ERGA Subgroup 4

2024

EU regulation of digital services - implementation, enforcement and the role of audiovisual regulators

Deliverable 1

The implementation and cross-border enforcement of the European legal framework for digital and audiovisual media services

1. Executive Summary

In the report below, ERGA which is already contributing to the implementation of the AVMSD, has explored the objectives and the anticipated impact of new cooperation mechanisms in the Regulation 2022/2065/EU (Digital Services Act - DSA) and the Regulation 2024/1083/EU (European Media Freedom Act – EMFA) on cross-border activities of media regulatory authorities. As in recent years, the European legislators chose to adopt several novelties in the field of media regulation, particularly online, ERGA provides a report aiming to assess how new and old regulatory instruments interact with each other (Chapter 3). Further, ERGA considers what kinds of cross-border mechanisms are part of the new European toolbox for cooperation mechanisms and how NRAs may use these procedures to maximize their effectiveness (Chapter 4). In a last step, this report assesses possibilities to allow a smooth interplay between long established procedures in the Directive 2018/1808/EU, amending the Directive 2010/13/EU (Audiovisual Media Services Directive – AVMSD), and the new cooperation mechanisms. For this purpose, ERGA gives suggestions to the European legislators to find a comprehensive cross-border enforcement regime for digital and media services in the European Union. The main findings of the chapters will be presented in this short executive summary:

1. **The AVMSD and the new rules for digital services in the DSA complement each other.** Whilst the AVMSD, in general and with certain exemptions, follows a content-approach, the DSA has set out a fully harmonized horizontal framework of rules applicable to providers of online intermediary services aiming to ensure a safe, predictable and trusted online environment concerning their due diligence obligations as regards illegal and harmful content. Nonetheless, according to Art. 2(4) DSA, the DSA is without prejudice to the AVMSD (see also Recital 10 DSA). ERGA takes note of the resulting complementary roles for NRAs, DSCs and the European Commission. This complementarity stems from a similar approach in the AVMSD's Art. 28b and the DSA's due diligence obligations. ERGA further highlights the need to consistently enforce the rules according to both approaches.

2. NRAs are faced with a multitude of new cooperation mechanisms. As a general result, **the variety of cooperation tools can create possibilities for new procedural paths and crossroads**. Each procedure may have some operation challenges that need to be considered when enforcing media law across borders.

3. With the new cooperative approach in the EMFA and the DSA, the EU has given regulators new mechanisms to ensure proper enforcement of media law. With these new provisions in place, the **Commission should consider a fitness-check for the long-established mechanisms** as provided for in the AVMSD (and the Directive 2000/31/EC – E-Commerce Directive – ECDERGA recommends improving these procedures in three ways:

   (a) Effective enforcement against media services originating from outside the Union: In order to reinforce the impact of Art.17 EMFA, if the AVMSD is revised, careful attention should be paid to the approach taken in cross-border scenarios. As Art. 17 EMFA has not been in application yet, the Commission might closely monitor whether **Art. 3 AVMSD may need to be amended to allow Member States to take into account opinions by the Media Board** even if the opinion concerns media service providers that are not under their jurisdiction.

   (b) Review and simplify the derogation procedure from the country-of-origin principle: ERGA invites the Commission to **investigate whether audiovisual media services and VSPs, with due respect public policy goals including effective protection of minors and public order, may be considered to be put under the same or a similar derogation procedure from the country-of-origin principle**. This could be based on the derogation procedure from Art. 3 ECD as a proper inclusion of the Media Board and a dialogue with the competent/requested authority will be already assured through the cooperation mechanisms as established in EMFA (Art. 14 or Art. 15 EMFA respectively).

   (c) Allow effective cross-border enforcement of Art. 7a AVMSD: Particularly the prominence of services of general interest has been difficult to enforce across borders in the past. ERGA calls on the Commission **to consider the possibility of introducing a provision in Art. 7a AVMSD to make sure that nationally determined services of general interest are displayed to**

national audiences in Member States that opted to introduce measures on prominence of services of general interest. This may be ensured even if the distributor of the content is established in another EU country but is targeting audiences in other Member States.

2. Introduction

In recent years, the European legislative landscape regarding media and online platform regulation has seen a significant increase in scope and depth. Since the final adoption of the AVMSD, the European Commission has presented two particularly relevant initiatives, the DSA, and the EMFA. Both texts introduce cross-border procedures that can complement existing mechanisms in the AVMSD. It is to be noted that EMFA, and in particular its cross-border cooperation mechanisms, is not fully applicable yet. Hence, there have not been practical insights yet on the functioning of the procedures.

