



Report on the Implementation of the ERGA Memorandum of Understanding in 2021

Background

Based on a voluntary commitment of ERGA members, the objective of ERGA's Memorandum of Understanding¹ is to establish effective cooperation mechanisms to support the implementation of the AVMSD, in particular as regards cross-border cases.

As stated in the ERGA's work programme for 2021, the year was dedicated to the enforcement of a fully operational AVMS Directive and its consistent implementation and application. In this regard, an efficient and sustainable implementation of the Memorandum of Understanding as developed by Subgroup 1 in 2020 and adopted by the Plenary in December 2020 was one of the main objectives of the work of Action Group 1 (AG1) during this year.

According to the Terms of Reference of AG1, the main goal of the action group was to help strengthen cooperation between national regulatory authorities (NRAs) to ensure a consistent and effective implementation of the AVMS Directive, assist ERGA members in smoothly solving cross-border cases and, when required, facilitate mediation. On top of those tasks, AG1 evaluated the functioning of the Memorandum of Understanding (MoU) and its provisions.

Developments

AG1 successfully gathered the list of Single Point of Contacts (SPOCs) in each member NRA pursuant to section 2.1. of the MoU and placed them in the Digital European Toolkit (hereinafter DET – the virtual forum for ERGA members) to have the most up to date version of contacts accessible 24/7 to every member of the AG1.

As stated in section 2.2.2.3. of the MoU, AG1 also gathered details of national financial contribution schemes (pursuant to Article 13(2) AVMSD) based on the information (where available) provided by

¹ https://erga-online.eu/wp-content/uploads/2020/12/ERGA_Memorandum_of_Understanding_adopted_03-12-2020_1.pdf

individual NRAs. For the data to be available 24/7, it was uploaded and became part of the growing repository of up-to-date data in the DET.

As stated in Section 3.2. of the MoU, a list of mediators was gathered for the needs of possible assistance in the resolution of any differences between the NRAs. The list of mediators is also a permanent part of the library of the DET.

Pursuant to Section 3.3.2.e of the MoU, a standard form was developed to facilitate smoother and more efficient cooperation between NRAs. Moreover, it was intended for more efficient data collection with the aim to evaluate and improve the functioning of the MoU.

The standard form was developed early on and was subject to significant testing by the SPOCs. During the collection of the cross-border cooperation data, as well as while accumulating information about the financial contributions, it appeared that having this information readily available 24/7 would be of great significance. Therefore the leadership of the group decided to store the standard form in the DET as well. The DET is proving to be useful tool and AG1 aims at making it an even more useful repository of data for its members as time goes by.

Developments in the individual cases or other issues connected to this topic were discussed thoroughly during the regular meetings of the SPOCs and of this AG1. It has come to light that this regular sharing of information is quite useful for keeping every NRA in sync as to the trends in this specific sector, as well as facilitating smoother, more transparent cooperation and exchange of best practices within the AG1. The Action Group should continue to explore ways to refine its processes and procedures to ensure it supports the implementation of the MoU as effectively as possible.

After adoption of the MoU in December of 2020, the AG1's drafters spent 3 months on discussing and refining the standard form concentrating mainly on the specific needs of NRAs (requesting and receiving) as well as on the particulars of different types of requests. The second meeting of AG1 held on 26 of April 2021 examined the work on the standard form done so far and slight modifications were adopted (e.g. usage of the more detailed version of the standard form and adding the requirement for the form to be sent in copy to the chair of AG1 to keep track of the cross-border cooperation under the MoU for statistical purposes). Shortly after the modifications agreed upon in the second meeting of AG1, the final version of standard form was sent out to the members to be used in a pilot phase.

According to regular feedback from AG1 members, the first year of voluntary cooperation under the MoU is seen as very positive. From 27 April to 3 November 2021 (the monitoring period for this report), 42 requests for either information or assistance were exchanged (see Table I below). 11 of these request were requests for mutual assistance, and 31 were information requests (of which two were accelerated requests under section 2.1.4. of the MoU). Out of all requests, 25 were completed/answered, while 17 requests remain pending in different stages of completion (e.g. with regard to the difficulty of the assistance/information requested).

