



[Annex 3 to Final Report of Subgroup 3]

ERGA Subgroup 3 – Taskforce 3

“Concrete Mechanisms of Regulation”

Paper

(Deliverable 3 of ToR)

Introduction

Within Subgroup 3, overall dedicated to the implementation of the revised AVMS Directive, Taskforce 3 was designed to explore the mechanisms of regulation depending on fundamental values and services regulated, accompanied by the evaluation of cooperation models both between ERGA members on European level, and between NRAs and regulatory authorities from other thematic areas at national level.

For this purpose, the work of this Taskforce has been split into several workstreams with the intention to best separate the wide range of goals to be achieved.

In this vein, Workstream 1 elaborates on matching fundamental values with different forms of regulation (see Chapter A).

Workstream 3 provides for an analysis of examples of an effective cooperation of NRAs with other regulators at national level, while trying to draw common conclusions from different sorts of cooperation (see Chapter B).

Finally, the initially separated Workstreams 2 and 4, both dealing with cross-border cases with a particular view at the various service providers in the online environment, have been merged to jointly develop solutions for cooperation between ERGA members (see Chapter C).

A. Workstream 1 – Exploring the mechanisms of regulation depending on areas and services regulated

I. Preamble

The revised AVMS Directive deals with questions concerning different mechanisms of regulation and encourages the Member States to make use of co-regulation and the fostering of self-regulation in the fields coordinated by the Directive (Art. 4a). Against this background, this paper is intended to give an overview of the main fundamental values contained in the European media framework combined with the mechanisms for their protection.

In this vein, the paper is based on the results of the Subgroup on co- and self-regulation that in detail analysed the individual elements and attenuations of these forms of regulation in 2017 and 2018. For the purpose of this paper reference is made to the respective ERGA papers.

In this very first status of analysis, the paper can only function as an overview and starting point for further discussion. Respectively, this paper does not contain any binding elements.

II. The fundamental values at stake

The five most relevant fundamental values covered by this paper are:

1. Protection of freedom of expression (Art. 11 ECHR)
2. Protection from violence or hatred in the spirit of the obligation of Member States to protect human dignity as set out in Art. 6 I of the new AVMS Directive.
3. Protection of minors (Art. 6a)
4. Protection of consumers (Art. 30 II)
5. Pluralism (internal and external) (Art. 30 II)

ad1: The over-arching fundamental principle of utmost relevance for a stable European media landscape is **freedom of expression**, generally referred to as the right to freely express opinions without interference and to vice-versa freely receive information. Contrary to the four other values, freedom of expression is formed as a defensive right against illegitimate statutory intervention. It does therefore not fit to the exercise of matching with the mechanisms of regulation that will be conducted in chapter 3 below. Thus, freedom of expression will not be contained in the overview at the end of this paper.

ad2: Art. 6 of the revised AVMS Directive stipulates that without prejudice to the general obligation of the Member States to respect and protect human dignity, 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 EU Charter of Fundamental Rights.

ad3: Media regulations regard the healthy and uninterrupted development of children (protection of minors) to be of paramount importance. The revised Directive aligns the level of protection for linear and non-linear services by introducing a better protection of minors in the online world. The new rules strengthen the protection on video-on-demand services and extend the obligation to protect minors also to VSPs. In many Member States the contents published by linear media service providers must be age-rated (classification). The manner of the “consumption” of on-demand media services is fundamentally different from that of linear media services, as it is based on individual demand. Therefore, in their case, the time-bound programme flow structure requirements applied to linear media services are not applicable. However, the media service provider of an on-demand service or media service distributor concerned is required to use an effective technical solution to prevent minors from accessing these programmes.

ad4: The new Directive aims to strike the right balance between consumer protection, more specifically the most vulnerable consumers (e.g. minors) and more flexible systems for linear service providers to address the challenges posed by new services.

ad5: The Activity Report of the Committee of [Council of Europe] Experts on Media Concentration and Pluralism defines pluralism as *internal* in nature with a wide range of social, political and cultural values, opinions, information and interests finding expression within one media organization (often also referred to as “Diversity”), or *external* in nature, through a number of such organizations, each expressing a particular point of view. More simply, internal pluralism is the diversity of content within a given audiovisual service provider, while external pluralism is the plurality of ownership.

III. Mechanisms of regulation based on the revised AVMSD

The general mechanisms of regulation available to safeguard these fundamental values can be schematically divided into the following:

1. Statutory Regulation (strong or second-strike approach)
2. Co-Regulation
3. Self-Regulation
4. Codes of conduct

Even though there are more differentiated systems in some Member States, there is the need to agree on an abstract scheme applicable to the majority of NRAs to ensure a fairly harmonised approach across the Member States.

ad1: **Statutory regulation** means ordinary regulation executed by (independent) national regulatory authorities, for example as described in Art. 30 AVMS Directive. This includes methods of regulation in the sense of following strict procedures as well as those guided by softer second-strike approaches, meaning that a “warning letter” precedes the initiation of statutory measures

The mechanisms of **Co- and Self-regulation** have been examined in Subgroup 4 in 2018, including the elaboration of different types as well as possible roles for the NRAs. The following paragraphs build upon and complement the work done in 2018.

ad2: **Co-regulation** “provides, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States” (Recital 14 of the new AVMS Directive). According to a study by the Hans Bredow Institute/EMR (2006:35) it means: “combining non-state regulation with state regulation in such a way that a non-state regulatory system links up with state regulation”. Three basic forms of co-regulation can be distinguished depending on the cooperation of state and non-state partners based on their involvement in the co-regulatory procedure:

- State led (top-down) co-regulation: whereby rule-making is done by state authorities and non-state partners are invited to be involved in the process of implementation and enforcement;
- Non-state-led (bottom-up) full co-regulation: whereby rule-making is developed by non-state partners and then validated and adopted by the state;
- Mixed co-regulation: assigning the two sides (the state and the non-state actors) leading and supplementary roles, for example, with the state providing the general legislative framework and non-state actors provide for the detailed rules.

ad3: **Self-regulation** according to Recital 14 of the AVMS Directive constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations and associations to adopt common guidelines amongst themselves and for themselves. It may have enforcement mechanisms and feature a regulatory body. Self-regulation in a strict sense necessarily include some sort of (independent) dispute settlement within its members.

ad4: As a last mechanism there are **Codes of conduct** that also are based on voluntary initiatives between industry market players, but which are designed to be a mere self-binding element without disposing of a proper decision making body.

IV. Matching of values and mechanisms

4.1. General remarks

Traditionally, the regulation of the different audiovisual services was technologically defined: linear services (television) were subordinated under stricter control than non-linear services. A number of reasons are given for this differentiated regulatory approach: the special impact linear services have on the formation of opinion, spread (multiplication) affect, suggestive power, immediacy of linear services. These may not apply fully to non-linear services, thus the different regulatory approach.

And it is in line with what academics are summarizing under the concept of “flipping the regulation” (see for example the “HERMES” study of the Hans-Bredow-Institute and the IVIR, University of Amsterdam, <https://www.ivir.nl/publicaties/download/1643>).

In this vein, three principles can be stated:

- **The sensitivity of a fundamental value determines the intensity of regulation:** the more vulnerable the subject of protection is, the stronger the regulatory measures put in place need to be.
- **The reversibility and immediacy of an action determines the need for protection:** The less reversible and the more immediate the impact of a violation is, the higher is the need for a strong regulation. For example, an act of hate speech against a person has immediate effects and is irreversible (= the damage of an insult cannot be taken back; infringement and damage occur synchronously in the exact moment of the message being received). On the contrary, an unlawful advertising message does regularly not unfold immediate effects and does not necessarily lead to an immediately identifiable damage to individuals (= a child that is illegitimately addressed by an advertising message still needs to buy the product to result in a concrete damage; infringement occurs upon receipt of the message, whereas damage will only be done once the product is being consumed).
- **Mechanisms of regulation should allow for escalation:** While there might be a preferred mechanism of regulation for each fundamental value at stake, the regulatory framework should nevertheless be designed in a way to allow for a certain degree of flexibility to react in an escalating way to possible downsides of the system in place. This should be considered by NRAs when considering their approach to enforcement, and equally when designing new co-regulatory schemes. It should also be a criterion when considering whether self-regulation is adequate for an application. This could include not only escalatory measures within a single mechanism of regulation, but rather the possibility to switch to another form of regulation (for example a “backstop” in a co-regulatory scheme could be the NRA taking over the regulation directly). However, minimum standards set by the AVMS Directive in this regard should of course not be undermined.

