



Report on the Implementation of the ERGA Memorandum of Understanding in 2023

Background

Based on a voluntary commitment by ERGA members, the objective of ERGA's Memorandum of Understanding¹ (MoU) is to establish effective cooperation mechanisms to support the implementation of the AVMS Directive², in particular as regards cross-border cases. The MoU, adopted by ERGA in December 2020, creates a common framework under which ERGA members provide each other with information and mutual assistance for more effective enforcement of fundamental values in cross-border cases.

As stated in the 2023 Terms of Reference for ERGA's Subgroup 1³, the Subgroup has had a particular focus during the year on the approaches dealing with cross-border issues. As part of this work, the previous Action Group on the MoU⁴ – which worked on the implementation of the MoU during 2021 and 2022 – was incorporated into the work of Subgroup 1 while a new dedicated workstream continued the work with fostering the implementation of the MoU. The workstream was tasked to assess, in particular, potential needs for practical improvement and propose concrete amendments, if necessary.

In this third year of gathering experience with the MoU, the workstream has continued the work with assessing which parts of the MoU work well in practice and where, on the contrary, some difficulties as regards its practical application may arise.

The workstream continued to monitor the application of the MoU, as regards:

- Requests for information;
- Requests for mutual assistance;

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

² <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010L0013>.

³ https://erga-online.eu/wp-content/uploads/2023/03/ERGA_SG1_2023_ToR_adopted.pdf.

⁴ https://erga-online.eu/wp-content/uploads/2021/02/AG1_ToR_2021_final.pdf and https://erga-online.eu/wp-content/uploads/2022/02/AG1_ToR_2022_adopted.pdf.

- Requests for accelerated mutual assistance;
- Use of the standard form;
- Requests for mediation.

In doing so, the workstream gathered the records of the steps that NRAs have taken to implement the MoU and maintained records of the nature and number of requests for cooperation.

Developments

Developments relating to the standard form, list of SPOCs and list of mediators

Pursuant to Section 3.3.2.e of the MoU, a standard form was developed in 2021 to create a new way for smoother and more efficient cooperation between the NRAs. The form was updated by the group during 2023 to also include all EFTA NRAs, allowing them to both send and receive requests using the standard form.

Due to the need for a simplified and updated list of Single Point of Contacts (SPOCs) in each member NRA pursuant to section 2.1. of the MoU, all members of Subgroup 1 were requested to update the list by 1 September 2023. The list was then made available to all members in the Digital European Toolkit (hereinafter DET – an online forum/space for ERGA members).

The list of mediators, as stated in Section 3.2 of the MoU, was also updated during 2023 and made available in the DET. The list was first created in 2021 for the possible needs of assistance in the resolution of differences between NRAs.

Developments relating to the requests for cooperation

From 11 October 2022 until 27 November 2023 (the monitoring period for this report), 127 requests for either information or assistance were exchanged (see Tables I and II below). The number of requests has thus more than doubled compared to last year.⁵ 52 of the requests were requests for information while 71 were requests for mutual assistance. In regard to 4 requests⁶, it was not clear whether it was a request for information or assistance as the standard form was not used or at least not shared with the monitoring NRA⁷. Out of all 127 requests, 66 requests were considered completed, while 61 requests remain pending or not completed⁸. This makes for a completion rate of 52 percent. None of the 17 requests sent to all members have been completed by all members and are therefore still considered pending⁹. 16 out of all ERGA members used the standard form, more or less frequently, during 2023. The total number of recipients of requests cannot easily be quantified, partly due to incomplete information being shared with the monitoring NRA.

Finally, there were no disagreements between the NRAs requiring mediators¹⁰.

⁵ From 4 November 2021 until 10 October 2022 (the monitoring period for last year's report), 60 requests for either information and/or assistance were exchanged.

⁶ Not included in the tables below.

⁷ Before 1 March 2023 the monitoring NRA was the Czech NRA (RRTV). From 1 March 2023 the monitoring NRA was the Swedish NRA (MPRT/SPBA).

⁸ This number may include requests that may have been completed but where no update or response was sent via the monitoring NRA/the standard procedure was not used.

⁹ These requests are included in the 61 requests which still remain pending or not completed.

¹⁰ As of yet, there have never been any cases where a mediator was needed.