Without prejudice to the AVMSD, the DSA creates a fully harmonized horizontal framework for the regulation of providers of online intermediary services, including the newly established categories of online platforms, online search engines and online marketplaces. The DSA complements in a horizontal manner the sector specific rules of AVMSD aimed at video-sharing-platforms (VSPs) which can be understood as a subset of online-platforms although the VSP has been defined earlier in European law. However, unique provisions have been created through the AVMSD with regards to VSPs, without prejudice to the DSA. Very large online platforms (VLOPs) and very large online search engines (VLOSEs)[1] are exclusively regulated by the European Commission as a new player in this field concerning the DSA's provisions in Section 5 of Chapter III. The establishment of Digital Services Coordinators (DSCs) in the Member States as well as the creation of the European Board for Digital Services (EBDS) has further expanded the governance framework introduced by the DSA, adding new layers of oversight for some ERGA members. As, within ERGA, NRA's roles and competencies may differ as regards the DSA, this report includes an annex outlining the respective roles of ERGA members.

This paper therefore takes a closer look at the relationship between the relevant laws, presents different cross-border procedures for different use-cases when regulating online services. From these analyses of the new legal situation and the use cases of the new procedures, the report ultimately outlines challenges in cross-border enforcement and how to address the challenges by smoothening procedures.

3. The relationship between the DSA, the AVMSD and the EMFA

In a convergent media landscape, media services are often distributed through online platforms whilst online offerings themselves can be often defined as audiovisual media services (i. e. vloggers). While this development is not new, crossovers occur with regard to regulatory provisions, addressed services as well as oversight structures.

More specifically, these crossovers between the AVMSD and the DSA mainly emerge when dealing with the protection of minors online and commercial communication, most notably regarding Art. 28b AVMSD and Art. 28 DSA. Therefore, the relationship between the AVMSD and the DSA is of particular interest.

Whereas the AVMSD mainly regulates audiovisual content provided by audiovisual media services and, especially in Art. 28b, some obligations on the handling of such content on VSPs, the DSA regulates online intermediary services that besides fulfilling other functions may also be intermediating audiovisual media content. Overlaps regarding the services addressed in both legal texts mainly concern "online platforms" (as defined in the DSA) as well as "VSPs" (as defined in the AVMSD) as these are both hosting services, and the categories/definitions used in the two legal texts are not mutually exclusive. VSPs are considered as a subset of online platforms. The legal relationship is, nonetheless, not completely clear as the notion of "VSP" was defined earlier than the "online platform" under the DSA.

Furthermore, as a directive, the AVMSD, allows Member States the flexibility to define the provisions within their national law. Also, the enforcement of the provisions lies exclusively at the level of the Member State of establishment of the provider (except for cases in which the country-of-origin principle can be derogated from). The DSA, in turn, sets up a harmonized set of rules for online intermediary

[1] If referring to both VLOPs and VLOSEs, this report uses the abbreviation "VLOPSE".

services. As a directly applicable Regulation throughout the European Union, it further introduces a new role for the European Commission.

As a consequence of cross-border enforcement becoming more and more relevant, new procedures have been created in the DSA and the EMFA. These are already or will soon be (in the case of EMFA Art. 14, 15 and 17 from May 2025) applicable in addition to the procedures provided for in the AVMSD and the ECD. When enforcing media law across borders, regulators may draw upon different procedures depending on the enforcement goal, the type of service, the infringement and the expected effectiveness of the relevant procedure (for a more detailed overview of the advantages and shortcomings of the different procedures see Chapter 4) as well as depending on their own competences under national law.

Due to varying frameworks and overlapping regulatory provisions, NRAs, DSCs, and the European Commission (often with shared responsibilities) hold competencies for enforcing Union legal acts. Accordingly, ERGA believes that the European level bodies, namely ERGA – the future Media Board – and the EBDS, should cooperate closely in order to ensure coherent enforcement in areas that are of interest for both bodies.

For the purpose of demarcation, Art. 2(4) DSA stipulates that the DSA is without prejudice to other EU legal texts "regulating other aspects of the provision of intermediary services in the internal market or specifying and complementing this Regulation" and firstly names the AVMSD. Therefore, the AVMSD regulates other aspects of the provision of intermediary services than the DSA or specifies or complements the rules of the DSA. Hence, the AVMSD rules should remain applicable.

