mentioned.

Furthermore, Art. 6(2) AVMSD obliges the Member States to ensure that audiovisual media services do not contain public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541[88]. This part of the provision covers the comparatively narrow area of terrorist offences. These are international acts that may seriously damage a state or an international organisation by aiming to intimidate a population, unduly compelling governments or destabilising or destroying fundamental structures of a state. While the actual offence described therewith is narrow, the obligation to stop any provocation extends to any form of making available to the public such content and considers an endorsement of terrorist offences to be sufficient to fulfil the conditions of the provision, which was inserted not only in reaction to a growing number of incidents amounting to terrorist offences in EU Member States but also in light of the proliferation of such content especially disseminated online. The incitement to commit other types of criminal offences, even if these would constitute a considerable threat to public security and order, is not covered by the scope of application of the AVMSD and specifically its Art. 6. In particular incitement to crimes which may be illegal under national criminal law is not addressed by the AVMSD.

88 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, pp. 6–21.

Compared to the previous version of the Directive[89], the scope of Art. 6 was significantly amended in 2018. On the one hand, the incitement part of the provision was extended to cover violence and no longer only hatred, while the grounds of discrimination were furthered in comparison to the previously addressed race, sex, religion or nationality. Both changes were partly motivated by a step towards more coherence with other existing legislation. As Recital 17 underlines, the extension to include violence – being a step even more threatening than hatred – refers to the notion as included in the Council Framework on combating racism and xenophobia from 2008[90]. Since the CFR had become a binding instrument with the Treaty of Lisbon and contains a specific provision of types of discrimination that have been identified as a fundamental rights violation, it was regarded as the appropriate solution to not have a separate list of discrimination grounds in the AVMSD but rely on the one in the CFR and refer to it. The inclusion of public provocation to terrorist offences is a completely new insertion, but as described above it remains limited to a specific context as is generally the case with this content-restricting provision.

What is worth highlighting is that Art. 6 AVMSD since the revision in 2018 now explicitly clarifies that the provision with which Member States are obliged to ensure that providers under their jurisdiction to not include in their services content that fulfils the above mentioned elements is an addition to the basic obligation to respect and protect human dignity. Again, this follows the clear and strong commitment to the protection of human dignity in Art. 1 CFR, which is unconditional, but it is important that there are more reasons for content restrictions to be imposed against service providers than the two cases mentioned explicitly in Art. 6(1) lit (a) and (b). Art. 6(2) AVMSD acknowledges that content restrictions can infringe fundamental rights, namely freedom of expression (as well as freedom of the media), which is why it reiterates that measures to be taken in the context of combatting the illegal content addressed by Art. 6(1) AVMSD need to respect the principle of proportionality and the principles set out in the CFR. The prohibitions concerning incitement to violence or hatred leave

89 Cf. *Institute of European Media Law*, AVMSD synopsis 2018, available at https://emr-sb.de/synopsis-avms/.

90 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).

the Member States little room for manoeuvre, so they are implemented comparatively uniformly on the national level.[91]

2. Content Endangering Minors

With Art. 6a AVMSD, concerning the protection of minors from certain content in audiovisual media services, a uniform rule addressing both linear and non-linear service providers was included. Previous to 2018 there were two separate Arts. 12 and 27 addressing the protection of minors, and the obligations concerning non-linear services were much more lenient than those for television broadcasters. This provision addresses content which is not regarded as illegal per se but only if it is disseminated in a way that it can endanger the vulnerable group which is protected by the provision, namely minors.

According to Art. 6a(1) AVMSD, Member States shall take appropriate measures to ensure that audiovisual media services which may impair[92] 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. This does not only concern the services in their entirety but actually means content offered on such services, as is evident from the last part of para. 1 and from the formulation of Recital 19.

Art. 6(3) AVMSD supplements this with the requirement of providing in addition sufficient information to viewers about the potential impairment. Personal data of minors collected by media service providers (e.g. via age verification mechanisms) shall not be used for commercial purposes (Art. 6(2) AVMSD). Although there are some further details that are laid down in the provision, e.g. in para. 1 the concrete mention of possible ways to avoid the consumption by minors (selecting the time of the broadcast, age verification tools or other technical measures) or requiring a kind of graduated system according to which the application of the measures shall be proportionate to the potential harm of the programme, these provisions leave room to Member States how to ensure an appropriate level of protection for minors. Neither it is specified what is specifically considered to

91 Although some Member States opted to impose stricter rules by including also certain content which is illegal under criminal law. Cf. on this *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, p. 26.

92 The condition of a "serious" impairment was dropped in the 2018 reform.

be detrimental to the development of minors nor is there a fixation of specific groups of minors to be covered. However, it needs to be underlined – and this is especially relevant when it comes to analysing the adequacy of Member State rules and the application of these rules in practice – that the provision does clarify that the most harmful content is identified as being gratuitous violence and pornography. This in turn means that, if the most effective measures have to be taken to ensure that this especially risky content for the vulnerable group is not accessed by its members, the lack of any instruments or measures concerning such content would certainly be inadequate.

Because of the leeway the provision leaves in detail, the systems for the protection of minors from harmful media content differed in the various Member States before[93] the 2018 reform, and they continue to do so[94]. This ranges from differences in the regulatory system in general (partly statutory law, partly co- and self-regulatory systems, partly different regulation of public service and commercial broadcasters or of linear and non-linear offerings etc.) to different approaches to what 'impairment' means (for some Member States 'only' pornography and gratuitous violence, for some 'already' bad language or erotic scenes) and differences in age categories or technical measures provided for. More specifically, while most Member States rely on watershed-based limits accompanied by on-screen icons, content rating and special warnings to ensure the protection of minors in linear services, some go beyond this by establishing additional time limits and more granular age categories and even see need to rely on parental control measures and other technical means.[95] Whether and to what extent these rules also apply to non-linear services also varies greatly in the Member States.[96] For cross-border law enforcement, these differences lead to a situation in which there may not be the same contact persons for each issue, for example, within the authorities convened in ERGA, which has the

93 Cf. *Cappello (ed.)*, The protection of minors in a converged media environment, pp. 25 et seq.; *ERGA*, Report on the protection of minors in a converged environment.

94 Cf. the individual transpositions in the Member States that one can consult in (non-official) English translations at European Audiovisual Observatory, Revised AVMSD Tracking Table (including country fiches), https://www.obs.coe.int/en/web/observatoire/avmsd-tracking.

95 European Commission, Staff working document: Reporting on the application of Directive 2010/13/EU "Audiovisual Media Services Directive" for the period 2014–2019, SWD(2020) 228 final, p. 8.

96 *ERGA*, Report on the protection of minors in a converged environment.

power to initiate enforcement proceedings. In addition, lack of substantive harmonisation of what constitutes potentially endangering content – at least if it is not pornography and gratuitous violence, for which there is also no definition in the AVMSD – can make it difficult in practice to determine whether at all the other regulatory authorities would categorise the content as problematic.

It should be further pointed out that the provision prohibiting data processing is not directly aimed at the protection of minors in the media (otherwise the provision likely would have been formulated more broadly in the sense of a general prohibition of the processing of personal data of minors for commercial purposes) but rather is a protection mechanism in light of data protection rules which was necessitated by the risk situation created with the actual mechanism for the protection of minors in the media. Concretely, such mechanisms, with which, e.g., age-restricted access is enabled concerning content of potentially impairing nature, may come with collection and processing of data, such as the name and age or other personal data of the consumer. For this reason, the definition of a minor for this purpose does not depend on the perspective of the protection of minors in the media but of data protection law, where there is also no uniform definition in the sense of an EU-wide (as mentioned above) or even worldwide uniform age limit.[97]

The protection of minors is further supplemented within Art. 9(1) lit. (e) and (g) AVMSD for the area of advertising: audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages nor cause physical, mental or moral detriment to minors. According to Art. 9(3) AVMSD, codes of conduct, the creation of which the Member States shall foster within systems of self- and co-regulation, shall aim to effectively reduce the exposure of minors to audiovisual commercial communications for alcoholic beverages overall. In the same manner as for Art. 6a AVMSD, further details of this element of protection of minors is provided for in Art. 9 AVMSD: an impairment is in particular deemed to be seen in the direct addressing of minors to buy or hire a product or service

97 Although the GDPR calls for special protection of minors, it does not contain a definition. It only sets a limit of 16 years for the ability to give consent but allows deviations down to 13 years at Member State level, so that very inconsistent rules have emerged in the national area (cf. for an overview https://euconsent.eu/digital-age-of-consent-under-the-gdpr), which cause problems for supranationally operating providers in particular when it comes to implementation.

by exploiting their inexperience or credulity, in the direct encouragement to persuade their parents or others to purchases, in the exploitation of the special trust minors place in parents, teachers or other persons, or by unreasonably showing minors in dangerous situations. Beyond these clarifications there is ample room for implementation by the Member States outside the aforementioned categories on the national level – with the same consequences for enforcement in cross-border cases in the area of advertising.

3. Certain Types of Commercial Communication

Besides the specific protection of minors from certain commercial communications, there is a general restriction on certain types of such commercial communication. These restrictions partly declare some commercial communication illegal per se, while for other legal types of commercial communication there are certain limitations in the way they can be designed and disseminated.[98]

There are a number of different qualitative advertising provisions in Art. 9 AVMSD as well as in Art. 10 (on the recognisability of sponsorship) and Art. 22 AVMSD (on alcohol advertising). In the present context, the provision of Art. 9(1)(c) is particularly noteworthy. It states that audiovisual commercial communications shall not prejudice respect for human dignity, include or promote any discrimination and encourage behaviour prejudicial to health or safety or grossly prejudicial to the protection of the environment. For the first part there is a close link to Art. 6(1) AVMSD, but also the other restrictions aimed at protecting health and the environment address advertising content that is potentially harmful for the public or society. In comparison with other parts of the AVMSD, these provisions are very concrete, addressing very specific behaviours in a harmonised way across the EU. However, the area of advertising, in particular, is characterised by the fact that the objective here is not to disseminate illegal content but always to market services and products in the most attention-grabbing and psychologically incisive way possible. Thus, complaints will regularly concern borderline cases that require the responsible regulatory authorities or bodies to make an assessment, such as whether a commercial commu-

98 Cf. on the novelties under the 2018 reform *Cabrera Blázquez et al.*, Commercial communications in the AVMSD revision.

nication 'promotes' a certain behaviour or whether it only portrays it in a neutral way; another example would be whether a certain representation is discriminatory or only plays on (existing) prejudices. These assessments may vary from one Member State to another and will depend on long-standing interpretation of consumer protection rules.

This can be illustrated by the example of human dignity: although human dignity is globally enshrined in various human rights instruments and national constitutions, or at least recognised by national constitutional jurisprudence, its meaning and interpretation is nevertheless territorially very different because it is shaped by religious, moral and societal traditions.[99] Through its enshrinement in the CFR of the EU, it is also subject to the jurisdiction of the Court of Justice of the EU that already decided on human dignity in cases predating the Charter. In these cases the Court acknowledged that there may be different interpretations of what exactly is covered by human dignity, which is why it refrained from giving more indications than general criteria for interpretation by the national courts[100] without evaluating the specific item of content[101]. This can make it difficult to take a unified position in enforcing the law when regulatory authorities from different Member States are involved.

4. Application of the Rules to VSPs

The three topical areas covered by the provisions mentioned above are by their systematic positioning in the Directive applicable to both linear and non-linear audiovisual media services. With the 2018 revision the legal framework of substantive rules was partly extended to apply also to

99 *Le Moli*, The Principle of Human Dignity in International Law, pp. 352 et seq.

100 For example, in its judgement of 17 February 2016 (*Sanoma Media Finland – Nelonen Media*, ECLI:EU:C:2016:89), the CJEU held that for television advertising and teleshopping to be readily recognisable and distinguishable from editorial content as required by the AVMSD it might be sufficient for providers to use only one of the means referred to in the AVMSD (optical, acoustic or spatial).

101 Cf. for example CJEU, Case C-36/02, *Omega*, ECLI:EU:C:2004:614. In this judgement, the CJEU ruled that restrictions on the freedom to provide services are possible if they are based on public interests that are motivated by the protection of human dignity. The case concerned the ban on so-called killing games in laser arcades, which German authorities had imposed on the grounds of violation of human dignity. The CJEU did not comment on the criteria as to whether this actually constituted a violation of human dignity but left this to the national courts.

video-sharing platforms (VSPs) as mentioned above.[102] Besides a specific jurisdiction provision in Art. 28a AVMSD, the following provision lays down the substantive requirements that Member States have to extend to VSPs.

According to Art. 28b(2) subpara. 1 AVMSD, VSP providers have to comply – in the same way as audiovisual media services – with the rules on audiovisual commercial communication laid down in Art. 9(1) AVMSD whenever the respective audiovisual commercial communications is marketed, sold or arranged by them. Concerning user-generated content which is disseminated on VSPs, the AVMSD expects a lower level of compliance, thereby recognising the limited control VSP providers have on such content in contrast to audiovisual media service providers that fully control (with editorial responsibility) the composition of their programmes. Therefore, Member States have an obligation to 'only' ensure that VSP providers take "appropriate measures" to protect certain groups or all viewers from certain risks that are addressed by the AVMSD.

The protection obligation extends to the protection of minors as well as the general public from programmes, user-generated videos and audiovisual commercial communications in the same way as it is foreseen for audiovisual media services in Art. 9(1), Art. 6a(1) and Art. 6 AVMSD. With regard to Art. 6(2), Art. 28b AVMSD goes even beyond that including besides terrorist offences also other criminal offences under Union law, namely offences concerning child pornography as set out in Art. 5(4) of Directive 2011/93/EU[103] and further offences concerning racism and xenophobia as set out in Art. 1 of Framework Decision 2008/913/JHA.

Art. 28b(3) AVMSD contains some concretisations for measures which can be regarded as 'appropriate' by stating that appropriateness shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected, and the rights and legitimate interests at stake; in addition it provides a list of possible measures to be implemented by VSP providers (e.g. age verification and labelling mechanisms, parental control and notification/flagging systems). In a similar way as for the protection of minors, the measures

102 Cf. on this and the following also *Kukliš*, Video-sharing platforms in AVMSD: a new kind of content regulation.

103 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, pp. 1–14.

implemented must be put in relation to the risks to be addressed. And in result, the AVMSD leaves the specifications up to the Member States and, furthermore, encourages them to the use of co-regulation systems by doing so, which means a lower level of uniformity across Member States can be the consequence.

A first look at the implementations of the VSP provision on national level shows that the assessment of appropriate measures to be taken is, on first level, essentially passed on to the providers.[104] Most Member States laws are very close to the wording of the AVMSD (German community of Belgium, Bulgaria, Cyprus, Greece, Lithuania, Luxembourg and Malta), i.e. obliging VSP providers to take appropriate measures and, by taking up the list of the AVMSD, providing for such possible measures. Some Member States opted to oblige VSP providers to apply certain specific measures from within those listed in Art. 28b (while omitting others) as a minimum requirement (e.g. French Community Belgium or Finland), some detailed the technical measures (e.g. Austria for reporting mechanisms and promotion of media literacy or Hungary clarifying the interrelation to Art. 15 e-Commerce Directive), and a few Member States adopted stricter rules (in some Member States, such as Finland, Germany or Sweden, the duties of VSPs are also (partly) extended to certain content that is prohibited under (national) criminal law). The roles assigned to regulatory authorities in this process are different as well. They diverge between involving them on the 'first level' of the assessment of appropriate measures, i.e. by conferring to the regulatory authorities statutory powers of concretisation or giving them an essential role in the drawing of codes of conduct (ex ante), and involving them on the 'second level', i.e. by tasking them with overseeing

104 Cf. on this and the following the overviews of national implementations on VSP rules in *Deloitte/SMIT*, Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD), pp. 83 et seq.; *ERGA*, Guidance and recommendations concerning implementation of Article 28b, pp. 17 et seq.; *EAO*, Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online; *EAO*, Mapping report on the rules applicable to video-sharing platforms – Focus on commercial communications; for a more detailed insight *EAO*, Interactive searches across the national transpositions of the Audiovisual Media Services Directive (AVMSD Database, https://avmsd.obs.coe.int/).

the measures taken by VSP providers and assessing their appropriateness (ex post).[105]

Concerning VSPs, the illegality of certain content can be regarded differently at national level and therefore also in the enforcement of the law. Although key elements for illegality are prescribed by the AVMSD, including which elements of protection are relevant (protection of minors, of the general public, against certain audiovisual commercial communication), differences can result from the margin in implementing the rules in consideration of own constitutional traditions and national legislative solutions. Especially which concrete measures can be expected from the VSP providers as 'appropriate' depends on the national framework; thus, the providers' assessments based on this and ultimately – at least in principle – on the evaluation of the measures by the regulatory authorities of the Member State in which the respective provider is established.

III. The Country-of-Origin Principle and Derogation Procedures – Art. 3 AVMSD

1. Background to the Country-of-Origin Principle

a. Introduction of an explicit rule to devise responsibility of Member States

When the European Economic Community set out to harmonise certain rules of Member States concerning television broadcasting in order to act towards the creation of a single market of television media content, a necessary precondition was seen in offering legal certainty to those providers that would utilise the new possibilities. Based on a market situation in which broadcasters needed licences – issued by Member State authorities – as a basis for their offer of television services to the viewers, the compromise between harmonisation of rules and respecting Member States' retained powers for regulating the media was found as follows: every provider with establishment in one of the Member States was to be treated as falling under the jurisdiction of this Member State irrespective of the service offered and to which populations it was addressed. That Member State would then

105 For a regulatory perspective on issues in the context of implementation see *ERGA (Subgroup 3)*, Implementation of the revised AVMS Directive; *ERGA (Subgroup 3, Taskforce 2)*, Video-Sharing Platforms under the new AVMS Directive.

be able – and at the same time be obliged – to guarantee compliance of the provider with the applicable rules, as it would have a direct access to the provider both in the license award procedure and later in monitoring the service. All other Member States, on the other hand, would be in a situation to accept a reception and transmission of such services on their territory even without being able to fully apply their own legal framework to it, because the harmonisation as achieved with the Television without Frontiers Directive[106] would ensure that some fundamental rules are to be respected in all Member States.

In legal terms, this approach was achieved by laying down as cornerstone of the TwF Directive, which was retained ever since and is still the basis of the AVMSD, the country-of-origin principle (COO).[107] Art. 2(1) AVMSD states accordingly that a provider of audiovisual media services – since 2007 this extends beyond linear television services also to non-linear, i.e. on demand services – that falls under the jurisdiction of a Member State based on the criteria laid out in the following paragraphs must, in principle, comply "only" with the rules of its "home Member State". Whenever it is in conformity with that legal framework it is not only authorised to disseminate its services all across the single market, but the other Member States may not subject the provider to rules applicable to those providers under its own jurisdiction, e.g. licensing requirements. Importantly, the formulation of this rule in Art. 2(1) AVMSD does not take the perspective of the providers profiting from the legal certainty the country-of-origin principle gives them; instead it emphasises the obligation of the competent Member State to ensure that the providers under its jurisdiction "comply with the rules of the system of law applicable to audiovisual media services".

However, the country-of-origin principle was from the very beginning of its introduction conditional on several requirements and not designed as being absolute in its validity or applicability across all elements of regulation of providers that, in principle, are covered by the country-of-origin principle. On the one hand, the country-of-origin principle limits other

106 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, pp. 23–30.

107 Extensively on the country-of-origin principle *Cole*, The Country of Origin Principle; *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp. 110 et seq.; *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, pp. 143 et seq.

Member States than that of establishment in respect of action against a provider only in the areas harmonised by the Directive, or in the words of the Directive the "fields coordinated" by the TwFD/AVMSD. On the other hand, reliance on the country-of-origin principle necessitates actual compliance with the legal framework of the country of establishment – which includes the Directive's provisions that have to be transposed into the national frameworks of all Member States[108] – and on the side of the Member State concerned the actual monitoring and enforcing of the rules. In case of a failure to do so or if there are risks for overriding public interest goals posed by infringements of service providers, the Directive consequently introduced exceptional measures that Member States other than the establishment Member State can take. This backstop was deemed necessary so that all Member States, based on their responsibility to address risks to fundamental rights and fundamental values, would be able to deal with dangers coming from cross-border dissemination of audiovisual content even though in principle another Member State should be in charge of that specific provider and its compliance with the rules.[109]

In view of this system, it is evident that the assignment of jurisdiction, i.e. the decision about which Member State is in charge of a specific provider within the single market, is key for the functioning of the country-of-origin principle. Therefore, over time the criteria with which jurisdiction is to be established according to Art. 2(3) and (4) AVMSD were refined, partly integrating the interpretation by CJEU jurisprudence.

b. The consequence of the country-of-origin principle in the AVMSD

As mentioned, several consequences are attached to the country-of-origin principle in the AVMSD. A provider active on the single market and with establishment in one of the Member States receives legal certainty as to which 'system of law' it has to comply with. In a certain way, the choice of establishment – if it is not a circumvention situation (see below C.IV.2) – is a choice of law.[110] Although this choice leaves a variety of different legislative frameworks to choose from, each of those is comparable in that

108 Cf. on this *Cole*, The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform, p. 5.

109 This system was extensively presented in *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, pp. 53 et seq.

110 See on this also *Harrison/Woods*, Jurisdiction, forum shopping and the 'race to the bottom'.

the main elements of the AVMSD are transposed within the margin left to the Member States but which nonetheless lead to a certain uniformity at least in the wording of the applicable laws.

In addition to the provider's perspective, the most important consequence is the responsibility created by the choice of establishment of the provider on the side of the Member State that automatically becomes competent. The Member States cannot choose for which providers they want their framework to apply, but the establishment – according to the criteria of the AVMSD – by the provider automatically leads to jurisdiction and with it to the responsibility to actively ensure compliance of that provider with the standards deriving from the AVMSD itself. Thus, these standards reflect not only the minimum harmonisation level achieved by the AVMSD but also the minimum compliance assurance that Member States have to realise for 'their' providers. This does not hinder the introduction of stricter rules than the minimum harmonisation even in the fields that are harmonised by the Directive – a possibility explicitly authorised under Art. 4(1) AVMSD (see further below C.IV). These rules may then only be directly applied to the providers under own jurisdiction. Member States are hindered by the country-of-origin principle, however, of undermining the minimum harmonisation level by either not having a sufficient (in view of the transposition requirement) legislative framework or by not enforcing it efficiently against providers under their jurisdiction.

In view of Member States that are not directly competent for a specific provider because it does not fall under their jurisdiction, the country-of-origin principle has the consequence of not being able to impose its own legal framework to these providers. This consequence of the principle is limited as was mentioned above. The restriction of imposing measures against such providers only concerns the coordinated fields of the Directive, and, more importantly, the Directive itself foresees exceptions to the application of the country-of-origin principle and includes two detailed procedures for measures that the 'receiving' Member State can take based on content emanating from a provider under the jurisdiction of another Member State.

For providers not established in the EU and therefore not falling under the mechanism in Art. 2(3) (see on this below C.III.2.c), there is no limitation for the jurisdiction of each Member State; as a consequence they can apply any rules they may have set up for such information society services.

c. Other codifications of the country-of-origin principle

As has been presented in previous studies,[111] the country-of-origin principle was not only enshrined in the AMVSD but also in other legislative acts of relevance for the audiovisual media/content dissemination sector.[112] Although the application of the fundamental freedom to provide services does not necessitate per se the application of a country-of-origin principle, restrictions of cross-border trade even without an inclusion of the country-of-origin principle in secondary law would need to be proportionate and comply with Union law more generally, in particular with fundamental freedoms.[113] In case of inclusion of the country-of-origin principle in a given piece of legislation, the question of assignment of responsibility to a Member State and the limitation for others is more clear.

Firstly, in the context of this study it is relevant to question whether the rule was extended to VSPs when these were included in the scope of application of the AVMSD with the revision in 2018. Although the scope of the Directive was indeed extended to include these new types of providers, they are separately addressed in an own chapter (IXa.). Besides the relevant definitions for these actors in Art. 1 AVMSD, there are no further references to VSPs at the beginning of the Directive. Chapter II with the general provisions clearly limits these provisions to audiovisual media services and thereby a category distinct from VSPs. For VSPs there is therefore a specific jurisdiction rule included in Art. 28a AVMSD. Paragraph 1 of that provision addresses the regular case according to which the provider falls under the jurisdiction of that Member State in which it is established. For the purpose of the notion of establishment for these types of providers a reference is made to Art. 3(1) ECD, which – as will be shown below – includes the country-of-origin principle read in connection with Art. 3(2) ECD.

For VSPs without an establishment in an EU Member State, with Art. 28a (2)–(4) AVMSD the Directive sets up a specific rule, with which a broad interpretation of what other links of providers can be used to assume an establishment. Mainly this relates to other parts of an undertaking that may

111 *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp. 173 et seq.; *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, pp. 143 et seq.

112 See more generally on the country-of-origin principle and its inclusion in legislative acts concerning other sectors *Sørensen*, in: Nordic & European Company Law, LSN Research Paper Series No. 16–32.

113 More detailed *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, pp. 144 et seq.

not be offering the VSP service but being addressable by a Member State due to an establishment which then is used to bridge to the actual VSP service provider within that larger undertaking or group. Similar to the multi-layered rules on how to determine which Member State is actually in charge in case of several establishments of audiovisual media service providers, the rule for VSPs clarifies these different combinations. Originally, the jurisdiction rule for VSPs was included as the legislators wanted to avoid a situation in which VSPs, which in the most important cases were originally not EU-based companies, would be able to evade the new rules by not establishing themselves in an EU Member State while being active there with other economic activities. Recital 44 underlines the goal of ensuring that "it is not possible for an undertaking to exclude itself from the scope". In practice, since the transposition of the AVMSD in the Member States this residuary clause for non-established companies has not become very relevant, as the providers that were in focus when creating the new rules – but also many others – have actual establishments in one of the EU Member States for their VSP activity, which is why no other 'deemed to be established'-link is needed.

Therefore, although the VSP jurisdiction provision is separate from the rules for audiovisual media services, with its reference to the ECD it follows the same idea of one national jurisdiction, the one where it is established, to apply to a given VSP.[114] In that way the approach resembles the country-of-origin principle. This observation is underlined by the reference to Art. 3 ECD in order to determine when a VSP is deemed to be established. Besides the AVMSD, it is, secondly, the ECD that has prominently featured in its 'internal market clause' the country-of-origin principle and the limitation in Art. 3(2) ECD that Member States may not restrict services falling under the scope of the ECD and coming from other Member States. Although in detail the enshrinement of the country-of-origin principle is different here from the AVMSD, for the main elements it is the same approach.[115] The starting point is the assignment of ensuring compliance with the ECD to the Member State that is the country of establishment – origin – of the information society service. This shall again lead to legal certainty for the providers which can then offer their services across the

114 Cf. also *Kukliš*, Video-sharing platforms in AVMSD: a new kind of content regulation, p. 305. Cf. also *Cavaliere*, Who's sovereign? The AVMSD's country of origin principle and video-sharing platforms, pp. 407 et seq.

115 Cf. the comparison made in *Cole*, The Country of Origin Principle; cf. also *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp. 99 et seq.

single market on the basis of compliance with the rules of their home country, including the rules resulting from very first harmonising steps for e-commerce services achieved by the ECD. The non-interference by other Member States is the other consequence, but also here there are exceptions to the rule and Member States may take measures against providers not under their jurisdiction. For providers not established in a Member State of the EU, as is the case for the country-of-origin principle in the AVMSD, there is no limitation for the jurisdiction of each Member State; therefore these Member States can apply any rules they may have set up for such information society services.

The internal market clause of the ECD and the country-of-origin principle laid down therewith are not affected by the entry into force of the DSA. Although the Regulation amends certain parts of the Directive and deletes them, this only concerns the liability privilege provisions of Arts. 12 to 15 ECD, as Art. 89 DSA shows. In addition, as the substantive rules are laid down in the DSA itself in binding form, there is no question of inclusion of a country-of-origin principle in regard to substantive rules. However, the question of establishment is still relevant in a comparable way as with the country-of-origin principle, but here – as Art. 56(1) DSA states – in order to determine which Member State has the power to supervise and enforce the rules of the DSA. In this light, it is rather a procedural than a substantive jurisdiction choice that can be made by the providers when deciding on their main establishment (for EU-based providers).

2. Current Scope of the Country-of-Origin Principle

a. The determination of jurisdiction concerning a provider

As a basis of the country-of-origin principle, rules on clearly determining jurisdiction are essential. Art. 2(2) AVMSD relies for this either on an establishment (further detailed in para. 3) or – only in a subsidiary manner if the criteria of para. 3 are not met – on the criteria which can be applied to providers not established in the EU under certain conditions (further detailed in para. 4).[116]

116 Cf. extensively on the following *Cole*, The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform; *Weinand*, Implementing the EU Audiovisual Media Services Directive, pp. 57 et seq.

As the standard case to decide on jurisdiction, the provision sets the criterion of the establishment of the provider.[117] This is defined in para. 3 and contains a number of constellations reflecting that many undertakings active in the media sector are active in multiple territories and therefore often have company structures with several offices in different Member States. In principle, jurisdiction is determined by the place of establishment, whereby the location of the media service provider's head office is decisive in different variations. Establishment according to Art. 2(3) has two cumulative elements: the head office of the provider and the place where editorial decisions about the audiovisual media service are made. There are different constellations of these two elements possible, depending on whether both are located in one Member State, in two different or several Member States or when decision-making takes places outside of the EU.[118] If an establishment is not clear by referring to the seat, then one has to rely on the criterion on the relevant workforce's location, and under certain circumstances it then depends on the place of first activity of the provider.

Only for situations in which companies operate in some way or other within the EU but without having an establishment according to Art. 2(3), a set of ancillary or subsidiary criteria are applicable as detailed in Art. 2(4). These technical criteria were mainly meant to target the situation of content disseminated on the territory of the EU which had emanated from third countries and for which, due to the use of technology linked to a Member State, there is at least a potential avenue for law enforcement. It was not originally meant to establish a way for any third country provider to be able to use the single market dissemination possibilities without actually being integrated in the market of a Member State. In cases where the dissemination infrastructure is located within or attached to a EU Member State, it is regarded to be appropriate to be able to apply the rules of the Directive, e.g. concerning prohibition of incitement to hatred as a public interest goal. Specifically, the technical criterion refers either to the provider using a satellite up-link in a Member State or a satellite capacity appertaining to a Member State.

If neither of those criteria bring a clear result on establishment, the Directive refers in an ancillary way to the notion of establishment as men-

117 This was already made clear by Recital 10 of Directive 97/36/EC: "establishment criterion should be made the principal criterion".

118 Detailed overview *Cole*, The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform, pp. 30 et seq.

tioned in the TFEU in the chapter on the fundamental freedoms. Finally, para. 6 excludes from the scope of the Directive services that are meant for reception outside the EU and cannot be received by standard equipment in an EU Member State, which then also excludes the assignment of a country-of-origin principle.

The revision of 2018 brought some marginal changes to the establishment criteria, in the context of which part of the workforce is potentially to be considered in the determination of whether a main establishment is given (the 'programme-related' workforce) and by inserting a definition of 'editorial decision', which is in line with the previous understanding of this element of the jurisdiction criteria.[119] Besides these clarification, the important change by inserting Art. 2(5a)–(5c) AVMSD was the inclusion of a procedure with which Member States regularly have to check about their jurisdiction – in order to ensure they fulfil their supervision tasks for all relevant providers –, make the jurisdiction publicly known and, if necessary, rely on a newly created conflict-resolution mechanism about jurisdiction matters involving ERGA.

b. The necessary distinction between EU-based providers and third country providers

One important aspect of the country-of-origin principle as it is included in the AVMSD needs to be highlighted as it is connected to some recent challenges of the application of the Directive. The country-of-origin principle is structured in a way that not only providers with a regular establishment in one of the possible countries of origin, the states to which the AVMSD applies, can benefit from the principle but under certain narrow conditions also providers from third countries, as was explained above. This choice of regulatory approach was motivated in view of ensuring some form of reaction to content from such providers that is available widely across the Member States of the EU and uses a technology in dissemination that gives the actual possibility to intervene through one of the Member States. As such providers do not otherwise fall under the scope of the Directive, they therefore do not necessarily have to respect (comparable) standards concerning the content offered in their services, since this is depending on the legal framework (and enforcement of it) in their originating countries.

119 Cf. on that *Cole*, The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform, pp. 46–48.

The extension of jurisdiction criteria was regarded to be an appropriate answer to this. In the currently applicable form, the subsidiary technical criteria are, however, limited to satellite dissemination of services as both elements of Art. 2(4) AVMSD refer to this technology.

