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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

Executive Summary

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CHALLENGES OF A CROSS-BORDER MEDIA LANDSCAPE IN THE EUROPEAN UNION

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

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.

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.

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

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'

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

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

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)?

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.

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

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 Eu-

ropean 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

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 implementation 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

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

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.

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

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

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 utilized by the provider of the transmission capacity (Art. 2 para. 4).

EXEMPTIONS FROM THE COUNTRY-OF-ORIGIN PRINCIPLE: DEROGATION POWERS AND ANTI-CIRCUMVENTION

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.

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...

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

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 is 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.

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

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, secondarily, 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

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

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

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.

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

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.

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

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

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

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

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

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.

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

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

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

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

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

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

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 harmonized 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 which 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

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.

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.

Furthermore, the degree of harmonization 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

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

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.

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.

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

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.

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.

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 CO-OPERATION SYSTEMS

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

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

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

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

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.

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.

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.

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