ERGA consequently highlights the parallel application of the DSA and the AVMSD in certain instances. The DSA as a regulation ensures a harmonization with regards to, among others, harmonized, systemic due diligence obligations for intermediary services and is enforced by the DSCs, designated competent authorities and the European Commission. The AVMSD, which is implemented by Member States and enforced by NRAs, must always be read as complementary when audiovisual content (including on VSPs) is concerned. This is even the case as VSPs might fall under the scope of both legal instruments, the DSA and the AVMSD.

The illegality of individual pieces of content is to be assessed against national law and remains exclusively within the competence of the relevant Member States and is enforced by their respective national authorities. The AVMSD is structured to directly connect the measures imposed on relevant service providers to specific categories of content. ERGA believes that, unlike the DSA, this explicit link to content provisions makes the AVMSD much more precise in addressing the handling of illegal and harmful content or practices associated with such content, as prescribed in the provisions of Art. 28b AVMSD.

It is important to acknowledge that some provisions of Article 28b complement the DSA. The AVMSD focuses on audiovisual content, aiming to protect citizens from illegal or harmful material by establishing specific requirements for how such content must be managed by service providers, including VSPs. Article 28b AVMSD, however, adopts a more abstract approach, resembling that of the DSA. Overall, the two legal instruments diverge in their foundational aims: the AVMSD focuses on protecting citizens from illegal and harmful audiovisual content, while the DSA aims to safeguard citizens by promoting a systemically safe online environment.

4. Cross-border regulation of digital services – recommendations for the application of different procedures

As outlined above, NRAs may face new challenges and opportunities when applying media law to cross-border services. With the adoption of these legal texts, the European Union has established several cross-border procedures within the media and digital sectors, opening new avenues for cooperation among media regulators. To facilitate the practical implementation of these procedures, ERGA offers a detailed mapping of available frameworks, along with non-binding guidance to assist regulatory bodies in coordinating cross-border actions. The new procedures address different case-scenarios. Mainly, the possible cross-border interventions concern illegal content, due diligence obligations, systemic infringements and measures against services originating from outside the Union. This mapping will outline various scenarios and list potential intervention options in the relevant case-groups. The cases are selected mainly on the basis of general procedural provisions within the AVMSD, the ECD, the

EMFA and the DSA. Consequently, procedures which might also be performed by NRAs, such as those arising from the Terrorist Content Online Regulation for instance, are not considered here. This also applies to specific “opinion” provisions within the EMFA like the Media Board’ opinion on media market concentrations under Art. 22 and 23 EMFA. Conversely, we have included the coordination of measures against services from outside the Union in Art. 17 AVMSD, given its close connection to the jurisdiction principles and the country-of-origin principle.

4.1 Actions against one or more specific items of content violating national or Union law

Scenario one: *illegal content (examples from certain Member States, i.e. depicting violence, illegal hate speech, pornography if accessible to minors) in intermediary services*

The new rules introduced under the Digital Services Act (DSA) have set a new standard procedure for regulators to enforce content violations under national and/or EU law. **Art. 9 DSA** establishes a procedure for national authorities to directly order service providers to remove illegal content, even if the service provider is not based in the same country as the issuing authority (see also Recital 38 DSA). Yet, the legal bases for authorities to issue these orders stem from national law or other sources of European law and explicitly not from Art. 9 itself (see Recital 31). Due to the legal nature of Art. 9 DSA, the procedure outlined below is relevant only for those ERGA members that are nationally competent to issue orders against illegal content and/or illegal behaviour on intermediary services.

In fact, each content violating any law in the Member States or Union law can be addressed by an order by the relevant authority, if there is a legal base for the latter and the order is issued in compliance with Union law (see Art. 3(h) as well as Recitals 12 and 32 DSA). In the media realm in certain Member States this e. g. includes content depicting extreme violence, illegal hate speech, the usage of prohibited symbols or phrases, and pornographic content if it is accessible to children.

The procedure outlined under Art. 9 of the DSA is relatively straightforward: A judicial or administrative authority issues an order to act against one or more specific items of illegal content directly to the intermediary service provider (1). The intermediary service is obliged to inform the issuing authority on the effect given to the order (2). Once the issuing authority receives a response from the service, the order is shared with the DSC of the issuing authority's Member State (3), as well as with all other DSCs (4).

Hence, ERGA members may suggest the use of orders under Art. 9 DSA whenever relevant authorities pursue a procedure in line with national procedural law, addressing illegal content and/or illegal behaviour on an intermediary service. When assessing the procedures under Art. 9 DSA, one may consider that its application is still in an early stage and conclusions on its practical implications might evolve once regulators gained more experience applying their orders using the Art. 9 procedures.