If a third country provider is regarded to fall under the jurisdiction of a Member State due to this technical link to the single market, there is a consequence which was not the intention when including the technical criteria. Those providers can fully benefit of the free movement of their services in the single market although they regularly do not fall under the same type of monitoring than providers 'properly' established in the Member State in question. In other words, the narrow entry door of using a satellite-related dissemination with a connection to one of the Member States opens widely to a use of market freedoms that is equal to those providers that are fully under the obligations of the provisions of the AVMSD and its transposition in the national law of the Member State of establishment. The latter may even depend on a license or other authorisation before providers can offer their service. Any other requirements that third country providers using satellite technology may have to comply with, for example in order to be allowed to use a satellite service by an undertaking in one of the Member States, depends on whether or not there are specific rules for this in the domestic law. There is no detailed harmonisation of this aspect in EU law. The first technical criteria refers to the use of a technology, the uplink, which is volatile, can change relatively easy, may not even be entirely clear at any given time (e.g. if several uplink agreements exist) and is readily accessible on the market. The second technical criteria is in practice of high relevance only for two of the Member States, as satellite capacity service providers in France and Luxembourg offer transponder services to the market.[120]

From the perspective of regulatory authorities concerned, dealing with illegal content disseminated by third country providers via relevant satellite technology is potentially problematic for several reasons. There may already be a question of competence to act, as the content providers themselves do not have a direct relationship with that authority.[121] In terms of focus of attention when monitoring the domestic market for audiovisual content

120 Extensively on this *Cole*, The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform, pp. 36 et seq.

121 For example, in the context of possible consequences to be requested from a satellite company in France concerning the economic sanctions of the EU against the providers of Russian programmes, the French regulatory authority was in doubt

services – assuming a clear competence to do so –, typically such offers will not have the same significance as, for example, the main linear and non-linear services from providers falling under jurisdiction of that Member State or other EU Member States due to direct establishment. Therefore, the capacities of an authority in monitoring and enforcing might rather be concentrated on this main category of providers. It needs to be further considered that measures potentially taken by an authority will not be directed against the actual provider of the illegal content but a technical intermediary which may lead to a higher proportionality threshold and which may be technically difficult to achieve for the provider, e.g. in case of an order to interrupt dissemination of a programme which is included in a package with other (not affected) programmes for which a transponder capacity has been rented. Finally, and from the perspective of other Member States and their regulatory authorities, if they detect the illegality of content by a provider falling under the jurisdiction of a Member State due to the technical criteria, the AVMSD does not contain a procedure with which that Member State or its regulatory authority can be addressed resulting in a mandatory response.

The very different situation of third country providers and regularly established providers in EU Member States as illustrated here results in a clear distinction of the country-of-origin principle as applied to them.[122] The current rule in the AVMSD does not reflect this distinction; nevertheless it has consequences in dealing with current challenges, as will be further explained below.

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whether it was competent to order the interruption of the satellite service for providers covered by the sanction. Its competence to act was clearly confirmed, however, in a ruling of the Conseil d'état (Decision of 9.12.2022, no. 468969; https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-12-09/468969). The French regulatory authority followed the court's decision in its final decision of 14.12.2022 (https://www.arcom.fr/nos-ressources/espace-juridique/decisions/decision-du-14-decembre-2022-mettant-en-demeure-la-societe-eutelsat-sa). For an overview of the sanctions against RT and Sputnik see *Lehofer*, EuG: Keine Nichtigerklärung der Sanktionen gegen RT France; *Lehofer*, Kurzes Update zu den Sanktionen gegen russische Staatsmedien; *Lehofer*, Überwachen, Blocken, Delisten – Zur Reichweite der EU-Sanktionen gegen RT und Sputnik; *Cabrera Blázquez,* The implementation of EU sanctions against RT and Sputnik.

122 Cf. also *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, pp. 15 et seq.; *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive (Policy Recommendations), pp. 3 et seq.

c. Specific challenges

(1) The actual jurisdiction criteria and their application

The application of the jurisdiction criteria, namely whether the conditions of an establishment in the meaning of Art. 2(3) AVMSD are fulfilled, have worked well in practice over time, especially since the early jurisprudence of the CJEU on this question was integrated in the first revision of the TwF Directive. There have been a few instances where the establishment decision by a Member State was challenged by others, e.g. because it was questioned whether the head office of a specific provider was the place where the editorial decisions are taken.[123] But in the vast majority of cases, the establishment criteria brought clear results. With the insertion of an additional definition in the AVMSD 2018 on "editorial decision" in Art. 1(1)(bb) and with the addition of the programme relevance of the concerned workforce when applying the criteria, the interpretation of the previous provision was confirmed. More transparency in practice will be created by the publicly available database listing jurisdiction over providers, because potential double-jurisdiction instances will be immediately visible to the Member States, regulatory authorities, ERGA and the Commission, as they become evident when entering the data about jurisdiction decisions. Therefore, Art. 2(5c) also introduced a formal procedure for resolving possible conflicts of jurisdiction, which with involvement of ERGA leads to a final allocation of jurisdiction in such cases.

The jurisdiction list, which does not only exist for audiovisual media service providers according to Art. 2(5b) AVMSD but also for VSPs according to Art. 28a(6) AVMSD, will serve an additional purpose. It will be visible which Member State is in charge of a specific provider and therefore has the obligation to ensure that that provider complies with the legal framework applicable. This can substantiate further any request from one Member State (through its regulatory authority) to another (or its regulatory authority) to take action against a provider under its jurisdiction. In view of an effective enforcement of the minimum harmonisation standards of the Directive also concerning VSPs and on-demand services which may not be mainly active in the country of establishment and for which typically no

123 See, for example, the underlying dispute to the (inadmissible) preliminary reference procedure in CJEU, case C-517/09, *RTL Belgium SA*, ECLI:EU:C:2010:821. The same constellation has been brought to the attention of the Court again recently in the pending cases *RTL Belgium and RTL BELUX*, C-691/22 and C-692/22.

licensing requirements are foreseen – this in turn is the explanation why in the past there has been less regulatory scrutiny in comparison to linear providers –, this visibility of jurisdiction is a first important step to avoid that jurisdiction responsibilities are not assumed by a Member State.

In applying the jurisdiction criteria, it is important to follow the hierarchy of the criteria. Beside the fact that the technical criteria of Art. 2(4) AMVSD are subsidiary to those in Art. 2(3) AVMSD, Art. 2(3) (a) AVMSD, which is based on establishment, is the regular case if both relevant elements of the provider are present in the same Member State. If such a constellation is applicable, there is no need to check for any of the other criteria. More importantly, the criteria are based on objective factors and not a subjective understanding of the provider, which leads to an automatic establishment of a provider if the criteria are fulfilled. Attempts at disguising an actual establishment by claiming not to be present in one of the EU Member States in order to be able to rely on the technical criteria only to benefit from access to the single market are therefore not possible under the provisions of the AVMSD.[124]

(2) The situation of third country providers or licences

As described above, although the AVMSD in principle is aiming at regulating providers established within the EU Member States, through the technical criteria there is an extension up to a certain extent to third country providers if these are using a satellite dissemination with a link to a Member State and thereby being deemed under jurisdiction of that Member State. The jurisdiction system established by the Directive was initially not designed for providers who broadcast from outside the EU, which is why Member States themselves remain responsible for such offers, for example, in case they intend to take action against illegal content. It is

124 An example of such an attempt was the activity – before suspension of all channels due to the sanction decision of the EU – of RT DE which claimed it would not fall under jurisdiction of Germany and did not have to apply for a license in order to be able to broadcast. The decision of the regulatory authority was confirmed by the administrative court of Berlin in interim proceedings (decision of 17.3.2022, no. 27 L 43/22, ECLI:DE:VGBE:2022:0317.27L43.22.00). See for a summary of the case *Medienanstalt Berlin-Brandenburg*, press release of 18.3.2022, https://www.mabb.de/uber-die-mabb/presse/pressemitteilungen-details/verwaltungsgericht-berlin-bestaetigt-mabb-im-fall-rt-de.html.

only different in case there is a technical link, which is actually a simulated or artificial link to the jurisdiction of a Member State. Providers being linked to the scope of the AVMSD 'only' by using a satellite uplink or capacity do not subject themselves to the full media law regime of the Member State which has jurisdiction in contrast to the situation if they had a regular establishment there. In practice, only two Member States, or more specifically two satellite providers located in those two Member States, are the ones that can create the link to the satellite capacity and thereby jurisdiction under that criterion. The administrative practices in those two Member States differ concerning the way the satellite providing companies are treated, at least until now.[125]

With regard to the satellite uplink criterion, many Member States can be concerned. The problem here is that the uplink can be volatile, meaning it can change relatively easy from Member State to Member State and also in multiple instances. Renting uplink capacities is relatively easily accessible. As a result of these factors, it can become unclear in practice which Member State can claim, and has to apply, jurisdiction to a given audiovisual media service provider if the uplink is the only criterion creating jurisdiction. It is therefore not surprising that in such uncertain cases the main focus of regulatory authorities – if they have power of approaching the service providers of the uplink (or the above-mentioned satellite capacity providers) at all – is not on these services but on their domestic services, respectively those for which they have clear responsibilities in their monitoring and enforcement activity.

In addition, a problem is to be seen in the fact that these exceptional constellations that create jurisdiction without an actual establishment only refer to one specific dissemination technique. The creation of jurisdiction is limited to the context of satellite dissemination, and equivalent rules to deal with non-EU providers in the online dissemination of audiovisual (media) content are missing. Thus, it is only in the case of dissemination via satellite that Member States, at least potentially, can exceptionally derogate from applying the country-of-origin principle by obstructing the free reception and retransmission of an audiovisual media service (see below C.III.3) even if it is a third country provider which falls under jurisdiction of another Member State due to the technical criteria. No such possibility exists under

125 Cf. for recent developments in France concerning the undertaking Eutelsat above fn. 121.

the AVMSD in case of online dissemination. In such cases restrictions to the freedom to provide such services across borders – if coming from another provider of another Member State and only if 'properly' established there, as clearly derives from Art. 3(1), (2) in combination with Art. 2(c) ECD – could only be taken under the procedure of Art. 3(4) and (5) ECD.[126] These procedures do not necessarily fall under the competence of the regulatory authorities for audiovisual media services so that the two approaches under AVMSD and ECD already fall into different enforcement systems. As the substantive provisions of the AVMSD do not make a distinction between methods of dissemination (if an audiovisual media service is concerned and it falls in the same category as the one compared to), it may seem contradictory from the perspective of recipients that the question of how to react to possible illegal content especially from third countries depends to a large extent on how this content is distributed to their end devices.

Concretely, this situation results in the following consequence in case of an illegal content coming from a third country provider, even if it has a licence for its service from that third country: if it is a 'pure' non-EU provider, the competence for supervisory measures depends on whether a Member State provides for substantive provisions and procedures to deal with such constellations under its own legal framework, as all Member States remain in charge. On the other hand, it depends whether a given Member State – or the competent regulatory authority – even regards a particular situation as being problematic. Where such need for action is seen, each EU Member State in which the content is disseminated can take action if the service or content is regarded by the respective national legal framework to be illegal. There is then no coordinated approach between these States, unless such an approach can be established through bilateral or multilateral coordination, which could be possible within the framework of the ERGA and only insofar as the respective national legal systems of the Member States concerned and willing to cooperate allow for comparable possibilities of reaction. If, however, there is no need seen to react or a national legislative framework does not foresee a reaction, then there is a falling apart of regulatory reaction across Member States. If there is jurisdiction over the non-EU provider – via the technical link –, then the reaction depends only on that one Member State (if it is not for the use

126 Cf. on this extensively *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, pp. 174 et seq., pp. 253 et seq.

of the exceptional procedures described below). In both situations there would not necessarily be the same result or effect in all Member States, even though potentially an offer available across the single market may be endangering for all parts of it.

3. *Possibilities and Procedures to Derogate from the Country-of-Origin Principle*

a. Explaining the system

Even if jurisdiction of a Member State over an audiovisual media service provider exists due to the criteria mentioned above, the standard of law enforcement reached by the competent Member State may not be regarded as satisfactory from the point of view of some or all other Member States affected by the service in question. This is especially relevant if a service even targets a specific Member State – more precisely its population – transmitting it from another Member State, because in that case the illegality of content or services available may not be very relevant for the Member State having jurisdiction in contrast to the targeted/receiving Member State, e.g. because of language reasons. Therefore, as mentioned, the AVMSD included from the outset the possibility for Member States to exceptionally be able to derogate from the country-of-origin principle and the connected obligation not to restrict freedom of reception or retransmission of incoming services.

The system for such temporary derogations is laid down in Art. 3(2), (3) and (5) AVMSD and was overhauled by the revision in 2018 in an extensive manner.[127] In short, the procedure is a multi-step process that can be used in case a Member State successfully can claim a serious violation of specific rules of the AVMSD by a non-domestic provider and includes that provider, the country of origin and the European Commission. As it is an exception to the otherwise binding principle of not restricting incoming signals and challenges the activity of the country of origin, that Member State is included in the procedure in order to safeguard an interest of both

127 On the previous system which was different for some of the procedural steps and especially differentiated between derogations for linear and non-linear services, the latter being aligned (then) with the procedure in the ECD for information society services, cf. *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, p. 114; *Cappello (ed.)*, Media law enforcement without frontiers, pp. 16 et seq.

Member States concerned. As will be shown in more detail in the following section, since the revision in 2018 the ERGA also plays an important role in the procedure.

In more detail, the procedure works as follows and is conditional on several steps, while being only limited to certain areas. Namely, as Art. 3(1) AVMSD states, the principle of free reception and retransmission only binds the Member States and prohibits any restriction if the reason for doing so falls "within the fields coordinated by this Directive". Difficulties may therefore already arise in determining whether a certain situation falls under the coordinated matters, because otherwise a Member State can take restrictive measures without having to follow the procedure of Art. 3 AVMSD. This can be the case, for example, when it comes to harmful content such as disinformation, which is not regulated in itself by the Directive. The CJEU has confirmed in the past that there are measures possible on the basis of issues that are possibly partly regulated in the Directive but not for the specific aspect used by the Member State in the specific situation. Such issues concerned, for example, consumer protection rules which are also the basis for parts of the rules of the AVMSD but (at the time of the decision even more so) are not comprehensively dealt with by the AVMSD in every regard.[128] Nonetheless, for illegal or harmful content, e.g. due to violation of rules for the protection of minors, the fact that there are general rules which need to be detailed further by the Member States means that the area is within the coordinated field. This question also plays an important role in the anti-circumvention context (see below C.IV.2).[129] Recital 10 of Directive (EU) 2018/1808 contains a declaratory statement that measures taken by Member States outside of the coordinated field have to respect the principle of proportionality as they affect the freedom to provide services if audiovisual media services are concerned. It furthermore underlines that

128 CJEU, joined cases C-34, C-35/95 and C-36/95, ECLI:EU:C:1997:344, *Konsumentombudsmannen v. De Agostini and TV-Shop*; cf. also Case C-11/95, ECLI:EU:C:1996:316, *Commission v. Belgium*, esp. para. 34.

129 In that context cf. CJEU, Case C-555/19, ECLI:EU:C:2021:89, *Fussl Modestraße Mayr*; *Cole,* Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, pp. 7 et seq. for one example concerning commercial communication rules. For measures taken that concern audiovisual media services but are instruments not within the coordinated field cf. CJEU, Case C-622/17, ECLI:EU:C:2019:566, *Baltic Media Alliance*, para. 72 et seq.

the measures taken are not allowed to amount to preventing retransmission in case of television broadcasts.[130]

The actual procedures for derogation depend on which violation is claimed. Art. 3(2) AVMSD concerns reactions to violations of Art. 6(1)(a) AVMSD – incitement to hatred – or Art. 6a(1) AVMSD – protection of minors against hearing or seeing potentially harmful content. The infringement must have been manifest, serious and grave. Alternatively, a prejudice or serious and grave risk of such prejudice of public health is addressed by this provision. Art. 3(3) AVMSD concerns violations of Art. 6(1)(b) AVMSD – public provocation to commit terrorist offences – or a prejudice or serious and grave risk of prejudice to public security. The second procedure concerns violations that are regarded to be even more serious, which is why the other conditions for this procedure are (slightly) lighter than for Art. 3(1) AVMSD. In addition, Art. 3(5) AVMSD even foresees an accelerated procedure for urgent cases in which the procedural inclusion of the other parties and the review of compatibility of the measures takes place only after the measures have already been put in place; this special urgency procedure only relates to the category of violation covered by Art. 3(3) AVMSD.

For Art. 3(1) AVMSD the violation has to have taken place twice during the period of the last 12 months before the derogation consideration is initiated. In this procedure the media service provider, the country of origin and the Commission need to be informed in writing of the reasoning behind the measures and the proposed measure the Member State will take in the next case of violation. That procedure has to safeguard the right of defence of the provider concerned (Art. 3(2)(c) AVMSD), and a condition is that the attempt to cooperate with the country of origin and the Commission on this matter had not led to "an amicable settlement" within a narrow timeframe. For Art. 3(2) AVMSD an occurrence just once in the previous 12 months is sufficient, otherwise the procedure is the same as described except that the last step of consultation is not included. After the procedure is completed to this point, for both paragraphs it is then the Commission after having consulted ERGA to take a decision on compatibility of the measure with EU law. So far, not many cases have been completed under the procedure as it already existed before 2018 and since the revision. These

130 Cf. on that CJEU, joined Cases C-244/10 and C-245/10, EU:C:2011:607, *Mesopotamia Broadcast und Roj TV*, para. 36 et seq. On that *Cole*, Note d'observations, « Roj TV » entre ordre public et principe du pays d'origine.

cases will be introduced in the following section to show the complexity of the procedure leading to long timespans between initial violations and measures finally being declared compatible with EU law in a specific case.

b. Application cases

All the cases so far involved reactions by regulatory authorities in two of the Baltic states against Russian-language and Russian state-owned broadcasting services established in another EU Member State (the "Baltic cases"[131]). These services were suspended from being broadcast for several months due to their content inciting hatred, which endangered social cohesion in the states concerned. In these cases, Lithuania[132] and Latvia[133] demonstrated that programmes in those services were addressing mainly the Russian-speaking minorities in their territory and endangering public policy due to the incitement to hatred contained in some of the programmes. The measures were introduced after 2014 and can be seen as a reaction to the

131 Cf. also *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, where the cases are addressed in this way. This section here is based on that point of the Background Analysis provided by the same authors.

132 Commission Decision of 10.7.2015 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 10.7.2015, C(2015) 4609 final; Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 17.2.2017, C(2017) 814 final; Commission Decision of 4.5.2018 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 4.5.2018, C(2018) 2665 final.

133 Commission Decision of 3.5.2019 on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 3.5.2019, C(2019) 3220 final.

Russian aggression in Ukraine in that year and the subsequent increase in risk stemming from those channels.[134]

In April 2015, Lithuania formally notified to the Commission its decision to suspend the channel RTR Planeta for a three-month period. The broadcaster was under jurisdiction of Sweden due to a satellite uplink used in that Member State, and consultations with authorities there had not led to a solution that responded to the issues Lithuania had raised. The Commission therefore found that Lithuania had fulfilled the procedural requirements of the AVMSD. As to the nature of the programmes, the Lithuanian authority argued that a programme from March 2014 "instigates discord and a military climate and refers to demonization and scapegoating with reference to the situation in Ukraine"[135]. Secondly, with regards to a programme from January 2015, the authorities highlighted statements deemed to aim "at creating tensions and violence between Russians, Russian-speaking Ukrainians and the broader Ukrainian population"[136]. Additionally, two programmes from March 2015 where qualified as inciting tension and violence not only between Russians and Ukrainians but also against the EU and NATO States. In its decision on the admissibility of the three-month suspension, the Commission confirmed the context with the ongoing military confrontation involving Russia and the possible tensions which could arise due to the content of the programmes.[137] In evaluating whether the elements of incitement and hatred were fulfilled, the Commission relied on the interpretation delivered by the CJEU in the case of Mesopotamia Broadcast and Roj TV according to which the Directive's

134 Cf. for background *Kokoly*, Exceptions to the Principle of Free Transmission and Retransmission of Audiovisual Media Content – Recent European Case-Law, pp. 83, 91. On the background also *Broughton Micova*, The Audiovisual Media Services Directive, pp. 271–272.

135 Commission Decision of 10.7.2015 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 10.7.2015, C(2015) 4609 final, para. 18.

136 Ibid, para. 18.

137 Ibid, para. 19.

restriction of incitement to hatred is a general public order consideration that goes beyond protection of minors.[138]

An additional three-month suspension was notified to the Commission by Lithuania in 2016, which also included the suspension of the retransmission of RTR Planeta online, for which the Commission confirmed the compatibility, too.[139] In 2017, Lithuania again notified a suspension of RTR Planeta, but this time based on new facts for a period of twelve months because of repeated violations. In that decision it is important that the Commission underlined a margin of discretion of the Member States to determine the appropriate measures. Therefore, the duration of a suspension would only be questioned by the Commission if it were manifestly disproportionate, which was not the case here.[140]

Latvia notified a suspension of the channel Rossiya RTR. After initiating the procedure in 2018, Latvia fulfilled the procedural steps and suspended the channel for three months. The Commission confirmed in the same way as in the Lithuanian cases that a programme with statements by a Russian politician incited to violence, advocating for a military invasion of the Baltic States and other Member States as well as to hatred against Ukrainians, stating that they would be "attacked and completely destroyed"[141]. In the first derogation procedure decided under the revised AVMSD, the Commission confirmed that another twelve-months suspension order of the

138 CJEU, joined Cases C-244/10 and C-245/10, EU:C:2011:607, *Mesopotamia Broadcast und Roj TV*, para. 36 et seq. On that *Cole*, Note d'observations, « Roj TV » entre ordre public et principe du pays d'origine, pp. 50 et seq.

139 Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 17.2.2017, C(2017) 814 final.

140 Commission Decision of 4.5.2018 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 4.5.2018, C(2018) 2665 final, para. 26.

141 Commission Decision of 3.5.2019 on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 3.5.2019, C(2019) 3220 final, para. 11.

Latvian regulatory authority against Rossiya RTR for comparable reasons was compatible with Union law.[142] As will be explained below, an important novelty of the revised procedure is the inclusion on ERGA and the need for it to provide an opinion, in which it explained its own understanding of the new role and presented extensively the facts as provided for by the national regulatory authority.[143] The assessment by ERGA and the Commission included the checking of having taken the procedural steps as well as whether the substantive arguments concerning the violation were convincing; the ERGA had supported in its finding the proportionality of the action by the regulatory authority, as it was subsequently also concluded by the Commission.

All these cases were initiated and decided before the Russian federation started the war against Ukraine in February 2022. They show that, although there is a procedure to react to problematic content, if the Member State with jurisdiction does not do so, the time-lag is highly problematic and the effectiveness of the measures depends on what the targeted Member State is able to do; namely, if the programme is also disseminated by satellite, it needs to rely on the procedures provided for in Arts. 3 and 4 AVMSD. The cases decided so far give an indication on how the procedure can be successfully applied, but at the same time the cases concerned violations that were clear; so the substantive assessment based not last on an earlier case decided by the CJEU which necessarily resulted in supporting the findings of the national regulatory authorities. Therefore, it is mainly the acknowledgement of the proportionality of the measure – both concerning the type of measure (e.g. order for suspending retransmission of a channel to a cable network provider) and for how long it was applied – that contributes to building a catalogue of measures which can be used in other comparable cases. Nonetheless, as mentioned, with only a handful of cases this is very limited, and the cases mainly concerned television broadcasters, for which the measures imposed – e.g. on cable network providers available in those Member States – were quite obvious. In this light it cannot be concluded that the procedure under Art. 3(2), (3) and (5) AVMSD is so

142 Commission Decision on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council to restrict retransmission on its territory of an audiovisual media service from another Member State, Brussels, 7.5.2021, C(2021) 3162 final.

143 ERGA, Opinion on decision No. 68/1–2 of the Latvian National Electronic Mass Media Council restricting the retransmission of the channel Rossija RTR in the territory of Latvia for 12 months.

far a strong instrument in maintaining the interest of Member States being targeted by illegal content from providers under jurisdiction of another Member State.

The only CJEU case that can add to the understanding of the reach of the procedure is the already mentioned confirmation in Baltic Media Alliance that the national regulatory authority of Lithuania had taken a measure against a non-domestic provider that was not an application of the derogation procedure, because it did not constitute in restricting retransmission of the service in question.[144] The authority had originally not suspended the Russian-language channel NTV Mir Lithuania broadcasting under UK jurisdiction for violations comparable to those mentioned above and based on wrongful information in the programmes leading to incitement; instead it had limited the way the channel could be disseminated in Lithuania, namely for a twelve-month period only in pay-TV packages. The Court's decision only concerned this measure although the national regulatory authority had subsequently moved to a suspension order soon after the original decision. Because the CJEU had only been asked by the referring national court whether or not the measures fell under the AVMSD procedure and had to be assessed for proportionality under those provisions, the answer neither had to check the proportionality of the actual measure nor discuss any other point after underlining that the measure was below the effect needed to be covered by a restriction under Art. 3(1) AVMSD. Therefore, no additional indications on the actual procedure exist so far by the CJEU.

4. Institutional Cross-Border Cooperation: The Role of ERGA

a. The definition of ERGA's role in the AVMSD

With the reform of the AVMSD in 2018, ERGA was assigned a specific role in the cross-border enforcement through the derogation procedure of Art. 3 AVMSD. This concerns first the above-mentioned involvement in specific cases when a Member State invokes its derogation power under para. 2 and 3, but not in the urgency procedure under para. 5 (which relates only to violations as included in the procedure under para. 3). The Commission shall request the opinion of ERGA before taking a decision

144 CJEU, Case C-622/17, ECLI:EU:C:2019:566, *Baltic Media Alliance*, para. 84.

on the compatibility of the Member State's derogation measure with Union law. This leads to an information of all the representatives of Member States regulatory authorities united in the ERGA about such a case, which already can help in order to draw attention to an issue regarded as exceptionally problematic by the Member State intending to take a measure. This information from ERGA to its members is also referred to in Art. 30b(3)(c) AVMSD, according to which it has to provide its members with information on the application of Art. 3 AVMSD in particular. Already in the previous version of the Directive and maintained still in Art. 30a(1) AVMSD, the mutual information flow necessary for the application of, inter alia, the derogation procedure was stipulated. Originally (in the previous Art. 30) it was a request that Member States provide each other and the Commission with the necessary information, now it is the national regulatory authorities and bodies as well as the Commission. In addition, there is a specific encouragement for a close cooperation between two Member States in case of a provider under jurisdiction of one of those States that is targeting the other (para. 2 and 3).

Although the information flow under Article 30b(3) from Commission to ERGA is not regulated in a temporal sense, the obligation to request the opinion under Art. 3(2) and (3) as well as the task of the ERGA under Art. 30b(3) (d) AVMSD to give the opinion necessitate a swift forwarding of the information as the Commission is bound to a three-months decision period by Art. 3 AVMSD counted from the moment of receipt of the measures taken by a Member State, and this decision has to include the opinion of ERGA as well as keeping the Contact Committee duly informed during the procedure. In the first case under this new procedure, after having completed the initial steps foreseen, the Latvian regulatory authority adopted its restrictive measure on 8 February 2021 and notified the Commission by letter of 12 February; ERGA was requested for an opinion already on 15 February and adopted it on 10 March; in between the broadcaster concerned by the measure had been invited to comment on the procedure by the Commission, which then took the final decision on 7 May 2021.[145] Another indication of expected time-frames can be deducted from Art. 2(5c) AVMSD. According to that provision, if there is a dispute

145 Commission Decision on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council to restrict retransmission on its territory of an audiovisual media service from another Member State, Brussels, 7.5.2021, C(2021) 3162 final, no. 7 et seq.

about jurisdiction between two Member States in the context of derogation (or anti-circumvention) procedures, the Commission can request ERGA to provide an opinion on the matter, in which case this shall be delivered within 15 working days.

The role of ERGA in connection with this procedure has a second dimension. Art. 3(7) AVMSD, introduced in 2018, foresees a regular exchange of experiences and best practices by the Member States and the Commission regarding the procedure set out in Art. 3. This exchange shall take place in the framework of the Contact Committee and ERGA. In its final report on the implementation of the revised AVMSD Directive from the end of 2019, the ERGA noted that its members are detecting an increasing number of infringements that contain cross-border-elements, in particular in the online environment. It took note of the procedures foreseen in Arts. 3, 4 and 30a AVMSD concerning the essential rules of cooperation but pointed out the difficulties to reach satisfactory outcomes in practice. Furthermore, the ERGA remarked they apply to individual cases only and do not establish a general and ongoing cooperation of NRAs, which would be essential to ensure effective enforcement and at the same time preserve the efficiency and stability of the country-of-origin principle.[146] The cooperation Art. 3(7) does not provide for concretely binding or even periodic reporting obligations, an information exchange system or which conclusions should be drawn from this exchange, which is why ERGA Members agreed on further procedural details for cooperation via internal rules of procedure (which ERGA is authorised to adopt under Art. 30b(4) AVMSD) and, more importantly, on a Memorandum of Understanding that will be presented in the next section.

Concerning the role of ERGA in the Art. 3 AVMSD procedure, it should be reminded, as shown above in the first application case, that ERGA has described its approach to preparing its opinions on restrictive measures by one of its members by assessing the aspects that fall "within both legal and practical remit of individual ERGA members", meaning it has to consider the relevant national legal framework under which the member operated and to extensively take account of "all the actions, or omissions thereof, of the relevant parties" by checking the complete file of a case but without

146 *ERGA Subgroup 3*, Implementation of the revised AVMS Directive – Final Report, 2019, https://erga-online.eu/wp-content/uploads/2020/01/ERGA_2019_SG3_Report-1.pdf.

having to verify the content of the established facts or doing a secondary check of the conclusions drawn by the national regulatory authority.[147]

b. The Memorandum of Understanding between ERGA Members

After ERGA was established formally as part of the institutional structure of the AVMSD with its revision in 2018, its members, the national regulatory authorities, identified the need to further develop and formalise the elements of cooperation as laid down in basic terms in the scope of powers mentioned in the AVMSD. Especially the future oversight of VSPs was regarded to necessitate an agreement on cooperation between each other. This was regarded to be especially necessary because, in contrast to audiovisual media services, content available on the VSPs is generally equal for viewers across all EU Member States, and it is also consumed as such, although content may be organised by recipient-specific interests, for example by recommending only specific language content based on the location of the viewer. In addition, a challenge was assumed that would come with the concentration of the location of many of the major VSPs in one Member State due to their establishment and a (possible) difficulty if all enforcement measures would depend only on that one regulatory authority of the Member State in question.

The agreement on a "Memorandum of Understanding between the national regulatory authority members of the European Regulators Group for Audiovisual Media Services"[148] (MoU) adopted on 3 December 2020 lays out the cooperation between the members in general terms, but also for specific areas such as the VSP-context. It is not a binding document but a commitment by the ERGA Members to apply these 'rules' in their cooperation in future.[149] The result of such collaboration and information exchange shall lead to a more consistent implementation of the AVMSD across all Member states.

147 ERGA, Opinion on decision No. 68/1–2 of the Latvian National Electronic Mass Media Council restricting the retransmission of the channel Rossija RTR in the territory of Latvia for 12 months. See also above C.III.3.b.

148 ERGA, Memorandum of Understanding between the national regulatory authority members of the ERGA, dated 3 December 2020, https://erga-online.eu/wp-content/uploads/2020/12/ERGA_Memorandum_of_Understanding_adopted_03-12-2020_l.pdf.

149 Cf. also point 4.4. of the MoU on the "non-legally binding" character.

In a brief overview, part 1 of the MoU is about the objectives and principles of cooperation, while part 2 sets out in detail the mechanisms of cooperation between the regulatory authorities. A first important point is that single points of contact are established to receive requests for cooperation from other authorities and that it is laid down when and how requests for cooperation should be issued and how they should be responded to. The MoU distinguishes between requests for information, for example about a particular provider established in the Member State of the receiving authority, and requests for mutual assistance, regarding the implementation and enforcement of the revised AVMSD. The latter can be issued, e.g., when the requesting authority finds that an implementation or enforcement matter relating to the AVMSD has arisen within its territory while jurisdiction over the provider is with another Member State. In order to avoid certain difficulties that have shown in the past concerning procedures included under the AVMSD, the MoU foresees for urgent cases that the requesting NRA may issue an accelerated request for mutual assistance.