4.2. Concrete proposals of matching

Measured by the aforementioned criteria, **human dignity** is one of the most vulnerable values protected by media regulation.¹ Violations unfold immediate effects to the person being affronted and the damage done is irreversible. Due to this fact, human dignity hardly lends itself to self- or co-regulation: as a fundamental element of media regulation, the protection of human dignity might be best safeguarded by the regulatory authority and the courts. Co-regulation in the online environment can also be an option, but it must be supported by a solid regulatory backstop.

According to the report by Subgroup 3 of 2017 on co- and self-regulation prepared for the ERGA Plenary Meeting in November 2017, one of the most popular regulatory purposes for which co- and self-regulation is applied is the **protection of minors** (second only to commercial communications). With the blurring of the boundaries between traditional linear, non-linear and VSP services, it is evident that co-regulation will become more and more popular among Member States to address the

¹ It should be noted that the AVMS Directive requires Member States to protect viewers from content containing incitement to violence or hatred. This is without prejudice to the obligation of Member States to respect and protect human dignity.

challenges posed by the plethora of services. However, a differentiation needs to be made whether the action in question has immediate negative effects (e.g. exposure to pornography) or whether it only is a threat to the protected subject (e.g. exposure to illegitimate advertising; see also the second principle above). While the latter cases might be suitable to be dealt with by measures of co-regulation, the former should exclusively be addressed by stronger approaches in the field of statutory regulation.

In any case, having regard to the sensitivity of the subjects to protect, mere self-regulation and codes of conduct do not seem to be appropriate measures in these circumstances.

It is evident, that **consumer protection** in the sense of the AVMS Directive is the regulatory objective where the different forms of self-and co-regulatory regimes are most often and effectively operated. This is reflected in Recital 13 referring to the experience, which has shown that both self- and co-regulatory instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering high level of consumer protection. Consumer Protection is an area that might lend itself quite well to a softer approach (e. g. self and co-regulation), in complement to or regarding issues that are not already regulated by law.

The Directive acknowledges that the transparency of media ownership is directly linked to the freedom of expression, a cornerstone of democratic systems. Yet, Member States should not only guarantee transparency but also the diversity of ownership. This requires a strong regulatory intervention and detailed rules to prevent the formation of media monopolies and to preserve **external plurality**. At the same time there are a number of examples for co-regulatory regimes to preserve **internal plurality**. Thus, self-and co-regulation are the most appropriate regulatory tools for maintaining internal pluralism, while a strong state supervision is necessary to maintain a healthy and vibrant media market, where free market competition as well as the freedom of expression can be guaranteed by the state.

The following table gives an overview of mechanisms suitable in principle for the different fundamental values, while being sceptical regarding certain mechanisms for certain values:

	Pluralism (external plurality)	Human Dignity	Protection of Minors		Protection of Consumers	Diversity (internal plurality)
			Violation	Threat		
Regulation						
Co-Regulation		*	*			
Self-Regulation			*	*		
Codes of Conduct						

* Not as stand-alone, meaning that the main principles should be guaranteed by statutory regulation.

If regulation exclusively by the NRA or co-regulation is not possible for different reasons, like a lack of national or European jurisdiction (especially in cases with a cross-border element from outside Europe), other mechanisms can be the best possible alternative. In such cases, deviations from the general scheme depicted above could be considered feasible.

B. Workstream 3 – Cooperation of ERGA members and exchanges of ERGA with relevant authorities

I. Preamble

The task of Workstream 3 is the *“Development of possible frameworks to improve and facilitate cooperation and exchanges between ERGA members and other relevant authorities”*.

In order to achieve this goal, NRA’s particular experience when cooperating with other authorities has been collected and recommendations have been developed on how to set-up similar projects. In collecting the NRA’s cooperation experience, a special focus was given to the procedures, the necessary steps, and the competences developed in the agreements with other authorities. Some examples of cooperation by the French CSA, the Italian AGCOM and the German Media Authorities are listed in the Annex to this document.

II. Level of Cooperation

The taskforce started from the assumption that generally there are the following intentions to start a cooperation:

- a) National level: Audiovisual NRAs with national authorities competent for other areas
- b) European level: ERGA members with EU institutions competent for other areas
- c) International level: ERGA members with non-EU institutions competent for other areas
- d) Interorganisational: ERGA members with EPRA

Having regard to the scope of Subgroup 2 on the future of ERGA, this workstream will exclusively look at the cooperation mentioned under point a), while points b) to d) are part of the outcome of SG 2. Nevertheless, it is assumed that results of this workstream will feed the SG 2 discussions on the role of ERGA in relation to other institutions.

III. Basis and Models of Cooperation

The examples of cooperation (see Annex) show that there are generally three kind of models that lead to cooperation of audiovisual NRAs with authorities from other areas:

- a) Induced by a **statutory requirement** on the basis of a national law
- b) On the basis of previously agreed, ongoing processes (usually set out in a **Memorandum of Understanding**)
- c) Own initiative of an NRA (ad-hoc voluntary **contact**)

It must be noted that model b) may, in some cases, be complementary to model a). It is particularly the case when the NRAs want to clarify (and/or show to the public) how they mutually understand their respective responsibilities.

IV. Potential partners for cooperation

As regards the range of potential partners for cooperation, the following institutions and entities are typically involved:

- a) Statutory Authorities (e.g. competition, infrastructure and networks, data protection, consumers)
- b) Prosecution Bodies (e.g. public prosecutors, police)
- c) Industry (e.g. associations, single companies)
- d) NGOs
- e) Academics

V. Conclusions and Recommendations

From the implementation of the various models of cooperation and the projects conducted by various NRAs the following conclusions and recommendations can be deduced. They should function as a guidance for other authorities that are considering entering into similar models of cooperation with other institutions.

- a) Induced by a **statutory requirement** on the basis of a national law

The basic requirement for an effective cooperation between NRAs – whenever that cooperation is required by virtue of law – is to reach a common understanding of where responsibility lies for each regulator. Ideally, that mutual understanding should be reached before any dispute (e.g. regarding the expected outcomes of the cooperation procedure) arises.

It may nevertheless be the case if the law itself leaves some margin of interpretation. It is not up to NRAs to draft the law but it may be desirable for them to make recommendations to their national government, should any difficulty come across in the process. Whereas the NRAs concerned may decide to jointly address any practical issues (i.e. measures to make the procedure smoother), for instance via a Memorandum of Understanding (see below), it seems like, at least, the following questions should be clearly specified in the law:

- Under what specific conditions and for which purpose(s) are the two NRAs required to cooperate with each other?
- Which NRA takes legal responsibility for whatever decision is made?
- How much is one NRA's viewpoint or input binding for the other NRA?
- What is the overall timeframe of the cooperation procedure?

- b) On the basis of concrete agreements (usually **Memorandums of Understanding**)

For EU regulators which are not convergent, in particular, the establishment of a procedure of cooperation with the regulators of the electronic communications sector may be important, since a considerable part of the audio-visual content available to the general public is now being distributed on electronic communications network and, specifically, through Internet Protocols (IP), thus beyond the traditional field of intervention of the audio-visual regulators. However, the way both authorities may (or not) find it beneficial to interact to a large extent relates to their respective powers and competences (particularly with regard to the online environment) which is provided for in national law. The added-value and scale of that cooperation may vary accordingly.

Besides, new online services and new business models are emerging, which are dragging a relevant part of the economic resources of the audio-visual market to the online environment and to new players who do not operate within the national borders. New forms of cooperation are therefore needed to allow the NRAs to foster research, investigations and coordination with other regulators.

The recommended areas for the development/improvement of the cooperation with the other bodies/institutions could be:

- Coordination of the actions in areas of common interest (pluralism, electronic communication, audio-visual media services)
- Mutual exchange of documents, data and information concerning proceedings started by the NRA and its partners and on all relevant initiatives
- Training (and possibly also exchange) of personnel
- Creation of a reporting system of cases detected by one institution/body which can be considered violations under the competence of other institutions/bodies
- Carrying out studies and researches on topics of common interest

c) Own initiative of NRA

When establishing an ad-hoc initiative, there are the following recommendations to consider, which were drawn on the basis of experiences made at initial and later stages of the German NRA's initiative "Enforcing instead of only deleting". The main guiding principles are the following:

First of all, the most important prerequisites to successfully set up cooperation are to determine the right partners to start with, to inspire them and to create the best surrounding conditions to realise the project.