This latter category of pending requests includes the following cases:

- With or without indicated deadline (which may or may not have elapsed)
- With or without update on the progress by the receiving NRA
- With or without acknowledgement of receipt pursuant to the MoU

Table I: Overview of cases under the MoU (from 27 April 2021 to 3 November 2021)

Requests for information

Type of request (based on the categories used in the standard form) ²	Number of requests (standard forms)	Number of requests completed
A1) Information maintained by the Receiving NRA pursuant to Articles 2(5)(b) and 28a(6) of the Directive	2	2
A2) Information necessary for the application of Articles 3 and 4 of the Directive as provided in Article 30a(1) and in particular information concerning the activities of a provider according to Article 30a(3)	2	1
A3) Information about services relevant to the calculation of financial contributions pursuant to Article 13(2)	11	7
A4) Information about matters relating to the Implementation and Enforcement of Art 28b	4	4
A5) General information and/or advice (eg on regulatory or legal matters within the Receiving NRA's jurisdiction, best practice in regulatory matters, accessibility issues, market data, decisions, etc	12	7
<i>Total number of cases</i>	<i>31</i>	<i>21</i>

Requests for assistance

Type of request (based on the categories used in the standard form) ³	Number of requests (standard forms)	Number of requests completed
B1) Jurisdiction issues (Article 2 and 28a)	1	0
B3) Cases where cross-border harm might arise (including, without limitation, Articles 6, 6a, 9-11 and 19-24) ⁴	6	2
B6) Matters relating to the Implementation and Enforcement of Article 28b (Video-Sharing Platform Services)	1	0
B7) Other	3	2
<i>Total number of cases</i>	<i>11</i>	<i>4</i>

² Categories A6 (Information related to a previous request submitted by the receiving NRA) and A7 (Others) were not included due to the absence of reported cases in the monitoring period.

³ Categories B2 (Matters relating to freedom of reception and cases of circumvention (Articles 3 and 4), B4 (Matters relating to Accessibility (Article 7), and B5 (Matters relating to the implementation and enforcement of cross-border financial contributions (Article 13(2)) were not included due to the absence of reported cases in the monitoring period.

⁴ Cases related to i.e. the protection of minors, commercial communications and TV advertising.

Since the use of the standard form allows for a monitoring of the cooperation under the MoU, it is however important to note, that only slightly more than half of the total queries were answered to the satisfaction of the requesting NRA. Overall, 12 out of all ERGA members actively used the standard form, while a total of 14 members were recipients of requests. At the same time, it is important to note that some requests were made without using the standard form. While the use of the standard form is not strictly mandatory under the MoU, making NRAs more comfortable with using the standard form is a goal for the upcoming year (as the efforts of AG1 will continue under the ERGA's work programme for 2022).

There is a slight lack of consistency in the way NRAs choose to use or not to use the standard form. Due to the inconsistencies in the usage, we decided for the purposes of this Report to count each standard form as one unit.

For example, two NRAs requested information from all members of AG1 (regarding the methodology towards the assessment of political pluralism in the media and information about services relevant to the calculation of financial contributions pursuant to Art. 13(2)). These were counted as two requests.

On the other hand, one NRA asked for information via a simple e-mail (without using the standard form) from six NRAs concerning data on European works. This case was counted as a single request.

Compared to that, there are four NRAs who decided not to use one form for multiple requests to NRAs concerning the same issue but instead used separate forms for each individual request to an NRA (even though all requests concerned one issue). In that case we have counted each sent out form as one request.

AG1 also successfully set up a repository of basic data concerning financial contributions (Article 13(2) of the AVMS Directive) as envisioned in section 2.2.2. of the MoU for making cross border data sharing even more effective and mainly conveniently faster for its members. The AG1 developed a datasheet holding all the information concerning financial contributions made available by NRAs. The gathering of this information was executed in a speedy manner and is currently stored in the DET (see above).

It should be noted that only 13 NRAs (out of 27 reactions to the sent questionnaire) shared detailed information about their financial contribution schemes.

On another note, there was fortunately no need to activate the List of mediators. This fact shows the usefulness of the MoU and the efficiency and clarity of processes it brings to cross border cooperation.

Challenges

While implementing the MoU and its provisions as mentioned above, no major challenges were met due to the excellent cooperation of all members of AG1. However, it should be noted that only half of the requests for cooperation monitored were fully completed to the mutual satisfaction of the requesting and receiving NRAs. This may notably be explained by the voluntary nature of the MoU.