The relevance of cooperation concerning VSPs as the basis of the MoU can be seen in that there is a dedicated section concerning VSP matters (section 2.2.1) and the "Implementation and Enforcement" of the AVMSD provisions on VSPs are addressed specifically (point 2.1.3.4. (f)). In dealing with problems concerning content on VSPs, the MoU stresses the use of a 'macro' level and systemic approach to regulation rather than individual cases of illegal content present on such platforms (point 2.2.1.1. (d)), which is an approach comparable to that adopted in the DSA regarding systemic risks. Referring to the E-Commerce Directive, the MoU also finds that the mere existence of harmful or illegal content does not automatically constitute a failure by the VSP to take appropriate measures. The section develops new directions for application of the rules concerning VSPs in monitoring these. For example, the MoU recognises that a regulatory authority, even when it does not supervise a VSP, may contribute to finding solutions to regulatory challenges. The regulatory authorities commit to exploring whether dedicated complaints mechanisms used when they address VSP providers could provide added value (point 2.2.1.3.3.). Overall, the MoU supports a pan-European approach towards the regulatory aspects of Art. 28b AVMSD. Part 3 of the MoU concerns the administration, including reporting, mediation between the authorities in case of dispute and the role of the dedicated ERGA Action Group.

Even though the MoU is not legally binding, it is a remarkable effort of self-organisation of authorities across 27 EU Member States in trying to achieve the common goal of enforcing the legal standards set by the AVMSD concerning providers that have a reach across the EU from the outset. It is a form of 'internal procedure' that has the advantage of being able to reflect practical knowledge on how cooperation can work on a daily basis. The disadvantage is that its functioning depends on the voluntary commitment of all of the members. In addition, in order to be successful, the collaboration does not only need active commitment but the regulatory authorities have to be adequately equipped with the appropriate powers and resources by the Member States to be able to dedicate part of their activity to dealing with cross-border issues along the lines of the MoU.[150]

5. Interim Conclusion on the Derogation Mechanism

As presented, the 2018 revision of the Directive brought a significant change to the derogation mechanism. By aligning the procedures for linear and non-linear services, which were previously separate and for the latter followed exactly the same procedure as for information society services under the ECD, and amending some of the procedural requirements, a streamlining of the procedures was planned to make the application more easily. However, the final result has not changed the main issue of the time-lag between the moment a regulatory authority sees the need to react to an issue and the conclusion of the procedure. Being able to resort to an urgency procedure without having to wait for any reaction, e.g. by the Commission or the Member State of jurisdiction, has paved the way for a more effective use of the procedure; however, it is limited to the most dangerous situations.

The reaction to Russia's propaganda activities by means of the EU sanctioning regime, which took place on a different legal basis, underlines the necessity of identifying a better possibility to react to problematic content in the context of the AVMSD framework if audiovisual media services are concerned. While adding some additional possibilities in the proposal for

150 Cf. on this aspect also *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, pp. 202 et seq.; *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp. 258 et seq.; practical illustration also in *Cabrera Blázquez/Denis/Machet/McNulty*, Media regulatory authorities and the challenges of cooperation.

the EMFA is one way forward, this would not amend the derogation (and anti-circumvention, see below) procedures of the AVMSD as suggested at the moment. The 'fast-track procedures' that the regulatory authorities have developed in some parts of ERGA's MoU are a way of effectuating the derogation procedure. Additionally, the urgency measures allowed under Art. 3(5) AVMSD will show by more frequent use if they are sufficient to respond more effectively to problems of cross-border content dissemination or whether they need to be extended.

An issue that remains unsolved by the last revision and which only surfaced clearly after the successful application of the derogation procedures in the 'Baltic cases' is the limited effect such measures have on the actual dissemination of the content. Art. 3 AVMSD concerns a derogation from not restricting 'retransmissions' on the territory of the Member State taking action, therefore it is limited to cable or terrestrial retransmission of the content. A broad understanding of Art. 3(1) AVMSD, which mentions that a targeted Member State can deviate from the principle of 'freedom of reception', could be in the direction that it concerns any type of dissemination as the flipside of reception. Nonetheless, the technical situation in connection with satellite dissemination renders a measure concerning this method of content distribution without effect if the Member State or its competent regulatory authority that can impact the satellite dissemination itself do not take additional action to remedy the situation. They are, however, not directly obliged by the AVMSD to do so under the provisions of the derogation procedure. This problem occurs also with regard to online dissemination of the same content. Without a legislative amendment, the effectiveness of the derogation procedures will probably remain limited.

IV. The Possibility of Member States to Enact Stricter Rules– Art. 4 AVMSD

1. The Question of Scope: Fields "Coordinated" by the AVMSD

In addition to temporary derogation measures, Member States exceptionally have the possibility to deviate from the country-of-origin principle in treating audiovisual media services providers that do not fall under their jurisdiction but that of another Member State. The procedure of Art. 4 AVMSD allows for anti-circumvention measures in case that a provider has evaded stricter or more detailed rules that the Member State has in place concerning providers under its jurisdiction in comparison to the standards

of the AVMSD that have to be in place in all Member States. If it can be proven that the provider in question only established itself in another Member State to avoid application of these stricter or more detailed rules and the service is nonetheless mainly directed at the Member State with the additional layer of rules, then such providers can be exceptionally subjected to specific measures aiming at compliance with these rules. Before presenting the procedure, two conditions need to be briefly recalled.

Firstly, the Member State intending to take measures must have stricter or more detailed rules in place in having used its possibility to 'discriminate' not against other EU nationals (or service providers from other EU Member States) but against its own nationals (or domestic providers). Such reverse discrimination is possible under EU law as long as it respects other conditions of EU law. This possibility is explicitly included in Art. 4(1) AVMSD for the stricter treatment of domestic audiovisual media services providers. Secondly, the procedure only needs to be initiated, however, if the stricter or more detailed rules are "in the fields coordinated by this Directive" – a limitation of the application of the country-of-origin principle from the outset as it also applies in the derogation mechanism presented above. In other words: besides being able to introduce stricter or more detailed rules even in the areas for which the AVMSD creates a minimum harmonisation, Member States can – and have to, as Art. 2(1) AVMSD states – apply their legal framework which audiovisual media services providers have to comply with. The same test as described above for the derogation procedure (see C.III.3.b) is relevant under the anti-circumvention provision. In some instances, the relation of national rules to the coordinated fields are clear, e.g. if stricter rules are introduced for commercial communication prohibiting or limiting more than is already the consequence of Art. 9 et seq. AVMSD. This was the case in the only application of Art. 4 AVMSD so far, as will be shown below. But it can be more difficult to distinguish when rules prohibit harmful content, which is also the case for the rules of Art. 6 and 6a AVMSD, while these are limited in reach.[151]

151 For a discussion of the concept *Cole*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, pp. 7 et seq.

2. Procedure for Tackling Circumvention Situations

a. Explaining the system

Member States can apply stricter rules compared to the minimum level provided for in the AVMSD, i.e. the "field coordinated by this Directive", on audiovisual media service providers under their jurisdiction, as Art. 4(1) AVMSD explicitly states, as long as these measures are compliant with EU law. When a Member State has such stricter rules, the procedure laid down in Art. 4(2) to (5) AVMSD contains a mechanism to apply such rules also to providers which are not under its jurisdiction but have established themselves in another Member State and therefore are under the jurisdiction of that State.[152] Thus, this mechanism applies only to providers which are established in a Member State according to an establishment based on the criteria in Art. 2(3) AVMSD. For non-EU providers, Member States are anyway free to apply their national rules without having to resort to Art. 4 AVMSD.

The procedure in Art. 4 AVMSD is aimed at resolving the situation in which the Member State of jurisdiction enforces the law as applicable to a provider under its jurisdiction although the service by that provider targets another Member State which has stricter rules than the ones in the AVMSD and, in the constellation given, incidentally also those in the country of origin. It shall apply if the fact that the provider is established in that country of origin and not in the destination State of its service is to avoid falling under the stricter rules. In that sense it is a further exception to the applicability of the country-of-origin principle ensuring a balancing between the interests of both States and the provider concerned.

The rules have to be more detailed or stricter and the service has to be wholly or mostly directed towards the territory of the Member State intending to apply the procedure. The question of targeting is one of the difficult parts of the assessment in the procedure.

If a Member State wants to take appropriate measures against the 'circumventing' provider, first the multi-step procedure of Art. 4(2) to (5) AVMSD need to be completed.[153]

152 Generally on Art. 4 AVMSD see *Kokoly*, The Anti-Circumvention Procedure in the Audiovisual Media Services Directive.

153 Cf. also *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, pp. 20, 21.

In the first step (Art. 4(2) AVMSD), the receiving Member State may make a substantiated request to the Member State having jurisdiction to address the issue while both Member States shall cooperate sincerely and swiftly with a view to achieving a mutually satisfactory solution. The Member State having jurisdiction shall then request the media service provider to comply with the "rules of general public interest" in question, i.e. the stricter or more detailed rules by the requesting Member State. It shall regularly inform the requesting Member State of the steps taken to address the problems identified and, within two months of the receipt of the request, shall inform the requesting Member State and the Commission of the results obtained and explain the reasons, if applicable, where a solution could not be found. Either Member State may invite the Contact Committee to examine the case at any time.

If the receiving Member State is not satisfied with the results of the intervention of the Member State having jurisdiction, i.e. if the provider still does not comply as required under its national law or if there has simply been no reaction within the given timeframe, it can enter a second step according to Art. 4(3) AVMSD. Taking this next step has changed requirements since the 2018 reform. The receiving Member State has collected relevant evidence that the media service provider in question established itself in the Member State of jurisdiction in order to circumvent the stricter rules it would have to adhere to if it were established in the requesting Member State. As further clarified, such evidence shall allow for the circumvention to be reasonably established, without the need to prove an intention of the media service provider to circumvent the stricter rules. Recital 11 of Directive (EU) 2018/1808 mentions that a set of corroborating facts should be established. If that is successfully done, the receiving Member State may initiate the proceeding further described in Art. 4(4) AVMSD in order to adopt measures against the provider which have to be objectively necessary, non-discriminatory and proportionate. Before applying them, it first needs to notify the Commission and the Member State with jurisdiction of its intention to take the measures which it has to describe in a substantiated manner, and it also has to give the media service provider the opportunity to express its views (Art. 2(4) lit. a) and b) AVMSD).

The concluding step of the procedure is that the Commission after having requested an opinion by ERGA and having kept the Contact Committee duly informed of the procedure has to decide about the compatibility of the measures with EU law. There is a time limit for the decision, which needs to be taken within three months of the receipt of the notification

of the intended measures, but this time limit can be expanded for the necessary period if the Commission asks the requesting Member State for additional information where needed (Art. 4(5) AVMSD).

With a positive decision of the Commission, the Member State without jurisdiction can then take the necessary measures it had announced; in case of a negative decision, it has to refrain from such an intervention.

b. Application case

Compared to the few cases that have occurred under the derogation mechanism as described above, an analysis of the effectiveness and practical operation of the circumvention mechanism based on precedents is even less fruitful. In fact, only once a Member State has (unsuccessfully) invoked the procedure after this had been introduced to codify CJEU case law concerning the original version of the TwFD.[154]

In that case Sweden invoked the anti-circumvention procedure against two providers broadcasting under jurisdiction of the United Kingdom, which was still an EU Member State at the time. Swedish authorities had notified the Commission in October 2017 of the intention to impose fines against these providers, which it alleged were targeting a Swedish audience and had established themselves in the United Kingdom only in order to circumvent the stricter Swedish rules which prohibited advertisement of alcoholic beverages. At the time, the Swedish law contained a strict ban on alcohol advertising, while the UK legislation applicable to audiovisual media services did not. The AVMSD standard in this regard (laid down now in Art. 9(1)(e) AVMSD) only requires Member States to ensure that audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages; therefore the Swedish law had to be considered as stricter as addressed by Art. 4 AVMSD. However, the burden of proof in light of a circumvention could hardly be met in that case, because the relocation of the providers and the overall situation had occurred partly even before the original TwFD entered into force. Therefore, showing a specific intent retrospectively after such a long time in a sufficient way to

154 Cf. also *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, pp. 20, 21 where this case is also taken up.

meet the threshold of the procedure (which was still the one before the revision in the 2018 Directive) was difficult from the outset. Accordingly, in its Decision the Commission declared the measures incompatible with the anti-circumvention provision because the evidence provided had to be regarded insufficient in light of the threshold for showing the circumvention.[155]

The introduction of a clarification in Art. 4(4) AVMSD in the 2018 reform – the evidence to be collected in order to give 'proof' of the circumvention does not mean that a specific (subjective) intention of the provider has to be proven but that a more objective assessment of the actual circumvention has to be undertaken – meets the difficulty of the one application case that existed before. It is not an easy task to show such circumvention even now, and it was already possible before. As it is an exceptional procedure, only future applications will show whether it can help to answer certain cross-border enforcement challenges. As with the derogation procedure, the anti-circumvention measures can be taken against audiovisual media services providers, both linear and non-linear, but the procedure does not extend to VSPs.

3. Institutional Dimension

In parallel to assigning ERGA a specific role in the cross-border enforcement through the derogation procedure of Art. 3 AVMSD with the reform of the AVMSD in 2018, the same was done for the anti-circumvention procedure of Art. 4 AVMSD. In coming to its decision about compatibility of the national measures, the Commission shall request the opinion of ERGA according to Art. 4(4)(c) AVMSD. Even before that, the jurisdiction over a provider may be in question in issues concerning a question of circumvention by that provider. Art. 2(5c) AVMSD foresees that in such disputes ERGA provides an opinion to the Commission if it so requests, and the Commission, in its decision on compatibility of national measures, also has to take a final decision on the jurisdiction question. For the purpose of Art. 4 AVMSD, the involvement of ERGA also leads to an information of

155 Commission Decision of 31.01.2018 on the incompatibility of the measures notified by the Kingdom of Sweden pursuant to Article 4(5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services. Brussels, 31.01.2018 C(2018) 532 final.

all its members about the pending matter, as Art. 30b(3)(c) AVMSD gives ERGA the task to provide its members with information on the application of Art. 4 AVMSD. And as it was the case in the previous version of the Directive for Art. 3 AVMSD, the mutual information flow necessary for the application for the circumvention procedure derives from the previous Art. 30 AVMSD – then still addressing the Member States – and now for the regulatory authorities from Art. 30a(1) AVMSD.

4. Interim Conclusion on the Circumvention Mechanism

With the 2018 revision of the Directive the conditions for application of the anti-circumvention procedure were facilitated slightly, especially concerning the clarification of the burden of proof of such circumvention. However, there have not been any new application cases since the first and so far only case on alleged circumvention of stricter commercial communication rules was unsuccessfully completed. What is more relevant with the changes is that the first step of the procedure in Art. 4(2) AVMSD addresses the 'spirit' in which cross-border issues should be resolved between Member States and their regulatory authorities in question: they shall cooperate closely and sincerely, they shall aim at achieving swiftly a solution which is satisfactory for both sides. As this was not always the case in the past, the national regulatory authorities convened in ERGA have already addressed the issue of improved cooperation in cross-border matters by agreeing on the MoU presented in detail above. The formal inclusion of ERGA in the procedure after the revision can contribute to a more intensive exchange between its members also on the question of differing standards in the legal frameworks applicable to audiovisual media services.

As the anti-circumvention measure is a permanent derogation from a situation covered by the fundamental freedom of the Treaty and the country-of-origin principle in contrast to temporary derogation measures to respond to risks posed by specific content, it will continue to have a limited relevance in quantity, and the conditions need to be interpreted narrowly. However, the extension to on-demand service providers by the revision could lead to more cases in the future, and even more so if a comparable provision would apply to any form of audiovisual content dissemination. In addition, effective enforcement of the minimum standards, as laid down in the AVMSD, by all Member States and their regulatory authorities may respond to some issues of treatment of service providers that are under

the jurisdiction of other Member States, which may make it unnecessary to consider resorting to the procedure of Art. 4(2) to (5) AVMSD. In that regard, the relevance of Art. 4(6) AVMSD about effective enforcement can also play a role, which will be presented in the next section.

V. Demanding Effective Compliance and Enforcement – The Relevance of Art. 4(6) AVMSD

Between 2014 and 2019 a significant number of Member States reported that they encountered issues in relation to incitement to hatred or protection of minors with regard to content of audiovisual media service providers originating in other Member States. Several Member States had used one of the cooperation mechanisms as provided in Arts. 3 and 4 AVMSD and analysed in detail above. In the report on the application of the AVMSD – considering the time period before its revision in 2018 – some of these Member States flagged that the outcome of the cooperation was not entirely satisfactory, either because the procedures were regarded as too cumbersome and time consuming or because the authority of the country of origin did not grant their request for assistance or to take measures against a provider. In addition, other Member States reported on issues regarding providers originating from third countries and the measures that were taken in these cases.[156] Overall, although the cooperation procedure in general was not questioned, the finding clearly underlines that the complexity of the procedures are not regarded as sufficient in ensuring that the regulatory authorities can fulfil their oversight and enforcement tasks.[157]

Although the 2018 revision also took this issue into consideration and attempted at streamlining some of the steps of the procedures of Arts. 3 and 4 AVMSD, the alignment of these procedures for both categories of audiovisual media services did not lighten the conditions and therefore did not facilitate their application. In some aspects, the procedures were even adapted to running for even longer time periods. It was an important step that, irrespective of the limited usability of these two specific cooperation procedures, a more general agreement on how to enhance cross-border cooperation between national regulatory authorities was found in the above

156 See European Commission, Staff working document: Reporting on the application of Directive 2010/13/EU "Audiovisual Media Services Directive" for the period 2014–2019, SWD(2020) 228 final, pp. 4 et seq.

157 Ibid, p. 6.

described Memorandum of Understanding. It is also not surprising that the call for further formalisation of this cooperation, namely by including more rules on this in the actual Directive or another legal act, continued after the first period of application of the MoU in order to gain legal clarity.

This discussion is reflective of the expectation towards competent regulatory authorities to fulfil the task of enforcing the applicable law. Although the procedures contained in the AVMSD address the Member States and foresee obligations or possibilities of these to take measures against certain media service providers, the actual implementation of the procedures is typically in the realm of the regulatory authorities of the Member State(s) in question. The same is true for a provision in the general section of the AVMSD that has hardly been addressed in scholarship and certainly not in jurisprudence: according to Art. 4(6) AVMSD, Member States shall, by appropriate means, ensure, within the framework of their national law, that media service providers under their jurisdiction effectively comply with the Directive. This compliance is not only achieved by the legislative framework but – "effectively" – by the monitoring and, if necessary, sanctioning of the providers typically by a national regulatory authority. The provision, which is placed within the Article dealing with anti-circumvention measures, merits a brief discussion.

Already the TwFD from 1989 contained in its Art. 3(2) the rule that Member States shall, by appropriate means, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction comply with the provisions of the Directive. The placing in that provision is to be explained with the fact that Art. 3 of the original Directive only briefly stated that Member States were free to enact stricter rules (laying down what already follows from the possibility of reverse discrimination under EU law) without yet having a procedure in case a provider acts to circumvent these rules. In connection with that, the Member States' obligation (irrespective of such possible stricter rules) was underlined to ensure that at least the (minimum) rules of the Directive are enforced.

In 1997, the rule of Art. 3(2) TwFD was importantly amended by adding the word "effectively" (comply with). This was aimed to emphasise even more the requirement that Member States, in order to strengthen the country-of-origin principle, make sure that the minimum level of harmonisation as provided for by the Directive is actually achieved by an effective enforce-

ment of the rules.[158] It was seen as conditional, according to Recital 16 of that Directive, to "preserve free and fair competition between firms in the same industry". Interestingly, a novelty of the 1997 revision was later dropped – without specific explanation – in the 2007 furthering of the Directive into an Audiovisual Media Services Directive: Art. 3 had been expanded by a para. 3 that indicated that measures to be taken by Member States – obviously referring to para. 2 and the compliance obligation although in that provision "means" are mentioned – should include "appropriate procedures for third parties directly affected, including nationals of other Member States, to apply to the competent judicial or other authorities to seek effective compliance according to national provisions". There is no explicit trace of this provision any longer. It had followed such remedy provisions that were also contained in other consumer protection legislative acts. The deletion of this provision does not mean that legal remedies no longer have to be made available for third parties, as this already follows from the general obligation to foresee effective judicial remedies for individuals.[159]

In 2007, this expectation of effective compliance was extended to non-linear services and the numbering changed to Art. 3(6), while with the revision in 2018 it was moved to Art. 4(6). The 2018 amendments touched the provision only with a minor clarification by deleting the words "the provisions of" (this Directive) and declaring what was already the case before: the compliance requirement concerns the Directive as such and therefore not only the provisions within the Directive but also the national transposition acts.[160] So, more than 30 years after the creation of the TwFD we (still) have in Art. 4(6) the requirement that Member States shall, by appropriate means, ensure, within the framework of their national law, that media service providers under their jurisdiction effectively comply with this Directive.

The provision was retained in substance from the very beginning of the Directive until now, and the expectation of "effective compliance" within the national legal framework shows the need to not only set up

158 Cf. also *Scheuer/Ader*, in: Castendyk/Dommering/Scheuer (eds.), Art. 3 TWFD No. 52 et seq.

159 See similarly *Scheuer/Ader*, in: Castendyk/Dommering/Scheuer (eds.), Art. 3 TWFD No. 64 et seq. and *Dommering/Scheuer/Ader*, in: Castendyk/Dommering/Scheuer (eds.), Art. 3 AVMSD No. 6.

160 Cf. for the earlier discussion *Scheuer/Ader*, in: Castendyk/Dommering/Scheuer (eds.), Art. 3 TWFD No. 61 et seq. based on the old wording.

such a framework, an obligation that stems anyway from the primary law obligation to transpose Directives and give EU law an 'effet utile', but to apply it in practice. As mentioned, this in turn means the application of the norms being monitored – and if necessary action taken – by the competent authorities or bodies. Although the word "enforcement" is not explicitly mentioned, this is a decisive factor of compliance. It goes beyond having regulatory authorities established but requires an adequate toolbox of supervision and enforcement powers as well as their actual use. In the cross-border context this also concerns effective remedial mechanisms and cooperation between regulatory authorities to ensure that compliance is achieved, and in case of non-compliance of a provider the country-of-origin principle can be alerted to by other Member States or in practice their national regulatory authorities. If such cooperation requirements are laid down in national law, this would extend only to the authorities of the Member States that were willing to include this form of cooperation into the tasks of the authority to enable it to ensure that all providers under its jurisdiction effectively comply. There would be no reciprocity, which is why the insertion of cooperation obligations in the AVMSD is the solution to ensure effective compliance also in cross-border cases.

The limit of the provision in Art. 4(6) is that the obligation for appropriate means to ensure compliance concerns the legal framework of the country-of-origin principle, so that other Member States cannot directly invoke this provision when assessing whether in a cross-border case a non-established provider is non-compliant. It does, however, underline the relevance that all Member States have to ensure effective compliance of "their" providers, which necessitates at least respecting the rules of the Directive such as, for example, the obligation to protect minors, because the minimum level of harmonisation is what has to be achieved at least in the national legislative framework and its enforcement. Where a Member State does not meet this effective compliance-guarantee, there is a violation of secondary law. The wording of the provision underlines the general principle of giving EU law an effective validity in national law – the above-mentioned 'effet utile' – by explicitly stating that systematic underperformance in terms of effective compliance of media service providers is a failure by the Member State under whose jurisdiction the provider in question falls. Such failure to comply with EU law in principle should lead to treaty infringement procedures according to Art. 258 TFEU, which the Commission in its role as 'Guardian of the Treaties' has to initiate when it supposes a violation of primary or secondary law by a Member State. Non-transposition of a

Directive is a clear-cut case for this, wrongful transposition when it can be proven, too, and Art. 4(6) AVMSD is reflective of violations that occur not necessarily in the legislative framework of a Member State itself but the way it is applied in practice.

D. The Institutional Dimension: AVMSD and Beyond

I. Institutional System in the AVMSD

With the last revision, the institutional system of the AVMSD underwent significant changes.[161] Whereas the AVMSD had previously – not least in view of questions of competences of the Member States for designing the administrative structures – essentially confined itself to taking for granted the existence of regulatory authorities in the Member States that effectively enforce the implemented rules, Art. 30 now sets out much more concrete and detailed requirements.[162]

According to Art. 30(1) AVMSD, each Member State shall designate one or more national regulatory authorities, bodies, or both. The wording here is interesting, as it does not refer to the establishment or provision of a regulatory authority or body, but to the designation. The AVMSD thus assumes the transfer of tasks to an authority or body that may or may not already exist (this is the same, for example, with the DSA that does not necessitate the DSC to be a newly created authority[163]), and it does not call for the establishment of a new 'media regulatory authority'. However, Member States have to then meet requirements concerning such authorities or bodies. They have to ensure that they are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. Member States retain the possibility to set up (converged) regulatory authorities or bodies having oversight over different sectors. Recital 53 AVMSD specifies that these obligations should not preclude Member States from exercising supervision in accordance with their national constitutional law. National regulatory authorities or bodies should be considered to have achieved the requisite degree of independence if they are not only functionally but also effectively independent of their respective governments or any other public or private body.

161 See on this and for an overview of national approaches *Cappello (ed.)*, The independence of media regulatory authorities in Europe; *ERGA*, Report on the independence of National Regulatory Authorities.

162 Cf. on this *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector, Chapter D.II.2.d.(5).

163 Art. 49(1) DSA, see below D.II.1.a.

Art. 30(2) AVMSD adds that Member States also have to ensure that these authorities or bodies exercise their powers impartially and transparently and in accordance with the objectives of the Directive, in particular media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition. National regulatory authorities or bodies shall not seek or take instructions from any other body in relation to the exercise of their tasks and shall be equipped with adequate financial and human resources, which has to cover their tasks of cooperating within ERGA. The annual budgets shall be made public. Furthermore, independence also of the responsible members of such authorities or bodies is addressed in Art. 30(5) AVMSD. According to this provision, Member States shall lay down in their national law the conditions and procedures for the appointment and dismissal of the heads of national regulatory authorities and bodies or the members of the collegiate body fulfilling that function, including the duration of the mandate. The procedures shall be transparent and non-discriminatory, and they shall guarantee the requisite degree of independence. The head of a national regulatory authority or body or the members of the collegiate 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 shall be duly justified, subject to prior notification and made available to the public.

Recital 54 clearly puts this in light of the interest of recipients and the fundamental rights of freedom of expression and information: "As one of the purposes of audiovisual media services is to serve the interests of individuals and shape public opinion, it is essential that such services are able to inform individuals and society as completely as possible and with the highest level of variety". Besides underlining with this the need of plurality in information conveyed to the public overall, the Recital additionally emphasises the condition that editorial decisions have to remain "free from any state interference or influence by national regulatory authorities or bodies". This does not, however, mean that the authorities cannot interfere with the position of providers; much to the contrary, Recital 4 acknowledges the legitimacy of regulatory action, but it has to limit itself to "the mere implementation of law" and specifically safeguarding legally protected rights, which do not aim at limiting a particular opinion.

Finally, Art. 30(6) AVMSD calls for ensuring an effective appeal mechanism at national level against decisions of regulatory authorities and bodies,

which shall be independent of the parties involved in the appeal. All these safeguards shall be enshrined in clear terms in national law.

Before the 2018 AVMSD revision there was only a basic expectation towards a cooperation structure contained in the Directive, which required the Member States merely to take appropriate measures to provide each other and the Commission with the information necessary for the application of the Directive. Now, the conditions for this cooperation have become more concrete, and in particular Arts. 2, 3 and 4, and generally Art. 30a AVMSD, contain indications of the areas in which the cooperation takes place and how. In addition to the former wording, the provision of Art. 30a(2) AVMSD stipulates that a regulatory authority or body which becomes aware of a media service provider under their jurisdiction being wholly or mostly directed at the audience of another Member State shall inform the authority or body of that other Member State. Para. 3 of that provision goes further and lays down a formal mutual assistance rule. If, in a cross-border matter, the regulatory authority of the receiving Member State of an audiovisual offer sends a request to the authority of the Member State having jurisdiction, the latter shall do its utmost to address the request within two months. The request shall be supplemented with any information that may assist the concerned authority in addressing the request.

With the new Art. 30b AVMSD, the already existing ERGA, which was initially set up by a Decision of the Commission[164], became formally established within the AVMSD. The ERGA is now tasked with providing technical expertise, giving its opinion to the Commission and facilitating cooperation among the authorities or bodies that are its members as well as between them and the Commission.[165]

164 Commission decision of 3 February 2014 on establishing the European Regulatory Group for Audiovisual Media Services, C(2014) 462 final.

165 For further details also the ERGA Statement of Purpose, http://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-02_Statement-of-Purpose-adopted.pdf, and for details about the functioning of the Group the Rules of Procedure, last amended on 10.12.2019, http://erga-online.eu/wp-content/uploads/2020/04/ERGA-Rules-of-Procedure-10-12-2019-ver-1.pdf.

II. A Look at Media-oriented Institutional Approaches beyond the AVMSD

1. The Approach of the Digital Services Act (DSA)

The institutional system of the DSA is complex. On the one hand, this results from the DSA addressing very diverse types of actors in the digital sphere as a horizontal legal act. These range from social networks, online marketplaces or video-sharing platforms and others. On the other hand, the duties also pursue different objectives, address different risks and therefore touch on matters that are domiciled in different areas of law. These include issues of competition law, consumer protection law, data protection law, electronic communications networks and services law, the protection of minors and, importantly, also media law, each of which are areas of law with (typically) specific institutional structures based on EU legislation or the Member States approaches. It is further relevant that the DSA follows a graduated risk approach, i.e., it subjects services of different types and different sizes or reach to different sets of obligations. All of this the institutional system attempts to take into account.

a. Designation and powers of supervisory authorities

According to Art. 49 DSA, Member States shall designate one or more competent authorities to be responsible for the supervision of providers of intermediary services and for the enforcement of the DSA. In addition, the Member States shall designate one of these competent authorities as the so-called Digital Services Coordinator (DSC). The designation has to take place at the latest by 17 February 2024, which is the date for the application of the DSA. The DSC "shall be responsible for all matters relating to supervision and enforcement" of the DSA in its Member State "unless the Member State concerned has assigned certain specific tasks or sectors to other competent authorities". This means that the organisation of supervision is initially left to the Member States. They can, in principle, delegate the supervision of certain duties to one authority and the supervision of others to a different authority; they can also entrust just one authority with the complete supervision. However, and here the DSA will make a significant impact on the seemingly decentralised supervision approach, one of the authorities must be designated as DSC. The DSC in turn takes over coordination at the national level and, above all, acts as a contact point for providers, users, other authorities and the European Commission.

Art. 50 DSA places certain requirements on the DSC, including that it must carry out its tasks in an impartial, transparent and timely manner. There is no explicit requirement to lay down a specific mention and definition of independence criterion for the Member States, but they can do so by including such mention in the context of the institutional structure or by transferring the supervisory tasks to an already existing and independent authority. Additionally, Art. 50(2) DSA describes the way the powers have to be assumed by the DSC in a way that it is clear it can only "act with complete independence" if it at least has a degree of independence from influence for its powers that relate to the DSA. Recital 112 reinstates this in stronger wording by pointing out that freedom from external influence in acting under the DSA also means that the DSC has to be without "obligation or possibility to seek or receive instructions, including from the government". In Arts. 50, 51 and 56 DSA, powers are assigned to the DSC. These same powers, according to Art. 49(4) DSA, are granted in addition to any other competent authority that (and if) the Member State has entrusted with tasks under the DSA. The list is very detailed and extensive; it ranges from investigative powers (Art. 51(1) DSA) to enforcement powers (Art. 51(2) DSA) and explicitly states the power to impose fines, with certain benchmarks for these being set by the DSA itself.

Despite the high level of detail of these powers, there is still an important implementation obligation for the Member States. Art. 51(6) DSA demands from Member States to lay down specific rules and procedures for the exercise of the powers that have been defined by the previous para. 1 to 3. Especially, it shall be ensured that the exercise of those powers is subject to adequate safeguards contained in national law in compliance with the Charter and general principles of Union law. What may seem to give Member States some leeway on how to achieve the concrete functioning of the authority in order to ensure an effective use of the powers is in actual fact a pre-determined relatively narrow framework.

b. Competences in cross-border matters and with regard to very large providers

With regard to competences in cross-border matters, the DSA in principle follows the country-of-origin principle. It provides, however, for important deviations from that principle. According to Art. 56(1) DSA, the Member State in which the main establishment of the provider of intermediary services is located shall have exclusive powers to supervise and enforce the

DSA provisions in view of that provider. If a provider has no establishment in the Union, the Member State where its legal representative resides or is established shall have the powers as clarified by Art. 56(6) DSA. To this point, the DSA approach is similar to the system provided for in the AVMSD, which creates additional links besides the establishment. However, there are some significant exceptions to the principle as mentioned.