Further basic requirements are:

- Professional infrastructure and sufficient resources at partner institutions involved
- Industry's willingness to devote resources despite the lack of immediate commercial return
- Co-operative personnel at public authorities (e. g. Public Prosecution Authority, relevant Ministries, State Office of Criminal Investigations...)
- The NRA – independent from governmental institutions – to set up the project, take over the lead, organise meetings and coordinate between participants

At the initial stage of cooperation, the **main challenge** may be 1) to make the founding partners embrace the idea and believe in the opportunity to actually solve an enforcement problem by co-operating and 2) to convince the political and executive level of devoting (public or company's) resources.

Therefore, **personal relations** are key:

- Establish a reliable and trustful contact at the working level, try to raise enthusiasm for the initiative and/or the topic and create a co-operative and solution-oriented atmosphere;
- Involve the executive level, raise decision-makers' awareness and interest and make clear to them that – and how – they benefit from co-operating.
- Especially when it comes to allocating resources, it is crucial to address the "right" person in ministries as well as companies – use personal networks, if possible.

Always bear in mind that a Ministry of Justice's interests and concerns differ from those of, for example, a media company. Make yourself aware of what their motivation is and adapt your approach and arguments respectively.

Once a basic working contact has been established and the executives have authorized their staff to engage, make sure you do not let yourself or other participants get lost in complexity. Existing

structures are often traditional and do not fit to your purpose or new circumstances – so question the given structures' effectiveness *and* efficiency and be courageous to set up new procedures.

For the **ongoing cooperation process** there are several recommendations to be pointed out:

- Be prepared: have as much information as possible ready for any counterparts.
- Keep up and follow up: reach out to contact persons in other authorities frequently; request updates on process developments and milestones and offer to help or mediate whenever they face a problem.
- Point out problems: make them traceable for others so that it becomes easier to find common solutions.
- Gain an understanding for different approaches. Many obstacles derive from divergent procedures and working methods. Mutual understanding helps.

These recommendations may well be adopted in the implementation of any cooperation between NRAs and other authorities on national level and between ERGA with other institutions on European level. As soon as a project/initiative is established and first achievements have been reported, it gets easier to include other partners, transfer it to different areas or use it as a blueprint for any other cooperation.

C. Joint Workstreams 2 and 4 – Enforcement of Relevant Rules and Cross-Border Cooperation between Regulators – Responsibilities of Providers

I. Preamble

Within the framework of their supervisory practice, the national media regulatory authorities (“NRAs”) have found that enforcing the law against audiovisual media services from abroad, especially online services (Video on Demand, VoD), which violate national law², has proved both tedious and difficult.

The fact that the AVMS Directive does not impose fully harmonised requirements for content in all areas resulted in different approaches in national legislations and in some cases in the degree of protection for individuals for certain regulatory areas³ in the Member States, thus impeding a consistent and effective approach. With the revision of the AVMS Directive and its transposition, some of these regulations will be harmonised further.⁴ The transposition period for the new provisions laid out in the review of the AVMS Directive (completed in 2018) is until September 2020. The principle of minimum harmonisation remains unchanged.

The various formal cooperation procedures⁵ set forth in the AVMS Directive (some of which have proven to be difficult to apply in the past), the liability exemption for hosting and access providers laid out in the Directive on Electronic Commerce, and the lack of formal notification and enforcement agreements can make the enforcement in cross-border cases very difficult in practice. The same applies to the various regulations for the Member States relating to the rights to information towards hosting providers.

It is noted that ERGA strongly believes in the Country of Origin Principle as the cornerstone of the European legal framework for media services that in many cases is well-functioning in guaranteeing free flow of information in the European Single Market. To strengthen this concept – and this is the spirit in which this paper has been written –, it is a core task of national regulatory authorities to discuss any need and potential for optimization in this regard. Therefore, it is necessary to devote sufficient attention to these issues and to cope with the challenges, while at the same time preserving the full efficiency and stability of the Country of Origin principle. The lack of effective rules on enforcement leads to a weakening of regulation in the Member States and thereby may affect the functioning of the Single Market of audiovisual media services.

In addition, these problems relating to law enforcement in cross-border cases already lead Member States to tighten their national regulatory framework, therefore putting the Country of Origin principle into question. Against this background, it is necessary to explore adequate solutions for concrete legal threats in cross-border cases.

In any case, whenever cases are discussed that are covered by the Country of Origin principle, this paper does neither question the validity of this principle, nor does it seek to apply the legal procedures to such cases.

² Such as the protection of minors from harmful media and protection of human dignity.

³ E. g. pornography, hate speech etc.

⁴ For example, content containing pornography or gratuitous violence will require a system for age verification in the future.

⁵ The paper will focus on the formal cooperation proceedings (procedures set forth in the AVMSD), but will refer to possible informal ways of cooperation (e. g. Call of Regulators etc.).

Beyond the various issues in relation to the interpretation and future implementation of the Directive, the purpose of this paper is to present the approaches foreseen in the AVMS Directive and the Directive on Electronic Commerce for infringements of the regulations for audiovisual media services. In fact, the strategic goal is to identify any potential for clarification and/or improvement between the NRAs or the legal framework by means of the depiction of procedures, focussing on the full range of measures of cooperation available to NRAs, including early-stage consultations and pre-issue co-ordination.

Any procedure to address infringements by audiovisual media service providers as a starting point needs to be based on the AVMS Directive, as it is the more specific regulation for audiovisual media services and video-sharing platform services. Consequently, in case of an infringement, measures need to be addressed to the concerned audiovisual media service provider, since they are editorially responsible for the content retransmitted, and following the procedures established in the AVMS Directive. In some cases, when such measures prove to be unsuccessful and the content is being transmitted through information society services, national regulators need to revert to the hosting service provider and, subsequently, the internet access provider. In such event, due regard needs to be paid to the liability regime for intermediary service providers established in Articles 12 to 15 of the e-Commerce Directive.

Acknowledging that not all ERGA members dispose of powers exceeding the scope of the AVMS Directive (yet), it is noted that the present paper does only govern those aspects that each NRA can touch upon on national level. In other words, the paper does neither alter existing attributions of responsibilities nor does it create new competences for ERGA members in their respective Member States.

This paper will not respond to the question of which sections of the AVMS Directive are partially harmonised and which are fully harmonised. The same applies to the question of what should be considered a legal infringement and when. For the intentions of this paper, an assumption has been made that a potentially unlawful act has occurred in an EU Member State or has been detected by one of the regulatory authorities located there. In other words, this paper does not exclusively elaborate on scenarios that are covered by the procedures foreseen in Articles 3 and 4 of the AVMS Directive.

In any case, a substantive exegesis can and should not be provided within this paper. Furthermore, this paper will not comment on Data Protection, in particular the right to information. This paper is not meant to be exhaustive, but should form a starting point for discussion on this topic.

II. Content from other Member States

In general, three steps should be undertaken before initiating formal proceedings:

- a. Query in the **MAVISE database** of the European Audiovisual Observatory and the future database of the **AVMS Directive** [Art. 2(5)(b) of AVMSD].
- b. Consultation of the proposed **list of ERGA points of contact** for cross-border cases. The ERGA secretariat should supplement the current list of ERGA Members with a list of points of contact for cross-border cases (known as the "first contact helpdesk"; s. conclusions).
- c. Prior to any formal proceedings, the NRA of the Country Concerned (CC) should consult with the NRA of the Country of Origin (CoO) on an informal basis.

Country of Origin

The Country of Origin Principle constitutes a major pillar of both the AVMS Directive and the e-Commerce Directive and is decisive for any cross-border cases where harmonised rules are infringed [Art. 3(1) AVMSD, Article 3(1) e-Commerce Directive]. As a first step of all following scenarios one has to examine the Country of Origin of the media service provider.

On the basis of the Country of Origin Principle, content which can legally be transmitted in another Member State and which corresponds to the minimum standards of the Directive can also be transmitted in other EU Member States, even if stricter rules apply in the Country Concerned (CC) which would make this content unlawful from a national perspective. The Country of Origin Principle stipulates that the law of the Country of Origin shall prevail when determining the legality of the content [Art. 3(1) AVMSD].

Assessment: Country of Origin of the media service provider

If it transpires as part of this assessment that the content originates from a media service provider under the territorial jurisdiction of the Member State which has determined the infringement, measures can be taken to prevent the content from being retransmitted in accordance with national rules.⁶ This applies to all of the scenarios described in the following.

If the assessment of the Country of Origin of the media service provider reveals that it is established or considered established in another Member State, the competent authority of the Member State which has determined the potentially illegitimate act (from here on referred to as “infringement”) initially cannot, without more ado, take any measures to prevent the retransmission of the content.