In addition, AG1 encountered a small number of minor difficulties, which is to be expected at the beginning of the application of the MoU. One of the issues which kept arising throughout the past year was not making full use of the standardised form. Some NRAs preferred to send out requests without filling the form, but as they correctly made use of the SPOC list created and maintained by AG1, we were able to keep track of these motions. The topics dealt with in this manner spanned from technical protection means, jurisdiction issues, media literacy provisions, complaints, to European works.

Another issue the group became aware of when monitoring the cooperation under the MoU, was receiving only a fragment of ongoing bilateral communication between NRAs (e.g. the leadership of AG1 received only an acknowledgement pursuant to 2.1.1.5. of the MoU, but not the actual original standardised form). This particular issue will need to be further monitored and analysed as the trial phase of the standard form reaches its end and is expected to become a permanent instrument in cross border cooperation under the MoU. As mentioned above, the ERGA's work programme for 2022 plans on the continuation of the important work of this group. This will enable more in-depth analysis and identification of weaknesses and strengths of the MoU.

Another slight roadblock encountered by the AG1 was the absence of knowledge of the DET from many members. As the SPOC and mediators list, as well as the standard form, were developed, it became apparent that there is a need for storage in a common online repository for such files. With the swift help of ERGA's secretariat, all members were given access to the DET. It needs to be noted that the feedback on utilization of the DET was positive.

Suggestions/amendments

As AG1 concentrated on facilitating and improving the cooperation between its members, collecting and maintaining relevant data as envisaged by the MoU, there are currently no specific suggestions to amend the MoU as such. Suggestions to amend the MoU would ideally be explored as part of a strategic deliberative process in accordance with the ERGA Rules of Procedure, if needed. The information and evidence gathered over the course of the Action Group's work in the past year provide an excellent basis from which to start.

Nevertheless, we suggest making even better use of the DET as it proved an efficient way to store up to date data available for all members at any given moment.

As the standard form proved a significant instrument in cross border cooperation, we suggest cultivating them even further for more efficient data gathering and making the landscape of cooperation clearer and more precise. By adopting this Report, ERGA members formally agree to use the standard form as a means of clearly and unambiguously initiating requests for cooperation.

The repository of financial contribution schemes, as mentioned above, will be subject to further discussions in the AG1 in the coming year to make sharing of information more user friendly.

Finally, exploring the relationship and the delineation of functions between the Action Group and the group of SPOCs could be helpful. It may be useful to ensure that all SPOCs are a part of the Action Group to streamline discussions.

Summary

Overall, the first year of cooperation under the MoU as well as the work AG1 in 2021 can be described as very positive. Nonetheless, work on the MoU is still in progress. As pointed out above, the MOU is a voluntary framework and members will need some time to utilize it as much as possible.

At the beginning of 2021, the List of SPOCs was created more swiftly than expected, thanks to the dedication of all the members of the group. As the MoU envisioned, the need to create a common tool

and put it to use was next on the agenda and became one of the most significant achievements of AG1 in 2021. As the trial phase on the usage of this instrument (the standard request form) is nearing its end, it is noteworthy to say that the group and its SPOCs have not encountered any issues with the functionalities of the form itself, which is a remarkable success. As it is the purpose of trials, the AG1 became aware, while compiling data and statistics on the usage of the form and cooperation itself, that there are asymmetries in using the form. As the ERGA's work programme 2022 intends for this group to continue its valuable work, it will be the main goal – to evaluate the reasons behind the lack of consistency and offer feasible solutions.

During the summer, the group also created a short survey in order to collect data on financial contributions schemes from all willing NRAs. As the work spills over to 2022, perfecting the data storage in order for all members to access it easily and instantly will be another important aspiration to fulfil in the coming year.

The AG1 noted with satisfaction that there was no need to make use of the List of mediators as no divergent opinions between the members have arisen.

As the year 2021 was focused on starting the implementation of the MoU, 2022 is going to concentrate not only on the challenges described above but mostly on further analysing the MoU's strengths and weaknesses and offering possible solutions.

For the work of the group to continue at least as efficiently as until now, regular meetings shall stay as the main ground for interactions between SPOCs.

Overall, the adoption of the MoU is seen by ERGA members as an important step in the right direction and as an essential instrument in strengthening cooperation between NRAs across the EU to fulfil their responsibilities.