Legal representatives of non-EU-established providers need to be appointed according to Art. 13(1) DSA, giving the provider the choice of jurisdiction from within those Member States in which the service is offered. As the DSA follows the market place or market location approach, all intermediary service providers that are present on the EU single market by way of offering services in at least one of the Member States are confronted with this obligation. If non-EU providers do not follow their obligation to appoint a legal representative in the EU, they are faced with the negative consequence that all Member States have the power to enforce the DSA for that provider. With regard to the enforcement of the rules, the DSA thus is again comparable to the AVMSD. The latter leaves the power of Member States to deal with non-EU-based providers of audiovisual media services untouched both in terms of substantive law and enforcement, while the DSA is directly applicable in such cases but it is only the enforcement element that can be undertaken by all Member States in parallel. Consequently, if a DSA-covered provider does not appoint a legal representative, every Member State has the power of enforcing the obligation of the DSA to appoint a legal representative. Once the provider has appointed a legal representative, the competence for supervising that provider would be with the Member State in which the representative was appointed.

The most important exception to this general system of powers of supervisory authorities, according to Art. 56(2) DSA, is the exclusive assignment of supervision and enforcement powers to the Commission when very large online platforms (VLOPs) and very large online search engines (VLOSEs), and the obligations the DSA imposes on these specifically, are concerned. This exception also applies in case a non-EU-based provider did not appoint a EU representative as mentioned above. For Section 5 of Chapter III of the DSA with special duties only for such very large providers, this power is fully assigned to the Commission, and for all other obligations of the DSA it is construed as additional layer besides the powers of the DSC of the Member State of establishment of that provider (Art. 56(3) DSA). In the latter case, the DCS of the Member State of establishment is competent

unless the Commission has initiated proceedings. In other words, the Commission may draw the power to itself by initiating proceedings against a very large provider. The supervision, investigation, enforcement and monitoring powers concerning VLOPs and VLOSE are substantiated further in Section 4 of Chapter IV, Art. 66 DSA. Even before initiating proceedings against a very large provider, the Commission may exercise investigative powers concerning such providers, either on its own initiative or following a request of a DSC in case that DSC has reason to suspect that a provider of a VLOP or VLOSE has infringed the provisions of Section 5 of Chapter III or has systemically infringed any of the provisions of the DSA in a manner that seriously affects recipients of the service in its Member State (Art. 65 DSA). The Commission is, therefore, vested with comprehensive powers of investigation and enforcement vis-à-vis VLOPs and VLOSEs, as the further elaboration in Arts. 67 et seq. DSA demonstrates.[166]

c. European Board for Digital Services

According to Art. 61 DSA, an independent advisory group of DSCs on the supervision of providers of intermediary services named "European Board for Digital Services" (hereinafter EBDS, the DSA refers to "the Board") is established. The EBDS, once established, will be composed of the Member States' DSCs who shall be represented in meetings by high-level officials. Other competent authorities that have been entrusted with specific operational responsibilities under the DSA in national law may also participate to meetings of the EBDS as the provision of Art. 62(1) DSA states. It will be chaired by the Commission which will convene the meetings, prepare the agenda in accordance with the tasks of the Board and provide administrative and analytical support. The Commission will also be charged with approving the rules of procedure the EBDS will have to adopt, which puts the Commission in an important position. In the actual work of the EBDS, the Commission will not have any voting rights, while each Member State has one vote, irrespective of whether additional authorities besides the DSC participate in the work of the EBDS.

166 Critical in light of independence of supervision, required from national competent authorities but not from the Commission, *Buiten*, The Digital Services Act from Intermediary Liability to Platform Regulation, para. 78; *Buri*, A Regulator Caught Between Conflicting Policy Objectives; *Wagner/Janssen*, A first impression of regulatory powers in the Digital Services Act.

The main task of the Board is to advise its members, the DSCs, and the Commission in order to contribute to the consistent application of the DSA. It shall ensure effective cooperation, including contributing to guidelines and analysis, and to especially assist the DSCs and the Commission in the supervision of very large online platforms. These tasks are concretised by a non-exhaustive list in Art. 63 which refers, inter alia, to a support of joint investigations or the issuing of opinions and recommendation. These activities are more of a supportive nature and do not in themselves have directly legally binding effects. However, if competent authorities do not follow the opinions, requests or recommendations addressed to them by the EBDS, they shall provide the reasons for this choice, including an explanation on the investigations, actions and the measures that they have implemented as appropriate. In that regard there is a justification need when national authorities want to deviate from the Board's positioning. The EBDS may also recommend that the Commission initiate the drawing up of voluntary crisis protocols for addressing crisis situations (Art. 48), and it is involved in the drawing up of codes of conduct (Art. 45). Apart from that, there are regular information obligations of the Commission towards the EBDS on the exercise of its supervisory measures.

Concerning some matters, the powers of the EBDS reach further and give the possibility to take more binding positions. For example, in the case of violations of Section 5 of Chapter III (additional obligations for VLOPs and VLOSEs), an extended supervisory system is provided for under Art. 73 DSA. Before issuing a non-compliance decision vis-à-vis VLOPs and VLOSEs, the Commission shall inform and involve the EBDS in a procedure and finally "take utmost account" of the Board's position. In the crisis response mechanism (Art. 36 DSA), the Commission has to consult the EDSB and also take utmost account of its recommendation. But even in these cases a directly legally binding character of the EDSBs actions is not foreseen.

d. Cooperation structures

In addition, the DSA also provides for comprehensive duties to cooperate between different actors.[167] In addition to the generally formulated duty in Art. 56(5) DSA for close cooperation between Member States (here not

167 See on this *Smith,* Enforcement and cooperation between Member States in a Digital Services Act.

the DSCs but the Member States are addressed) and the Commission in law enforcement and supervision, Art. 56(7) DSA provides (in the case of failure to appoint a legal representative by the obliged provider) for an extensive duty of information of the DSC: Where a DCS intends to exercise its powers, it shall notify all other DSCs and the Commission and ensure that the applicable safeguards afforded by the Charter are respected, in particular to avoid that the same conduct is sanctioned more than once for the infringement of the obligations laid down in this Regulation. Where the Commission intends to exercise its powers, it, too, shall notify all DSCs of that intention. Following such notifications, other Member States shall not initiate proceedings for the same infringement as referred to in the notification.

Art. 57 DSA contains rules on mutual assistance. This shall include, in particular, a regular information exchange and the duty of the DSC of establishment to inform all DSCs of destination, the EBDS and the Commission about the opening of an investigation and the intention to take a final decision in any DSA-rules application, including the assessment of the case at hand. For the purpose of an investigation, the DSC of establishment may request other DSCs to provide specific information they may have. The receiving DSCs have to comply with this request without undue delay and no later than two months after reception, unless they can rely on the reasons provided for in Art. 57(3) DSA, such as a lack of sufficient specification of the request, an impossibility to provide the information or the request being incompatible with Union or national law. Such a refusal has to be justified.

For these purposes of providing relevant information, an information exchange system shall be established by the Commission (Art. 85 DSA). This shall provide the place for communication and exchange of information between the Commission, the DCSs and the EBDS.

Arts. 58 and 59 DSA contain a specific procedure for cross-border issues when a competent DSC does not act on its own behalf in view of a possible infringement of a provider under its jurisdiction. In that case, either a DSC of destination, in case of suspicion of an infringement negatively affecting recipients in its Member State, or the EBDS, in case of a request from at least three DSCs of destination, may request the DSC of establishment to assess the matter and to take the necessary investigatory and enforcement measures to ensure compliance with the DSA. If the Commission has already initiated an investigation for the same infringement, this specific procedure does not apply.

Art. 58(3) DSA contains requirements for such requests, including a description of the relevant behaviour of the provider and a reasoning for the alleged infringement. The DSC of establishment shall then "take utmost account" of the request and, without undue delay and in any event not later than two months following receipt of the request, communicate to the requesting DSC and the EBDS the assessment of the suspected infringement and an explanation of any investigatory or enforcement measures taken or envisaged in relation thereto. Where the DSC of establishment considers that it had received insufficient information about the alleged violation, it can request such information from the requesting DSC or the EBDS, which leads to a suspension of deadlines. In the absence of a communication within the period, in the case of a disagreement of the EBDS with the assessment or the measures taken or envisaged or in the cases of failed joint investigations (Art. 60(3) DSA), the EBDS may escalate the matter to the Commission (Art. 59 DSA). After having consulted the DSC of establishment, the Commission has to assess the matter within two months following this referral and, in case of issues seen with the actions of the DSC of establishment, can request the DSC of establishment to re-asses the case taking utmost account of the views and the request for review by the Commission.

2. The Proposed Future Cross-border Cooperation Mechanism of the EMFA

In its Chapter III, the EMFA Proposal provides for a framework for regulatory cooperation and "a well-functioning internal market for media services". In doing so, the institutional and cooperation structures included in Sections 1 to 3 of the chapter are fundamentally based on the AVMSD and would amend the AVMSD including deleting rules on ERGA which would be replaced by the EMFA provisions. In addition, these sections contain significant innovations, in particular concerning more formalised cooperation structures, by building on the MoU achieved within ERGA between its Members and setting up new mechanisms in the oversight of providers between the national regulatory authorities and the European Commission.[168]

168 For a more detailed overview and assessment of the EMFA Proposal see *Etteldorf/Cole*, Research for CULT Committee – European Media Freedom Act - Background Analysis.

a. National regulatory authorities or bodies

As a starting point, EMFA relates to the supervisory structure as established by the AVMSD by referring in Art. 7(1) to Art. 30 AVMSD and declaring that the national regulatory authorities or bodies under the AVMSD shall be responsible "for the application of Chapter III" of EMFA and have to exercise their powers in the context of the Regulation with the same independence and other requirements as stipulated for them in Art. 30 AVMSD. In addition to Art. 30(4) AVMSD, which already ensures this for the tasks under the AVMSD, Art. 7(3) EMFA repeats the requirement that Member States have to ensure adequate financial, human and technical resourcing for them so that they can carry out their extended tasks under the Proposal.

Art. 7(4) EMFA demands that the national regulatory authorities or bodies shall have appropriate powers of investigation with regard to the conduct of natural or legal persons to which Chapter III applies. Especially important is the power to request relevant information from these persons within a reasonable time period which they need for carrying out their tasks.

b. Role of the Commission

In strong contrast to the approach in the AVMSD, the European Commission would play a central role in the way the EMFA Proposal devises the cooperation of authorities and the handling of cross-border matters.

As with other legislative acts, it is the Commission's tasks to evaluate the functioning of the EMFA (Art. 26 EMFA), but it shall also more generally be in charge for monitoring the internal market for media services, including analysing risks that exist and the overall resilience of the market (Art. 25). The Commission is granted several harmonisation powers in that it cannot only regularly issue opinions on any matter related to the application of the EMFA and the national rules implementing the AVMSD (Art. 15(3) EMFA), on media market concentration (Art. 22(2) and Art. 21(6) EMFA) or on national measures affecting the operation of media service providers (Art. 20(4) EMFA). Beyond that it has the power to issue guidelines on the practical application of audience measurement (Art. 23(4) EMFA), on the factors to be taken into account when applying the criteria for assessing the impact of media market concentrations on media pluralism and editorial independence by the national regulatory authorities or bodies (Art. 21(3) EMFA) and on the form and details of declarations to

be provided by VLOPs (Art. 17(6) EMFA). Most importantly, the design of the cooperation structures in the proposal involves the Commission heavily in the tasks of the supranational body European Board for Media Services (hereinafter referred to as "EBMS") that is to replace the ERGA (see below). However, EMFA does not clarify to what extent guidelines and opinions of the Commission are binding or how the involvement of the Commission relates to the position of the independent regulatory authorities.

c. European Board for Media Services

Art. 8 aims to establish the EBMS, which shall replace and succeed the ERGA. The EBMS shall act in full independence when performing its tasks or exercising its powers, in particular neither seek nor take instructions from any government, institution, person or body (Art. 9). However, this notion of independence is without prejudice to the competences of the Commission or the national regulatory authorities or bodies in conformity with the EMFA.

Just like the ERGA, the EBMS shall be composed of representatives of the national regulatory authorities or bodies. Other than the AVMSD, which did not contain any internal procedure rules for ERGA, Art. 10 EMFA explicitly states that each member shall have one vote, which leads to the necessity of appointing a joint representative who is able to exercise this right to vote in case of a Member State having more than one regulatory authority or body in charge of the sector. Several aspects of how ERGA has been functioning in practice since its establishment are proposed to be included in the binding text of the Regulation, such as the formal representation by its Chair, which is elected for two years amongst its members by a two-thirds majority of members with voting rights. Differently from the AVMSD, where only a Commission representative participates in ERGA meetings, the EMFA stipulates that the Commission shall "designate" a representative to the Board which shall participate not only in all meetings but all activities of the EBMS, albeit without having voting rights. In addition, the EBMS Chair shall keep the Commission informed about the ongoing and planned activities of the Board and shall consult it in preparation of the EBMS's work programme and main deliverables. The reliance on the Commission as foreseen in the proposal goes further in that agreement has to be sought with it when deciding on internal rules of procedure and when inviting external participants to meetings.

The tasks of the EBMS are considerably expanded compared to those assigned to the ERGA under the AVMSD. According to the long list provided for in Art. 12, it remains that the EBMS under the EMFA (just like ERGA under AVMSD) shall provide "technical expertise" to the Commission, promote cooperation and the effective exchange of information, serve as a forum to exchange experience and best practices and give opinions when requested by the Commission. However, the conditions for this work change significantly under EMFA if compared to the relatively basic pronouncing of ERGA's activities in the AVMSD. For the latter only certain cases were detailed in which the ERGA had to respond to requests of the Commission. In the EMFA Proposal it is stated that the EBMS shall not only support the Commission through technical expertise (Art. 12 lit. (a) EMFA) but advise the Commission, where requested by it, on regulatory, technical or practical aspects pertinent to the consistent application of the EMFA and implementation of the AVMSD and on all other matters related to media services within its competence. Where the Commission requests advice or opinions from the Board, it may indicate a time limit, taking into account the urgency of the matter. The EBMS shall not only promote cooperation and the exchange of experience and best practices but is equipped with more concrete tasks (Art. 12 lit. (i) to (m) EMFA) to:

- upon request of at least one of the concerned authorities, mediate in the case of disagreements between national regulatory authorities or bodies, in accordance with Art. 14(3) EMFA;
- foster cooperation on technical standards related to digital signals and the design of devices or user interfaces, in accordance with Art. 15(4) EMFA;
- coordinate national measures related to the dissemination of, or access to, content of media service providers established outside of the Union that target audiences in the Union, where their activities prejudice or present a serious and grave risk of prejudice to public security and defence, in accordance with Art. 16(1) EMFA;
- organise a structured dialogue between providers of very large online platforms, representatives of media service providers and of civil society, and report on its results to the Commission, in accordance with Art. 18 EMFA;[169]

169 Critical on this in conjunction with Art. 17 EMFA *van Drunen/Helberger/Fahy*, The platform-media relationship in the European Media Freedom Act, arguing that the

– foster the exchange of best practices related to the deployment of audience measurement systems, in accordance with Art. 23(5) EMFA.

The powers of the EBMS to issue opinions are significantly expanded and connected to specific provisions and tasks covered in the EMFA. However, these powers are, as a rule, dependent on either a request by the Commission (as regards national measures and media market concentrations likely affecting the functioning of the internal market for media services) or even an agreement with the Commission (as regards requests for cooperation and mutual assistance between national regulatory authorities or bodies, requests for enforcement measures in dispute cases and national measures concerning non-EU providers). The only case where the EBMS can issue opinions without involvement of the Commission is on draft national opinions or decisions where the EBMS can assess the impact on media pluralism and editorial independence of a notifiable media market concentration where such a concentration may affect the functioning of the internal market.

In addition, the EBMS is tasked with "assisting" the Commission when it draws up the above-mentioned guidelines with respect to the application of the EMFA and of the national rules implementing the AVMSD. The same applies concerning factors to be taken into account when assessing the impact of media market concentrations (Art. 21(3) EMFA) and aspects of audience measurement (Art. 23 EMFA).

d. Cooperation structures

Based on the more formalised cooperation procedures that the ERGA members developed in the – legally non-binding – MoU as presented above, Art. 13 of the EMFA Proposal contains rules on structured cooperation between national regulatory authorities or bodies. Art. 13(1) EMFA stipulates that any regulatory authority or body can request cooperation or mutual assistance at any time from another for the purposes of exchange of information or taking measures relevant for the consistent and effective application of the EMFA and the AVMSD. Such a general mutual assistance idea is more concretely put for certain issues: in case of a serious and grave risk of prejudice to the functioning of the internal market for media

concept leads to a "privatisation of fundamental rights governance" as regards the important roles given to platforms.

services or to public security and defence, Art. 13(2) EMFA provides for "accelerated" cooperation and mutual assistance. In all cases, in order to secure a manageable workflow, such requests shall contain all relevant information (Art. 13(3) EMFA), and the requested authority or body can, by providing reasons, refuse it in case it is not competent for the matter or fulfilling the request would infringe Union or Member State law. In any case, the requested authority or body shall inform the requesting authority or body on progress made and shall do "its utmost" to address and reply to the request without undue delay. These notions clearly integrate the efforts for a more speedily cooperation as included in the MoU. The requested authority shall provide intermediary results within the period of 14 calendar days from the receipt of the request, and for accelerated cooperation or mutual assistance the requested authority shall even (finally) address and reply to the request within 14 calendar days. If the requesting authority is not satisfied with the measures taken or if there is no reply at all to its request, it shall again confront the requested authority giving reasons for its position. If the requested authority continues to disagree with that position or again does not react at all, either authority may refer the matter to the EBMS. Within 14 calendar days from the receipt of that referral, the EBMS shall issue – again "in agreement" with the Commission – an opinion on the matter, including recommended actions. This opinion is not binding for the requested (competent) authority, but it shall, however, "do its outmost to take into account the opinion".

A specific mechanism is proposed in Art. 14 as regards enforcement vis-à-vis VSPs. Any national regulatory authority or body may request the competent authority to take necessary and proportionate actions for the effective enforcement of the obligations imposed on video-sharing platforms under Art. 28b AVMSD. The requested national authority or body shall, without undue delay and within 30 calendar days, inform the requesting national authority or body about the actions taken or planned. In the event of a disagreement regarding such actions, either the requesting or the requested authority or body may refer the matter to the EBMS for mediation in view of finding an amicable solution. If no amicable solution can be found, both may request the EBMS to issue an opinion, in which it shall assess the matter without undue delay and in agreement with the Commission. If the EBMS then considers that the requested authority has not complied with a request, it shall recommend actions. The requested national authority or body shall, without undue delay and within 30 calendar days at the latest from the receipt of the opinion, inform the Board,

the Commission and the requesting authority or body of the actions taken or planned in relation to the opinion. However, neither a binding effect of the opinion nor an obligation to take (utmost) account of it is put on the competent authority. The need for closer cooperation especially in the VSP area is also documented by a specific section in the MoU which would be reflected in the inclusion of dedicated procedures foreseen in the EMFA Proposal.

Finally, Art. 16 EMFA contains a provision on the coordination of measures concerning media service providers established outside the Union. This provision is a reaction to difficulties observed when trying to achieve a common reaction to the risks created by dissemination of Russian channels in the EU after the Russian Federation started war against the Ukraine. The procedure shall allow for other ways to react to dangers from such external influence than 'only' by the possibility of issuing economic sanctions as was the case for the Russian channels in 2022 (see above). Concretely, the EBMS shall coordinate measures by national regulatory authorities or bodies related to the dissemination of, or access to, media services provided by such media service providers that target audiences in the Union where, inter alia in view of the control that may be exercised by third country governments or other entities of the states over them, such media services prejudice or present a serious and grave risk of prejudice to public security and defence. In that light, the EBMS may, in agreement with the Commission, issue opinions on appropriate national measures, to which all competent national authorities (not only the authorities or bodies under EMFA or AVMSD) shall do their utmost to take them into account.

III. Other Oversight Systems and Their Institutional Structure

1. Overview of Comparable Approaches

Other systems of supranational cooperation, which are not in the direct context of the media or content dissemination sector, show responses to similar cross-border challenges, which is why they merit a comparative analysis.

In this context, competition law is an interesting sector to begin with, as there are some overlaps with media law in practice, especially with regard to business models and the media markets. Although competition

law is based on a different legal environment than, e.g., the AVMSD, EU norms on competition law are highly relevant. With its basis in primary law (Arts. 101–109 TFEU) and the approach concerning actions of undertakings (or States) of significance for the EU due to the market impact, it is worth considering the extensive powers the European Commission as the executive body in these cases has. In addition to EU competition law there is also national competition law of the Member States, which addresses anti-competitive concerns on the level of the specific Member States. The supervisory authorities are interconnected in an EU-wide exchange when it comes to the application of EU Competition law. Council Regulation (EC) No. 1/2003[170], detailing the application of Arts. 102 and 103 TFEU, had significantly modernised competition law and thereby created an interaction between the different levels of supervision. It empowers (and obliges) Member State competition authorities to apply EU competition rules, and it introduces a number of rules on cooperation between the Commission and these authorities (mandatory) and between the authorities among each other (optional).[171] In principle, however, the national authorities retain their competences for those cases that they are in charge of. In contrast to other areas, there are no consistency or coherence procedures foreseen that would allow other non-affected authorities to be involved in a specific case.

There are, however, rules on cooperation in the sense that, e.g., a suspension possibility concerning proceedings in cases where the matter is already dealt with by another competition authority is foreseen. Essentially, the provisions concern general cooperation and, more importantly, the exchange of information. Although a specific forum for this exchange is not formally established by the Regulation, Recital 15 states that "the Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation". This mandate has developed into the European Competition Network (ECN), which has since served to exchange and develop best practices and to monitor developments from a

170 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pp. 1–25.

171 See on this in detail with an early assessment of the effectiveness of the cooperation structures *Mataija*, The European competition network and the shaping of EU competition policy. For a more recent evaluation *Vantaggiato/Kassim/Wright*, Internal network structures as opportunity structures: control and effectiveness in the European competition network.

cross-border perspective.[172] Statistics show that valuable insights into the exchange of information can be gained from this.[173] The technical instruments used in the ECN certainly provides a valuable experience for other sectors. Furthermore, recommendations and best practices, for example on investigative and decision-making powers,[174] that have been developed in the ECN can serve as source of inspiration for other authorities which have a task to cooperate with each other. From a legal point of view, however, the flexible but non-binding cooperation structures among the Member State authorities are not suitable for gaining insights for strengthening law enforcement in the cross-border dissemination of audiovisual content.

More robust cooperation structures and tasks of supranational bodies, however, can be found in electronic communications law and data protection law. Due to the facilitation of cross-border cooperation with such structures – at least in principle – a more intensive look at these sectors will be taken in the following.

2. The Approach in the European Electronic Communications Code

Another sector that lends itself in principle to a comparison of institutional structures is the electronic communications sector. After all, the transportation of content (also) is an element of the dissemination of media and communication. With the European Electronic Communications Code (EECC)[175], the rules applicable to this sector at EU level have recently been consolidated and reformed into a uniform set of rules. Unlike with competition law, here the conditions for the legal framework are comparable to the field of audiovisual media (law): In essence, it is a EU Directive that must be implemented in national law and imposes certain obligations on the providers of electronic communications networks and services. The institutional system is in basic terms comparable to that of the AVMSD.

172 Cf. Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, pp. 43–53.

173 See https://competition-policy.ec.europa.eu/european-competition-network/statistics_en.

174 See https://competition-policy.ec.europa.eu/european-competition-network/documents_en.

175 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), OJ L 321, 17.12.2018, pp. 36–214.

a. Independent supervisory authorities

Member States shall ensure that each of the tasks laid down in the EECC is undertaken by a competent authority. Even more so, Art. 3 EECC stipulates that national regulatory and other competent authorities shall contribute within their competence to ensuring the implementation of policies aimed at the promotion of freedom of expression and information, cultural and linguistic diversity, and media pluralism. This closely links the EECC to the media sector itself. The EECC lays down rules on the independence of national regulatory and other competent authorities (Art. 6 EECC), appointment and dismissal of members of national regulatory authorities (Art. 7 EECC), political independence and accountability of the national regulatory authorities and regulatory capacity of national regulatory authorities (Art. 9 EECC), which are similar to the rules of Arts. 30 et seq. AVMSD.

In light of possible cross-sector structures on national level, Member States may assign other tasks provided for in the EECC and other Union law to national regulatory authorities, in particular those related to market competition or market entry. Where those tasks related to market competition or market entry are assigned to other competent authorities, they shall seek to consult the national regulatory authority before taking a decision. This structure is at least comparable to the structures provided for in the DSA related to the DSCs and their interaction with other national competent authorities.

b. Competences and tasks

Unlike in the AVMSD, a basic framework of tasks to be assigned as a minimum requirement to the competent authority is already specified by the EECC itself. Regulatory authorities shall be responsible at least to contribute to the protection of end-user rights in the electronic communications sector, in coordination, where relevant, with other competent authorities, and for performing any other task that the EECC reserves to them. In addition to this general allocation of tasks, the individual parts and chapters of the EECC dealing with specific regulatory areas (spectrum allocation, market entry etc.) contain specific assignments of tasks to the national regulatory authorities.

c. The Body of European Regulators for Electronic Communications

The supranational cooperation body for national supervisory authorities in the electronic communications sector is the Body of European Regulators for Electronic Communications (BEREC). It had also pre-existed[176] but is now established by Regulation (EU) 2018/1971 itself.[177] BEREC comprises a Board of Regulatory authorities and working groups. The Board is composed of one member from each Member State appointed by the national regulatory authority that has primary responsibility for overseeing the day-to-day operation of the markets for electronic communications networks and services under the EECC. Each member has one right to vote. With regard to other authorities which are assigned with certain tasks under the EECC, Art. 5(1) subpara. 2 provides that for the purposes of contributing to BEREC's tasks national regulatory authorities shall be entitled to collect necessary data and other information from market participants. The Commission participates in all deliberations of the Board of Regulators, albeit without the right to vote, and shall be represented at an appropriately high level. Art. 8 Regulation (EU) 2018/1971 contains a provision on independence concerning BEREC: When carrying out the tasks conferred upon it and without prejudice to its members acting on behalf of their respective national regulatory authorities, the Board of Regulators shall act independently and objectively in the interests of the Union, regardless of any particular national or personal interests, and, without prejudice to coordination, the members of the Board of Regulators and their alternates shall neither seek nor take instructions from any government, institution, person or body.

Art. 10 EECC interlinks the whole Directive closely to BEREC. Member States shall ensure that the goals of BEREC of promoting greater regulatory coordination and consistency are actively supported by their respective national regulatory authorities and that national regulatory authorities take utmost account of guidelines, opinions, recommendations, common posi-

176 Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337, 18.12.2009, pp. 1–10.

177 Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No. 1211/2009, OJ L 321, 17.12.2018, pp. 1–35.

tions, best practices and methodologies adopted by BEREC when adopting their own decisions for their national markets.

The provisions of the EECC foresee repeatedly a central role for BEREC in the procedures, especially in the various cooperation mechanisms and the development of guidelines for the consistent application of the EECC. This concerns, for example, the development of guidelines for uniform notifications by electronic communications service providers (Art. 12(4) EECC) or templates for information requests (Art. 21(1) EECC), information rights vis-à-vis Member States in connection with complaints procedures (Art. 31(3) EECC) and participation in procedures for cross-border dispute resolution (Art. 27 EECC), for the uniform application of remedies (Art. 33 EECC) and on harmonisation measures (Art. 38 EECC).

However, as a rule, this does not entail any binding powers of BEREC. This is true both vis-à-vis the national regulatory authorities – according to Art. 10(2) EECC, these shall 'only' take utmost account of the BEREC guidance – and vis-à-vis the European Commission. Within the EECC, the Commission is granted substantial powers, in particular with regard to the harmonisation of divergent national implementations by supervisory authorities (Art. 38 EECC) or the creation of binding guidelines in the context of the consistent application of the EECC (Art. 34). In doing so, the Commission shall, as well, take utmost account of the opinion of BEREC. For example, according to Art. 38 EECC, where the Commission finds that divergences in the implementation by the national regulatory or other competent authorities of the regulatory tasks could create a barrier to the internal market, the Commission may adopt recommendations or decisions by means of implementing acts to ensure the harmonised application of the EECC. In such a case it is obliged to take utmost account of the opinion of BEREC. BEREC's possibilities in this context go further as it may, on its own initiative, advise the Commission on whether a measure as described should be adopted in order to achieve the objectives set out in Art. 3 EECC. In that way, BEREC has an important role to play, even if its positions do not have a directly binding effect.

d. Cooperation and consistency

Art. 5(2) EECC contains a more general rule on cooperation: National regulatory and other competent authorities of the same Member State or of different Member States shall, where necessary, enter into "cooperative arrangements" with each other to foster regulatory cooperation. Further-

more, national regulatory authorities, other competent authorities under the EECC and national competition authorities shall provide each other with the information necessary for the application of the EECC (Art. 11 EECC).

Moreover, various specific cooperation mechanisms are scattered throughout the EECC and concern individual (sometimes very different) mechanisms of regulation of the electronic communications sector. Of these rules, the mechanisms in Arts. 27 and 32 et seq. EECC are particularly relevant.

Art. 27 EECC contains a mechanism for the resolution of cross-border disputes between undertakings themselves, which is a different matter than a potential conflict between regulatory authorities concerning a question of competence. Any party may refer a dispute arising under the EECC between undertakings in different Member States to the national regulatory authority or authorities concerned (without their right to bring an action before a court being curtailed by this). Where the dispute affects trade between Member States, the competent national regulatory authority or authorities shall notify the dispute to BEREC in order to bring about a consistent resolution of the dispute. BEREC shall then issue an opinion inviting the national regulatory authority or authorities concerned to take specific action in order to resolve the dispute or to refrain from action. This opinion shall be issued in the shortest possible timeframe and in any case within four months if it is not for exceptional circumstances. The national regulatory authority or authorities concerned shall await BEREC's opinion before taking any action to resolve the dispute. There is an urgency procedure foreseen, in which any of the competent national regulatory authorities may, either at the request of the parties or on its own initiative, adopt interim measures exceptionally if it is necessary to safeguard competition or protect the interests of end-users. Any obligations imposed on an undertaking by the national regulatory authority as part of the resolution of the dispute shall take utmost account of the opinion adopted by BEREC and shall be adopted within one month of such opinion.

Another mechanism of interest in the context of cross-border enforcement are the provisions on the consolidation of the internal market for electronic communications services. If a national regulatory authority intends to take a measure that falls under certain provisions of the EECC, which are predominantly of cross-border relevance, and which would have an effect on trade between Member States, it shall publish the draft measure and communicate it to the Commission, to BEREC and to the national

regulatory authorities in other Member States, at the same time stating the reasons for the measure (Art. 32(3) EECC). National regulatory authorities, BEREC and the Commission may comment on that draft measure within one month. The draft measure shall not be adopted for a further two months if that measure aims to regulate certain issues with cross-border relevance (respectively define a relevant market or designate an undertaking as having significant market power) and if the Commission has indicated to the national regulatory authority that it considers that the draft measure would create a barrier to the internal market or if it has serious doubts as to its compatibility with Union law and in particular the objectives referred to in Art. 3 EECC. The Commission shall inform BEREC and the national regulatory authorities of its reservations in such a case and simultaneously make them public. BEREC, in turn, shall publish an opinion on the Commission's reservations, indicating whether it considers that the draft measure should be maintained, amended or withdrawn, and shall, where appropriate, provide specific proposals to that end. The Commission shall take utmost account of this opinion by taking its reasoned final decision within the hold-still period mentioned before deciding that either the regulatory authority concerned shall withdraw the draft measure or lift its reservations.