If the assessment reveals that the unlawful content originates from another Member State, **five potential scenarios** are conceivable:

1. Infringement of harmonised provisions
2. Infringement of stricter provisions in the Country Concerned
3. Circumvention
4. Infringement of provisions which relate to legal goods of fundamental importance
5. Lack of material jurisdiction

1. Scenario 1: Infringement of harmonised provisions

Scenario 1 is based on the following situation: A media service provider is established in Member State CoO (MS CoO). The competent authority in the Country Concerned (MS CC) has identified an infringement of harmonised rules by this media service provider. In this case, the AVMS Directive provides for a cooperation procedure in Art. 30a(3) AVMS Directive.

[Proposed procedure:] For the first contact within the framework of the cooperation procedure, the NRA in the MS CC should provide the NRA in the MS CoO with all of the information at its disposal – information relating to the media service provider, description of the problem which has arisen, any communication which has already taken place, initial legal assessment of the case, etc [Art. 30a(3) AVMSD].

⁶ Taking into account the liability exemption set forth in the Directive on Electronic Commerce [Art. 4(7) AVMSD in combination with Art. 12 to 15 e-Commerce Directive]. See below for further details.

Steps of the cooperation procedure for infringements to harmonised law [Art. 30a(3) AVMSD]:

Step 1: Consultation of the MS CoO

Notification of the MS CoO about the allegations against the media service provider [CoO Principle, Art. 3(1) AVMSD, Art. 30a (3) AVMSD].

[Proposed procedure:] The NRA in the MS CoO informs the NRA in the MS CC within two weeks whether the case has been accepted.

Every step in this regard should occur according to national procedures in the MS CoO.

Step 2: Hearing by the MS CoO

Respect for the media service provider's right of defence by giving that provider the opportunity to express its views on the alleged infringements [inspired by Art. 3.2(c) AVMSD]. The NRA in the MS CoO informs the NRA in the MS CC within two months whether it intends to take actions against the media service provider.

Step 3: Information to the MS CC

The NRA in the MS CoO reports regularly on which steps have been taken to address the difficulties identified [Art. 30a (1), (2) AVMSD].

Even if the NRA in the MS CoO eventually does not see the need for a regulatory intervention or does not assess an infringement, it should commit to do its best to make the concerned media service provider aware of the concerns that the NRA in the MS CC has with certain actions.

Overall, in this scenario, only a close cooperation between the two NRAs concerned is able to secure the respect of the Country of Origin Principle, while at the same time foster pan-European compliance of a media service provider with the harmonised provisions of the AVMS Directive.

In any case, attention should be paid to the **exception** within the scope of the flexibility clauses in Article 3(2 et seq.) AVMS Directive [Art. 3(2 et seq.) e-Commerce Directive], see Scenario 4.

2. Scenario 2: Infringement of stricter provisions in the Country Concerned⁷

According to the principle of minimum harmonisation enshrined in Article 4(1) AVMS Directive, Member States can require media service providers under their territorial jurisdiction to comply with more detailed or stricter rules in the fields coordinated by the AVMS Directive, provided that such rules are in compliance with Union law.

Scenario 2 is based on the following situation: A media service provider is established in MS CoO. MS CC has set up stricter national rules in compliance with Article 4(1) AVMS Directive, for example in advertising, and has identified an action taken by the media service provider that would result in an infringement of the rules in the Country Concerned.

⁷ For example: With regard to advertising regulations, Germany has laid out stricter rules than the AVMSD prescribes. Therefore, these regulations are stricter than the rules within most of the other Member States.

Provided that the media service provider has complied accordingly with the minimum standards of the AVMS Directive in the MS CoO, the competent authority in the MS CoO can refuse to proceed against the media service provider, and the competent authority in the MS CC also cannot proceed against the provider.

Nevertheless, in general there is always the possibility for the competent authority in the MS CC to submit a request to the competent authority in the MS CoO and collaborate with the authority and the media service provider on a voluntary basis to solve the issue in the spirit of European solidarity.

Attention should be paid to the **special provision** set forth in Article 4(2 et seq.) AVMS Directive (circumvention, see Scenario 3) and the **exception** within the scope of the flexibility clauses in Article 3(2 ff.) AVMS Directive [Art. 3(2 ff.) e-Commerce Directive].

3. Scenario 3: Circumvention

As some sort of special case to Scenario 2, Scenario 3 is based on the following situation: A media service provider is located in MS CoO. MS CC has set up stricter national rules in compliance with Article 4(1) AVMS Directive, for example in advertising, and has identified an infringement of these rules by the media service provider. Furthermore, the MS CC takes the view that the media service provider is trying to circumvent these stricter rules by establishing itself in the MS CoO according to Article 4(2 et seq.) of the AVMS Directive.

If the MS CC exercises its right to set up stricter rules (Art. 4(1) AVMSD) in the fields of public interest and comes to the conclusion that a media service provider under the territorial jurisdiction of the MS CoO renders an audiovisual media service which is wholly or mostly directed towards its territory, the circumvention described in Article 4(2 et seq.) AVMS Directive can be relevant.

Steps of the formal cooperation procedure according to Article 4(2) AVMSD:

Step 1: Request of the MS CC

Request to the MS CoO to take on all issues related to these difficulties. Both Member States should collaborate seriously and expeditiously to reach a solution which is mutually satisfactory [Art. 4(2)(b) AVMSD].

Step 2: Request to the media service provider by the MS CoO

When a justified request is received, the MS CoO calls for the media service provider to comply with the relevant regulations in the public interest [Art. 4(2) AVMSD].

Step 3: Periodic Information by the MS CoO

The MS CoO provides the MS CC at regular intervals with information regarding which steps have been taken to address the difficulties identified [Art. 4(2) AVMSD].

Within two months of receiving the request, the MS CoO provides the MS CC and the Commission with information relating to results which have been achieved and – if no results have been achieved – the grounds for this [Art. 4(2) AVMSD].

Either of the two Member States can invite the Contact Committee to review the case at any time [Art. 4(2) AVMSD].

If the results obtained are not satisfactory for the MS CC, it may, if it can demonstrate the intention to circumvent, adopt its own measures under the following conditions [Art. 4(3)(a and b) AVMSD].

Further preconditions for the MS CC to take its own measures [Article 4(4) AVMSD]:

Step 4 [following unsuccessful consultation]: Notifications

The MS CC has notified the Commission and the MS CoO of its intention to take such measures while substantiating the grounds on which it bases its assessment [Art. 4(4)(a) AVMSD].

Step 5 [following unsuccessful consultation]: Hearing

The MS CC has respected the rights of defence of the media service provider concerned and, in particular, has given that media service provider the opportunity to express its views on the alleged circumvention and the measures the notifying Member State intends to take [Art. 4(4)(b) AVMSD].

Step 6 [following unsuccessful consultation]: Commission decision

The Commission has decided, after having requested ERGA to provide an opinion i. a. w. Article 30b(3)(d), that the measures are compatible with Union law, in particular that assessments made by the MS CC under Article 4(4)(c) AVMS Directive are correctly founded.

Within three months, the Commission shall take a decision on whether those measures are compatible with Union law. Where the Commission decides that those measures are not compatible with Union law, it shall require the MS CC to refrain from taking the intended measures [Art. 4(5) AVMSD].

The Commission shall keep the contact committee informed [Art. 4(4)(c) AVMSD].

The measures to prevent the retransmission of the content by the MS CoO (Steps 1 to 3) or the MS CC (Steps 4 to 6) can be taken having regard to the editorial responsibility of the media service provider and, where relevant, the liability exemption for the host and internet access provider set forth in Articles 12 to 15 of the e-Commerce Directive and adhering to a strict timetable.

In doing so, the media service provider must initially be proceeded against. Pursuant to Article 14 e-Commerce Directive, the hosting provider is not liable for illegal activity or information stored as part of its service unless the hosting provider has actual knowledge of the illegal activity or information. However, the content provider is always liable for the content it generates and publishes. In accordance with the principle of proportionality and the editorial responsibility of the media service provider, as a rule, the media service provider shall be contacted first in compliance with the provisions of the AVMS Directive. In turn, where applicable, the downstream liability of the host and internet access provider is based on the e-Commerce Directive.

In addition, the application of these procedures to the types of services providers covered by the AVMS Directive and in the e-Commerce Directive to concrete cases increasingly shows that the current division in both legal frameworks does not always reflect the changed media reality.

Liability exemption of the e-Commerce Directive:

(+) If the measures against the media service provider by the MS CoO prove successful after consultation, the procedure is concluded at this point.

(-) If these measures are not successful, the hosting provider can then be contacted and informed of the illegal activity [Art. 14(1)(b) e-Commerce Directive].

If the hosting provider is established in the MS CoO, it can then take action.