Table I: Overview of requests under the MoU (from 11 October 2022 until 27 November 2023)

Requests for information

Type of request (categories in the standard form)	Number of requests¹¹	Number of completed requests
A1) Information maintained by the Receiving NRA pursuant to Articles 2(5)(b) and 28a(6) of the Directive	2	0
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)	0	0
A3) Information about services relevant to the calculation of financial contributions pursuant to Article 13(2)	2	1
A4) Information about matters relating to the Implementation and Enforcement of Article 28b	7	4
A5) General information and/or advice (e.g. on regulatory or legal matters within the Receiving NRA's jurisdiction, best practice in regulatory matters, accessibility issues, market data, decisions, etc.	40	19
A6) Information related to a previous request submitted by the receiving NRA	0	0
A7) Other	1	0
Not identified ¹²	0	0
Total number of requests	52	24

¹¹ For the purposes of this report, the group counts each new standard form or e-mail conversation regarding a request (even if the form is not used) as one request.

¹² This category includes requests which did not have any specifications in the standard form and/or were known about only from fragmented bilateral communications.

Table II: Overview of requests under the MoU (from 11 October 2022 until 27 November 2023)

Requests for assistance

Type of request (categories in the standard form)	Number of requests¹³	Number of completed requests
B1) Jurisdiction issues (Articles 2 and 28a)	0	0
B2) Matters relating to freedom of reception and cases of circumvention (Articles 3 and 4)	3	2
B3) Cases where cross-border harm might arise (including, without limitation, Articles 6, 6a, 9-11 and 19-24)	24	13
B4) Matters relating to Accessibility (Article 7)	0	0
B5) Matters relating to the implementation and enforcement of cross-border financial contributions (Article 13(2))	0	0
B6) Matters relating to the Implementation and Enforcement of Article 28b (Video-Sharing Platform Services)	4	2
B7) Other	35	21
Not identified ¹⁴	5	1
Total number of requests	71	39

In addition to the above-mentioned requests, there is most likely a large number of requests sent via more informal cooperation between ERGA members, which are not shared with the monitoring NRA and therefore not included in the statistics.

Challenges

During this year’s monitoring and assessment of the MoU, the group encountered some challenges when it comes to the practical use of the SPOC-function. Some of these issues have already been handled during the year and have been mentioned above under “Developments”, while some of them remain.

¹³ For the purposes of this report, the group counts each new standard form sent or an e-mail conversation regarding a request (even if the form is not used) as one request.

¹⁴ This category includes requests which did not have any specifications in the standard form and/or were known about only from fragmented bilateral communications.

One of the first issues encountered by the group was the fact that not all ERGA members had been included in the drop-down menus of the standard form, leading to confusion as to whether it was possible for these specific members to send and/or receive requests using the SPOC-function. This issue was solved through an updated standard form, which included all ERGA members, both those with voting rights, and those without.

Relating to this issue, was a difficulty raised by several members regarding the SPOC-list available in the DET, and the need for the list to be updated and made more accessible for the members to be able to send out requests more easily. The Secretariat, upon the request of the Subgroup 1 Chair, sent out a new list, which was then updated by all members.

Another issue that the group encountered this year was difficulties with having requests delivered to other NRAs due to safety filters blocking requests, both e-mails and documents, containing certain words (e.g., “porn”). This issue was raised and discussed during one of the first meetings of the subgroup and was then handled by the relevant NRAs.

A few other issues encountered by the group this year – as well as during previous years – relate both to the actual use of the function and the commitments that the members have made and agreed upon, as well as to the monitoring of the SPOC-function. One issue is the fact that the form is not always used or not always used correctly, which makes it more difficult – especially for the monitoring NRA – to identify what is being requested and whether the procedure foreseen in the MoU is being followed. Another issue, especially for the monitoring of the MoU, is the receiving of only fragments of an ongoing bilateral communication between NRAs (e.g., the monitoring NRA may receive only an acknowledgement pursuant to 2.1.1.5. of the MoU, or a partial e-mail conversation, but not the original standard form). Additionally, the monitoring NRA might not always be put on copy when requests are being sent out. This makes it more difficult for the monitoring NRA to ensure that the data presented at the end of the monitoring period is correct. As inconsistencies in the statistical data may hinder further perfecting of the cross-border cooperation under the MoU, it would be of great value to the group to continue working on solving these issues.

In addition, and due to its voluntary nature, not everyone uses the MoU and the standard form for their cross-border issues, most likely due to the fact that they already have a well-functioning – and in some cases less formal – cooperation with other NRAs. As can be seen from the statistics, the number of requests have still more than doubled this year compared to last year. These numbers show that the MoU and the SPOC-function has been and continues to be a valuable tool for many of the NRAs. Along with the increased number of requests comes, however, a need for increased efforts from the members to respond to the requests, as well as a more difficult and complex task for the monitoring NRA. In practice it may turn out to be difficult, especially for a small NRA, to find the staff necessary to effectively participate in activities under the MoU. Even though it is not mandatory for the members to use the SPOC-function and the standard form, it becomes even more important that the members follow the procedure foreseen in the MoU when the function is actually used (including for example acknowledging the request for cooperation by e-mail on the same business day as it is received¹⁵).