NRAs may face challenges when enforcing orders. Compliance with national procedural law must be assured at any time. Moreover, while intermediaries are obligated to respond to orders in accordance with the relevant national provision or European legislation, if the intermediary replies and declines to follow the order, a recourse might be initiating a derogation procedure under Art. 3 ECD, if all requirements for such a procedure are fulfilled. Further, if the non-compliance of the intermediary service presents a violation of the DSA’s procedural requirements, one could consider a cooperation procedure under the DSA (or, if the service is a VLOP and the issue arises frequently, an intervention against systemic risks or systemic violation of the DSA by the Commission). Further, all national proceedings performed using Art. 9 DSA may be subject to judicial review.

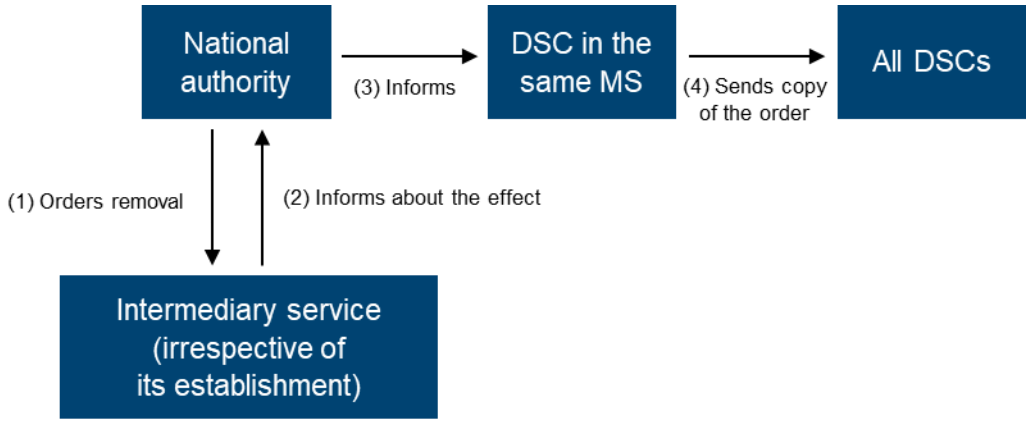

Illustration 1: Art. 9 DSA procedure

Scenario two: *content violating the provisions of AVMSD (i. e. content inciting violence or hatred, content impairing the physical, mental or moral development of minors, non-recognisable commercial communication) in audiovisual media services*

As of May 2025, when Art. 14 EMFA will enter into application, NRAs will be able to use the new structured cooperation mechanism to deal, among others, with content violating national provisions transposing AVMSD. In such cases, the NRA in the country-of-destination requests cooperation from the NRA in the country-of-origin (1). The latter is obligated to make every effort to address the request (2). It can only refuse to act if it lacks the necessary competence, if the request is unlawful, or if it is deemed unjustified or disproportionate. If no amicable solution is found between the two authorities, the matter may be referred to the Media Board by any party (3). The Media Board, in consultation with the Commission (4), may issue an opinion on the matter (5). In a final step, the requested authority shall do their utmost to take the opinion into account (6).

The use of this cooperation mechanism is helpful whenever illegal content appears in audiovisual media services. If the content is distributed via an intermediary service, NRAs may assess which procedure would be more effective or more likely to achieve the desired outcome. Depending on the situation, they can choose between issuing orders in compliance with Art. 9 DSA (and consequent DSA cooperation procedures) or initiating a cooperation procedure concerning the audiovisual media service under Art. 14 EMFA.