In the first case, the national regulatory authority shall amend or withdraw the draft measure within six months. Where the draft measure is amended, the national regulatory authority shall undertake a public consultation and notify the amended draft measure to the Commission, thus starting the described procedure again. However, in exceptional circumstances there is a comparable urgency procedure foreseen as described above, according to which a national regulatory authority may immediately adopt proportionate and provisional measures if this is needed to safeguard competition and protect the interests of users. It shall then, without delay, communicate those measures, with full reasons, to the Commission, to the other national regulatory authorities and to BEREC. A decision of the national regulatory authority to render such measures permanent or extend the period for which they are applicable shall be subject, however, to the regular procedure described.

Both examples show a detailed procedural fixation in the EECC of cooperation between the relevant national authorities concerning their work in relation to cross-border matters. In those procedures the role of BEREC as the forum to deal with the issues and ensure a possibility for all concerned Member States (through their authorities) to bring in their view-

point is manifest. The opinions of BEREC are central to the procedures, which also is the case for the Commission in exercising its powers, as both Commission and regulatory authorities need to consider them carefully and, by taking utmost account of them, need to provide a justification if they do not follow them.

3. The Approach in the General Data Protection Regulation

a. Fundamental rights basis

The core of data protection law in the EU and thus the underlying basis of legislation is the fundamental right to protection of personal data as laid down in Art. 8 CFR. According to this, everyone has the right to the protection of personal data concerning them, while such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or another legitimate basis laid down by law. Furthermore, unlike other fundamental rights, Art. 8(3) CFR contains very concrete requirements for supervision that follow directly from the fundamental right: compliance with the rules emanating from Art. 8 CFR shall be subject to control by an independent authority. The establishment of independent supervisory authorities is thus an essential component of protecting individuals with regard to the processing of personal data.[178] These authorities are seen as "the guardians of those fundamental rights"[179]. It follows that the independence requirement must guide not only legislation at both the EU and national level, as these are charged with the application of EU law such as the "General Data Protection Regulation" (GDPR), but the rules on this structural aspect must be interpreted in the light of fundamental rights, taking into account the case law of the CJEU.[180] Already the

178 CJEU, Case C-614/10, *Commission/Austria*, ECLI:EU:C:2012:631, para. 37; Case C-518/07, *Commission/Germany*, ECLI:EU:C:2010:125, para. 23.

179 CJEU, Case C-518/07, *Commission/Germany*, ECLI:EU:C:2010:125, para. 23.

180 In particular CJEU, Case C-645/19, *Facebook Ireland Ltd. a.o./Gegevensbeschermingsautoriteit*, ECLI:EU:C:2021:483; Case C-311/18, *Data Protection Commissioner/Facebook Ireland Ltd a.o.*, ECLI:EU:C:2020:559; Case C-210/16, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein/Wirtschaftsakademie Schleswig-Holstein GmbH*, ECLI:EU:C:2018:388; Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB (C-203/15)/Post- och telestyrelsen and Secretary of State for the Home Department (C-698/15)/Tom Watson a.o.*, ECLI:EU:C:2016:970; Case C-362/14, *Maximilian Schrems/Data Protection Commissioner*, ECLI:EU:C:2015:650; Case

predecessor of the GDPR[181], the Data Protection Directive[182], included the independence criterion concerning the institutions involved in supervision, and this is now further specified in the GDPR.

b. Institutional system of the GDPR

The institutional system of the GDPR is structured in correspondence with the market location principle to which the GDPR adheres.[183]

(1) Independent supervisory authorities on the national level

According to Art. 51(1) GDPR, each Member State shall provide for one or more independent public authorities responsible for monitoring the application of the GDPR. However, design and structure of these authorities are not entirely left to the Member States, as they need to comply with the conditions set out in Arts. 52 et seq. GDPR.

Art. 54 GDPR lays down binding specifications for the national law establishing the supervisory authority:

- the qualifications and eligibility conditions required to be appointed as a member of each supervisory authority;
- the rules and procedures for the appointment of such members;
- the duration of the term of the members (in principle no less than four years);
- whether and, if so, for how many terms the members can be re-appointed;
- the conditions governing the obligations of the members and staff (prohibitions on actions, occupations and benefits incompatible therewith

C-288/12, *Commission/Hungary*, ECLI:EU:C:2014:237; Case C-518/07, *Commission/Germany*, ECLI:EU:C:2010:125; Case C-614/10, *Commission/Austria*, ECLI:EU:C:2012:631.

181 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, pp. 1–88.

182 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, pp. 31–50.

183 Cf. on this and the following already *Cole/Etteldorf/Ullrich*, Cross-border dissemination of online content, pp. 134 et seq.

during and after the term of office and rules governing the cessation of employment);
– a duty of professional secrecy both during and after their term of office.

Art. 53 GDPR provides further conditions for the members of supervisory authorities (i.e. the persons acting with responsibility and being entrusted with the supervisory powers under the GDPR), which derive from the independence criterion and must be safeguarded in national law. They must be appointed by means of a transparent procedure by the national parliament, government, head of State or an independent body; shall have the qualifications, experience and skills required to perform their duties and exercise its powers; and shall only be dismissed in cases of serious misconduct or if they no longer fulfil the conditions required for the performance of the duties.

In addition, Art. 52 GDPR contains further specifications on the concept of independence. It requires that supervisory authorities act with "complete independence" in performing their tasks and that their members "remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody", which includes state influence but also orders from any other external sources. Beyond formal orders, the safeguard goes further and means that members shall not be put under any form of external pressure.[184] Furthermore, they shall refrain from any action incompatible with their duties and shall not engage in any incompatible occupation, whether for profit or not (Art. 52(3) GDPR), meaning they must act objectively and impartially.[185] With regard to adequate resources, Art. 52(4) GDPR stipulates that Member States have to ensure that each supervisory authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board, and is free to choose its own staff under its directions. The authorities are subject to financial control, which, however, needs to ensure independence by establishing separate, public annual budgets, which may be part of the overall state or national budget.

The CJEU oversees compliance with these provisions and has already given a number of clarifications. In infringement proceedings brought by

184 CJEU, Case C-518/07, *Commission/Germany*, ECLI:EU:C:2010:125, para. 18.
185 CJEU, Case C-518/07, *Commission/Germany*, ECLI:EU:C:2010:125, para. 25.

the European Commission, the institutional systems set up in Germany[186], Austria[187] and Hungary[188] were found to be (partly) unlawful and thus in breach of the Treaties because of violations of the independence requirement, although those cases still concerned the national implementation of the less concretely formulated independence provision in Art. 28 of the former Data Protection Directive.

(2) Competences and tasks

According to Art. 57(1) GDPR, each (national) supervisory authority shall monitor and enforce the application of the GDPR on its territory. This needs to be read in context with the territorial scope of the GDPR (Art. 3), linking the application either to the establishment of a controller or processor in the Union or to the processing of personal data of EU citizens by a controller or processor established outside the Union. In terms of jurisdiction, this means that, in principle, each authority is competent for data processing on its territory, i.e. regularly when either the data subject and/or the processor/controller is located/established in its Member State. However, in the case of cross-border data processing, which is regularly synonymous with the cross-border provision of services, the result of this competence rule is that several authorities may be in charge simultaneously.

To prevent an inconsistent application of the GDPR, the Regulation therefore provides a 'one-stop-shop' mechanism for these cases. According to Art. 56(1) GDPR, for processing operations carried out across borders, there is a specific assignment of jurisdiction: the supervisory authority of the controller's or processor's main establishment (or single establishment) in the EU is the competent so-called lead supervisory authority. Where there is a lack of such an establishment, jurisdiction remains within the competence of all supervisory authorities concerned by the activities of that processor or controller. Also, the principle of a lead supervision does not apply when it comes to data protection violations that only relate to the company's establishment in one Member State or only significantly affect citizens in one Member State. This again results from the approach of the GDPR that aims at an effective application based on the potential or actual impact on a given market location. When there is a connection to one

186 CJEU, Case C-518/07, *Commission/Germany*, ECLI:EU:C:2010:125.
187 CJEU, Case C-614/10, *Commission/Austria*, ECLI:EU:C:2012:631.
188 CJEU, Case C-288/12, *Commission/Hungary*, ECLI:EU:C:2014:237.

Member State due to the specific impact on that market or because an alleged violation only took place at the establishment in that Member State, there is a duty to inform the supervisory authority that would normally be the lead authority, which can, but does not have to, take over the proceedings. If it does so, the coherence and consistency mechanisms of Arts. 60 et seq. GDPR apply here as they do in the other cross-border situations foreseen by the law.

Although setting up such a mechanism based on previous experience of very diverse transposition of the Data Protection Directive was an important step towards coherent application of the GDPR, it is associated with challenges in practice. This starts already with the issue of determining jurisdiction over a processor or controller. On the one hand, this concerns the determination of the lead authority in specific cases. The Art. 29 Working Party, the predecessor of what became the more elaborate European Data Protection Board (EDPB), had issued Guidelines on this, which contain details on definitions such as "cross-border processing", "main establishment", or "substantially affects" (market location relevance).[189] On the other hand, this also concerns exceptions to the principle by rules in other secondary legislation or practical circumstances. For example, the one-stop-shop mechanism does not apply in the context of the ePrivacy Directive[190], i.e. when it comes to data processing for the purposes of electronic communications. It may also be difficult, especially in the case of large tech companies, to determine by which sub-unit of the company (e.g. company headquarters in the US, European headquarters in Ireland, branches in other Member States) the data processing in question is carried out or whether the different parts of the undertaking are to be regarded as joint controllers, which then has consequences for jurisdiction.[191]

189 Guidelines for identifying a controller or processor's lead supervisory authority, adopted on 13 December 2016 as last Revised and Adopted on 5 April 2017, https://ec.europa.eu/newsroom/article29/items/611235.

190 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, pp. 37–47, as amended by Directive 2009/136/EC, OJ L 337, 18.12.2009, pp. 11–36.

191 Cf. on these aspects for example the decision of the French data protection authority on Google of 6 January 2022, English press release available at https://www.cnil.fr/en/cookies-cnil-fines-google-total-150-million-euros-and-facebook-60-million-euros-non-compliance.

(3) The European Data Protection Board

According to Art. 68 GDPR, the above-mentioned EDPB is established as a body of the Union with own legal personality and is composed of the head of one supervisory authority per Member State and of the European Data Protection Supervisor or their respective representatives. There is a strong commitment in the GDPR to the independence of the work of this body: while it is already composed of independent supervisory authorities (both national and the EDPS), Art. 69 GDPR orders the EDPB to act independently when performing its tasks.

According to Art. 53(2) GDPR, if more than one supervisory authority is established in a Member State, that Member State shall designate the supervisory authority which is to represent those national authorities in the EDPB and shall set out the mechanism to ensure compliance by the other authorities with the rules relating to the consistency mechanism referred to in Art. 63 GDPR. Compared to the system proposed in the EMFA, the participation of the Commission in the EDPB's work is limited: the Commission shall have the right to participate in the activities and meetings of the Board without voting right, and the Chair of the EDPB, on the other hand, shall communicate to the Commission on the activities of the EDPB, including its opinions, guidelines, recommendations and best practices. The EDPB is assigned a variety of tasks which are listed non-exhaustively in Art. 70 GDPR and relate amongst other issues to generally advising the Commission. However, it should be noted that these tasks of the EDPB can be carried out either on its own initiative or in the cases foreseen by the Regulation on a request of the Commission.

The EDPB is also involved in the procedure of drawing up codes of conduct and certification mechanisms and thereby is integrated in a co-regulatory system with the market participants. In this role, the EDPB adopts, after extensive consultations, inter alia guidance in the form of guidelines, recommendations, best practices and opinions, thus clarifying the terms of the Regulation in order to provide a consistent interpretation of the rights and obligations of stakeholders.

(4) Cooperation and consistency

Art. 60 GDPR comprehensively regulates the cooperation procedure between the lead supervisory authority and the other supervisory authorit-

ies concerned in cases of cross-border data processing, but also the cooperation between them in general. The cooperation includes the exchange of all relevant information with each other, the provision of mutual assistance at any time and, beyond that, the shared work by conducting joint operations. If a case has cross-border relevance, the lead supervisory authority has to submit a draft decision it intends to take to all other supervisory authorities and give them the opportunity to respond. In its final decision-making it shall take due account of the views expressed by the other authorities. More importantly, however, if these other authorities concerned express relevant and reasoned objections to the draft decision and the lead supervisory authority does not intend to follow them by adapting the planned decision, then the so-called consistency mechanism under Arts. 63 et seq. is triggered.

If no consensus can be found in cross-border cases, the EDPB has ultimate dispute resolution powers by being able to adopt a final decision in the matter, taking account of the reasoned objections of the supervisory authorities concerned. This decision is then binding for the lead supervisory authority (Art. 65 GDPR). Hence there is a clear consideration of the interests of all concerned authorities in order to avoid situations in which only one (the lead) authority would have come to conclusions which would have been in contradiction to the interests of the others. The decision of the EDPB is bound to a tight timeline and shall be adopted by a two-thirds majority of its members within one month from the referral of the subject-matter to the EDPB. The timeline may be extended in certain complex cases. The decision must be reasoned and addressed to the lead supervisory authority and all the concerned supervisory authorities and is binding on them. While this procedure takes place, all supervisory authorities have to refrain from adopting decisions in the subject-matter concerned. The proceedings can also take the form of an urgency procedure according to Art. 66 if there is need for accelerated action in order to protect the rights and freedoms of data subjects. In such cases a supervisory authority is allowed to adopt provisional measures immediately. The EDPBs urgent binding decision has to be adopted within two weeks by simple majority of the members.

So far, since the entry into force of the GDPR, the EDPB has adopted seven binding decisions, five of them in 2022 and one urgent binding decision. Six of them are concerned with the data processing activities of the Meta company within their services WhatsApp, Facebook and Instagram and were related to the lead supervisory authority of Ireland. From these

decisions, their course and their outcome in practice first conclusions can be drawn about the effectiveness of the mechanism and related challenges.

c. First experiences with the cooperation mechanism

By way of example, the first binding decision of the EDPB concerning Twitter and three different decisions concerning WhatsApp, including the urgent binding decision and the most recent decision, will be briefly considered. All of the decisions involved draft decisions by the Irish Data Protection Commissioner (DPC) as lead authority, which many other Member State authorities had concerns about both in terms of the substantive assessment of infringements and the calculation of the penalty.

On 9 November 2020 the EDPB delivered its first binding decision concerning the case against the social media platform Twitter, which was led by the Irish DPC due to Twitter's establishment with its European branch in Dublin (Art. 56 GDPR) but also affected a large number of Twitter users in other EU Member States.[192] The case concerned an incident on the Twitter platform which occurred from late 2018 to early 2019. Due to a bug in the Android app, posts and accounts that had been marked as private by users of the platform had been mistakenly made publicly accessible. This affected not only Irish users but users worldwide, particularly in other EU Member States. The platform duly reported the breach to the DPC, which subsequently initiated an investigation. As a result, the DPC found in particular (essentially undisputed) violations of data protection and data security law. However, since this also affected users in other Member States and justified a competence of those data protection authorities, the DPC initiated the consistency procedure. In this context, the lead DPC submitted a final draft decision against Twitter with intended sanctions to the other supervisory authorities concerned. Some national supervisory authorities made use of their right to file a reasoned objection to the draft decision. The criticism related to the scope of the breaches found, the findings on Twitter's role as (sole) data controller, the competence of the DPC and the amount of the proposed fine. In turn, the DPC rejected the other authorities' objections as "not relevant and unfounded" and thus initiated

192 Decision 01/2020 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding Twitter International Company under Article 65(1)(a) GDPR, https://edpb.europa.eu/our-work-tools/our-documents/binding-decision-board-art-65/decision-012020-dispute-arisen-draft_en.

the dispute settlement procedure provided for in Art. 63 GDPR. Due to the "complexity of the facts", the deadline for the EDPB's decision was extended, and in the end the decision was taken two years after the incidents had taken place. In the given context it is also interesting to take a look at the timetable (which is summarised in a condensed overview below) that the EDPB published with its decision in order to demonstrate the complexity and duration of this single decision on a matter which was not very complex with regard to the actual violation that had occurred:

26.12.2018	Twitter Inc. receives a bug report.
03.01.2019	After internal investigations Twitter Inc.'s Legal Team decided that the issue should be treated as an incident.
08.01.2019	After being notified by Twitter Inc (US), the Twitter International Company (TIC, established in Dublin) notifies the DPC of the incident.
22.01.2019	The DPC notifies TIC of the scope and legal basis of the investigation started.
28.05.2019 to 21.10.2019	Inquiry of the DPC takes place involving submissions by TIC.
11. and 28.11.2019	DPC corresponds with TIC and invites TIC to make further written submissions.
2.12.2019	TIC makes further submissions to the DPC.
14.03.2020	The DPC issues a preliminary draft decision to TIC, concluding that TIC infringed Arts. 33(1) and 33(5) GDPR; hence it intends to issue a reprimand in accordance with Art. 52(2) GDPR and an administrative fine in accordance with Art. 58(2)(i) and Art. 83(2) GDPR.
27.04.2020	TIC provides submissions on the preliminary draft decision to the DPC.
22.05.2020 to 20.06.2020	The DPC shares its draft decision with the other supervisory authorities concerned. Several authorities (AT, DE, DK, ES, FR, HU, IT and NL) raise objections.

15.07.2020	The DPC replies to the objections in a Composite Memorandum, declaring (why) not to follow the objections, and shares this with the other concerned authorities.
27 and 28.07.2020	In light of the arguments put forward by the DPC, two authorities drop their objections, whereas the others maintain their objections.
19.08.2020	The DPC refers the matter to the EDPB in accordance with Art. 60(4) GDPR, thereby initiating the dispute resolution procedure under Art. 65(1)(a).
09.11.2020	The EDPB adopts an Art. 65 GDPR decision in its 41st plenary session.
09.12.2020	The DPC adopts its final decision.

In its assessment, the EDPB rejected several objections that the other supervisory authorities had raised against the draft decision of the DPC on procedural grounds. According to that decision, the objections did not meet the requirements of a "relevant and reasoned objection", which would have required a clear demonstration of "the significance of the risks posed by the draft decision as regards the fundamental rights and freedoms of data subjects and, where applicable, the free flow of personal data within the Union"[193]. The EDPB imposes with this standard of scrutiny a detailed duty on the other authorities concerned to provide reasons. Some of the insufficiently argued objections concerned the assessment of the roles of the different actors within the Twitter group, the competence of the DPC, the failure to issue a reprimand and the finding of breaches of the data breach notification obligation. Conversely, the objections that had requested the finding of further breaches by the DPC – essentially that Twitter had failed to comply with its obligations to ensure data security, which the bug had demonstrated – were indeed relevant and reasoned. However, the Board could not make a final determination on them, as it lacked the necessary information from (own) investigations to do so because it was bound by the scope of the DPC's investigation. As a result, only the objections from Austria, Germany and Italy concerning the amount of the fine were successful. Therefore, the EDPB required the DPC to re-assess the elements

193 Art. 4(24) GDPR.

it had relied upon to calculate the amount of the fixed fine to be imposed on TIC and to amend its Draft Decision by increasing the level of the fine in order to ensure it fulfils its purpose as a corrective measure and meets the requirements of effectiveness, dissuasiveness and proportionality. A precise amount was not specified. The DPC complied accordingly in its final decision of 9 December 2020 and imposed a fine of EUR 450,000 on Twitter (instead of $150,000 – $300,000 as provided for in the draft decision).[194]

The decisions concerning WhatsApp are much more complex. The first of a total of three concerned an urgent procedure initiated by the Hamburg data protection authority.[195] WhatsApp announced changes to its terms of use in May 2021, also to users in Germany, which, if accepted, would have essentially meant 'consent' to the merging of user data of different services of the Meta Group and its use within the entire group. With the consent to this processing was made a requirement for further use of WhatsApp.[196] The Hamburg supervisory authority, among others, considered this a significant breach of data protection law and issued a temporary and provisional prohibition order against WhatsApp and, a month later, turned to the EDPB in an urgency procedure. Repeatedly expressed concerns on the part of the Hamburg DPA vis-à-vis the Irish DPC – which had already been in dialogue with WhatsApp for some time regarding the change in the terms of use – had not brought the desired success.[197]

In the extensive (50 pages) decision of 12 July 2021, the EDPB analyses in detail the lawfulness of the processing by WhatsApp and the Meta Group along the different purposes (marketing, security etc.) and relies on the publicly available terms of use and further information on the privacy policy of the group. The result of the analysis is quite telling: "As regards the existence of infringement, based on the evidence provided, there is a high likelihood that Facebook IE already processes WhatsApp's user data as a (joint) controller for the common purpose of safety, security and

194 DPC, Decision of 9.12.2020, Case Reference: IN-19–1–1, https://edpb.europa.eu/sites/default/files/decisions/final_decision_-_in-19-1-1_9.12.2020.pdf.

195 EDPB, Urgent Binding Decision 01/2021 on the request under Article 66(2) GDPR from the Hamburg (German) Supervisory Authority for ordering the adoption of final measures regarding Facebook Ireland Limited, adopted on 12 July 2021, https://edpb.europa.eu/system/files/2021-07/edpb_urgentbindingdecision_20210712_requesthh_fbireland_en.pdf.

196 See on this and the following in more detail *Mustert*, The EDPB's second Article 65 Decision – Is the Board Stepping up its Game?.

197 See on this the timetable provided in the EDPB decision, ibid, pp. 4, 5.

integrity of WhatsApp IE and the other Facebook Companies, and for the common purpose of improvement of the products of the Facebook Companies. However, the EDPB is not in a position to determine whether such processing takes place in practice." In the end, the EDPB, therefore, ruled that there was no urgency for the DPC to adopt final measures as this would have required the existence of an urgent situation for the protection of the rights and freedoms of data subjects which the EDPB could not clarify.

While the EDPB's binding decision on WhatsApp, issued two weeks later at the end of July 2021, essentially concerned other aspects of the company's data processing,[198] the further decision of 5 December 2022[199] was again about the terms of use and related aspects of data processing in the Meta Group. The core of those proceedings goes back to a complaint from the data protection NGO noyb from 2018. After the conclusion of the investigation procedure conducted by the DPC (after more than four years), the DPC forwarded its draft decision to its colleagues in other Member States at the end of 2022. In the draft, the DPC found, in particular, a breach of transparency and information obligations, which, however, in its view did not require the imposition of a fine because a fine of €225 million had already been imposed on WhatsApp in 2021 for similar breaches over the same period. For the remainder of the complaint, the DPC considered the processing operations as described by the terms of use to be covered by the justification basis of Art. 6(1)(b) GDPR (processing for the fulfilment of contractual purposes) and thus lawful. Some authorities from other Member States saw things quite differently, which led to the initiation of the conflict resolution mechanism within the EDPB. The EDPB issued a binding decision on 5 December 2022. While the Board again rejected some objections as not relevant and reasoned, it did, in particular, instruct the DPC to amend its decision to the effect that WhatsApp could not rely on contractual purposes and had to find another justification for the processing, that breaches of other provisions also needed to be identified

198 EDPB, Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR, adopted on 28 July 2021, https://edpb.europa.eu/system/files/2021-09/edpb_bindingdecision_202101_ie_sa_whatsapp_redacted_en.pdf.

199 EDPB, Binding Decision 5/2022 on the dispute submitted by the Irish SA regarding WhatsApp Ireland Limited (Art. 65 GDPR), adopted on 5 December 2022, https://edpb.europa.eu/system/files/2023-01/edpb_bindingdecision_202205_ie_sa_whatsapp_en.pdf.

and sanctioned with a fine and that the amount of the fine would have to be reassessed. Tied to this decision, the final decision of the DPC of 12 January 2023[200] reflects this assessment and finds a violation of information obligations and Art. 6(1) due to the lack of a justification for the data processing. The finding is accompanied by the imposition of a fine of 5.5 million Euros and an order to remedy the situation within a period of six months.

However, the DPC limits this to processing for purposes of service improvement and security. It does not address processing for personalised advertising purposes, which is included in the terms of use, too, or disclosure for such purposes to Meta Group affiliates. However, the EDPB had instructed in its binding decision that the DPC would have to instigate further investigations and possibly issue a new Draft Decision in accordance with Art. 60(3) GDPR in relation to exactly that aspect: "[the DPC] shall carry out an investigation into WhatsApp's processing operations in its service in order to determine if it processes special categories of personal data (Article 9 GDPR), processes data for the purposes of behavioural advertising, for marketing purposes, as well as for the provision of metrics to third parties and the exchange of data with affiliated companies for the purposes of service improvements, and in order to determine if it complies with the relevant obligations under the GDPR". In its press release accompanying its final decision of 19 January 2023 in the other elements of WhatsApp investigation, the DPC responded to this request by the EDPB with harsh words questioning the Board's competence:

> "The DPC's decision naturally does not include reference to fresh investigations of all WhatsApp data processing operations that were directed by the EDPB in its binding determination. The EDPB does not have a general supervision role akin to national courts in respect of national independent authorities and it is not open to the EDPB to instruct and direct an authority to engage in open-ended and speculative investigation. The direction is then problematic in jurisdictional terms, and does not appear consistent with the structure of the cooperation and consistency arrangements laid down by the GDPR. To the extent that the direction may involve an overreach on the part of the EDPB, the DPC considers it appropriate that it would bring an action for annulment before the Court

200 Decision of 12 January 2023, DPC Inquiry Reference: IN-18–5–6, https://edpb.europa.eu/system/files/2023-01/final_adoption_version_decision_wa_redacted_1.pdf.

of Justice of the European Union in order to seek the setting aside of the EDPB's direction."[201]

This opinion by the DPC underlines that the GDPR has indeed introduced a conflict resolution mechanism by which other than lead supervisory authorities should be shielded against inactivity or limited investigation and enforcement efforts by the lead authority, even though in this case the concerned authority is of the opinion the EDPB is overstepping its competences in the use of the procedure. The differing opinions on the consistency procedure and the underlying reasons for its existence show that, as the practical experience gained so far proves, challenges remain even with a formalised procedure and binding decision-making powers by the cooperation structure on EU level.

On the one hand there is the difficulty to comply with the formal requirement of a relevant and reasoned objection by other authorities, which can regularly only refer to the results of the (or the lack of any) lead supervisory authority's investigations for this purpose. The same applies to the EDPB, which can only base binding decisions on the scope of the investigations as they were specified by the lead supervisory authority – as the DPC alludes to in its press release. This is particularly problematic in urgent proceedings where the state of investigation is regularly not far advanced. Outside of these emergency procedures, the procedure can take a long time: although the EDPB itself is obliged to decide within short deadlines in the consistency procedure, there are no such limits for the draft decision that triggers the consistency procedure in the first place. Only the urgency mechanism can be invoked in such cases, but the fact that such a procedure was foreseen reflects the anticipation that it would be necessary to overcome potential delays endangering a timely response to violations.

On the other hand, the limitation on the scope of the lead supervisory authority's investigation has an impact on the scope of the binding decision. As the binding decision on WhatsApp shows, the consistency mechanism does not in itself provide the EDPB with a fully effective way to steer investigations in a certain direction in order to meet doubts and requests issued by the supervisory authorities of other Member States. As the delineation of competences between national authorities and the EDPB is likely to be subjected to interpretation by the General Court and

201 DPC, press release of 19th January 2023, https://www.dataprotection.ie/en/news-media/data-protection-commission-announces-conclusion-inquiry-whatsapp.

ultimately possibly also the Court of Justice of the EU, it remains to be seen how the procedure will be framed in detail and applied in the future. Based on this, the question if and to what extent this procedure is efficient will be able to be answered better.

E. Applying the Findings to the Illustrative Scenarios and Gaps Identified

Scenario 1:

Provider X operates an online platform XYXYX as a website on which users can freely upload audiovisual content generated by them. The content made available is exclusively of a pornographic nature, which is the focus of the platform's design and description. The platform offers the content in a categorised manner, includes search functions and makes recommendations for specific content to users entering the platform. The text content of the website is entirely in the language of EU Member State B including for the majority of the titles and descriptions of the videos, which are created by the users when uploading the content. Before users accessing the platform XYXYX can watch a video for the first time, they are asked to confirm that they are at least 18 years old by clicking the button "OK" following the text box indicating this question; there are no further measures foreseen for age verification or limitation of access to any of the content made available on XYXYX. The imprint of the website lists company X as provider of the website, which has its registered office in EU Member State A. In EU Member State B the website is available under the top-level domain of ".b" (XYXYX.b).

The service described in scenario 1 will likely fulfil the conditions to be qualified as a video-sharing platform service according to Art. 1(1)(aa) AVMSD, which is a service where the principal purpose of the service (or of a dissociable section thereof or an essential functionality of the service) is devoted to providing (programmes,) user-generated videos(, or both,) to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to (inform,) entertain (or educate), by means of electronic communications networks within the meaning of point (a) of Art. 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing. As the offer mainly consists of user-generated videos and the provider organises these videos by categorising them and providing search functions and recommendations, these requirements are fulfilled without difficulty.

According to Art. 28b(1)(a) in conjunction with Art. 6a(1) AVMSD, Member States shall ensure that VSP providers under their jurisdiction take appropriate measures to protect minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development. As such potentially appropriate measures, Art. 28b(3) (f) AVMSD mentions, inter alia, establishing and operating age verification systems for users. This means that both Member State A and B must have obligations in place in their national law obliging VSPs to appropriately protect minors in a comparable way. Nonetheless, the appropriateness of the exact measures to be taken and how these measures have to be applied depends to a certain extent on the national implementation and the respective monitoring efforts. It could well be that Member State A adopted the wording of the AVMSD in its national legislation and leaves the assessment of the appropriateness of the measures to be taken in the first instance to the (VSP) providers. This approach in actual fact was chosen by most Member States in the transposition of the latest revision of the AVMSD. Member State B, on the other hand, could have made it mandatory in its national legislation to have specific, effective age verification mechanisms in place, which possibly even state that any lack of applying such systems may amount to an offence.

Member State B does not have jurisdiction in the present case, because according to Art. 28a(1) AVMSD this lies with the Member State on whose territory the service is established. According to the imprint of the website this is State A. It is irrelevant for the determination of jurisdiction that the offer is obviously directed exclusively or mainly at users in Member State B, if there is such an establishment in another EU Member State. Therefore, Member State B would in principle be prevented from taking action based on its national law against the website or the VSP provider because of the country-of-origin principle. This would also apply if the service disseminating the content would have editorial control over the videos and fulfil the requirements of Art. 1(1)(a)(i) in combination with Art. 1(1)(g) AVMSD to be qualified as on-demand audiovisual media service. If it were responding to the content of an audiovisual media service provider, Member State B would have resort to the derogation procedure of Art. 3(2) AVMSD if the conditions of the procedure are respected. No such procedure exists in case of VSPs. However, B could attempt to request mutual assistance from A.

Art. 30a(3) AVMSD provides a mechanism for mutual assistance, but it applies only if audiovisual media services are concerned and is closely connected to possible derogation decisions. It does not extend to VSP matters.

This means that Member State B could not rely on a specific procedure enshrined in law but could still make a request to Member State A asking to ensure that X operates the website in compliance with Art. 28b AVMSD. Because of a lack of procedures for VSP constellations in the current AVMSD, this was a focus area for the MoU that ERGA Members agreed on. In section 2.1.3. there are details on how the regulatory authorities want to provide each other mutual assistance, also concerning matters related to protection of minors and in connection with VSPs (see point 2.1.3.4. (c) and (f)). For VSP-related matters there is even a dedicated section in the MoU which addresses cooperation between the regulatory authorities to achieve a compliance of VSPs on a "macro level"; so rather than regarding individual items that have not been dealt with appropriately by a provider, it aims at the more general problems that may occur (point 2.2.1.1. (d)). It could be easily argued that offering a VSP service focusing on pornographic content without any age verification instrument besides a question to the user about whether they are of age and the consequential open availability of the pornographic content is a 'macro' issue. In cross-border cases where the matter created by a non-domestic VSP is of special relevance for a targeted state, another section of the MoU lays down how ERGA members can submit requests for cooperation and how other regulatory authorities should react to them (point 2.2.1.3.5). These procedures are promising in that they carefully describe adequate steps which could also help in the case of B and A. However, and this is not only obvious from the legal nature of the Memorandum but also explicitly acknowledged by the parties to it, the MoU is not legally binding and no legal obligations arise out of it. This means that if A has not reacted so far to the way provider X has rolled out its service – possibly because the regulatory authority is not of the opinion that it is problematic – then it may well be that a mutual assistance or cooperation request would not be responded to and there would not be a (direct) measure that the national regulatory authority of B would have against that.