(+) If these measures prove successful, the procedure is concluded at this point.

(-) If these measures are not successful, the internet access provider can be contacted.

If the hosting provider is established in a different Member State, according to Art. 3(2) e-Commerce Directive, the Country of Origin Principle applies again. Accordingly, the procedure must again be taken up from the beginning and the formal cooperation procedure with the hosting provider's Country of Origin must be undertaken, including the possible progressions described above. If this is also unsuccessful, the internet access provider can be contacted.

At present, the lack of formal notification conventions and assistance in enforcement conventions among most of the EU Member States represents a further obstacle. Administrative judgements following the hearing of the audiovisual media service cannot be notified or enforced in other Member States without difficulty. Only seven Member States have signed the European agreement on the service of documents⁸ hitherto (Austria, Belgium, France, Italy, Luxembourg, Spain, and Germany). There are currently only a few agreements in place to assist in enforcement relating to the protection of the general public against inappropriate commercial communications (e.g. Belgium and France). These agreements should be expanded and set up by all Member States to ensure efficient enforcement.

Assessment: Possibilities for formal notification and enforcement assistance

→ It must be assumed that cross-border notification and enforcement would only be possible in extremely rare and serious cases.

4. Scenario 4: Infringement of provisions which relate to legal goods of fundamental importance⁹

Scenario 4 is based on the situation where a media service provider is established in MS CoO but commits severe and grave infringements with effects on the MS CC.

⁸ Regulation (EC) No 1393/2007.

⁹ e. g. Germany has made Holocaust denial illegal in Section 130 of the German Criminal Code – Offences against Public Order.

For this scenario, the AVMS Directive contains a **flexibility clause** [Art. 3(2) AVMSD] relating to the Country of Origin Principle (similar procedure for derogation from the Country of Origin principle applies to the e-Commerce Directive). The clauses provide the Member States with the option of enacting exceptions to the Country of Origin Principle for the specified fields. With regard to the AVMS Directive, this relates to measures

- for an apparent, serious, and grave infringement of Article 6(1) points (a) and (b) or Article 6a(1);
- to protect public health;
- to protect public security, including the safeguarding of national security and defence.

The AVMS Directive explicitly establishes a **formal cooperation procedure** for cross-border applications of the flexibility clause [Art. 3(1), (2)(b and d), (3)(b), Art. 4(2)(b) AVMSD]. This procedure varies based on the fields concerned:

a) Hate speech, the protection of minors from harmful media, and the protection of public health

The formal cooperation procedure for the fields of hate speech, the protection of minors from harmful media, and the protection of public health arises from Article 3(2)(a to d) AVMS Directive. The precondition for the application of this procedure is that the media service provider has infringed on one or more provision(s) on at least two prior occasions during the previous 12 months [Art. 3(2)(a) AVMSD].

Steps of the formal cooperation procedure according to Article 3(2) AVMSD:

Step 1: Notifications

The MS CC shall notify the media service provider, the MS CoO and the Commission of the alleged infringements and the proportionate measures the MS CC intends to take, should any such infringement occur again [Art. 3(2)(b) AVMSD].

Step 2: Hearing

Respect for the media service provider's right of defence by giving that provider the opportunity to express its views on the alleged infringements [Art. 3(2)(c) AVMSD].

Step 3: Consultation with the MS CoO and the Commission

Consultation with the MS CoO and the Commission in accordance with Art. 3(2)(d) AVMSD. The Consultation has failed, if it has not resulted in an amicable settlement within one month of the Commission's receipt of the notification referred to in step 1 [Art. 3(2)(d) AVMSD].

Within three months and after having requested ERGA to provide an opinion in accordance with Art. 30b(3)(d) of AVMS Directive, the Commission shall take a decision on whether those measures are compatible with Union law. Where the Commission decides that those measures are not compatible with Union law, it shall require the MS CC to put an end to the measures in question as a matter of urgency [Art. 3(2) AVMSD].

The Commission shall keep the Contact Committee informed.

If taking measures pursuant to Article 3(2) AVMS Directive, the MS CC must take into account the editorial responsibility of the media service provider and comply with the liability exemption for host and internet access provider set forth in the e-Commerce Directive.

Steps according to the liability exemption of the ECD: see page 18

b) Protection against terrorist offences and safeguarding of public security

The formal cooperation procedure for the fields of protection against terrorist offences and safeguarding of public security is enshrined in Article 3(3)(a to b) AVMS Directive. The condition for this is that the media service provider has infringed on one or more provision(s) at least once during the previous 12 months [Art. 3(3)(a) AVMSD].

Steps of the formal cooperation procedure according to Article 3(3) AVMSD:

Step 1: Notifications

The MS CC shall notify the media service provider, the MS CoO and the Commission of the alleged infringements and the proportionate measures the MS CC intends to take, should any such infringement occur again [Art. 3(3)(b) AVMSD].

Step 2: Hearing

Respect for the media service provider's right of defence by giving that provider the opportunity to express its views on the alleged infringements [Art. 3(3)(b) AVMSD].

Within three months and after having requested ERGA to provide an opinion in accordance with Article 30b(3)(d) AVMS Directive, the Commission shall take a decision on whether those measures are compatible with Union law. Where the Commission decides that those measures are not compatible with Union law, it shall require the Member State concerned to put an end to the measures in question as a matter of urgency [Art. 3(3) AVMSD].

The Commission shall keep the Contact Committee informed.

The MS CC may, in *urgent* cases (as those defined in Art. 3 (3) AVMS Directive), derogate from the conditions defined for the formal cooperation procedure one month at the latest after the alleged infringement [Article 3(5) AVMSD]. However, where this is the case, the measures taken shall be notified as soon as possible to the Commission and to the MS CoO, indicating the reasons for which the MS CC considers that there is urgency. The Commission shall then examine the compatibility of the notified measures with Union law. If this is not the case, the Commission shall ask the MS CC urgently to put an end to the notified measures.

If taking measures pursuant to Article 3(3) AVMS Directive, the MS CC must in turn take into account the editorial responsibility of the media service provider and follow the liability exemption for host and internet access provider set forth in the Directive on Electronic Commerce.

Steps according to the liability exemption of the ECD: see page 18

5. Scenario 5: Lack of material jurisdiction

Consideration must also be given to the event that the NRA of the MS CoO could lack material jurisdiction for the case. There are no clear rules set up in the AVMS Directive.

[Proposed procedure:]

- In the event of lack of material jurisdiction of the NRA of the MS CoO, the NRA shall commit to forward the case to the responsible body within one week.
- If there is no material jurisdiction at all within the MS CoO, the MS CC receives formal correspondence in which the MS CoO sets out that there is no possibility for it to take

measures due to its lack of material jurisdiction. If there is a self-regulation system in place for such cases, the MS CoO refers the case to this body and establishes the contact.

III. Content from third countries targeting EU Member States

In this case, informal contact should also be made prior to any formal procedure [Proposed procedure].

Assessment: Country of origin of the media service provider

If the assessment of the media service provider's country of origin indicates that the media service provider is established in a third country, the AVMS and the e-Commerce Directive are not applicable, thus also negating the formal cooperation procedure, the CoO Principle, and the liability exemption for the media service provider. Also a specific procedure for conflict resolution is not set forth in the AVMS Directive for audiovisual media services from non-EU countries. **Generally, national legislation of the Country Concerned (MS CC) applies.**

Unlike for content from EU Member States, there is no safeguard of a joint minimum standard here. Initially there is no obligation for EU Member States to transmit unlawful content on their territory. However, the wording of the e-Commerce Directive does not stipulate an exception for host and internet access providers from third countries. German legislators, for example, have transposed the liability exemption in the German Telemedia Act correspondingly in a very broad manner. Depending on the degree of transposition in the respective Member States, this approach can lead to providers from third countries benefiting from the liability exemption without having to commit to complying with the European legal framework (the so-called letterbox companies). **There is a risk of over-privileging non-EU media service providers compared to domestic media service providers.**

Liability exemption of the e-Commerce Directive for third-country providers:

(+) If the measures against the media service provider prove successful after informal consultation, the procedure is concluded at this point.

(-) If these measures are not successful, the hosting provider shall be pursued next.

If the hosting provider is also established in a third country, the same issues arise as for the media service provider.

If the hosting provider is established in the MS CC, that Member State can then contact the hosting provider directly and inform it of the illegal activity [Art. 14(1)(b) e-Commerce Directive] and require it to terminate or prevent the legal infringement [Art. 14(3) e-Commerce Directive].

(+) If these measures prove successful, the procedure is concluded at this point.

(-) If these measures are not successful, the internet access provider can be contacted.