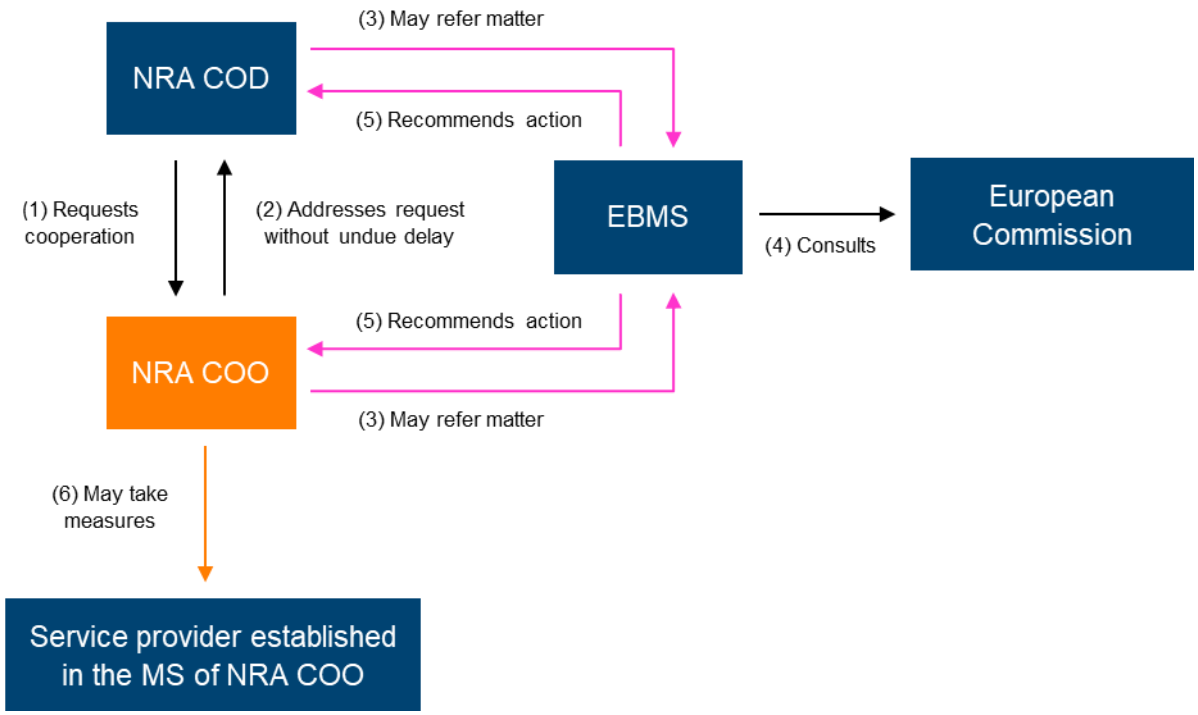

Illustration 2: Art. 14 EMFA procedure

Like in scenario one, challenges may arise if the legal bases in the Member States concerned differ. In those cases, NRAs may check whether the violation by an audiovisual media service is allowing for a derogation of the country-of-origin principle under the AVMSD-procedures. If this is the case, a derogation procedure may follow a cooperation request as outlined above.

In such procedures, a Member State notifies an infringement against Art. 6(1)(a) or Art. 6a(1) or if the infringement prejudices or presents a serious or grave risk of prejudice for public health that occurred twice (once if the infringement concerns Art. 6(1)(b) or presents a serious or grave risk for public security) within 12 months to the Member State in the country-of-origin (1) and the Commission (2). The Member State in the country-of-destination notifies the service in question, gives it a chance to express its views and respects its right to defence (3). If the Member States and the Commission do not resolve the issue within a month (3), the Member State in country-of-destination takes derogation measures (4). In the urgent derogation procedure under Art. 3(3) AVMSD, the one-month consultation between the Member States and the Commission is dispensed with. The Commission asks ERGA for an opinion (5) and decides on the compatibility of the measures with Union law. The Commission requires the Member State in the country-of-destination to stop its measures if they are incompatible with Union law (6).