Although in this case it would seem that there cannot be two different opinions on the inappropriateness of age verification tools that only request clicking an "OK" button confirming a supposed age of 18 or more, especially as pornography in Art. 6a(1) AVMSD is mentioned as one of the categories that are most harmful for minors and therefore require the strictest measures (which is repeated for VSPs in Art. 28b(3) sentence 4 AVMSD), the procedures currently applicable are purely voluntary. Obviously, in a case such as scenario 1, where a Member State would not act on a mutual

assistance request, it can be doubted that Member State A would be acting in accordance with the 'effet utile' principle of EU law, as the Directive's application in practice in that Member State (even if based on the national transposition) would not be reaching the goals of the Directive. However, it would only be the Commission that could initiate an infringement proceeding ultimately bringing A to the CJEU.

If it were not such a clear-cut case of content endangering minors, e.g. if it was only nudity or simple depictions of violence that would be available on the service of X, the regulatory authority of B might not even see a need to act. The same could be the case if there are age verification instruments foreseen which B for providers under its own jurisdiction would hold to be inappropriate but at the same time not completely ineffective. If B would decide to act itself because of the situation being a grave risk, the regulatory authority would have to rely on X's cooperation. If X cannot even be reached – it is possibly not identifiable via the imprint and additional searches – or simply does not react to any requests, restrictive measures against the accessibility of the website in B could only be addressed to domestic providers of other services, such as internet access providers, for blocking the website. These measures would depend on the framework of derogation measures under the ECD (Art. 3(4)(a)(i)), but they would also depend on fulfilling the proportionality requirement in light of the measure being addressed against another provider than the content provider, and they would have to complete the procedural steps foreseen if B would not resort to the urgency procedure. Even if such a measure leads to a successful blocking of access to the website for users in B – as long as they do not use, e.g., VPN or other tools to imitate a different geolocation with which they access the content –, the problem is that the measure will be directed against the URL as it stands when the investigation is completed, here: "www.XYXYX.b". If X as the provider changes its domain, here for example to "www.XYXYX.ba", the validity of the original measure does not extend to it and – at least the way the law stands now – a new procedure would have to be initiated.

Scenario 1 therefore shows that even in such an obvious case of need for enforcement there are challenges that cannot be resolved satisfactorily with certainty under the current framework. And this does not even address possible consistency issues with the jurisdiction of the DSC under the future DSA with regard to the obligations of online platforms to protect minors.

Scenario 2:

Broadcaster C is based in State D, which is located outside of Europe. It is directly financed by State D, and it is openly communicated that D has the power to take editorial decisions over the programme of C. C does not have any other subsidiaries or offices within or outside of the EU. C broadcasts in its linear offer a daily programme dealing with current medical and health issues. In several of these programmes, persons declared as medical experts for the field spoke repeatedly about findings that Corona vaccinations cause serious damage to health. This is done without reference to any scientific evidence. They further spread the theory that governments of EU Member States are aiming to reduce population numbers by mandating the use of the vaccinations. Senior management staff of C have publicly declared that government representatives of State D decided on the content of these programmes and selected the 'experts' to be invited. The linear offer of C is broadcast both via satellite operated by a provider in a EU Member State and via a live stream on the internet, which runs on C's own servers. In both ways the offer is available in EU Member State E and the programmes in question have corresponding subtitles in the national language of E. As a result of those broadcasts there has been considerable unrest among the population of E, and a considerable decline in the vaccination rate in the population could be observed compared to the situation before the programmes were broadcast.

Scenario 2 is about an audiovisual media service that distributes its programmes within the EU but is located outside of it. On first view it is evident that it is a linear audiovisual media service and could therefore, in principle, be within the scope of the AVMSD. Irrespective of the question of whether or not there is a legal competence to deal with such providers by EU Member State E, there is a difficulty to have access to provider C for example to request information on the financing or structure. It is not of immediate relevance that the programme of C is directed at citizens in the EU and namely Member State E through the subtitles in the national language of E, as the AVMSD does not follow the market location but the country-of-origin principle in order to determine jurisdiction. According to Art. 2(1) AVMSD, Member States (only) have to ensure that providers under their jurisdiction comply with the AVMSD. C clearly does not have an establishment in any of the EU Member States as it does not have any other subsidiaries or offices but the base in D. Therefore in principle each Member State in which the content is available – due to the satellite dissem-

ination likely all of the EU Member States – is competent to deal with the service. However, this changes if a jurisdiction is deemed to be determined due to one of the technical criteria as mentioned in Art. 3(4) AVMSD. The provider of the satellite service which is located in the EU is not a sufficient link between service provider C and the single market to create jurisdiction due to the technical criterion. However, it is likely (and in the case of the actually relevant satellite service providers currently operating in the EU typically the case) that such a provider either will be offering its clients uplinks, which are also within the State where it is established or another EU Member State, or will be using satellite capacities, which are appertained to the Member State where it is established. In either way it is sufficient to create jurisdiction.

However, such jurisdiction results only for the satellite transmission of the programme, so questions related to this are in the scope of application of the AVMSD. For the transmission of exactly the same content and in parallel to it via an internet stream, however, there is no such jurisdiction of a Member State, so that for this dissemination the legal framework of the AVMSD does not apply.

For the internet stream, under the current framework it is only the legal rules besides the AVMSD that are relevant. On first glance, relevance of the DSA could be considered as content dissemination is concerned. However, C distributes its own content via its own servers, so there is no intermediary involved between C and the availability of the online stream on the internet. An intermediary service only comes into play between the end user/viewer and his or her access to the internet from where he or she can then visit the livestream of C. The ECD and derogation procedures allowing to deviate from the internal market principle are not applicable here either, as the provider of the potentially illegal content is not established in any of the EU Member States.

The scenario poses the additional difficulty of the substantive rules applicable. Currently, there are no explicit rules in EU law on the topic at issue here with the content of C, primarily disinformation as it is possibly a campaign with the intention to destabilise, and with state-controlled content in the service. Therefore, the relevant legal framework including on whether and how reactions to C are possible depend on the law of Member State E. It could be imagined that E has passed specific laws dealing with disinformation or expecting certain editorial standards in news items of a linear programme, such as independence and accuracy. There could also be rules in criminal law. If media law would, e.g., require certain conditions

for a licence for broadcasting before a linear programme is allowed to be disseminated on the territory of E, the illegality in case of C's service would also become relevant for the DSA, if it would be otherwise applicable, when intermediaries are addressed that are involved in transmission of that broadcast and ordered to block access.

For the satellite transmission of C's service, the next hurdle in the AVMSD is that it must be questioned whether the substantive rules address this type of content disseminated. Although the effect as described in this scenario certainly can be harmful, currently the AVMSD neither prohibits disinformation as such nor establishes a requirement of independence for audiovisual offerings from state interference. In addition, there are no general obligations for audiovisual media service providers to comply with journalistic standards such as truth or impartiality of reporting. Any such rules would depend on whether they are existent in the Member State of jurisdiction or – if E would want to trigger a derogation procedure – in Member State E. If the Member State of jurisdiction would not have any specific rules for this situation, there would not be a fallback clause in the AVMSD qualifying the content as illegal under the Directive. Art. 6(1) AVMSD, for example, only covers the prohibition of "incitement" to hatred or violence, but mere spreading of disinformation as such does not necessarily come with a negative targeting of a specific group of persons, because in the scenario the programmes imply that it is the governments of the EU Member States that have a secret plan in mind.

A possible justification to take measures against dissemination in E, however, can be found in the derogation mechanism under Art. 3(2) AVMSD. In that regard, services prejudicing or presenting a serious and grave risk of prejudice to public health can be reacted to with restrictive measures if the derogation procedure is completed. Maybe the risk presented by the service would even qualify for a derogation under Art. 3(3) AVMSD due to the reaction of the people, as it may constitute a serious and grave risk of prejudice to public security. However, in both cases a multistep procedure as described in detail above would have to be completed by the Member State E firstly, although the threat by the service is very current and at a high level. Only if it would be a derogation procedure under Art. 3(3) AVMSD, the Member State could act in the urgent procedure laid down in Art. 3(5) AVMSD within a month of alleged infringement taking place (here some of those medical programmes) by taking restrictive measures without awaiting the outcome of the regular derogation procedure. But even then a compatibility of the measures would retrospectively have to be

reviewed by the Commission. Another issue with the restrictive measures that E could take is that they directly only concern means which it can enforce on its own territory, for example advising cable networks not to pick up and retransmit the satellite signal of C's service. The dissemination of the satellite signal as such and the reception possibility for viewers in E via a satellite dish is not affected by a restrictive measure in E, as a supplementary action based on the law of the Member State with jurisdiction would be necessary (but is not mandated by the AVMSD) in addressing the satellite provider.

This scenario shows that law enforcement in case of providers not regularly established in an EU Member State strongly depends on the means of dissemination, although from the perspective of the recipients and their interests protected by fundamental rights this should not be relevant. It is further evident that speedily reactions by regulatory authorities are not the norm even if the situation at hand is of high urgency. Finally, the consequence of successful derogation procedures under AVMSD is still limited.

Scenario 3:

Provider F operates a social media platform on which users can network with each other and share content in various forms (text, images, audio, video, combinations thereof) with each other and with the general public. The website on which the platform is operated is accessible in all Member States of the EU, but under different top-level domains. F has its headquarters in state G which is located outside Europe. It operates a European branch in EU Member State H, in the offices of which the design of the offer is decided in a binding manner for the offer as it is put on the market in the EU area under all the top-level domains which are available in the EU Member States, namely those with a country-specific top-level domain. User I, who registered himself as user on the platform with a valid email address under a pseudonym, shares a video which is publicly available and not only to registered users of the platform. In the video he can be seen masked and armed with a rifle and calls in an electronically distorted voice for an attack on the head of government of State J, which is an EU Member State. The real name or even place of residence of the user are not made known on the platform. The video in question is shared multiple times by other users and subsequently spreads widely over the whole network across different EU Member States.

In scenario 3, unlike in the other two scenarios, the question already arises as to whether the offering is covered by one of the provider definitions in the AVMSD. The user (I) is most probably not a provider of an audiovisual media service in the sense of the AVMSD (Art. 1(1)(a)), as the sharing of that video seems more incidental and not part of a recurring and editorial activity offered for commercial purposes as a service, e.g. resembling a news channel of a linear service or a catalogue of programmes of a non-linear service. In addition, if Member State J wanted to take action against user I – for example as part of a criminal investigation –, the initial problem would be that user I is not identifiable directly; hence procedures would have to be initiated to find out, e.g. from the platform provider F via the valid email address (although without a proper name), who user I is. Without going into detail here as this is beyond the scope of the analysis in this study, a potential order to provide information about the user I addressed to the intermediary F as foreseen in the procedure under Art. 10 DSA could apply. It is noteworthy that the setup under that provision, which also includes information flows via the DSCs, is complex, and it will have to be seen how efficiently this works in practice.

More interesting in our context is that a possible action by Member State J against F with the aim of removing the content could be considered. Potentially the service of F could qualify as VSP under the AVMSD, which, as stated in Recital 5, can include social media services if "the provision of programmes and user-generated videos constitutes an essential functionality of that service". This criterion of essential functionality as mentioned in the definition of VSPs was included to open further the scope of application of the AVMSD by not requiring that the main or a dissociable part of a service has the purpose of providing programmes or user-generated videos, but that it can be enough if there is the functionality of sharing videos and this is an essential functionality of the service. In order to give some direction, the Commission issued Guidelines on this criterion, as Recital 5 authorised (but did not mandate) the Commission to do. However, these non-binding Guidelines still leave it to the legislative framework of the Member State having jurisdiction to decide whether or not a specific service qualifies as VSP because of the essentiality of the function. Typically this decision will depend on a classification by the regulatory authority. In the present case, the social media platform is made up of sharing possibilities for all kinds of data, not only user videos, so the determination is at least not obvious, even though possible.

If there is a possibility that the service of F is a VSP, the jurisdiction determination is based on Art. 28a(2) to (4) AVMSD. In particular it is to be assessed differently than would be the case for an audiovisual media service according to Art. 2(3), for which the establishment and place of programme-relevant decisions is decisive. Art. 28a AVMSD foresees a cascade of criteria which allow to assume a "fictitious" establishment for VSP providers that are not established in an EU Member State but have connections to the Single Market through a presence in at least a Member State. According to Recital 44, the legislators deemed it to be appropriate to ensure that the same rules apply to VSP providers which are not established in a Member State and to those that are actually established in one of them, to make sure that the aims of protecting minors and the general public set out in the AVMSD can be reached. Therefore a parent undertaking or a subsidiary established in a Member State or where those providers are part of a group and another undertaking of that group are established in a Member State is sufficient to constitute an establishment of the part of the undertaking actually providing the VSP. F is established outside of the EU in G, but it operates a subsidiary branch in H – whereby it is not relevant which activity is provided by that branch, rather whether it is the place of

first activity in case there would be more than the one branch in H within the EU. In the scenario Art. 28a(2)(a) AVMSD would create jurisdiction for H because F would be regarded to be established there. If F is such a VSP under jurisdiction of H, the content of user I would likely violate Art. 6(1)(b) AVMSD and H would have to make sure that F has taken appropriate measures according to Art. 28b(3) AVMSD and, if not, take supervisory action.

This scenario shows the complexity of establishing what type of service under which jurisdiction is involved in the dissemination of illegal content by its users and what reach possible reaction measures have. Especially the multiplication of content in short periods of time, as described in this scenario, makes effective enforcement more difficult if it happens retroactively.

F. Approaches and National Solutions Concerning Current Challenges

I. The Degree of (Non-)Harmonisation on EU Level

As shown above and illustrated by the scenarios, the degree of harmonisation of the AVMSD is limited. This is due to the approach of minimum harmonisation, which in turn results from the limited competences of the EU in this field. Additionally, this Directive differs from later approaches in several Regulations concerning the digital environment, in that it has a more limited territorial scope, in particular when it comes to non-EU providers. It was underlined above that the possibilities of law enforcement against such providers are not harmonised by the AVMSD (see above C.III and C.IV) but left to reactions by the Member States. Furthermore, the substantive scope of application of the AVMSD is limited. It entails rules concerning only some, although very important, areas of illegal audiovisual content or behaviour by providers (see above C.II).

1. Dealing with Non-EU Providers

In view of the described developments especially in recent years with more risks emanating from non-EU providers whose audiovisual content is available in the EU, possible approaches to solve challenges for an adequate response to cross-border content dissemination in the framework of the AVMSD need to be reflected. Responding to providers from third countries has proven a significant problem in several ways.

On the one hand, a solution has to be found regarding the application of the technical jurisdiction criteria which allow for an easy access to the benefits of the Single Market rules without having a closer attachment to one of the EU Member States. The current mechanisms result in a situation where a non-EU provider, with a purely technical decision to transmit via a satellite in the EU, can benefit from the one-stop-shop mechanism by creating a simulated establishment and country of origin based on a merely technical connection. Apart from this link, such services still originate from a completely different de facto country of origin, which – being outside

of the EU – may be based on a completely different understanding of the media system and the values associated with it than in the EU. The starting point of the AVMSD, however, is that the services and offers that are included in its regulatory scope originate from (Member) States that are bound to EU values and whose national media law systems already take fundamental rights into account in a commonly accepted manner in the EU. Only because of this basis of a common ground between all Member States, a lesser degree of harmonisation concerning fundamental principles is sufficient, since a minimum guarantee is deducted from the constitution as democratic systems of all EU Member States. The supplementary link to non-EU providers via the technical link was never meant to change this by being more flexible when it comes to the type of provider or the actual content provided, simply because it stems from outside of the EU. Much to the contrary, the idea was to be able to at least safeguard the basic values and principles of the EU and its regulatory framework for audiovisual media by making even such providers fall under the jurisdiction of a Member State. With the difficulty of limited enforcement means of Member States against non-EU providers – because in direct manner they can only rely on the undertaking providing the technical service which triggers the jurisdiction, although these companies have no control over the content transmitted –, a way must be found which can guarantee the respect of certain minimum requirements in the creation of editorial content by all providers of services available in the EU. Upholding the idea of giving non-EU providers the full benefit by simply using the technical criterion is no longer appropriate without at least changing the requirements for applying this criterion.

One option, and probably the simplest, would be to drop the jurisdiction based on technical criteria altogether. When considering this option, it would need to be taken into account that, as a consequence, the more direct access to the technical provider over which the Member State has jurisdiction and with it the indirect enforcement possibility concerning the content of the media service provider would cease to exist in a harmonised manner. In other words, in such a new context each Member State would have to (and could) decide how to deal with the content of non-EU providers available on their territory, and there would not be the assignment of a responsibility to one Member State. Another option would be to add a supplementary condition that the technical link alone is not sufficient but there also has to be a more substantial connection to the market of the

given Member State – such as it is known from the GDPR or the DSA.[202] If this is not the case, the provider would remain under the jurisdiction of all Member States in parallel. As an additional or alternative option, it could be considered to place benefiting from the country-of-origin mechanism under certain basic conditions, for example that this is only possible for providers that are structured in a way to guarantee independence from state or other powers and/or are committed to basic journalistic standards (see also below for consideration under licensing conditions). For this purpose, a corresponding system for monitoring would have to be set up as is presented in the approaches in the next sections below. For these limited cases of determining jurisdiction, one could take inspiration from the mechanisms in data protection law. In that field under GDPR, the European Commission can decide by means of an adequacy decision that in a certain non-EU State there is a level of data protection provided by the legal framework existing there that is comparable to that in the EU provided by the GDPR. Data transfers to such States are then possible under facilitated conditions. Similarly, within the AVMSD – only for the purpose of determining jurisdiction – there could be such an adequacy decision on 'safe country of origins', which would establish that an adequate level of protection of basic media law standards exist that are comparable to those in the Union, at least for the harmonised areas of the AVMSD, and therefore providers from these non-EU states can profit without a problem from the technical jurisdiction link. Because there is no uniform and comprehensive media law on the level of the EU and only the basic principles of the AVMSD and the EU's fundamental values of independence, media freedom and media pluralism could be taken into account, such "adequacy decisions" would have to be taken by the Member States and not the European Commission. The decision-making could be delegated to the national regulatory authorities in their cooperation mechanism under ERGA. Such a solution would necessitate a further development of procedural means and corresponding structures within ERGA in order to ensure an appropriate use of these powers if they would be considered in the future.

202 Both the DSA and the GDPR already require a specific link to the internal market within their scope of application, which could be mirrored for jurisdiction. Art. 3 GDPR requires that the data processing, if it is not carried out by an establishment in the Union, is either carried out in connection with the offering of goods or services or the monitoring of the behaviour of Union citizens. Art. 2(1) of the DSA applies to the provision of intermediary services to EU citizens irrespective of the place of establishment of the provider.

The issue described here is connected to the lack of harmonised rules on licensing of linear audiovisual media services or to the conditions, such as a notification requirement, for providers of non-linear services in the AVMSD. These requirements for being entitled to operate audiovisual media services in the EU are left entirely to be configured by the Member States. Conversely, the legal consequence of admissibility to provide services under the law of one Member State follows directly from the Directive: the limitation of possibilities of other Member States to involve themselves in issues concerning those service providers. In regulatory practice this means that the decision of a non-EU provider to transmit in a way that allows it to fall under the jurisdiction of one – the 'technical link' – Member State is firstly a choice that the provider can make and that secondly results on all other Member States depending, at least in principle, on the enforcement of the law vis-à-vis such providers, even if indirectly via the satellite company, by this Member State. The Member State of jurisdiction is then faced with the additional challenge of whether and how it could enforce licensing conditions that would apply to regular domestic providers or, even beyond that, conditions for legal dissemination that may exist not in its own but other Member States, possibly the ones that are targeted by the service, such as, e.g., the prohibition of direct state financing or control by state entities, compliance with certain content standards or others. By law, only the legal framework of the jurisdiction Member State has to be applied, but the question would arise whether another (targeted) State could initiate an anti-circumvention procedure.

Therefore, a mechanism to overcome this structural problem needs to be found. One option could be to harmonise at least minimum requirements for licensing conditions on the basis of values and minimum expectations towards audiovisual media service providers which are common in all Member States. This could avoid that originally non-EU providers select market access in a Member State in which they can fulfil the licensing or other conditions, which they could not – due to substantive differences – if they entered the market in another Member State to which their service is directed. Criteria which could be relied on are elaborated in the following sections and concern, inter alia, criteria of independence of the provider or basic content standards but could be expanded beyond those examples. Another option could be to implement at least an easier application of the rule on prohibition of circumvention as currently laid down in Art. 4 AVMSD. If the anti-circumvention procedure remains the rule for these cases, it must be facilitated through a simpler procedure and be subject to

a lower burden of proof. For the specific case of a failure to comply with licensing conditions (or an application of those mutatis mutandis), which in all Member States can already be taken from a legally established catalogue of requirements, a separate circumvention instrument and procedure could also be considered.

Finally, and irrespective of further procedural and substantive harmonisation, the European Commission should be encouraged to explore all possibilities to foster an application of the AVMSD by the Member States – typically meaning the actions of the regulatory authorities – in a way that allows decisions by one regulatory authority taken in accordance with EU law to have full effect by avoiding any form of further dissemination of the disputed content in the Member State that took action. For the treatment of non-EU providers, but also of those against which a Member State has taken an anti-circumvention measure, this means that efforts should be coordinated in a way that ensures that these measures of one Member State are supported by complementary action of the others, especially if the possibilities to act of the Member State having taken the original action are limited and can only extend to limiting availability of a specific service or content on its territory via certain ways of distribution but not for all.

2. Degree of Substantive Harmonisation

Besides issues that arise in dealing with non-EU providers due to a lack of harmonisation and similar problems existing if one Member State has introduced stricter rules in the coordinated fields of the AVMSD and providers circumvent these by avoiding falling under the jurisdiction of that Member State, the limited degree of harmonisation in substantive terms can cause issues in the comparative treatment of providers which – without possibly passing the threshold of a circumvention – are available in, or even specifically targeted to, one Member State but falling under the jurisdiction of another. This is partly a result of the conception of the country-of-origin principle and the margin of discretion that is left to Member States when creating the transposing rules for the AVMSD. However, if some of the basic elements laid down in the Directive show a very diverse transposition on national level, this can stand in the way of effectuating the enforcement of these main elements of the law.

On the one hand, the AVMSD concerns provisions which only provide for more general conditions, leaving the Member States the mentioned wide scope for implementation. The protection of minors in the media is an illustrative example in this regard, not only if one takes a look at the general rules laid down in Art. 6a AVMSD, which apply also to VSPs in conjunction with Art. 28b(1), but also in light of growing or new risks posed in today's media environment.[203] Art. 6a(1) AVMSD obliges Member States to take appropriate measures so that audiovisual media services that have the potential to impair the development of minors are disseminated in a way that normally this age group does not "hear or see" them. There are only few indications that follow to clarify which measures are to be foreseen and how they should differentiate by level of harm, and also Recitals 19 and 20 of Directive (EU) 2018/1808 do not give a lot of additional details.

One option to have a more common approach to categorising services (or content in such services) that may impair the development would be to reach a higher level of harmonisation concerning this understanding. However, this area is especially prone to differences based on the variety of cultural traditions in the Member States which can already be observed in the very different approaches to age groups both concerning the actual age level and the amount of different categories between 0 and 18 years of age.[204] In addition, classification decisions with effect for protection of minors in the media is often connected to assessments in other rules concerning youth protection which again is not a harmonised area of the law. The assessment of whether or not a content has an adverse effect on the development is also related to media and digital literacy of minors, which can be at different levels in the Member States.[205] Finding a uniform standard outside of the most clear-cut cases of potentially endangering content would prove difficult most likely. At the same time, the two categories identified by Art. 6a(1) AVMSD as being "most harmful", pornography and gratuitous violence, should already now be addressed with the strictest measures by the Member States, and failing to do so should be relatively easy to discover for the Commission in monitoring whether the Member States are effectively giving EU law, here the AVMSD, validity in their national legislation and its application.

203 Extensively on this *Ukrow/Cole/Etteldorf*, Stand und Entwicklung des internationalen Kinder- und Jugendmedienschutzes.

204 See above C.II.2 with further references.

205 *Ukrow/Cole/Etteldorf*, Stand und Entwicklung des internationalen Kinder- und Jugendmedienschutzes, Chapter C.IV.1.

Another option instead of considering the harmonisation of the protection-of-minors standard in terms of the content categorisation would be a greater harmonisation of technical criteria. This would lay down minimum protective measures that at least must be put in place by providers, respectively enshrined in the national legislative frameworks or their application by regulatory authorities. There is no such minimum expectation in the AVMSD nor are the conditions spelt out, although Art. 6(1) AVMSD does mention watershed rules, age verification tools or other technical measures which correspond to the widespread practice in the Member States to rely on scheduling time restrictions for broadcasting or age verifications and labelling for VoD services combined with passcode-protected access. For VSPs, the AVMSD provides a list of measures to be considered if they are appropriate and mentions age verification systems (Art. 28b(3) (f)) for the categories of potentially harmful content as mentioned in Art. 6(1) AVMSD. A clearer definition of the minimum standards to be achieved in technical regard, especially what (effective) age verification systems are, would strengthen the enforcement of the clearest of violations of the protection-of-minors standards. At the same time such harmonising would hardly affect those providers who are already striving for compliance with protection-of-minors rules in practice, including those VSPs that have applied and are continuing to apply such measures. The Member State could still retain the competence to further detail the conditions in its law and especially also be stricter when it comes to the measures required at least. Such a codification of certain conditions when disseminating content that is problematic for minors, for example with regard to pornographic content, would allow for a joint standard in the enforcement of the law by the respective regulatory authorities in charge due to the country-of-origin principle, thereby reducing potential issues deriving from the cross-border dissemination. Besides such a development, in this context it will be important that in future a more intensive assessment is made and regularly repeated whether the measures actually foreseen by the Member States suffice for a proper ('actual') transposition of the obligations laid down at least in basic terms in the AVMSD itself. This is connected to a strengthening of institutional designs and cooperation in the AVMSD (see on this below F. V)

On the other hand, the question of a possible increase in the degree of harmonisation concerns issues that are not yet taken up in the AVMSD but pose significant risks to individuals and the general public in the dissemination of audiovisual content. The evolutionary steps achieved with the revisions of the AVMSD always picked up current developments in the

media landscape and changes in consumer behaviour, most recently, for example, with the strengthening of the protection of minors in the media. The current situation described above therefore calls for future reforms to continue in this way. Namely, the dissemination of problematic content from state-controlled or -influenced providers that contains wrongful information or propaganda knowingly and with the intent of a destabilising effect has surfaced as a serious and lasting problem that should be tackled. So far, no minimum standards are laid down in the AVMSD due to the allocation of power to the Member States for such content-related questions. But due to the large-scale risk which reaches beyond individual Member States, one option could be to extend the scope of the AVMSD to such threats, at least if they are associated with risks that affect audiences and the general public in the whole or a majority of Member States of the EU.

II. Content Standards: the UK Example

The lack of harmonisation of the licensing or authorisation requirements for audiovisual media service providers and VSPs in the AVMSD means that the overall assessment of the legality of an audiovisual content offer depends to some extent on the national rules. In some States, monitoring of the offer of providers under a Member State's jurisdiction includes quite extensive content-related scrutiny, e.g. requiring providers to ensure not only the avoidance of illegal content in their offer but also a certain degree of content quality, e.g. in news programmes. This is the case for the UK, which is no longer a Member State of the EU but has transposed the AVMSD 2018 and still follows the multi-level regulatory approach as devised by the AVMSD;[206] therefore it can offer relevant insights. The content standards to be presented here have been developed for linear broadcasting services.

The main rules detailing the licensing regime for linear television services in the UK are contained in the Broadcasting Act 1996[207], while

206 Generally on Brexit and its consequences for the audiovisual sector *Cole/Ukrow/Etteldorf*, Research for CULT Committee – Audiovisual Sector and Brexit: the Regulatory Environment; *Cabrera Blázquez*, Post-Brexit rules for the European audiovisual sector.

207 https://www.legislation.gov.uk/ukpga/1996/55/contents. Depending on the type of broadcasting service it could also be a licence under the Broadcasting Act 1990, https://www.legislation.gov.uk/ukpga/1990/42/contents, which runs in parallel to the 1996 Act for this matter.

the powers of the regulatory authority in licensing and supervision are included in the Communications Act 2003[208]. The functions of the Office of Communications (hereafter Ofcom) as converged regulatory authority in charge of the broadcasting sector are detailed in part 1 of the Communications Act 2003, according to which one of its duties is to ensure that certain content standards are applied in television services that avoid violations of rights of others (Sec. 3(2)). In addition, already the licensing as such is conditional on certain criteria which aim to secure independence of the provider and a quality offer. Section 3(3) Broadcasting Act 1996 tasks Ofcom with the assessment of a person's suitability to hold a licensing agreement by conducting a "fit and proper persons test". It shall not grant any licensing agreement unless and as long as it is sure the concerned individual is a fit and proper person to hold it. As can be seen in the practical application of this test, not only objective factors in the person in question, such as, e.g., the control of it by a (foreign) state entity, but also violations of content standards can lead to a disqualification of being a person in that sense.

The general obligation to ensure the respect of certain content standards is further detailed for Ofcom by sec. 319(1) Communications Act 2003.[209] It has to set, and from time to time to review and revise, standards for the content of programmes in television services with which the aim of these standards can be achieved. The provision sets out these objectives in a detailed manner in para. 2, referring among other to protection of minors and due impartiality and due accuracy of news items. These standards have been developed in the Ofcom Broadcasting Code (with the Cross-

208 https://www.legislation.gov.uk/ukpga/2003/21/contents.

209 Ofcom is also tasked with the supervision of the BBC, according to sec. 198 Communications Act 2003 in combination with Arts. 44 et seq. of the BBC Charter, Royal Charter for the continuance of the British Broadcasting Corporation, presented to the Parliament by the Secretary of State for Culture, Media and Sport by Command of Her Majesty, December 2016, http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/2016/charter.pdf; Art. 46(7) BBC Charter states that Ofcom must secure the observance of standards in the content in the relevant UK Public Services, and the BBC Agreement (Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation, presented to Parliament by the Secretary of State for Culture, Media and Sport by Command of Her Majesty, December 2016, http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/2016/agreement.pdf) requires the BBC to observe the Standards and Fairness Codes set out by Ofcom including the Broadcasting code which is presented here.

promotion Code and the On Demand Programme Service Rules)[210]. The Code contains principles and practices which broadcasters must comply with as a minimum standard requirement. The Code and its content are based on the legislative objectives set out in the Communications Act 2003, especially in Sec. 319(2)[211], and the Code refers to the provisions in the law throughout. While doing so it also aims at offering practical guidance to the providers that are addressed by the Code, thus not only setting up rules and principles but also offering explanations to the meaning of key notions as understood by the Ofcom and even practice guidance for the broadcasters in how to apply the Code. In addition to the standards objectives of Sec. 319(2) Communications Act 2003, the Code's rules were designed by Ofcom to consider the aspects mentioned in para. 4 of that provision, such as the potential harm and likeliness of the harm caused by certain content (lit. a) or how the Code's rules contribute to maintaining the independence by considering how editorial control over the content is applied (lit. f). The content standards of the Code thereby form the basis for the permanent "fit and proper persons test" in view of the broadcast offered.[212]

As mentioned, Ofcom has to make sure that its Broadcasting Code is kept 'up to date' by revising it whenever it is deemed necessary. In actual fact, this happens quite frequently,[213] and the meaning of key notions can evolve quite significantly, as was, e.g., the case for the understanding of 'hate speech' in Section Three of the Code between the version of 2019 and the most recent of 2020. This Section, and even more so the very extensive Section One on protection of minors, shows that the Code delivers very detailed requirements of how the standards, which are laid down only in general form in the legislation itself, have to be achieved. Several categories of content are prohibited on linear services; this extends, for example, to material which is "likely" to encourage or incite the commission of crime or lead to disorder. Also the understanding of hate speech, the inclusion of

210 Broadcasting Code as last amended on 31 December 2020, https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code.

211 For parts of the Code the basis is in sec. 107(1) Broadcasting Code 1996.

212 Cf. e.g. Ofcom, Sanction (117)19 Autonomous Non-Profit Organisation (ANO) TV Novosti of 26 July 2019, no. 122 et seq., in which Ofcom discusses the possibility of proposing revocation of the licence in view of the seriousness of the breaches but concludes in view of the proportionality requirement that in that case a serious level of fine and the obligation to announce it in the programme was sufficient.