Another issue identified by the group is whether requests for assistance generally are pursuant to 2.1.3.2. of the MoU. The group has noticed that NRAs occasionally send out requests because of an assumed violation of national rules which do not necessarily follow from the AVMS Directive, or go further because of the directive requiring minimum-harmonization. The starting point of requests for assistance should be the rules of the AVMS Directive.

¹⁵ Section 2.1.1.5 of the MoU.

A final issue, which has been highlighted in previous monitoring reports as well, is the fact that similar requests are being sent out by different NRAs due to the fact that the different requests, and the information collected through the requests, are not shared with all members, even though the information may very well be useful to most – if not all – ERGA members. This puts an additional, and in some cases unnecessary, burden on the receiving NRAs as they may have to respond repeatedly to similar requests during the year.

Suggestions for the continued implementation of the MoU

Suggestions relating to the standard form, list of SPOCs and list of mediators

Aside from the amendments already made to the standard form, SPOC-list and list of mediators (described under “Developments”), the group has not identified any needs to amend the MoU as such. Something to possibly look into in the future is the possibility to number the requests, perhaps through the use of a shared document in the DET, in order to more easily keep track of the different requests. This could be valuable both for those NRAs that send and receive many requests during the year, and for the monitoring NRA keeping records of the requests.

Suggestions relating to the practical use of the MoU

The group has identified some areas where the practical use of the function could be improved. They relate both to the members’ use of the SPOC-function and the commitments made under the MoU, the need for meetings to exchange ideas regarding the MoU and the possible future use of the DET.

For the purposes of perfecting and smoothing cross-border cooperation under the MoU in the future, it would be beneficial to the group if the procedure foreseen in the MoU is followed whenever the MoU is used. This includes using the form both when sending out and responding to a request (this allows for easy identification of the relevant request both by the requesting and receiving NRAs as well as the monitoring NRA), and acknowledging the request to both the requesting NRA and the monitoring NRA (this allows for more certainty among the members on whether a request has been received and whether the procedure foreseen in the MoU is being followed¹⁶). If the steps foreseen in the MoU are followed, then the results from the monitoring will be more accurate and reliable.

To help with cross-border cooperation under the MoU, and as the number of requests are growing, there might also be a need for further guidance on how the MoU is expected to be implemented. Additionally, there could be a need for specific guidance on sending requests concerning sensitive and/or illegal content to SPOC:s. A first guidance can be found in the Annex.

In addition to the above – and to ensure easy communication between the members and reliable statistical data – it would be beneficial to the group if members clearly identify, or notify the monitoring NRA, which request their communication relates to (see also suggestion above about possibly numbering the requests). The lists of SPOCs and mediators should also, preferably, be updated each year to facilitate smooth and easy communication between the members. In order to more easily keep track of different requests it might also be useful if the topic of the request was shortly described in the header of the e-mail sent to all SPOCs, e.g. with a reference to the relevant article of the AVMSD and/or a short description.

¹⁶ Something to take note of is that if a member uses an automatic response when receiving a request, without automatically sending a confirmation to the monitoring NRA as well, it becomes more difficult for the monitoring NRA to determine whether this part of the procedure is followed by the receiving NRA.

In similar ways, as during previous years, meetings relating to the use of the MoU and discussions regarding either developments in the individual cases (perhaps in smaller groups) or other issues connected to the MoU (both in smaller and larger groups) have proven quite helpful to facilitate smoother, more transparent cooperation and exchange of best practices within the group. Such meetings could be held also in the future to explore ways to refine the MoU processes and make sure that the MoU fulfils the needs of the ERGA members. One suggestion from the group is that the monitoring NRA could annually provide a summary of the topics covered by the various requests of the year, in addition to simply presenting the number of requests. This approach could potentially encourage NRAs to respond to the requests and, at the same time, prevent the MoU from being misused. It might also be beneficial for the evaluation of the efficiency of the MoU to do yearly in-depth qualitative analyses of some requests to try and identify themes.

Finally it could be beneficial to the group to explore whether the DET could be made more useful when it comes to the cooperation under the MoU and/or for the requesting NRA to circulate a summary of the input received, e.g. in an excel sheet. Besides possibly being an efficient means to share and store up-to-date data for all members (e.g. by serving as an online tool that could give insight into the replies of all ERGA members to a specific request for information), it could also allow for easier monitoring of the requests and the usefulness of the MoU-function¹⁷. One suggestion from the group is the possible addition of a third type of MoU request, a "questionnaire request", which could replace certain requests for information sent out to all members. All answers to this new type of request could then be made public and accessible for ERGA members via the DET, inspired by the way EPRA¹⁸ handles its online survey tools¹⁹. An addition of such a third type of request could potentially lighten the workload of NRAs answering duplicate questions, and the sharing of such information could benefit all NRAs.