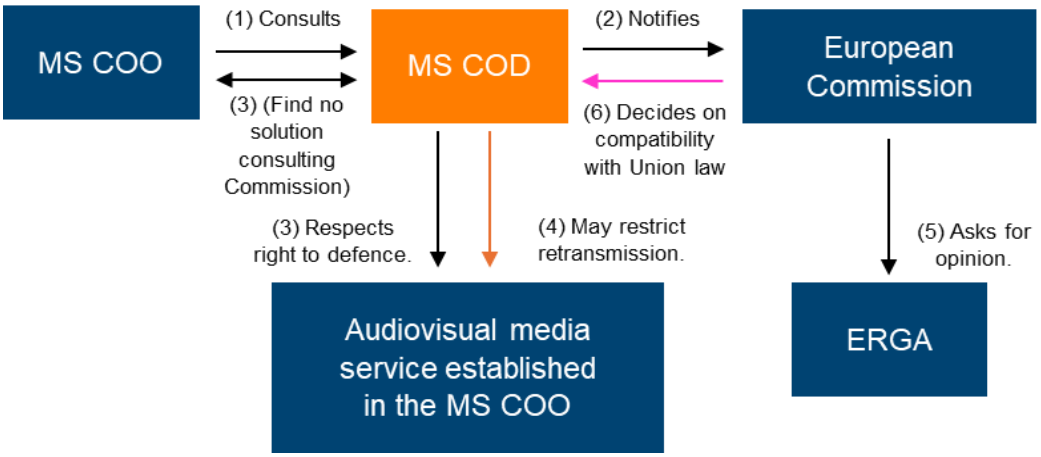

Illustration 3: Art. 3 AVMSD procedure

4.2 Violations of due diligence obligations

Scenario one: *violations of the provisions of the DSA (i. e. insufficient notice-and-action mechanism, failure to provide an advertisement registry) by intermediary services which are not VLOPSEs or are VLOPSEs if the Commission did not already start a procedure against the VLOPSE based on the same infringement.*

If an intermediary service established in a different Member State violates the DSA's provisions, regulators may use the cross-border cooperation mechanism provided for in Art. 58 DSA. In certain instances, cases can be referred to the Commission following the provisions in Art. 59 DSA. Additionally, DSCs and competent authorities may join forces in a joint investigation under Art. 60 DSA. Once an NRA is a national competent authority for the enforcement of a provision, it can pursue a cooperation through said mechanisms.

Cross-border cooperation under the DSA is carried out by DSCs in cooperation with relevant competent authorities. If the same infringement is identified by three or more DSCs in different Member States of destination, the EBDS may step in to represent the DSCs of those countries (1) and act as the cooperation partner with the DSC in the Member State of establishment (Art. 58(2) DSA). In cases under Art. 58, the authorities in the Member State of destination request the authorities in the Member State of establishment to investigate the matter (2). The DSC in the Member State of establishment is required to provide its assessment and report on actions taken or planned to both its cooperation partner and the EBDS within two months of the request (3). If this communication is not made within the deadline or if the EBDS disagrees with the assessment, the Board can refer the case to the Commission (4), as provided for in Art. 59 DSA. The Commission assesses the matter and communicates its findings to the DSC in the Member State of establishment (5). The DSC, again no later than two months after the reception of the Commission's assessment, takes measures to ensure compliance with the DSA (6).

