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# 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

## Overview of core results

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## Overview of core results

The reality of cross-border dissemination of audiovisual content requires an effective legislative and enforcement framework to combat hate and violence, propaganda and disinformation, threats to children and young persons, as well as other problematic phenomena. The legal status of EU citizens, safeguarded by fundamental rights and values of the European Union, is both the benchmark and the objective and necessitates a safe, free and diverse media environment that is protected regardless of the nature of its endangerment, the origin or the distribution channel of endangering illegal and harmful content, especially in the online environment.

The legal framework currently applicable for dealing with cross-border disseminated audiovisual content must be considered in light of a network of both long-standing and recently enacted as well as ongoing legislative initiatives of the EU and Member State rules, the latter in implementation of the EU requirements or by exercising their remaining competences especially in media law. In addition to new approaches to regulating platforms, the core of EU regulation remains the Audiovisual Media Services Directive (AVMSD), which continues to pose implementation problems in practice after the last revision in 2018.

In particular, the relationship between the country-of-origin principle, which determines the jurisdiction of an EU Member State, and the exceptional derogations available to Member States is neither sufficiently clear, nor are the applicable procedures appropriate to strike an effective balance between general applicability and exceptional derogation. Especially with regard to dealing with providers of online platforms that are active throughout the entire EU, for which only one Member State is competent that is typically not the one whose citizens are addressed by the content of the offer, and even more so concerning providers from third countries which can come under the umbrella of protection of the single market rules and the AVMSD due to a mere technical connection with a Member State, better solutions need to be found. The adjustments in the last revision have remained incomplete or insufficient in view of new challenges, especially as far as cross-border cooperation between the competent regulatory authorities of the Member States is concerned. However, with the agreement of a Memorandum of Understanding in the European Regulators Group for Audiovisual Media Services (ERGA), a basis for more concrete procedures in cooperation has been created, which should be incorporated in the context of further legislative development.

In this context, it should be considered to harmonise minimum requirements regarding the creation of editorial content, as they have been and are the foundation for licensing decisions in case of linear services. At the very least, however, the possibilities of Member States to respond to content which is targeted at them, must be strengthened within the system of the country-of-origin principle through clear powers to derogate. Additionally, the practical applicability of the anti-circumvention rule needs to be improved. In substantive terms, this need for action applies irrespective of the Member States' competence to define more precisely how certain minimum requirements for the protection of minors or the general public by the various providers in the different forms of services have to be fulfilled, in a comparable way as is the case with the new regulations for video-sharing platform services in the AVMSD. One example is the codification of certain minimum conditions for the dissemination of content which is problematic for minors, such as the necessity of (age) access restrictions for pornographic content, in order to achieve a common standard in law enforcement.

In addition, there are other approaches for a higher degree of harmonisation at EU level, some of which have already been applied in Member States' regulatory frameworks and can help to avoid implementation problems. For example, there are requirements for news offerings to comply with binding content standards in order to guarantee a minimum level of accurate, impartial and independent reporting, whereby violations of such standards, for example in the former Member State United Kingdom, can even be sanctioned by the national regulatory authority in the form of a revocation of a linear provider's licence.

Independent content is also safeguarded by the independence of the providers. Consequently, in Germany the principle of "Staatsferne" (detachment from the state), which is derived by the Federal Constitutional Court as a constitutional principle, applies as a guarantee for the freedom and independence of broadcasting. State power in all its parts has to be subject to control and criticism by the general public, therefore, informing the public through the media must likewise be free from state influence. Although there are different ideas about the concept – especially

concerning the financing and structure of public service media – the value of independence as a basic principle is undisputed also at Union level where it is embedded in the guarantee of independent supervisory structures foreseen in the AVMSD. This value should be further substantiated in the future, also in relation to its content.

This includes the incorporation of co-regulatory approaches, which regularly leaves the development of standards, detailed rules and best practices to the concerned sector, but ties these back to regulatory bodies. Such approaches exist not only in the media law context, but also in data protection law, where codes of conduct can be found in EU-wide harmonisation. Drawing comparisons to this field is especially relevant because the fundamental right to the protection of personal data places similar demands on the independence of supervision as the fundamental rights of freedom of the media and freedom of expression do in relation to media content, which is why instruments of data protection-specific certification mechanisms, seals and marks can also be considered as potential models.

The further strengthening of the institutional system is of particular importance. Although elements of law enforcement from other regulatory sectors cannot simply be transferred due to media-specific peculiarities, they can serve as sources of experience, especially if intersections with media regulation exist and practical applications in dealing with cross-border issues have already taken place. It is especially relevant in the increasing multiplication of institutional structures, notably relevant in the case of the new provisions of the Digital Services Act (DSA), that the work of the competent national regulatory bodies and the already existing cooperation structures such as ERGA are taken into account. Equally important is that the Member States retain and use the possibility to implement their power to structure the regulatory bodies and their procedures by following an approach that is as coordinated as possible with regard to cross-border matters, especially in the case of online content dissemination. A comparative look at the system of the General Data Protection Regulation with the involvement of the supervisory authorities in the European Data Protection Board illustrates approaches that could also be implemented in a similar way within ERGA, whereby it should be noted that the Regulation, in contrast to the AVMSD, follows the market location principle and resulting from that the authority of the Member State of establishment does not have exclusive, but only a lead competence.

Overall, an adjustment in the applicable legal framework is needed in medium term in order to enable better fundamental rights-based law enforcement also in cross-border cases of dissemination of audiovisual content. In short term, an improvement concerning the enforcement difficulties identified as particularly pressing, must be sought through the agreement of common minimum standards between the regulatory authorities of the Member States within the framework of ERGA. This includes, in particular, the application of the “technical criteria” for jurisdiction, the deletion of which should be discussed in a further revision of the AVMSD or which should at least be supplemented with an additional requirement for editorial connection to the legal territory of the EU. The agreement between the Member States on minimum requirements with regard to an independent audiovisual content landscape free of state influence should be accompanied by a clarification that a sufficient separation from state or public power influence means that authorities which are subject to direct orders by the executive branch cannot be responsible for content control. At the same time, this approach makes it possible for the competent (independent) bodies to react robustly in case there is a lack of independence on the side of the media providers themselves or if minimum content standards are neglected. Where necessary, this can take place in a cooperation mechanism at EU level. Both are directed at taking action against the further dissemination of such services or offerings for the protection of the citizens in the EU Member States.

This type of cooperation in law enforcement in cross-border cases requires that, in conjunction with the country-of-origin principle, certain challenges can be dealt with jointly by the Member State regulatory authorities and bodies. For this purpose, formalised and legally binding mechanisms for cooperation and joint decision-making should be sought, which are to be further developed in the future. Even if the proposal for a European Media Freedom Act (EMFA) takes this up in part, a critical examination must be carried out in the further course of the legislative process of whether the adjustments are sufficient and coordinated with the substantive basis in the AVMSD or whether the latter would not also need to be subjected to a further revision. It should also be noted that the new substantive provisions of the EMFA must be aligned with the AVMSD and the further applicable legal framework for the cross-border dissemination of audiovisual content in order to ensure coherent regulation as a basis for effective law enforcement.

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