If the hosting provider is established in a different Member State, according to Article 3(2) e-Commerce Directive, the Country of Origin Principle applies as usual. Accordingly, the procedure must again be taken up from the beginning and the cooperation procedure with the hosting provider's country of origin must be undertaken, including the possible progressions described above. If this proves unsuccessful, the internet access provider shall be contacted.

At present, the lack of **formal notification conventions and assistance in enforcement conventions** with third countries represents a further obstacle. Administrative judgements following the hearing of the audiovisual media service cannot be notified or enforced in third countries without difficulty.

Assessment: Possibilities for formal notification and enforcement assistance

→ It must be assumed that notification and enforcement would only be possible in extremely rare cases.

IV. Conclusions

The description of the informal ways of cooperation and the formal procedures above reveals a variety of obstacles for cross-border law enforcement, especially in relation to online services. In the following, these obstacles will be worked out and, at the same time, solutions will be proposed. The proposed solutions distinguish between those that can be realized by the ERGA/NRAs/EPRA and those that can only be implemented by the European Legislator.

1. Main Obstacles

- a. **Differing transpositions of the AVMS Directive in the various Member States (Scenario 2):** Differing transposition can have various reasons. Firstly, pursuant to Article 4(1) AVMS Directive, there is the possibility for Member States to establish stricter rules for media service providers under their own territorial jurisdiction. Secondly, these differences in transposing the Directive can also arise from a different understanding of the provisions of the AVMS Directive amongst NRAs.
- b. **Collaboration of the NRAs:** It is possible for individual cases to fail due to ineffective collaboration/communication between the (NRAs of the) Member States. This can have a variety of causes, including communication issues with the Country of Origin, diverging opinions on where the media service provider is established, divergences over material jurisdiction (e.g. on what constitutes an on-demand audiovisual media service, or a video-sharing platform), an inability to find the content provider, or a lack of technical possibilities to delete/disable the illegal content.
- c. **No clear procedure in the event of infringement of harmonised law (Scenario 1):** The current AVMS Directive does not provide for a sufficiently clear and detailed cooperation procedure when the NRA in the MS CC from its national perspective detects a potential infringement of harmonised law. This obstacle is potentially tackled by the new Article 30a(3) of the revised AVMS Directive, which foresees a channel of cooperation between national regulatory authorities.
- d. **Identification of online audiovisual media service providers:** Naturally, the creator of an illegal or harmful content can be easily concealed by either technical or other means. This issue usually has not posed a major problem in the analogue context. The issues referred to in relation to the identification of a media service provider in the case of online audiovisual media services may significantly impede fast-track cross-border solutions.
- e. **Enforcement difficulties due to procedural requirements (Scenario 1 and 3 and cases with third countries):** The individual cases may not be able to be resolved in a reasonable period of time. The reasons for this can be found at the NRA itself (e.g. insufficient staffing levels, the procedure that needs to be performed internally is too lengthy) or outside its sphere of influence (e.g. the procedures take too long, procedures against third countries).
- f. **E-Commerce Directive does not reflect the contemporary media landscape:** The trisection – Content, Host, Internet Access Provider – that the liability regime of the e-Commerce Directive is based on, is not applicable anymore to most of the challenges arising nowadays. Such a strict distinction between the different kinds of services does no longer reflect the many different hybrid services evolving in the digital market. Example given is the extension of the scope of the AVMS Directive to VSPs. The practical experience for example of the German NRA demonstrates that it is difficult to apply the e-Commerce Directive to the occurring situations.

This opens loopholes and bears the risk of weakening the enforcement of European rules and values in the Digital Single Market.

- g. Applicability of the liability exemption and the Country of Origin on legal goods of fundamental importance:** According to the experience of NRAs the above issues are exacerbated in cases where the application of the liability exemption and the country of origin principle interact with legal goods of fundamental importance (human dignity, protection of minors [Art. 6a AVMSD], public security [Art. 6 AVMSD] etc.).
- h. Possible measures of the access provider** (see the liability privilege of the e-Commerce Directive): It is assumed that access providers can only block entire websites rather than (for example) individual social media profiles. The approach for such issues has not yet been clarified. The European Union also has to respect the principle of proportionality, meaning that the total suspension of a website will in most cases not be possible nor reasonable.
- i. Content from third countries:** The wording of the e-Commerce Directive does not stipulate an exception for content from third countries. Depending on the degree of transposition in the individual Member States, this can lead to providers from third countries benefiting from liability exemption without having to comply with the European legal framework – there is a risk of over-privileging non-EU media service providers compared to domestic ones.

2. Solutions

a. Solutions achievable by ERGA/NRAs/EPRA

- **Problem a: Differing transpositions of the AVMS Directive**

In this respect, ERGA provides valuable support by highlighting a common understanding of the Directive's provisions by means of its prior work with SG3/TF1, as well as its future work in 2020. It started a thorough examination of the new provisions of the revised AVMS Directive in 2018. This work resulted in the 'ERGA Analysis and Discussion Paper to contribute to the consistent implementation of the revised AVMS Directive' (2018). The report includes a list of 34 recommendations for further actions to be taken by NRAs and Member States in the context of the implementation of the Directive.¹⁰

- **Problem b: Collaboration of the NRAs**

- **MAVISE database** of the European Audiovisual Observatory and the proposed **database of the AVMS Directive** [Art. 2(5)(b) AVMSD]: Regular updating and consultation of the database should ensure that initial questions can be answered immediately for cross-border cases.
- Compilation of a **list of points of contact** for cross-border cases. This list shall be kept up-to-date at all times. The points of contact shall serve as permanent contact persons for the procedure for cross-border cases. (Ideally, these points of contact should represent the only channel of communication between the requesting NRA and the responding NRA.)
 - Establishment of a quarterly/periodic conference call among the NRA's points of contact during which problematic cases can be addressed and discussed ("**call of regulators**"). A member of the ERGA Board shall organize these regular conference calls and shall always participate.

¹⁰ See <http://erga-online.eu/wp-content/uploads/2018/11/ERGA-2018-08-SG3-Analysis-and-Discussion-Paper.pdf>.

Germany)¹¹. The European legislator needs to react to this development by means of effective and time-saving rules of cooperation procedures to safeguard the consistency of the Digital Single Market and preserve the full effect and stability of the Country of Origin principle.

- **Problem f: e-Commerce Directive does not reflect the contemporary media landscape**
Possible next steps: Consideration should be given to adapting the e-Commerce Directive, which has most recently been amended in the year 2000, to the technological reality and the changed legal framework. It should be assessed whether the definitions and provisions concerning host and access provider are in need of clarification.
- **Problem g: Applicability of the liability exemption and the Country of Origin on legal goods of fundamental importance**
Possible next steps: It should be assessed whether a clarification of the regulations of Art. 3(4) e-Commerce Directive is needed. In this case, in order to prevent an erosion of the Digital Single Market, special attention should be paid to the conditions under which Member States may deviate from the Country of Origin Principle.
- **Problem i: Content from Third Countries**
Possible next steps: It should be assessed whether the scope of the provisions setting out the liability exemption in Articles 12 to 15 of the e-Commerce Directive need to be designed in such a way that third countries cannot benefit from the liability privilege without having to commit to complying with the European legal framework.

¹¹ France: Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information; Austria: Bundesgesetz über Sorgfalt und Verantwortung im Netz vom 10.04.2019; Germany: Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz - NetzDG) vom 1. September 2017.

Annex to Chapter B (Workstream 3) – Concrete Examples of cooperation of selected NRAs

I. CSA (France) cooperation experience

Audiovisual market monitoring and regulation are two areas where the CSA is cooperating with other NRAs and/or public institutions in France.

The economic regulation of the sector has a competition dimension: the law grants the CSA with the responsibility to ensure and promote free competition on the audiovisual (and radio) market. This task is handled in cooperation with, on the one hand, the French Competition authority, as far as anti-competitive behaviours and mergers between media companies are concerned (see below a more detailed description) and, on the other hand, with the Electronic Communications and Postal Regulatory Authority (ARCEP) when it comes to the regulation of the DTT market. The monitoring of the latest market developments is also an important part of the CSA's daily business. While the CSA has its own research department and regularly publishes studies of its own, it also partners increasingly with other public institutions/NRAs. The challenges raised by the latest developments of the audiovisual market are cross-functional by nature and require strengthening the relationship with other public authorities, in particular with respect to the following issues:

- Protection against online piracy;
- Protection of people's personal data;
- Issues linked to the digital distribution of, and access to, audiovisual media services;
- The public access to national/European audiovisual works;
- Etc.