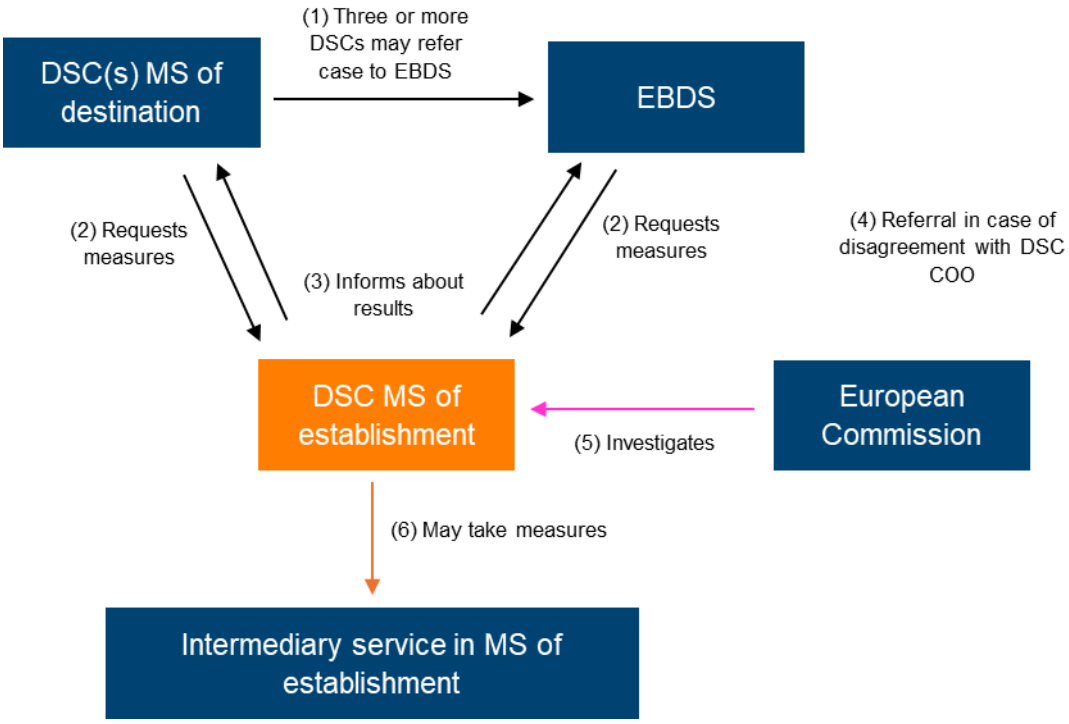

Illustration 4: Art. 58 DSA procedure, Cross-border cooperation

Joint investigations are initiated by the DSC in the Member State of establishment on its own initiative (2) or on the request of the EBDS (Art. 60 DSA) (1). DSCs and competent authorities (see recital 130 DSA) of other Member States can join joint investigations. They are either asked by the DSC triggering the joint investigation or can request to join on their own initiative. The DSCs investigate together (3). Inputs by other DSCs may inform a preliminary decision to be drafted by the DSC in the Member State of establishment. This DSC communicates its preliminary results to the Commission and the EBDS (Art. 59(1) DSA) (4). A referral to the Commission under Art. 59 DSA (5) is possible where the DSC in the Member State of establishment has not provided a preliminary decision, there is substantial disagreement with the Board or the DSC did not trigger the investigation after a request by the Board. The Commission will then investigate the preliminary results (6). Finally, the DSC in the Member State of establishment may take regulatory action (7).

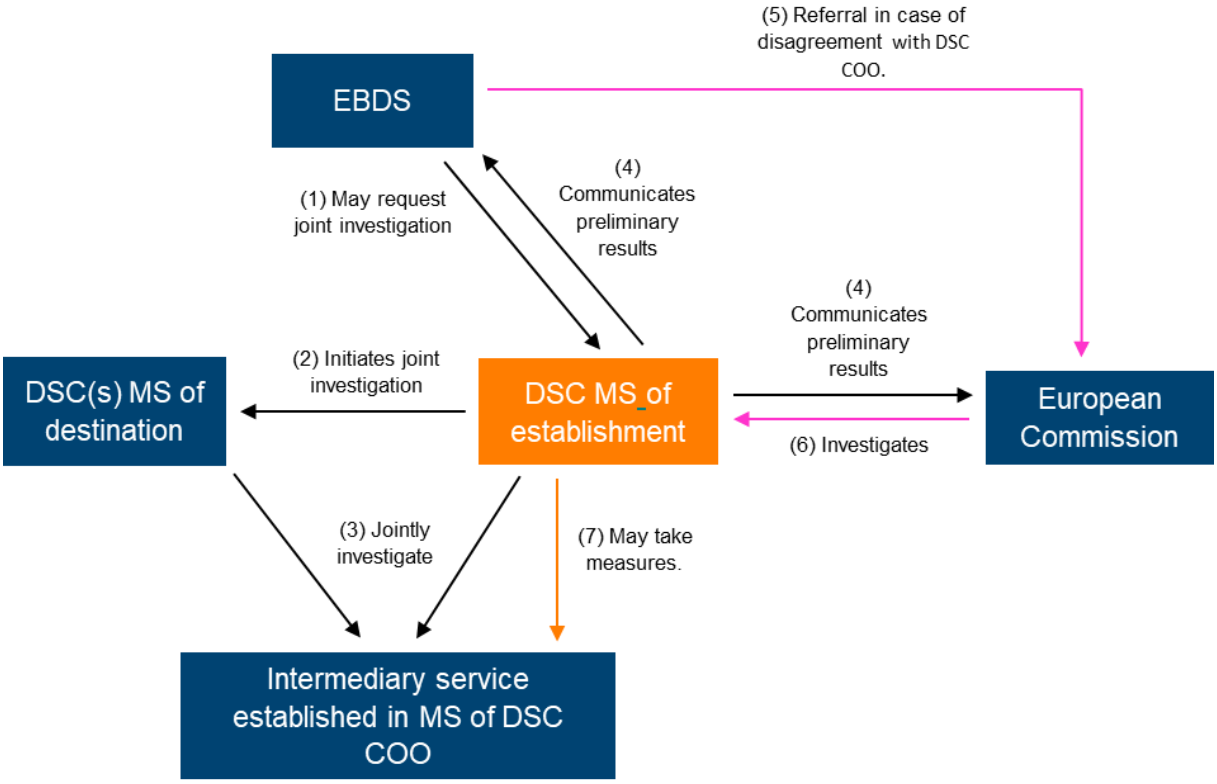

Illustration 5: Art. 58 DSA procedure, Joint investigations

If the intermediary service concerned is a VLOP and the violation concerns Section 5 of Chapter III DSA, the DSCs concerned may check whether the Commission has already initiated an investigation. If this is the case, the DSCs may not start proceedings themselves but must rather support the Commission's initiative by providing all information on the suspected infringement.