213 See overview at https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/legacy.

which can be exceptionally justified in view of the context of its placement, is broad, as it relates to expression that "spread, incite, promote or justify" hatred and as the ground on which this is based covers disability, ethnicity, social origin, gender, sex, gender reassignment, nationality, race, religion or belief, sexual orientation, colour, genetic features, language, political or any other opinion, membership of a national minority, property, birth or age. With these detailed formulations, and hate speech is just one example, the regulatory authority creates legally binding concretisations of the law, and the Ofcom can react to breaches with a finding that is published and to which sanctions can be attached, ultimately in form of a revocation of the licence.

Ofcom has used its powers in supervising broadcasters that are bound by the Broadcasting Code and has not only come to findings of breaches but also connected these with severe penalties. Recent examples concern the breach of the impartiality and accuracy obligations for news items, and an illustrative example of the implications of the Code is the Sanctioning Decision against ANO TV Novosti for breaches in the RT programmes which was decided on 26 July 2019.[214]

Recent examples in practice illustrate the importance of the standards set in the Code and of Ofcom's role in ensuring that the UK Broadcasting sector remains protected. For example, the decisions taken against Russian-based service providers illustrates this fact. The sanctioning decision is based on an extensive presentation of the elements of the legal framework, and the actual assessment of each programme is considered in a breach decision of 20 December 2018.[215] The two decisions show that a detailed analysis and evaluation of content is undertaken by the national regulatory authority and includes the consideration of the high value of freedom of speech while applying limits to this deriving from the Broadcasting Code.

214 Ofcom, Sanction (117)19 Autonomous Non-Profit Organisation (ANO) TV Novosti of 26 July 2019. RT's challenges against this decision were rejected before the courts, and the Supreme Court declined the request for appeal before it, cf. https://www.ofcom.org.uk/news-centre/2022/supreme-court-will-not-hear-rt-appeal.

215 Ofcom, Broadcast and On Demand Bulletin, Issue 369 of 20 December 2018, https://www.ofcom.org.uk/__data/assets/pdf_file/0020/131159/Issue-369-Broadcast-and-On-Demand-Bulletin.pdf, pp. 4 et seq.; the individual programme analysis starts at p. 25.

In the sanctioning decision an overview of previous precedents is given, which are indicative of the regular application of this power of Ofcom.[216]

Another important example, which again manifests that a critical review of content even of political nature by an independent regulatory authority is possible without being in violation of freedom of expression, is the case against the channel CGTN, which was a service of Star China Media Limited broadcasting under an Ofcom licence. There were numerous investigations, findings of breaches and sanction decisions for breach of the impartiality requirement and unfair treatment.[217] Interestingly, the last sanctioning decision was taken even after the licence of CGTN had been revoked. The revocation decision was based on the fact that the licence holder was not the entity controlling the channel but another corporation that was under direct control of the ruling party in China, which is a breach of the fit and proper requirement that requires independent providers.[218]

With regard to Russian programmes, Ofcom initiated several further investigations after the Russian Federation started the war against Ukraine, looking at the coverage of the respective events.[219] Before these investigations were concluded and after the channel had already stopped broadcasting in the UK due to the sanctions imposed by the EU on all RT outlets, the licence was revoked. The Ofcom no longer deemed ANO TV Novosti to be fit and proper to hold broadcast licences, and it not only referred to the (lack of) compliance history and previous decisions or to the ongoing investigations but also alleged that there was no independence from state control by the Russian Federation and finally that the new law passed in Russia which criminalises independent journalism if it reports in deviation

216 Ofcom, Sanction (117)19 Autonomous Non-Profit Organisation (ANO) TV Novosti of 26 July 2019, pp. 30 et seq.; investigations and decisions are made public and can be researched at https://www.ofcom.org.uk/about-ofcom/latest/bulletins/broadcast-bulletins.

217 Cf. e.g. Ofcom, Broadcast and On Demand Bulletin, Issue 403 of 26 May 2020, https://www.ofcom.org.uk/__data/assets/pdf_file/0031/195781/The-World-Today-and-China-24,-CGTN.pdf (Breach Decision); Sanction 145 (21) Star China Media Limited of 27 August 2021.

218 Ofcom, Notice of revocation of Licence Number TLCS000575 held by Star China Media Limited under section 238(4) of the Communications Act 2003 and Condition 28(2)(a) of the Licence of 4 February 2021, https://www.ofcom.org.uk/__data/assets/pdf_file/0025/212884/revocation-notice-cgtn.pdf.

219 Investigations started on 28 February and 2 March 2022, https://www.ofcom.org.uk/news-centre/2022/ofcom-launches-investigations-into-rt and https://www.ofcom.org.uk/news-centre/2022/ofcom-launches-a-further-12-investigations-into-rt.

from the official position of Russia made it per se impossible for the licence holder to comply with the rules of the Broadcast Code.[220]

The example of content standards and the requirements to be able to act as provider of audiovisual media services according to the law in the UK shows that judging about content even with the consequence of limiting or stopping entirely the transmission of content or a service altogether is part of the monitoring and enforcement of compliance with the law. Evaluating the position of a provider and being able to declare it unfit for a licence or authorisation, for example based on a lack of independence from a state, is a solution that could serve as basic standard also in the EU context. The importance of independence and detachment of providers from state influence will be presented in the following section by the example from Germany.

III. The Idea of 'Staatsferne' on a European Level

1. The Principle of 'Staatsferne' in the German Framework

The so-called 'Staatsferne' is a concept which in Germany is derived from the fundamental right of freedom of broadcasting of Art. 5 para. 1 sent. 2 Alt. 2 of the Basic Law (Grundgesetz) and applies to offers from public service and private broadcasting.[221] It applies similarly to the press for which it is derived from the freedom of the press laid down in the same provision.[222] The 'Staatsferne' principle can be translated as 'state neutrality' or 'detachment of the State' indicating that it is not absolute in the sense that no connection at all can exist between State power(s) and providers covered by the principle, but that it is important that a distance (or: detachment) of the state is guaranteed to ensure independence. It is based on the notion that state power in all its parts is subject to control and criticism by the general public, in which broadcasting plays a decisive role

220 Ofcom, Notice of a Decision under Section 3(3) of the Broadcasting Act 1990 and Section 3(3) of the Broadcasting Act 1996 in Respect of Licences Tlcs 000881, Tlcs 001686 and Dtps 000072 Held by Ano Tv-Novosti of 18 March 2022, https://www.ofcom.org.uk/__data/assets/pdf_file/0014/234023/revocation-notice-ano-tv-novosti.pdf, no. 59.

221 On the concept with further references and a comparison to possible approaches under EU law *Hain*, Das Gebot der Unionsferne der Medien, pp. 433 et seq.

222 German Federal Constitutional Court 20.12.2011 – VI ZR 261/10 = NJW 2012, 771.

in informing the public because of its special broad impact, topicality and suggestive power and must therefore be free from state influence in the way described. The Federal Constitutional Court, as the supreme guardian of the German constitution, not only sees this independence from the state as an indispensable condition of freedom of broadcasting but demands from the legislator to guarantee it in the design of the legal framework applicable to the media providers concerned.[223]

The requirement of state neutrality in this sense means first of all that the state may neither directly or indirectly control an institution (in the case of public service entities) or company (in the case of commercial undertakings) which provides broadcasting services.[224] The state may not itself be a broadcaster, nor may it exercise a controlling influence on the content disseminated by broadcasters.[225] This extends to a prohibition of only indirect and subtle influence.[226] It serves to prevent the political instrumentalisation of broadcasting, because otherwise its contribution to using fundamental rights could no longer exist.[227] Although the principle applies to both 'pillars' of what in Germany is understood as the dual system of broadcasting media by public service and commercial providers, there are some distinctions with regard to the details of scope and design.

For private broadcasting, the deductions following from the freedom of broadcasting prohibit the legislator to create rules that would allow the state to directly or indirectly control broadcasting service providers. This prohibition is consequently laid down in the applicable statutory law, which is an interstate treaty between the 16 federal states and can be found in the law of each of the Länder. It is § 53 para. 3 of the Interstate Media Treaty

223 Cf. on this and the following extensively *Dörr*, Der Grundsatz der Staatsferne und die Zusammensetzung der Rundfunkgremien; *Dörr*, Die Bestimmung des § 58 des Saarländischen Mediengesetzes (SMG) und die Vorgaben der Rundfunkfreiheit des Art. 5 Abs. 1 Satz 2 des Grundgesetzes (GG).

224 German Federal Constitutional Court 28.2.1961 – 2 BvF 1/60, 2 BvG 2/60 = BVerfGE 12, 205 – para. 184.

225 German Federal Constitutional Court 5.2.1991 – 1 BvF 1/85, 1/88 = BVerfGE 83, 238 – para. 490.

226 German Federal Constitutional Court 4.11.1986 – 1 BvF 1/84 = BVerfGE 73, 118 – para. 141 et seq.; 5.2.1991 – 1 BvF 1/85, 1 BvF 1/88 = BVerfGE 83, 238 – para. 471 et seq.; 22.02.1994 – 1 BvL 30/88 = BVerfGE 90, 60 – para. 146 et seq.

227 German Federal Constitutional Court 22.02.1994 – 1 BvL 30/88 = BVerfGE 90, 60 – para. 146, 147.

(MStV)[228] that prohibits a broadcasting licence to be issued to legal persons under public law or to political parties and electoral associations, which applies mutatis mutandis also to foreign public or state bodies. However, there need not be an absolute separation between state and broadcasting. For example, the Federal Constitutional Court has ruled that the legislature, with the objective of guaranteeing state neutrality, may restrict the influence of political parties, even though these are not directly attributable to the state but take an important role in constituting state power in the parliament, but it may not go so far as to prohibit any participation of parties in broadcasting companies below a controlling threshold, because of the strongly protected freedom of political parties.[229]

The principle of state neutrality must also be taken into account when structuring the supervision of private broadcasting, i.e. specifically concerning the legal status of the broadcasting supervisory authorities (which fall under Länder law). Therefore, the task of supervision has to be assigned to bodies that as organisational units are legally independent of the state, which is the case for the 'state media authorities' (Landesmedienanstalten) of the Länder. They are institutions under public law but must be able to carry out their activities independently and on their own responsibility within the legal framework, i.e., they must not be bound by orders or instructions and must not be subject to any state influence on the way in which they carry out their statutory tasks.[230] Supervision of the work of these authorities is strictly limited to a confined control of legality, and pluralistically composed bodies with representatives of society are integrated into the decision-making procedures of the authorities.

As an example to illustrate this, the State Media Act of North Rhine-Westphalia[231] stipulates that the State Media Authority of North Rhine-

228 Interstate Media Treaty (Medienstaatsvertrag, MStV) as of 14–28 April 2020 (GVBl. pp. 450, 451, BayRS 02–33-S), amended by Art. 1 of the Treaty of 21 December 2021 (GVBl. 2022 pp. 313, 396).

229 German Federal Constitutional Court 12.03.2008 – 2 BvF 4/03 = BVerfGE 121, 30 – para. 98 et seq.

230 German Federal Constitutional Court 4.11.1986 – 1 BvF 1/84 = BVerfGE 73, 118 – para. 166 et seq.

231 State Media Act of North Rhine-Westphalia (LMG NRW) of 2 July 2002, last amended by Art. 3 of the Act on the Adaptation of the Police Act of the State of North Rhine-Westphalia and Other Acts to the Telecommunications Telemedia Data Protection Act of 13 April 2022 (GV. NRW. 2002, p. 334), https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=2&gld_nr=2&ugl_nr=2251&bes_id=5079&aufgehoben=N&menu=1&sg=.

Westphalia (NRW) is a public law institution with legal capacity and has the right of self-administration (§ 87). The extensive incompatibility clause states that its bodies (the Media Commission and the Director) may not be members of the federal or state government, members of the legislative or decision-making bodies of the EU, the Council of Europe, the federal government or a state, election officials, employees of supreme federal and state authorities or party members with executive positions. The Media Commission consists of 41 members, of which only a small share is delegated by the Landtag (one member per parliamentary group, eight members altogether). According to § 94(3), the independence of the decisions of the Media Commission must be ensured in organisational and financial terms. To this end, the Media Commission is to be provided with the necessary financial and human resources. In the performance of their duties, the members shall represent the interests of the general public and shall not be bound by orders or instructions (§ 95). There are rules against a conflict of interests (§ 96) and against unjustified dismissal (§ 97). The director also enjoys protection against dismissal (§ 101(2)). According to § 117, the State Media Authority of NRW is only subject to limited control of legality by the Minister President, with the possibility of legal action before the administrative courts in case of an intervention by the supervision; in contrast there is no control of the authority's decision-making in technical regard.

Similar considerations apply to public service broadcasting.[232] The special characteristic in this context is that the state, as a mandatory task in the interpretation of the fundamental right of Art. 5 Basic Law by the Federal Constitutional Court, has to ensure the basic supply of the population with broadcasting by creating and maintaining public broadcasting. It must organise the framework and legal remit of the public service broadcasters in the law. At the same time, to comply with the principle of state neutrality, it must ensure that the organisation of the programme and its concrete contents are not in any way integrated into the regular performance of state tasks but are designed as activities of separate entities under public law.[233]

232 On the application of the principles of control bodies created for the public service broadcasting also to the national media regulatory authorities cf. *Dörr*, Die Bestimmung des § 58 des Saarländischen Mediengesetzes (SMG) und die Vorgaben der Rundfunkfreiheit des Art. 5 Abs. 1 Satz 2 des Grundgesetzes (GG).

233 German Federal Constitutional Court 28.2.1961 – 2 BvG 1/60, 2 BvG 2/60 = BVerfGE 12, 205; 4.11.1986 – 1 BvF 1/84 = BVerfGE 73, 118; 5.2.1991 – 1 BvF 1/85, 1/88 = BVerfGE 83, 238; 22.02.1994 – 1 BvL 30/88 = BVerfGE 90, 60.

This extends to the question of 'supervision' of the broadcasters, which are only subject to control by internal, independent control bodies, and there can only be very limited legality control from the outside. On the question of how the internal control bodies are to be legally structured, the Federal Constitutional Court has laid down very specific requirements in several judgments.[234] In the composition of the bodies, the number of representatives attributable to the state (e.g. delegated by the respective parliaments) must be limited to a maximum of one third; if such members are foreseen, they must reflect the diversity of political actors, and representatives of the executive may not have a determining influence in any way in these bodies. The legislator must ensure, through incompatibility rules, that the members have a sufficient detachment from state-political decision-making contexts and that they are guaranteed personal freedom and independence within the framework of their duties. Therefore, at the level of the law of the Länder, there are also provisions on the composition of the supervisory boards and on their independence and freedom from instructions, which are similar to the rules on the state media authorities mentioned above by way of example. The supervisory boards of the public broadcasters are also not subject to technical supervision but only to limited legality control.

2. Suitability on Union Level

In essence, the requirement of state neutrality – including in the supervision – is aimed at ensuring neutrality and independence of the programme of the media service providers because of the influence this content has on the democratic opinion-forming process of the population. Because this is part of the democratic process, it is important that it is not determined by the powers which the population decides about in elections. As not only the actual programme of a provider can be influenced directly but also the fear or actual application of sanctioning gives a similar interference possibility, it is important that the principle also applies to the supervision with its monitoring and sanctioning powers. The German model of 'Staatsferne' as strongly fortified is shaped by the negative historical experiences from the domination of the media apparatus by the National Socialists and the reaction of the post-war reorganisation of the media (and especially broad-

234 Instead of many see German Federal Constitutional Court 25.03.2014 – 1 BvF 1/11 und 1 BvF 4/11 = BVerfGE 136, 9 – para. 46 et seq.

casting) sector. When discussing the extent to which such an approach can be transferred as principle to Union level or whether it is already enshrined there, too, the aspect of neutrality of the programme as well as the supervision must be distinguished.

With regard to the second aspect of guaranteeing state-free or neutral supervision, an anchoring point can already be found in the current AVMSD. Since the 2018 revision, Art. 30 contains several provisions aiming for an 'independent' supervision. It states that Member States shall ensure that regulatory authorities are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. They shall be able to carry out their tasks without instructions, have their own budgets, the "requisite degree of independence" shall be guaranteed in the appointment and dismissal of lead members of the regulatory authority, and they may only be dismissed if the conditions of appointment laid down in national law no longer prevail.[235] Although the AVMSD clearly acknowledges that the way supervision is organised may depend on the national constitutional requirements, the conditions for it should be clearly regulated in the legal frameworks of the Member States. Recital 53 of Directive (EU) 2018/1808 specifies this further by stating that national regulatory authorities or bodies should be considered to have achieved the requisite degree of independence if they are functionally and effectively independent of their respective governments and of any other public or private body. Although the criteria are not as specific as required by the German Federal Constitutional Court for the composition of supervisory boards and as they have been implemented in statutory law, this new rule in the AVMSD is nevertheless very similar to the principle of the state neutrality of supervision.[236] Although political independence is not explicitly mentioned, the wording in the text and the recitals, especially regarding the independence from instructions, show that this is meant in the context of independence. A similar wording can be

235 Cf. on previous analysis of the independence analysis of NRAs the studies *Schulz et al.*, INDIREG, and *Cole et al.*, AVMS-RADAR, which were prepared for the European Commission, and the criteria of the Media Pluralism Monitor that relate to the position of authorities (see on this for the latest report https://cmpf.eui.eu/mpm2022-results/).

236 Cf. also *Hain*, Das Gebot der Unionsferne der Medien, p. 440, who argues that the principle of "Union detachment of the media" ("Unionsferne") already follows from the protection of media pluralism on EU level.

found in the European Electronic Communications Code (Art. 8)[237], which is also entitled "political independence". However, the details are left to the Member States, which takes into account the existence of different systems in the Member States and reflects the cultural diversity approach of the Directive.

With regard to the prohibition of dominant influence on media by state or other actors, the constitutional traditions in Europe are very different, especially with regard to the establishment of public broadcasting. Historically, the models in Europe have grown differently, in particular concerning the development of public service systems in Western Europe and the formerly state-controlled broadcasters in the East.[238] These differences still exist in some regard today.[239] In particular, so-called 'state media' still exist in Europe, but in differing structural designs. Although 54 % of these fall into the category of independent state media (independent public media, independent state-managed, independent state-funded and independent state-funded and state-managed media), there are still large gaps in the degree of independence and state detachment territorially between systems in Western and Eastern Europe.[240] Concerns have been raised in particular on the rise of private capture models where state authorities and political parties in power gain control over the editorial agenda of numerous privately owned media outlets through private stakes, which could be observed for example in the EU Member States Hungary and Poland as well as in the candidate countries Serbia and Turkey.

This trend may make a further harmonisation and an agreement on the exact meaning of 'state influence' difficult. The degree of state funding of the (audiovisual) media depends on the given structures of the respective

237 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), OJ L 321, 17.12.2018, pp. 36–214.

238 *Bajomi-Lazar/Stetka/Sükösd*, Public Service Television in European Countries, pp. 355, 360 et seq.

239 Cf. recently with regard to public service media *Cabrera Blázquez/Cappello/Talavera Milla/Valais*, Governance and independence of public service media; with regard to public service and commercial broadcasting in light of media ownership *Cappello (ed.)*, Transparency of media ownership, I.

240 Cf. on this and the following *Dragomir/Söderström*, The State of State Media, pp. 18 et seq. According to this study, more than 40 % of the independent state media in Europe and seven out of the 11 independent public media outlets are based in Western and Northern Europe. In contrast, the state media in Central and Eastern Europe and Turkey continue to act mostly as government mouthpieces, accounting for more than 85 % of all state-controlled and state-captured media in Europe.

(audiovisual) media market, which is very different in the Member States, so that a full harmonisation of participation rules or generally financing rules would not appear realistic. The question is rather whether the aspects relevant to the German approach to state neutrality, i.e. how a financial participation or even the operation of a broadcasting company may (not) have a dominant influence on the programme and with that on public opinion forming, are amenable to a uniform understanding on the basis of common democratic considerations in Europe. Without an explicit counterpart in the text, situated in the context of the Recitals to Art. 30 AVMSD, Recital 54 of the Directive actually already takes up this aspect. Because one of the purposes of audiovisual media services is to serve the interests of individuals and shape public opinion, it is essential that such services are able to inform individuals and society as completely as possible and with the highest level of variety. That purpose can only be achieved if editorial decisions remain free from any state interference or influence by national regulatory authorities or bodies as the Recital puts in very clear words. 'Interference' in that sense is only allowed for the mere implementation of law and serving to safeguard a legally protected right which is to be protected regardless of a particular opinion, which relates to the enforcement of the law as underlying this study, too. This very strong commitment of the AVMSD to a principle of state detachment not only of the providers but also of the supervision has potential to be further and more explicitly expanded in the legislative framework in the future. The proposal of the EMFA, as presented in the next section, picks this up.

3. Possible Implementation at EU Level: the EMFA Proposal

The EMFA Proposal references 'independence' (or 'independent') numerous times and including the Explanatory Memorandum to the proposal more than 100 times, which is an indicator for the relevance of this approach that motivated the proposal. Mostly, the independence is mentioned in context with public service media and supervision over it. Art. 5 of the EMFA Proposal – concerning public service media in contrast to the national approach that encompasses both pillars – contains a provision that resembles the German principle of state neutrality to some extent:

– It stipulates that responsible persons in public service media shall be appointed through a transparent, open and non-discriminatory procedure and on the basis of transparent, objective, non-discriminatory and

proportionate criteria laid down in advance by national law. However, it defines neither this procedure further or who should be responsible for the appointment nor the criteria about which persons can be appointed, because this clearly falls in the competence of the Member States;
- It contains protection against dismissal but no further explicit protection of independent performance of duties nor specific criteria for exceptions to protection against dismissal, which are again left to national law;
- It contains requirements for adequate and stable financing of public service media and the clear rule that financing means may not interfere with independence. This provision could not go beyond a rather general statement, because it is undisputed that the definition of the public service remit and the conditions of financing are a competence of Member States[241], albeit within the framework of EU state aid rules, which are addressed in a Recital;
- It provides that Member States shall designate one or more independent authorities or bodies in order to monitor compliance with these safeguards for the independent functioning of public service media providers. This provision is not very clear, and, because it does not explicitly refer to the 'independence' of such oversight by authorities or their powers, there is even a potential conflict with standards of state detachment or neutrality as they have been developed in some Member States.

For commercial media service there is a strong reference to independence for those providers that offer news and current affairs content. Art. 6(2) EMFA Proposal stipulates that they shall take measures that they deem appropriate with a view to guaranteeing the independence of individual editorial decisions, in particular listing that editors should be free in their decision-making and that any conflict of interests should be disclosed. It is indeed interesting that Art. 6 EMFA Proposal addresses the providers themselves and not the Member States to ensure such guarantees by legal implications. In the current formulation it is still vague how individual decisions about editorial content differ from more general decisions about the editorial line of a publication, for which the explanations in the Recitals do not give much additional clarity. In contrast to the German system, the provision does not contain any statements about restrictions on the participation of state actors in the media. This is only taken up in transparency

241 See for an overview *Cabrera Blázquez/Cappello/Talavera Milla/Valais,* Governance and independence of public service media.

provisions, which make the existing Art. 5(2) AVMSD more concrete and binding. In principle, therefore, a state actor operating media could also decide on appropriate measures to safeguard its editorial (in)dependence. However, the EMFA Proposal does pick up this issue in its rules on monitoring media market concentration and audience measurement, where an emphasis is put on the observation and reaction to developments that can negatively affect pluralism.

4. Specifically: Independence of Oversight Bodies

As already explained in more detail above (D.II.2), the EMFA Proposal relies mainly on the structures of the AVMSD providing for independent media regulatory authorities and also reflects this for the EBMS which shall replace the ERGA. While general observations can be made with regard to improving the institutional system tied to the dissemination of audiovisual content (see on this in more detail below, F.V.4), in light of the principle of state neutrality the proposed rules are much less rigid and even pose a problem at least in light of the German 'Staatsferne' concept. Although the independence requirements as established by the AVMSD are not replaced or deleted by the EMFA Proposal, the lack of specific rules on participation or prohibition of participation of political actors in the regulatory authorities and of demands that these should be composed in a pluralistic way makes it possible that bodies could be involved which by the standard of national approaches would fall within the realm of the 'state' and therefore be in conflict with the state neutrality obligation. This can be argued for the extensive inclusion of the European Commission in the decision-making procedures of supervision concerning certain types of providers and for its participation in the work of the Board in addition to providing the secretariat. According to the national model as developed in Germany, 'state neutrality' does not only mean elected members of Parliament or government representatives to be a part of the 'state' but also executive bodies that are bound politically to decision orders such as, e.g., a ministry on national level. In that regard, the value of the state neutrality principle as backstop against potential undue political influence should also be considered more strongly on EU level.

IV. Co-regulatory Approaches with Different Types of Codes of Conduct

1. General Observations

Self-regulatory and co-regulatory approaches can be found in a number of legal approaches in different sectors at both EU and national level.[242] In many respects, their use is encouraged and has become a standard instrument to consider in the context of EU legislation.[243] Especially in the media sector and closely related areas of law, the implementation of such instruments is common practice.[244] With the latest reform 2018, the AVMSD has given even more prominence to such approaches by devoting an own provision (Art. 4a) to self- and co-regulation as ways to transpose the Directive's goals which Member States should specially take into account.[245]

Apart from advantages such as making the legislation more flexible and adaptable and involving the industry in rulemaking and enforcement, such approaches are associated with disadvantages, especially in terms of effective enforcement, which has already been described in detail in a previous study.[246] Co-regulatory approaches are closer to an entirely statutory approach, as in those cases self-regulatory structures are typically linked to a regulatory authority in varying forms and degrees. This can take place, for example, through participation of the authority in the creation of codes of conduct when they are developed by the self-regulatory body or the monitoring of such codes of conduct with powers of intervention in the

242 *Senden*, Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?, pp. 13 et seq.; *Senden et al.*, Mapping Self- and Co-regulation Approaches in the EU Context.

243 Interinstitutional Agreement on Better Law-Making, 2003, OJ C 321; Opinion of the European Economic and Social Committee on Self-regulation and co-regulation in the Community legislative framework, 2015, OJ C 291/29.

244 *Panteia/VVA*, Effectiveness of self-and co-regulation in the context of implementing the AVMS Directive.

245 *Cappello (ed.)*, Self- and Co-regulation in the new AVMSD.

246 Extensively *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp. 239 et seq. with further references; see also on policy concepts in the online sector *Helberger/Pierson/Poell*, Governing Online Platforms: Form Contested to Cooperative Responsibility.

event of non-compliance by the providers that have bound themselves to the code.[247]

A closer look at such systems is worthwhile in the present context and with a view to a possible design of approaches in the future. This concerns independence aspects in particular. For example, many Member States' systems for the protection of minors provide for the involvement of independent self-regulatory bodies, which are sometimes given regulatory powers, but the regular regulatory authority's powers of review and intervention then mostly remain. Examples of this are Germany[248] and the Netherlands[249]. In the advertising sector, too, there are many such systems in the Member States, which are, however, only loosely linked to the audiovisual media services regulatory authorities. An example of stronger integration of the authority even in that field is Bulgaria.[250]

2. The Example of Data Protection Law

Not only the institutional system of the GDPR as described above can serve as a valuable source of inspiration but also some specific mechanisms that have been integrated into the scheme of the GDPR. This includes, inter alia, the codes of conduct and certifications which are laid down as a regulatory instrument and possibility for EU-wide harmonisation in Arts. 40 et seq. GDPR.

Similar to the AVMSD the GDPR encourages, in certain areas, systems of self- and co-regulation. According to Art. 40 GDPR, Member States, the supervisory authorities, the EDPB and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper application of the GDPR, taking account of the specific features of the various processing sectors and the specific needs of micro, small and medi-

247 See in this context and with regard to cross-sectoral issues *Cappello (ed.)*, Media law enforcement without frontiers; *Cornils*, Designing Platform Governance: A Normative Perspective on Needs, Strategies, and Tools to Regulate Intermediaries, pp. 38 et seq.

248 *Ukrow*, in: Cappello (ed.), Self- and Co-regulation in the new AVMSD, pp. 41 et seq.; *Panteia/VVA*, Effectiveness of self-and co-regulation in the context of implementing the AVMS Directive, p. 88.

249 *Panteia/VVA*, Effectiveness of self-and co-regulation in the context of implementing the AVMS Directive, p. 95.

250 *Panteia/VVA*, Effectiveness of self-and co-regulation in the context of implementing the AVMS Directive, p. 63.

um-sized enterprises. Associations and other bodies representing categories of controllers or processors may prepare codes of conduct for the purpose of specifying the application of the GDPR while the (non-exhaustive) list in Art. 40(2) GDPR points, inter alia, to fields such as the transfer of personal data to third countries or the exercise of rights of data subjects. As a substantial requirement, Art. 40(4) GDPR stipulates that such codes of conduct shall contain mechanisms enabling a monitoring of compliance with the provisions of the codes by an independent body.

Once developed, the draft codes shall be submitted to the competent supervisory authority which then provides an opinion on their compliance with the GDPR. If the code only concerns processing activities in one Member State, the authority of that Member State can approve (or decline) them on its own. If it is about processing activities in several Member States, the competent authority shall submit it in the procedure of Art. 63 GDPR to the EDPB in order to seek an opinion of it. If the opinion of the Board approves the code, the competent authority shall then submit the opinion to the Commission, which may, by way of implementing acts, decide that the approved code of conduct have general validity within the Union ('Union codes').

Codes that were approved according to this procedure can also be voluntarily joined by providers outside the scope of the GDPR, for example because they are located abroad and do not offer services directly in the EU. Such a step brings the advantage that these service providers have a confirmed adequate level of data protection in the respective area covered by the codes if they comply with them. This in turn is a prerequisite for data transfers outside the EU, so that foreign companies present themselves as attractive partners (processors) for companies in the EU (controllers). The fact that there is otherwise no supervision of foreign providers (because they do not fall within the scope of application) is compensated for by the fact that these codes must be monitored by a body that is in turn accredited by the competent supervisory authority. It is therefore an important solution to the supervision gap that otherwise may exist. The GDPR also specifies requirements for this monitoring body: it must have an appropriate level of expertise in relation to the subject-matter of the code, must have demonstrated its independence and expertise in relation to the subject-matter to the satisfaction of the competent supervisory authority and must have established procedures which allow it to assess the eligibility of controllers and processors concerned to apply the code, to monitor their compliance with its provisions and to periodically review its

operation. Importantly, for this purpose the body must have established procedures and structures to handle complaints about infringements; these have to be made transparent to data subjects and the public. Finally, the body has to be able to demonstrate to the satisfaction of the competent supervisory authority that its tasks and duties do not result in a conflict of interest. If such a body is accredited, it shall take appropriate action in cases of infringement of the code, including suspension or exclusion of the controller or processor concerned from the code, and shall inform the competent supervisory authority of such actions and the reasons for taking them. The powers and tasks of the body are without prejudice to the powers of supervisory authorities set out in the GDPR, meaning that enforcement actions can still be taken by the authorities against the processor.

A similar mechanism applies to the establishment of data protection certification mechanisms and data protection seals and marks for the purpose of demonstrating compliance with the GDPR of processing operations by controllers and processors according to Arts. 42, 43 GDPR. This type of certification shall be voluntary and available via a process that is transparent. Here, too, monitoring is carried out by an independent body accredited by the competent supervisory authority, which is also usually tasked with the certification (and the withdrawal of certificates). A certification pursuant to this mechanism does not reduce the responsibility of the controller or the processor for compliance with the law. In this context regulatory powers of the authorities are not limited, too, but they stand beside the certification. As with the above procedure, this brings the same advantages with regard to data transfers to third countries for entities that have to comply with the GDPR requirements. Furthermore, the certification visibly conveys compliance of the respective provider to the outside world, which is one of the main incentives to consider such certification.

The EDPB provides further details concerning these procedures and mechanisms via its guideline power, thus ensuring additional coherence at EU level.[251]

Such mechanisms cannot be transferred directly to the media sector or the AVMSD specifically, simply because compliance with data protection requirements is different from compliance with content standards. For

251 Cf. for example EDPB, Guidelines 07/2022 on certification as a tool for transfers Version 1.0, adopted on 14 June 2022, https://edpb.europa.eu/system/files/2022-06/edpb_guidelines_202207_certificationfortransfers_en_1.pdf.

example, the prohibition of a certain processing operation represents a completely different and, above all, less intensive interference with the rights of the processor than would be the case with the prohibition or restriction of an audiovisual content. The fundamental rights involved and the type of infringement that comes with it in these situations are not the same. Nevertheless, such mechanisms linked to an independent body, which would then be subject to the accreditation of media regulatory authorities or the ERGA, would also be conceivable for specific areas of content oversight. For example, media regulatory authorities within ERGA, or groups of media service providers themselves with approval in one way or other by ERGA, could develop codes or certification procedures that address certain basic editorial standards, with which providers covered by the codes or the certification comply, or procedures within which a medium's independence from outside influence would be evaluated and certified.[252] Media providers, both domestic and foreign, could voluntarily sign up to the regulatory framework and in return benefit from advantages such as being shielded from direct supervisory action insofar as the regulatory authorities then have to go through a process which involves the independent body before taking regulatory action directly against the provider in question. Alternatively, a corresponding seal could be awarded that informs viewers about the rules to which the medium has committed itself. However, the regulatory powers would otherwise (have to) remain unchanged, and the mechanism would be complementary to the AVMSD system.