While these forms of cooperation until now have taken place on an ad hoc, mostly non-formalised basis (wherever specific needs for information-sharing and data-gathering are identified, the CSA would contact these authorities and get on with a common research project), common research and/or study projects shall increasingly be subject to a systematic planification jointly with the relevant public authorities.

Example: CSA-Competition authority cooperation

Area

Media concentration and competition policy. The objective is to cooperate on competitive issues directly affecting the audiovisual (and radio) market.

Whereas the French competition authority is the competent NRA to clear (or not) mergers between media companies, as well as to sanction anti-competitive practices in the media sector, it has an obligation to notify and request the CSA's opinion before any decision is taken.

If the CSA is made aware of anti-competitive practices in the media sector, it has an obligation to notify the Competition authority.

Legal background

It is a requirement of the French audiovisual law (Article 41-4 of law n°86-1067 of 30 September 1986) that the CSA and the Competition authority must cooperate on these issues.

Procedure

The Competition authority would officially notify the CSA and would request its opinion about the case at stake. The CSA must provide a confidential opinion within one month. The CSA's opinion is made public only after the Competition authority has settled the case.

II. AGCOM cooperation experience

In the last years AGCOM has established a very comprehensive network of relations, with other NRAs, other institutions and bodies¹². The reason for this is that the technological innovation is driving the markets overseen by AGCOM beyond the traditional regulatory boundaries and that new forms of cooperation are needed to foster research, investigations, coordination with other regulators and so on. Luckily, being a convergent regulator, entrusted with the task to oversee the audio-visual, electronic communications and postal sector, AGCOM does not need to build synergies aimed at governing the convergence among these markets.

In fact, AGCOM has developed Memoranda of understanding with:

- Several Universities, to promote research and analyses - see this link: <https://www.agcom.it/convenzioni-in-corso>
- The Energy NRA (AEEGSI), to discuss the standards, the advantages and the challenges related to the use of new digital meters for the consumption of gas, electricity and water, which carry Internet of Things (aka Machine to Machine) technology¹³.
- The financial police (Guardia di Finanza), in order to receive appropriate support when carrying out on-site investigations (see below)
- The Institute for statistics (ISTAT), in order to be access the data on the population (see below)
- The competition authority (AGCM, or the NCA), to discuss issues related to market analysis, surreptitious advertising (see below), concentrations and dominant positions in the markets overviewed by both NRAs¹⁴.
- The transport NRA (ART), to promote the adoption of innovative telecommunications solutions (smart devices) in the transportation sector¹⁵

¹² For a detailed list of all Memoranda of understanding signed by AGCOM please refer to this webpage:

<https://www.agcom.it/accordi-di-collaborazione>

¹³

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_Is3TZlzsK0hm&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_Is3TZlzsK0hm_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_Is3TZlzsK0hm_assetEntryId=4656449&_101_INSTANCE_Is3TZlzsK0hm_type=document

¹⁴

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_Is3TZlzsK0hm&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_Is3TZlzsK0hm_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_Is3TZlzsK0hm_assetEntryId=908494&_101_INSTANCE_Is3TZlzsK0hm_type=document

¹⁵

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_Is3TZlzsK0hm&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_Is3TZlzsK0hm_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_Is3TZlzsK0hm_assetEntryId=6452760&_101_INSTANCE_Is3TZlzsK0hm_type=document

- The Privacy NRA, to discuss issues related to the privacy of data in the markets regulated by AGCOM
- The Italian copyright collecting agency, SIAE, to work jointly at the protection of copyright in the online environment¹⁶
- Several non-EU NRAS (the Lebanese CNA, the Jordanian TRC, the Armenian NCTR, the Bosnian RAK, the Egyptian NTRA and so on, in order to discuss and find common regulatory solutions to problems that relate to the global audiovisual or telecommunications market and, as such, require solutions that cannot be limited by the national borders.

Many of these memoranda of understanding have basic structures. The most interesting ones are presented more in detail below.

AGCOM most interesting Memoranda of Understanding

According to the national laws, AGCOM should cooperate with the Postal and Communications Police (Polizia postale e delle comunicazioni) and the Financial Police (Guardia di Finanza) to prosecute crimes, frauds and abuses in the fields of telecommunication, audiovisual media services, press media, and postal services. Law 249/1997, of establishment of AGCOM, states that the supervisory powers are exercised by Postal Police and by Financial Police on behalf of AGCOM. The Memoranda is necessary in order to identify respective areas of responsibility.

AGCOM – GUARDIA DI FINANZA (Special Unit for the Broadcasting and Publishing of Financial Police)

Competences.

Verification and reporting on:

- i) payment of the concession fee due by the radio and television companies;
- ii) respect for the equal access to the information media;
- iii) positions of control or connection with printed media;
- iv) compliance with the rules on television programming to guarantee users (advertising - crowding, positioning and content -, television sales, protection of minors, etc.);
- v) compliance with copyright on-line.

Necessary steps.

- Signing of Memorandum of Understanding between the AGCOM President and the Financial Police Commanding General, in which procedures are defined;
- Adoption of an annual work programme (main objectives to be pursued in each year)

Procedures.

- Inspection and Registry Service Director, on behalf of the relevant Directorates, requests the Commander of Financial Police Special Unit for Broadcasting and Press located in AGCOM to monitor on the described sector
- Financial Police Special Unit for Broadcasting and Press makes activities on the basis of its own initiative too, interfacing, according to need, with the provincial dictates of the Financial Police.

¹⁶ <https://www.agcom.it/documents/10179/1260154/Documento+generico+27-03-2014/ae26fa46-3ee9-47d1-a470-3dbc19bf9fb0?version=1.0>

- AGCOM and the Unit meet regularly to discuss the practical application of the Memorandum and they provide one another with any information
- Preferential treatment of Financial Police reporting of infringements
- Expenditure on monitoring operations deriving from the application of this Memorandum shall be reimbursed by AGCOM

AGCOM - POLIZIA POSTALE E DELLE COMUNICAZIONI

Competences.

Verification and reporting on:

- telecommunication infrastructures and networks and the connected services and products;
- collaboration in the execution of inspections on certain telecommunications service operators.
- verifying compliance with the regulations of the sector and, above all, compliance with the self-regulation code on premium services in respect of the correct use of numbering for numbers in the so-called "decade 48".
- monitoring on mobile telephony operators (correct information to the users "subscription" services, on activation and deactivation methods Monitoring on activation of premium services)
- monitoring on fixed telephony operators (compliance of the sector relative to the activation, migration, Number Portability (NP) and termination of fixed network access services and, in general, compliance with consumer protection legislation)
- compliance with the Regulation on radio and television advertising and television pursuant to resolution no. 538/01/CSP and successive amendments, and the provisions on interactive propaganda, audiotex, videotex and similar
- supervision of the postal sector

Necessary steps.

- Signing of Memorandum of Understanding between the AGCOM President and the Head of Central Police Directorate at Ministry of Internal Affairs
- Adoption of work programme (main objectives to be pursued in each year) by AGCOM President and the Head of Central Police Directorate at Ministry of Internal Affairs

Procedures.

- Secretary General, Directorates of AGCOM and the Postal and Communications Police Section meet regularly to discuss the practical application of the Memorandum and they provide one another with any information
- Operational decision by Inspection and Registry Service Director, on behalf of the relevant Directorates, and Head of Postal Police section
- Preferential treatment of Police reporting of infringements
- Police section makes activities on the basis of its own initiative too, interfacing, according to need, with the provincial dictates of the Postal Police.
- Expenditure on monitoring operations deriving from the application of this Memorandum shall be reimbursed by AGCOM

Copyright online - AGCOM, SIAE (the Italian Society of Authors and Publishers), FUB (Fondazione Ugo Bordini) – the institutional relationship between AGCOM and SIAE is established by law 249/1997 and legislative decree 177/2005; FUB is an organism with an expertise on communications, under the aegis of Communication Ministry)

The institutional relationship between AGCOM and SIAE related to monitoring compliance with copyright law is established by law 249/1997, that provides also the cooperation of the financial police. As a result of the legislative developments regarding copyright, in 2013, AGCOM issued regulation 680/13/CONS, creating procedures for the measures to protect copyright holders (notice and take down, claims...), enhancing the role of SIAE in them. For the management of short proceedings and many claims, AGCOM requested the collaboration of the FUB, already under a consultancy contract on communication technologies, to create a management platform of copyright infringement claims and take care of the start-up phase.

Competences.

copyright infringements on electronic communications networks

Necessary steps.