¹⁷ Due to the possibly confidential nature of the content of a request or a response to a request, some requests – if shared on the DET – may need to be accessible only to the requesting, receiving and monitoring NRAs.

¹⁸ <https://www.epra.org/>.

¹⁹ All information submitted in questionnaires through EPRA in the past are accessible via the EPRA website. Before sending out a request for information an NRA could check and ask only for an update on information already provided by ERGA or EPRA.

Annex

This matrix intends to provide informal guidance to ERGA members when engaging in cross-border cooperation.

Issue to tackle	Desired outcome	Recommended procedure(s)	Communication via...
<p>Bilateral information exchange:</p> <ul style="list-style-type: none"> Gathering of general information; gathering of best practices; no direct link to the practical application and enforcement of the AVMSD in the MS of the sending NRA. 	<ul style="list-style-type: none"> Inspiration for legislative development; best-practice exchange. 	<ul style="list-style-type: none"> Individual informal outreach to other ERGA Member. 	<ul style="list-style-type: none"> Email – No usage of MoU standard form required
<p>Multilateral information exchange:</p> <ul style="list-style-type: none"> Gathering of general information; gathering of best practices; no direct link to the practical application and enforcement of the AVMSD in the MS of the sending NRA. 	<ul style="list-style-type: none"> Understanding of national procedures; getting an overview of national legislative procedures. 	<ul style="list-style-type: none"> Informal outreach to all/several ERGA Members. Outreach via EPRA surveys. 	<ul style="list-style-type: none"> Email – No usage of MoU standard form required – i.e. send-out by ERGA Secretariat. Upload the answers to the MoU folder in the CIRCABC if the information is not confidential.
<p>Request for information on regulatory issue:</p> <ul style="list-style-type: none"> Gathering of specific information needed to exercise the powers as NRA. The request shall ordinarily regard a matter listed under 2.1.2.3 of the MoU.²⁰ 	<ul style="list-style-type: none"> Collecting information relevant for regulatory proceedings. 	<ul style="list-style-type: none"> Request for Information under MoU. 	<ul style="list-style-type: none"> Email – use standard form and go through SPOCs.

²⁰ Concretely:

“(a) Information about a service provider established within the Receiving NRA’s jurisdiction (e.g. in order to establish whether it is targeting audiences in the territory of the Requesting NRA);

<p>Request for assistance on regulatory issue:</p> <ul style="list-style-type: none"> • Enforcing provisions on a service provider in the country of origin of the service provider. • The request shall ordinarily regard a matter listed under 2.1.3.2 of the MoU.²¹ 	<ul style="list-style-type: none"> • Possible enforcement action on service provider in the Member State of establishment to ensure compliance with provisions of the AVMSD across the Union. 	<ul style="list-style-type: none"> • Request for (Accelerated²²) Mutual Assistance under MoU. 	<ul style="list-style-type: none"> • Email – use standard form and go through SPOCs.
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(b) Information maintained by the Receiving NRA pursuant to Articles 2(5)(b) and 28a(6) of the Directive;

(c) Information necessary for the application of Articles 3 and 4 of the Directive as provided in Article 30a(1);

(d) Information about services relevant to the calculation of financial contributions envisaged in Article 13(2) of the Directive (see also specific cooperation arrangements under sub-section 2.2.2. of this MoU); or

(e) Information about matters relating to the Implementation and Enforcement of Article 28b of the Directive (see also specific cooperation arrangements under sub-section 2.2.1. of this MoU).”

²¹ Concretely:

“(a) an Implementation or Enforcement matter relating to the Revised AVMS Directive has arisen within the Requesting NRA’s jurisdiction or has affected residents of its jurisdiction;

(b) the Requesting NRA has a Legitimate Interest in the resolution of the matter;

(c) the mutual assistance requested is likely to materially benefit the furtherance of that Legitimate Interest; and

(d) the Requesting NRA has reasonable grounds to believe the Receiving NRA will be able to assist in the resolution of the matter.”

²² A request may be accelerated when it meets the conditions set out under 2.1.4.1 of the MoU, concretely:

“(a) the resolution of the matter requires a high degree of urgency by virtue of the severity, immediacy or scale of harm that might be caused, or is being caused, by a failure to resolve it;

(b) the matter concerned is one of significant Public Interest in the Member State in which the Requesting NRA is established; or

(c) the resolution of the matter concerned is of Exceptional Importance to the Requesting NRA.”