V. Comparability of Regulatory Bodies and Cooperation Mechanisms

1. The System in the Digital Services Act

With regard to the institutional system of the DSA (see above D.II.1), it should first be emphasised that there is a need to bring it in line with the (existing) institutional framework for the audiovisual sector and also with the (previously assigned) tasks of the media regulatory authorities. This is a condition to avoid an unwanted undermining of the supervisory

252 Cf. on proposing such certification mechanisms in the EMFA in the context of content moderation *Cantero Gamito*, The European Media Freedom Act (Emfa) as Meta-Regulation, pp. 18 et seq.

structures by the newly introduced system and is to be separated from the question whether certain aspects of the DSA institutional system would be transferable to the AVMSD context. As the DSA contains many rules that directly or indirectly affect audiovisual content and providers, consistency plays a key role. This is especially true in light of the fact that the DSC has a crucial role in the supervision of intermediary services, including video-sharing platforms, but this function need not or will not necessarily fall to the media regulatory authorities in all Member States. The DSA leaves the design of the cooperation between different competent authorities at the national level to the Member States without providing any significant concretisation.[253]

However, since the DSC is also the gateway for supranational exchange in the EBDS, precise regulation of this aspect is of particular importance. There is otherwise the risk that EBDS and ERGA apply regulatory action side by side without coordinating. At least, according to Recital 134 of the DSA, in view of possible cross-cutting elements that may be of relevance for other regulatory frameworks at Union level, the EBDS "should be allowed" to cooperate to the extent necessary for the performance of its tasks with other advisory groups with responsibilities in fields such as audiovisual services as regards namely consumer protection or competition law. Furthermore, this also links to the monitoring and enforcement powers of the Commission concerning VLOPs, including very large video-sharing-platforms, which should be in line with monitoring and enforcement of Art. 28b AVMSD. A more precise regulation of this interaction would be desirable in the light of the interests protected by fundamental rights associated with the various rules, although it would then 'only' be a clarification from the perspective of the audiovisual sector in the more special legislation and not, as would probably have made more sense from the beginning, in the wider and more general horizontal legal act that for this purpose does not contain sufficient clarifications.

As far as institutional approaches from the DSA are concerned, the crucial difference between the AVMSD and the DSA is the territorial scope of application. The AVMSD does not apply directly to providers from non-EU Member States unless a technical link to a Member State exists and thereby a link to the single market can be established (cf. above at C.III.2). Regulatory intervention under the AVMSD therefore depends on

253 See on existing challenges from a media law perspective *Cabrera Blázquez/Denis/Machet/McNulty*, Media regulatory authorities and the challenges of cooperation.

whether there are any rules at all in national law and how they are designed. The DSA, on the other hand, applies if the offer is distributed in the EU (market location principle), but it bases jurisdiction in cross-border cases on the country-of-origin principle with exceptions. The mechanism of having, according to Art. 13 DSA, at least a legal representative in the EU if services are offered there is a useful way of forcing foreign providers to have a quasi-establishment in the EU and thereby bringing clearer results for matters of jurisdiction. Such an approach could only be implemented in the AVMSD context if this would then also be linked to an expansion of the territorial scope of application in the sense that content directed at the EU market would trigger such an obligation.

Besides this limitation, a mechanism as provided for in Arts. 58 and 59 DSA is worth considering for the AVMSD, too. Obviously it could then only relate to the areas that are harmonised by the AVMSD. The procedure in the DSA is about cross-border issues when a competent DSC does not act on its own behalf in view of a possible infringement of a provider under its jurisdiction. It gives other DSCs the possibility to demand an efficient enforcement of the norms by the actually competent DSC (the existence of which bars direct action by other DSCs). The specifications linked to deadlines and participation of other DSCs and the EBDS could regulate in a more concrete way what already applies under the AVMSD with the involvement of ERGA and a general cooperation requirement. In that sense the possible actions could be underlined with which affected regulatory authorities can demand (other) Member States' duties to ensure effective compliance with the rules of the AVMSD by providers under their jurisdiction.

2. The Approach of the European Electronic Communications Code

With regard to the question of whether structures from the EECC could be transferred to the AVMSD context, it should first be noted that the EECC is in principle comparable to the AVMSD in terms of its legal nature as Directive which leaves the design of institutional structures to the Member States. However, the network of rules in the EECC is more detailed and complex, as the individual parts of the Directive deal with formally and materially different areas, sometimes in a self-contained manner, and also give rise to different responsibilities and procedures. This is partly due to the unification of the rules previously spread over several Directives ap-

plicable in the sector of electronic communications networks and services into one 'code'. Many of the provisions are very technical, for example on spectrum policy or network security. This character of the substantive rules extends to the corresponding tasks of BEREC. It should also be noted that in many places of the EECC the European Commission assumes a central role with final decision-making and harmonisation powers based on the internal market relevance of certain procedures or aspects of the electronic communications sector.

It is significant that the EECC does not itself contain rules on cross-border jurisdiction assignment (although other rules such as the ECD or the DSA may be relevant in the context of providers that fall under the EECC, too), i.e., in particular it does not establish the country-of-origin principle. This different starting point is neither comparable to the AVMSD nor is it transferable to the media sector, except a complete reorganisation of the regulatory framework for this sector would be the aim. Such a different orientation is neither desirable against the background of the endeavour to maintain functioning systems nor necessarily compatible with the fundamental rights-induced necessities for content oversight. Therefore only the added value of certain mechanisms of the EECC for the AVMSD context can be considered.

The mechanism of Art. 27 EECC described above concerns disputes between undertakings in different Member States and is thus not directly relevant for the field coordinated by the AVMSD – in which audiovisual providers regularly do not confront each other directly with conflicting interests. However, a general mechanism such as in the EECC that prescribes a procedure for the settlement of cross-border disputes is certainly of interest. Without interfering with the competences of the authorities, it allows for a referral at the supranational level, here with the participation of BEREC, and sets a deadline to resolve the dispute. The dispute resolution is based on cooperative collaboration and mutual consideration between regulators, but it has the common ground that the outcome must be in line with the objectives of the EECC. This would at least provide a forum and framework for this, which has not been explicitly provided for in the AVMSD so far, at least outside the procedures under Arts. 3 and 4 AVMSD.

The mechanism for internal market procedures in Art. 32 EECC is formally comparable to the mechanisms of Arts. 3 and 4 AVMSD, although not in terms of content. It concerns only a limited area, provides for a procedure involving national authorities and their supranational body, is bound by deadlines and ends with a decision by the European Commission. Crucial

differences, however, are that it is not only about the adoption of temporary measures and the mechanism is not based on the country-of-origin principle (it is not about a derogation but about the exercise of competences). There are also more possibilities to influence the draft measure of the acting authority and not only to declare the measure either compatible or incompatible with Union law. An emergency procedure is provided for here, as in the AVMSD, but it is incorporated directly into the procedure, in that the provisional measures lead automatically to a procedure under Art. 32(3) EECC. The participation of BEREC is also more strongly formulated – taking utmost account of the opinion – than that of ERGA in the procedures according to Arts. 3 and 4. AVMSD. An orientation towards such consolidations in a future reform does not seem to be opposed by any reservations from the perspective of media law.

The same applies to the stronger involvement of BEREC. Although this is regularly not linked to binding powers, it is more specifically anchored where measures with cross-border relevance are concerned. In any case, the structures of BEREC are basically comparable to those of ERGA and focus in particular (and even more strongly) on independence. The common approaches[254], guidelines[255] or methodologies[256] published by BEREC and referring to regulatory issues could serve as a source of inspiration for the development of corresponding ones for the audiovisual sector as well – of course with appropriate consideration of media-specific particularities. The fact that this does not only have to concern the area of the primary regulatory framework but also affects other regulatory areas that are relevant for the regulatory authorities participating in the supranational body is demonstrated, for example, by BERECs recent guideline on net neutrality.[257]

254 https://www.berec.europa.eu/en/document-categories/berec/regulatory-best-practices/common-approachespositions.

255 https://www.berec.europa.eu/en/document-categories/berec/regulatory-best-practices/guidelines.

256 https://www.berec.europa.eu/en/document-categories/berec/regulatory-best-practices/methodologies.

257 BEREC, Net Neutrality Regulatory Assessment Methodology, BoR(22)72, https://www.berec.europa.eu/sites/default/files/files/document_register_store/2022/6/BoR_%2822%29_72_NN_regulatory_assessment_methodology_final.pdf.

3. Cooperation under the General Data Protection Regulation

As explained above, the institutional system of the GDPR and data protection rules on EU level more generally is essentially based on the requirements derived from Art. 8(3) CFR, which demands the independence of supervision. Supervisory authorities are seen as guardians of fundamental rights on the one hand (the protection of personal data of data subjects) and fundamental freedoms on the other (the free movement of data and thus, inter alia, the freedom to provide services of data processors). Independence is therefore regularly required to mediate between these two typically conflicting interests (interests in the protection of one's own privacy and economic/public interests in the use of third party data).

There are clear differences compared to the situation under media law. But there is still some comparability as far as recipients of media – comparable to data subjects – are affected in their interests by freedom of opinion and information, for example having access to pluralistic and independent content – and regulatory authorities are concerned with the protection of these interests. The same applies to the interests of media providers in terms of fundamental freedoms. However, in contrast to data protection law the decisive factor here is that media providers also have culturally driven interests and can derive these from the fundamental freedoms of the media. This relates to editorial freedom, for example, and is regularly parallel to (and not in conflict with) the interests of recipients. Another difference to data protection law is that the requirement of independence of supervisory authorities is not (at least not yet) derived at the European level from the fundamental right to freedom of opinion or freedom of the media.[258] Nevertheless it should be noted that there are active duties of the state to protect these freedoms, which extend to the guarantee of pluralism,[259] inclusive of ensuring that independent information is conveyed by the media in a democratic system.[260] So far, this explicitly concerns only the media providers and not the supervision. The argumentation that this independence requirement is equally essential when it comes to the supervision is a direct consequence of the need for independence in the framework of content production and dissemination, which can be affected

258 Cf. in more detail *Schulz et al.*, INDIREG, pp. 308 et seq.
259 ECtHR, no. 13914/88 15041/89 15717/89 15779/89 and 17207/90, *Informationsverein Lentia and others/Austria*, para. 38.
260 ECtHR, no. 13936/02, *Manole and others/Moldova*, para. 101.

by the monitoring body, and exactly that in turn would be problematic if it does not act independently. In some Member States, as the German example shows[261], this independence requirement for the regulatory authority is derived in this understanding from national constitutional law.

For the ECtHR the Council of Europe's Recommendation Rec(2000)23 on "the Independence and Functions of Regulatory Authorities for the Broadcasting Sector" also strongly 'suggests' this conclusion by, inter alia, emphasising that, to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector, it was essential to provide for adequate and proportionate regulation, including to establish independent authorities for the broadcasting sector.[262] However, the clarity with which independence of the supervisory authorities has been interpreted by the CJEU for data protection law has not yet been reflected for the audiovisual media sector. But the AVMSD takes up the argumentation as presented here by highlighting in Recital 54: "as one of the purposes of audiovisual media services is to serve the interests of individuals and shape public opinion, it is essential that such services are able to inform individuals and society as completely as possible and with the highest level of variety", which means that this "purpose can only be achieved if editorial decisions remain free from any state interference or influence by national regulatory authorities or bodies that goes beyond the mere implementation of law and which does not serve to safeguard a legally protected right which is to be protected regardless of a particular opinion".

Another significant aspect to consider in the comparison with an impact on the question of legislative competence of the EU is the foundation for the different areas of law. While economic and not cultural considerations are paramount for data protection law, even though there is the fundamental rights basis, this differs for the regulation of media and content. Where

261 See F.III.1.

262 Recommendation Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies, https://rm.coe.int/16804e0322. Cf. also more recently the Recommendation CM/Rec(2022)12 of the Committee of Ministers to member States on electoral communication and media coverage of election campaigns, adopted by the Committee of Ministers on 6 April 2022, and the horizontal Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance, adopted by the Committee of Ministers on 6 April 2022, which also shows the link between content producers, disseminators, users and supervision.

the GDPR impacts this sector or areas with more diversity in the Member States, it provides room for manoeuvre for Member State approaches as shown, for example, by the media privilege of Art. 85 GDPR.

It follows that systems established in data protection law cannot be transferred directly and to the full extent to the regulatory framework for the media sector, but whether such a transferal would be appropriate must be questioned for each part of the system, and it would likely need an alignment with specificities of the media sector. It should be emphasised that, unlike before the revision 2018, there is now an explicit requirement for independent supervisory authorities in the AVMSD including some details on what this means. The system is therefore now indeed already close to the system provided for in the GDPR as regards independence, even though the formulations applied are more cautious, which results from the division of competences in this field and the acknowledgement by the AVMSD of the Member States' retained competences in the field, therefore deliberately leaving a wide scope for them. With the EMFA Proposal, which includes institutional and procedural rules and was presented by the Commission as a Regulation, this understanding may be changing – at least from the perspective of the Commission.

The AVMSD in its current version refers to the regulatory authority as being "legally distinct from the government and functionally independent", while the GDPR demands that the authority "acts in complete independence", meaning it shall not be put under any external pressure. Other than Art. 53 GDPR, the AVMSD does not contain further details on the structure of the regulatory authority or the rules about the appointment of its members and the way it is established. Again, this is a result of the procedural and institutional autonomy of Member States especially in areas where they retain also substantive competences, which is the case for the media sector. If, therefore, rules comparable to the GDPR would be included in the AVMSD, this could conflict with the respective national understanding of independence of media regulatory authorities. Furthermore, a provision such as Art. 52(2) GDPR regulating that members shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether for profit or not, is not provided for in the AVMSD. Overall, the AVMSD does already provide for a high level of independence of the regulatory authority to be guaranteed by the Member States. Compliance with this standard has also been

monitored in the past.[263] The aspects of independence, which the AVMSD currently – and deliberately – leaves more open, could become subject of concretisation efforts by the CJEU in the future, thereby repeating what the Court did with the Data Protection Directive – also a Directive and not yet a Regulation as with the GDPR now – for which the Court based its interpretation of the independence criterion on the explicit guarantee deriving from fundamental rights, now specifically Art. 8(3) CFR.

The question arises, however, whether the various mechanisms of co-operation described above could be transferred to the AVMSD context. The more precise regulation of information exchange and information obligations as well as a concrete provision on requests for mutual assistance, combined with the creation of the necessary technical infrastructures, seem to make sense all across situations for which cross-border measures can be considered. The establishment of such measures does not conflict with the allocation of powers between Member States and the EU, nor do they pose a problem as such from the perspective of freedom of the media, as they do not touch the independence or powers given to the media regulatory authorities. This finding is important for cases that fall within the area harmonised by the AVMSD, because an effective handling must be ensured by the regulatory authority of the Member State of establishment within the framework of the AVMSD anyway. In the non-harmonised areas of the AVMSD, the competence of the regulatory authority of the receiving state remains in place and the mechanisms of Arts. 3 and 4 AVMSD do not apply, so in legal terms there is no need for the regulation of mutual assistance or cooperation, but practice shows certain challenges. For example, it is not always easy to assess whether a matter falls under the coordinated field or not.[264] Besides, the authority of the Member State of establishment regularly has more direct access to 'their' providers. The mechanisms mentioned – if they were introduced in comparable manner within the AVMSD – could therefore be used in these cases in order to give the authorities of receiving Member States a possibility to intervene. The exact consequence would then still depend on possibilities for action under national law in relation to the regulatory authority of establishment.

263 Cf. eg. the studies *Schulz et al.*, INDIREG, and *Cole et al.*, AVMS-RADAR, that were prepared for the European Commission as well as the criteria of the Media Pluralism Monitor that relate to the position of authorities (see on this for the latest report https://cmpf.eui.eu/mpm2022-results/).

264 *Cole*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, pp. 6 et seq.

A strengthening of ERGA based on the model of the EDPB is also possible in principle and does not meet any obvious reservations, as long as the independence and the right of initiative of this body and the individual members are preserved. Making the applicable provisions for the cooperation more concrete could serve the purpose of making the procedures more effective, whereas going too far in introducing fixed rules for the organisation and structure of the competent media regulatory authorities for these procedures may be contradictory to the question of competence of Member States and even to constitutional traditions as mentioned above.

With regard to binding decision-making powers, such as those granted to the EDPB in the coherence procedure, the different degrees of harmonisation between the GDPR and the AVMSD must be taken into account. Such procedures, which ultimately oblige the authority of the Member State of establishment to act in a certain way upon intervention of other authorities by majority decision of independent members, would also be conceivable in specified areas of audiovisual media and content regulation, such as labelling obligations for advertising or joint reactions in case of matters that affect the single market in all or many of the Member States. In the AVMSD area, in contrast to data protection law such reactions could be facilitated by the fact that the (assumed) infringement itself is visible and therefore open to assessment to all authorities, with which there is less need for lengthy internal investigations as was demonstrated above in the case of a possible data processing violation by an undertaking. If the evaluation of the situation is connected to areas with more discretion for the Member States and diverse approaches, such as for the protection of minors from harmful media, this would be much more difficult and possibly would have to be limited to clear-cut cases of infringement, addressing violations that are to be treated as such in all Member States due to the harmonisation level. It would further have to be clarified how such mechanisms could be integrated or how they would interrelate with the existing derogation and anti-circumvention procedures of Arts. 3 and 4 AMVSD.

4. Institutional Dimension of the EMFA Proposal

The existing approaches to institutional structures and cooperation means in other legislative acts in comparison to the AVMSD can be contrasted with the foreseen setup under the proposed EMFA. It should be noted,

however, that the proposal was only recently tabled and is still at an early stage of discussion in the legislative procedure, and it seems likely that there will be significant changes before this legislative act will be adopted. Some of the contentious issues that already have surfaced concern clarifications on the relationship to other legal acts, especially the AVMSD, and on the legally binding effect of some of the formal and substantive rules proposed. A further concern is the question of competence of the EU to propose a Regulation covering all the areas as included in the draft, as it is disputed whether the legal basis of internal market regulation by harmonisation of Member States rules is sufficient in view of the allocation of powers and whether the instrument of a Regulation is appropriate to address all of the points covered by the EMFA. The question of competence division is also affected by the role of the Commission in the institutional setup of the EMFA Proposal in view of the position of national regulatory authorities.[265]

Irrespective of these concerns, the EMFA Proposal acknowledges the importance of more formalised cooperation structures on EU level when dealing with cross-border matters, while suggesting solutions retaining the approach that competent authorities of the Member States should be charged with the daily supervision work. In that regard strengthening the ERGA is an important step to be welcomed, as it builds on existing structures, which were significantly furthered by the ERGA members themselves through agreeing on the MoU. Whether or not a name change – reflecting the wider scope of application of the proposed Regulation – is necessary in light of the fact that most national regulatory authorities that are members in ERGA will probably keep their names and an important focus of the Board will still be the tasks in connection with the AVMSD and thereby the audiovisual media, is not an important question. Conversely, the question of how the independence requirement, which is laid down in the Proposal both for the Members of the Board and the Board itself, is to be understood and how this is reflected in the procedures foreseen is of central importance. The strengthening of the Board as a form of 'mediating forum' of the regulatory authorities and bodies and as a joint assistance in matters that require the involvement of more than one authority rightly acknowledges that in comparison it is those regulatory authorities that have the longest standing experience and expertise in the balancing efforts necessary in order to achieve all of the goals of the EMFA. This partly is

265 Cf. on this criticism in more detail *Etteldorf/Cole*, Research for CULT Committee – European Media Freedom Act - Background Analysis, p. 14 et seq.

the result of a focus in the supervision of media and content providers that concerned entities which needed a licence as authorisation, with which typically a regulatory authority was involved in monitoring compliance with the conditions laid down therein. For other media sectors such supervision was not necessarily foreseen. In that regard the EMFA Proposal can overcome one of the potential difficulties that the DSA as horizontal regulation has created: in that context the oversight mechanisms were not specifically designed to incorporate the specificities of content supervision and enforcement against providers of such content but rather more generally as supervisory authorities for the activities of intermediaries. In the DSA framework, as shown above, it is left to the Member States whether or not they give any or a prominent role to the regulatory authority in charge of audiovisual media.

Because of this important role that is confirmed for regulatory authorities in the Member States, the cooperation forum with its diverse tasks needs to reflect requirements that are expected from the individual members of the EBMS, too. It is therefore problematic that the EMFA Proposal foresees a crucial involvement of the European Commission in several aspects and especially some of the actions of the Board can only happen at the request of, or are dependent on, the Commission. This comes in addition to providing the secretariat for the Board – as was the case for ERGA – which creates a further connection between the working procedures of the Board and the Commission services.[266]

It is problematic that the Commission is involved in the EBMS at essential points, either the EBMS is only able to act at the request of the Commission or has to reach an agreement with it. The Commission is not an independent regulatory authority like the national authorities according to Art. 30(1) AVMSD and the future Board under Art. 10 EMFA, instead it is the main executive body of the EU in which the administration is tied to the political level of the Commissioners.[267] The notion of independence not only of the media but also of their oversight, as it was demonstrated above, necessitates a different setup than, e.g., the supervision and enforcement of market rules such as product safety requirements. In addition, one of the

266 For a more detailed critical analysis *Etteldorf/Cole*, Research for CULT Committee – European Media Freedom Act - Background Analysis, p. 44, 46 et seq.

267 See on this, but in context to the Commission's role in the DSA, *Buiten*, The Digital Services Act from Intermediary Liability to Platform Regulation, para. 78; *Buri*, A Regulator Caught Between Conflicting Policy Objectives; *Wagner/Janssen*, A first impression of regulatory powers in the Digital Services Act.

goals of revising supervisory structures and cooperation forms in relation to cross-border matters is to overcome procedural complexities as they exist for some areas today and lead to potentially problematic time delays in enforcement, which is why the coordination with additional actors may run counter to this.

It should also be borne in mind that the EMFA Proposal 'delegates' important aspects to a guidelines-issuing power of the Commission. This approach is not new; e.g. in the AVMSD revision of 2018 three possible guidelines to be elaborated were included, with which Council and European Parliament accepted the need to further detail some of the Directive's provisions in order to reach – or at least contribute to – a consistent implementation in the Member States. With EMFA this goes well beyond concretisation of specific areas and concerns a Regulation which could already include binding elements without having to coordinate national transpositions. But in addition, the power extends to be able to issue such guidelines on all issues relating to the implementation of the AVMSD and the EMFA, which can be far-reaching. And even though these Guidelines would not have legally binding force, it is likely that, if they contain interpretations of the provisions, they result in a de facto binding position because Member States may not want to risk being – even if only in the view of the Commission – in violation of EU law provisions.

Another important element to consider in the legislative procedure is the reach of the power of the EBMS. Although the cooperation mechanisms in cross-border matters are significantly enlarged and the procedural possibilities spelt out, the Board does not have regular binding final decision-making powers. As was shown for other areas of law, namely the GDPR with the EDPB, such a decision-making power can help to deal with challenges in the cross-border context. For the dissemination of audiovisual content, at least when it comes to clear violations of the AVMSD standards, such powers could contribute to ensure regulatory activity and enforcement on the side of the competent authorities, even if they would have been reluctant to act on their own behalf. In that context the formal 'adoption' of some elements of the MoU of ERGA by introducing in the EMFA structured cooperation mechanisms for mutual assistance and especially by providing expedited procedures which could overcome the disadvantages of the current system under the AVMSD as well as the exchange of information in case of serious and grave risks could be helpful in further establishing these mechanisms. At the same time, a space for more detailed and more easily adaptable provisions laid down in internal procedural rules – as with the

MoU of ERGA – should be left in order to give the regulatory authorities the possibility to respond to challenges that appear in regulatory practice.

Most importantly, when inserting new institutional structures in the system of oversight of audiovisual content – and more specifically also audiovisual media services and VSPs – and combining these with procedures that would then be laid down in the legislative act itself, one should certainly consider the interplay with existing comparable procedures. More specifically, coherence requires to consider whether the introduction of the cooperation mechanisms under the EMFA are related to the procedures of Art. 3, but also Art. 4 AVMSD. And if the AVMSD is anyway amended by EMFA in view of the institutional provision, this would be the opportunity to also adapt certain procedures – if not even some of the substantive provisions – of the Directive, namely by overcoming the difficulties that have been proven in applying the procedures under those two Articles.[268]

Finally, where the EMFA Proposal addresses some of the important challenges mentioned above, the procedures and powers of EBMS are only limited in their legal consequence. For instance, where harmful content – such as "disinformation and foreign information manipulation" – posing a danger for society is concerned, Art. 18(1) EMFA limits the influence of the Board to a "structured dialogue" with VLOPs, which are otherwise addressed in Art. 17 EMFA and mainly in the DSA.[269] Additionally, this aspect shall be treated in the annual independent monitoring of the internal market for media services that the Commission would have to conduct under Art. 25 (specifically para. (3) (a)) EMFA and the findings of which shall be subject to consultation with the Board. The related provision of Art. 16 EMFA in the Section on Regulatory cooperation, which aims at coordinating measures directed against media service providers established outside the Union but targeting audiences in the EU, the services of which pose a risk to public security and defence, for example because they are under control of a third country, gives the EBMS a more active role: it shall be in charge of coordinating the measures by its members or other national authorities that are related to such a threat (Art. 16(1) EMFA) and it may issue opinions on appropriate measures which the competent national authorities should then take utmost account of in their further

268 In this light *Etteldorf/Cole*, Research for CULT Committee – European Media Freedom Act - Background Analysis, p. 20 et seq.

269 *van Drunen/Helberger/Fahy*, The platform-media relationship in the European Media Freedom Act, argue in light of transparency obligations that Art. 17 has a very limited impact anyway compared to obligations already contained in the DSA.

actions (Art. 16(2) EMFA). However, which abilities for coordination exist and what are the consequences of a possible ignoring of the opinion of the EBMS by a regulatory authority is left open. Other than with the EDPB there is no 'dispute resolution' which would give any binding power to a potential subsequent decision of the Board in case of such a conflict. As the EMFA does not replace the competence of the national regulatory authorities, this solution is understandable on first view. In light of the problems in enforcing effectively the law in cross-border situations, it is nonetheless questionable whether this approach promises sufficient results in consideration of the threats.

G. Conclusion: On the Way to Enhanced Efficiency and a Modernised Regulatory Framework

Fundamental rights and values call for the establishment of a safe, free and pluralistic environment for the dissemination of audiovisual content in order to adequately and comprehensively protect citizens and the society in the Union, irrespective of the nature of the harmfulness of the content, the means of dissemination and the disseminator. However, regulation and enforcement still depend on whether and under which legislation a content is illegal, through which channels and from which territory the content is disseminated and by whom. Depending on this, enforcement is associated with different prospects of success and different procedures with different timescales. Different regulatory authorities under different legal frameworks can be competent or must be involved in the proceedings.

As demonstrated in the context of this study, the major problems in this respect are related to the existing enforcement mechanisms, in terms of both their substantive and territorial scope and their procedural design. This relates in particular to taking action against unlawful audiovisual content from foreign countries. This is linked to institutional challenges and insufficient binding cooperation structures.

These problems will necessitate an adaptation of the applicable legal framework in medium term in order to ensure a better fundamental-rights-based enforcement of the law in cases of cross-border dissemination of audiovisual content.[270] In short term the agreement of joint minimum standards between the regulatory authorities and bodies of the Member States in the framework of ERGA is a path to be further pursued to find answers to the most pressing difficulties of enforcement identified. One of these areas for coordination is the application of the 'technical criteria' under Art. 2(4) AVMSD, which establish jurisdiction. In a future revision of the Directive it should be considered to give up these criteria or combine them with additional requirements that ensure some form of attachment to

270 Further recommendations on developing the legal framework in light of experiences with the AVMSD implementation have been presented by the authors of this study in a policy briefing for the CULT Committee of the European Parliament, cf. *Cole/Etteldorf*, Research for CULT Committee – The Implementation and Future of the revised Audiovisual Media Services Directive (Policy Recommendations).

the legal order of the EU with regard to the editorial work of the provider concerned. Requirements of a more substantial connection to a receiving state could be derived from legal frameworks in other sectors, such as the DSA or the GDPR, both including such approaches. The introduction of mechanisms of this kind would allow to retain the country-of-origin principle of the AVMSD as one of its cornerstones.

The strengthening of such mechanisms in order to ensure a closer attachment to the legal frameworks of the markets in which the provider's service is available and to which it is addressed needs to be accompanied by clear substantive rules that reflect the newly developed dangers created in the audiovisual sector. The question should be further debated in this context whether the material scope of application of the AVMSD should not be expanded again and existing coordinated areas should be concretised in the sense of common minimum definitions.

The principle of a media environment with providers that are independent from being controlled by the state is a fundamental element of this legal order as well as is the monitoring of content by bodies that are detached from the regular executive system of the state. Laying down minimum requirements in this respect in the coordinated law should be analysed as an option for the future. Within this minimum framework Member States would be able to retain or design their own approach to this type of 'state detachment' in their national media laws. A broad interpretation of this 'distance' from the state is preferable and would mean that authorities that are subject to orders from the executive are included in the notion of not fulfilling this standard. With such a broad interpretation it would then be possible for these bodies to react in a robust manner to the further dissemination of services for which the media provider lacks independence or does not comply with minimum content standards. The aim of such reactions is the protection of the population in the EU Member States. Independence of media providers is connected to a relevant media pluralism which necessitates the creation of a framework that avoids undue dominance of specific providers.

The legal framework which is relevant besides the rules of the AVMSD provides in parts answers to the challenges of audiovisual content dissemination, but legal mechanisms established are not yet sufficient. This applies on the one hand to the DSA, in relation to which the Member States must now prepare the oversight structures also concerning the moderation of audiovisual content when creating or assigning competent supervisory authorities or bodies. On the other hand, this applies to the proposed EMFA,

which aims to address precisely the problem of cross-border cooperation in addressing challenges coming from the cross-border dissemination. Those rules as proposed would fall short of actually guaranteeing full independence of the structures. The central role of the European Commission in both mentioned legal acts, but especially in the procedures foreseen in the EMFA, is problematic if taken a look at from a media law perspective. An additional problematic layer results from the division of competences between EU and Member States level. The approaches identified in this study, for example from EU data protection law, mechanisms in Germany concerning 'Staatsferne' (detachment from the state) or content standards for broadcasters in the UK, can offer inspiration for a future strengthening of both independence and its interconnection with existing structures.

With a view to the illustrative scenarios used in this study it is evident that the consideration of the institutional form of oversight is of utmost importance for enforcement in cross-border cases. In combination with the country-of-origin principle there need to be cooperation structures on European level, in which the authorities and bodies entrusted with the monitoring in the Member States can jointly respond to certain challenges. In addition, formalised and legally binding cooperation and joint decision-making should be achieved and further detailed in the law in future. In this respect, the study has taken up various approaches and examined them in the light of experience gained in practice to date, especially in other related sectors than the audiovisual media services. The study shows that looser forms of cooperation structures, such as those in the AVMSD or the EECC, which have been increasingly strengthened over time, have their limits when it comes to enforcing the law and harmonising the application of the law, at least as far as binding and thus robust requirements are concerned. Stronger structures such as those in the DSA or, even more, in the GDPR offer added legal certainty and effective possibilities for taking action. With regard to the latter, however, experience shows that new challenges are also associated with this, which must be taken into account in a future legal instrument, especially in light of specificities of supervision in the media sector and the competences of Member State authorities and bodies. ERGA has already created under the given legal framework an agreement between its members for a fostered cooperation with the internal Memorandum of Understanding. This can serve as basis for the further evolution of the AVMSD or – as this will change the AVMSD according to the proposed draft – the European Media Freedom Act. Such a development should consider relevant experience from other areas of law, such as especially data

protection, in order to strengthen the enforcement of the law in the context of cross-border dissemination of audiovisual content in the future – a goal that is becoming increasingly important in light of developments in the recent past.

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