Adoption of the regulation on Copyright protection on electronic communications networks (deliberation 680/13/CONS)

Collaboration agreement (under the Consultancy contract concluded between AGCOM and FUB) for setting up an operational management platform of copyright infringement claims (one off contribution for this activity)

Signing of Memorandum of Understanding between AGCOM President and SIAE President; the agreement lays down a one-off contribution to be paid by AGCOM to SIAE for the activities

Procedures.

- FUB: creation of management platform and support during the start-up phase of the activities

- SIAE:

- support in checking on copyright holder claims
- Preferential treatment of SIAE claim
- they provide one another with any information

AGCOM – ISTAT (National Institute of Statistics) start a cooperation for the use of administrative data for statistical purposes

Legislative decree 82/2005 (Digital administration Code) promotes the accessibility of the Public Sector information to guarantee transparency and efficiency of public administrations. For this purpose, AGCOM and ISTAT start a cooperation for the use of administrative data.

Competences.

- automatic exchange of information for the purpose of facilitating its exploitation for statistical purposes, in compliance with the regulations ;
- carrying out studies and statistical research on topics of common interest (consumer price analysis, implementation by the Authority of the database of Internet access networks in the

national territory, socio-economic analysis of the behaviors and uses of new services and digital content, implementation of Open data and Big Data projects)

- (the previous memorandum was dedicated to collaboration between AGCOM, ISTAT and Auditel for adoption of audience measurement system)

Necessary steps.

- Signing of Memorandum of Understanding between AGCOM President and ISTAT
- setting up the coordination committee. (2 AGCOM members and 2 ISTAT)

Procedures.

- The activities of the Memorandum shall be set out in rules of procedure to be adopted by the Coordination Committee
- The Committee shall meet at least once a year

AGCOM-AGCM Memorandum of Understanding 2013

The Italian Competition Authority (AGCM) and the Italian Communication Authority (AGCOM) signed a memorandum of understanding concerning several aspects of their cooperation in the application of market's protection rules and consumers' protection in the areas of common interest. Both Authorities pursue converging interests and, under the memorandum of understanding, they exercise interdependent roles. This Memorandum signed in 2013 is a policy paper; more specific Memorandum were signed for unfair commercial practices (see infra)

Competences.

- Coordinate action in areas of common interest (postal services, pluralism, electronic communication, printed media, audiovisual media services)
- mutual exchange of information on all relevant initiatives in these fields
- joint actions in verifying and enforcement
- exchange and training of personnel
- partnership in international relationship
- mutual reporting of infringements

Necessary steps.

- Principle of loyal cooperation between public administrations (law 481/1995 and law 287/1990)
- Signing of Memorandum of Understanding between AGCOM President and AGCM President

Procedures.

- Procedures in specific fields are described in subsequent Memorandum
- Exchange of personnel is regulated (maximum of three people, for up to 6 years)

AGCOM-AGCM (Competition Authority), with the aim to counter Unfair business-to-consumer commercial practices -

Competences

Italian Competition Authority AGCM (*Autorità Garante della Concorrenza e del Mercato*) is generally competent for proceedings concerning unfair business-to-consumer commercial practices on the basis of the Italian *Codice del Consumo (Consumers' Code)* which transposed the European Directive 2005/29/CE.

According to the law that established it (Law 249/97), AGCOM guarantees the competition in the economic sectors of its competence, i.e. communication and postal services.

Article 27, par. 1 bis, of Consumers' Code establishes that AGCM is the competent authority in case of unfair business-to-consumer commercial practices also in regulated sectors like communication sector. In such cases, AGCOM is requested to provide its advice before AGCM decides.

Necessary steps

Article 27, par. 1 bis, of the Consumers' Code states that both Authorities can sign a Memorandum of Understanding to govern their mutual cooperation.

In particular, it may be interesting to find an agreement in order to:

- coordinate the institutional intervention for consumer's protection of each Authority, also in a pre-investigation phase;
- provide a reporting system between Authorities concerning the detection by one Authority of practices and behaviours which can be considered violations under the competence of the other Authority.

Procedures

1. Permanent working group
2. Mutual exchange of documents, data and information concerning started proceedings
3. Identification of particular cases which need a joint intervention of the Authorities
4. Procedure rules for providing AGCOM advice in AGCM proceedings for unfair business-to-consumer commercial practices.

AGCOM - AEEGSI (National regulatory authority in the field of electricity, gas, water service)

In 2016, AGCOM and AEEGSI, according to the principle of loyal cooperation between public administrations (law 481/1995), signed a memorandum of understanding. Both parties has the role to promote the competition and to protect consumers in their relevant markets (AGCOM communication market and AEEGSI energy and water service markets). The Authorities, with the memorandum, share modalities to achieve their institutional common goals.

Competences.

- Cooperation in regulation, promotion of competition and guarantee of services of general interest and common organizational aspects, such as the methods of financing, the personnel policies, autonomy and specialization of independent regulatory
- mutual exchange of information on all relevant initiatives
- joint actions in consumer protection
- exchange and training of personnel
- partnership in international relationship

Necessary steps.

- Principle of loyal cooperation between public administrations (law 481/1995)
- Signing of Memorandum of Understanding between AGCOM President and AEEGSI President

Procedures.

- Procedures in specific fields are described in subsequent Agreements
- regular meetings relating to common issues concerning regulation and consumer protection
- Exchange of personnel is regulated (for up to 6 years)

III. German Media Authorities' experience

"Verfolgen statt nur Löschen" - Initiative against hate speech online

Goals & Measures

The aim of the initiative "Verfolgen statt nur Löschen - Rechtsdurchsetzung im Internet" ("Pursuit instead of just deletion - law enforcement on the Internet"), founded in 2017, is to send a clear signal against lawlessness and ruthlessness and thus for freedom and democracy on the Internet. The key idea is not only to delete hateful comments, but also to carefully check them under criminal law and to prosecute them in the event of a violation. Initiatives like „Verfolgen statt nur Löschen“ are therefore able to protect or even increase the diversity of opinions online by avoiding overblocking and distinguishing carefully between comments containing unlawful images or expressions and those covered by freedom of expression. Thereby the initiative is making an active contribution to protecting freedom of expression.

Background

The Federal Government of North Rhine-Westphalia (NRW) engaged Landesanstalt für Medien NRW (Media Authority of NRW) to work on a course of action to combat hate speech online. The goal was to civilise online debates by giving editorial teams the means to deal with escalating debates and by demonstrating the criminal relevance of certain posts by prosecuting their author. In order to prosecute hateful comments efficiently all parties involved in the prosecution process were brought together by Landesanstalt für Medien NRW.

Work processes

The key to success was the development of a mutual understanding of each other's work and an approach to optimise and synchronise processes involved in the prosecution. Therefore, law enforcement authorities, media regulators and several media houses have jointly developed concrete and efficient procedures for the preparation of reports: Clear contact persons have been determined and a central reporting channel as well as a relevant format for turning someone in have been developed. Thereby the effort for all parties involved in this initiative has been minimised. In addition, the initiative profits from comprehensive publicity support through its media partners.

The work process in detail:

- Media companies identify online comments containing for example incitement to hatred or violence;
- Preserving evidence: documentation of relevant information on each case (content, meta data etc.) in a pdf-dossier;
- Reporting of dossiers to authorities (via central email address especially established for this purpose);
- Prosecution Authorities investigate and where appropriate prosecute cases that are relevant under criminal law aspects;
- Afterwards media companies report publically about convictions and penalties.

Since February 1, 2018, the operational work phase has started. The medium-term goal of the initiative is to achieve a general preventive effect through the consistent sanctioning of violations of the law and their publication, thus effectively countering the brutalization of network communication.

Network & Actors

The participants of the initiative are Media Authority of NRW (Leadership), Public Prosecution Authority of NRW, Police Headquarters of Cologne, Media Companies and Internet Associations. Participants are also in exchange with the platforms Google and Facebook.

Current status & further planning

Since the start of the operational phase, media houses and Landesanstalt für Medien NRW have reported over 300 cases of hate postings centrally to ZAC NRW. The majority of the violations are online comments that are suspected of constituting incitement to hatred. In these cases, the ZAC NRW has initiated the first preliminary proceedings.

As part of this investigation, the police carried out house searches on suspected criminals in North Rhine-Westphalia whose cases had previously been reported as part of the initiative. This took part on 14 June 2018, embedded in a nationwide campaign day to combat hate postings on the Internet.

The work processes developed by the participants are subject to ongoing evaluation and further being optimised. The staff of Media Authority of NRW currently makes the experiences gained in this way available - both to other local media companies and to the responsible actors in other federal states of Germany. Thereby this initiative achieves the greatest possible impact.