Not all ERGA members are appointed to one of these two roles. Cooperation under Art. 58 DSA is particularly useful if NRAs identify violations that are exclusively related to their Member States, or if they believe they cannot effectively contribute to a joint investigation. Joint investigations, in turn, are particularly valuable, when possible, violations affect multiple Member States and NRAs see an added value of executing their investigatory powers on the territory of their Member State.

Both procedures are crucial for the effective enforcement of the DSA. Challenges may arise when NRAs who are not DSCs need to cooperate with the DSC in their Member States. In such situations, national agreements can be beneficial to keep competent authorities under the DSA informed about ongoing procedures and to involve them in proceedings where the DSC is representing a competent authorities' interest. This is particularly true for cross-border cooperation under Art. 58 DSA. For joint investigations, DSCs and the Board will need to ensure that all competent authorities can join investigations if they deem it appropriate and useful. The EBDS, in line with the delegated act on the instalment of AGORA (Implementing Regulation (EU) 2024/607), may allow competent authorities to use AGORA as well for this purpose.

Further, the DSA foresees additional mechanisms to allow a cooperation between DSCs and competent authorities. This particularly concerns the **management of complaints** as prescribed in Art. 53 DSA. If a user issues a complaint to a DSC, it will assess the complaint and refers it to the competent authority in its Member State or to the competent DSC in another Member State respectively. In the process of answering the complaint, both parties have the right to be heard.

Moreover, ERGA members might be party of other specific mechanisms within DSA including, for instance, the notification of suspicions of criminal offences under Art. 18 DSA.

Scenario two: *violations of EMFA or AVMSD by audiovisual media service*

The EMFA contains new provisions related to media services in the Union. Some of these provisions do not concern single pieces of content. Similarly, the AVMSD sets out certain obligations that are not content-related, for instance regarding accessibility, the prominence of general interest content and the promotion of European works. These rules, although they are all somewhat connected to audiovisual content, do not set out content requirements. If such cases occur in a cross-border scenario, NRAs may use the cooperation mechanism as provided for in Art. 14 EMFA (see outlined above).

In such cross-border cases, differences in national laws might complicate reaching the desired outcome by the NRA in the country-of-destination. However, certain provisions, such as Art. 13 AVMSD, provide a "soft" derogation from the country-of-origin principle as there is no need to follow a derogation procedure in such cases. Paragraph 2 of this article allows Member States to require audiovisual media services to contribute financially to the production of European works also in countries of destination. If no such exemption is in place, like in Art. 7a AVMSD which provides for a possibility for Member States to ensure prominence of services of general interest in their respective countries, enforcement of the provisions in cross-border scenarios can be particularly challenging as there may be no legal basis for enforcing these provisions in the country-of-origin.

Scenario three: *violations of Art. 28b AVMSD by VSPs*

Art. 28b AVMSD establishes certain rules for VSPs including obligations that are often directly related to content provisions within the AVMSD. For example, a violation of Art. 28b could involve not establishing age verification or parental control tools for pornographic content accessible to minors on a VSP. To address such issues, Art. 15 of the EMFA has been introduced. An NRA in the country-of-destination requests measures from an NRA in the country-of-origin (1). The NRA in the country-of-origin informs the requesting NRAs on any measures taken or planned in relation to the request (2). The procedure involves mediation by the Media Board in case of disagreement between the cooperating authorities (3). If mediation does not result in an amicable solution, the Media Board will issue an opinion, in consultation with the Commission (4). The requested authority must then inform the Media Board, the Commission and the requesting authority on the measures taken or planned in response to the opinion (5). Ultimately, the NRA in the country-of-origin may take measures against the VSP in line with the request (6).

Certain measures under Art. 28b can be more tailored than the DSA's horizontal rules and obligations. Therefore, a collaborative cross-border approach can help NRAs ensure compliance with the regulations, that are not fully harmonised, concerning for instance, impairing content for minors' development or illegal hate speech. Given that VSPs, in their purpose, are closely related to audiovisual media services, more specific rules under AVMSD are applicable to them. As VSPs are usually also online platforms under the DSA, it can be the case that more than one procedural paths (the DSA's cooperation mechanisms, mainly Art. 58 and Art. 60, and Art. 15 EMFA) are open to ERGA members. In such cases, ERGA members might choose, which procedure will most likely lead to the desired outcome.

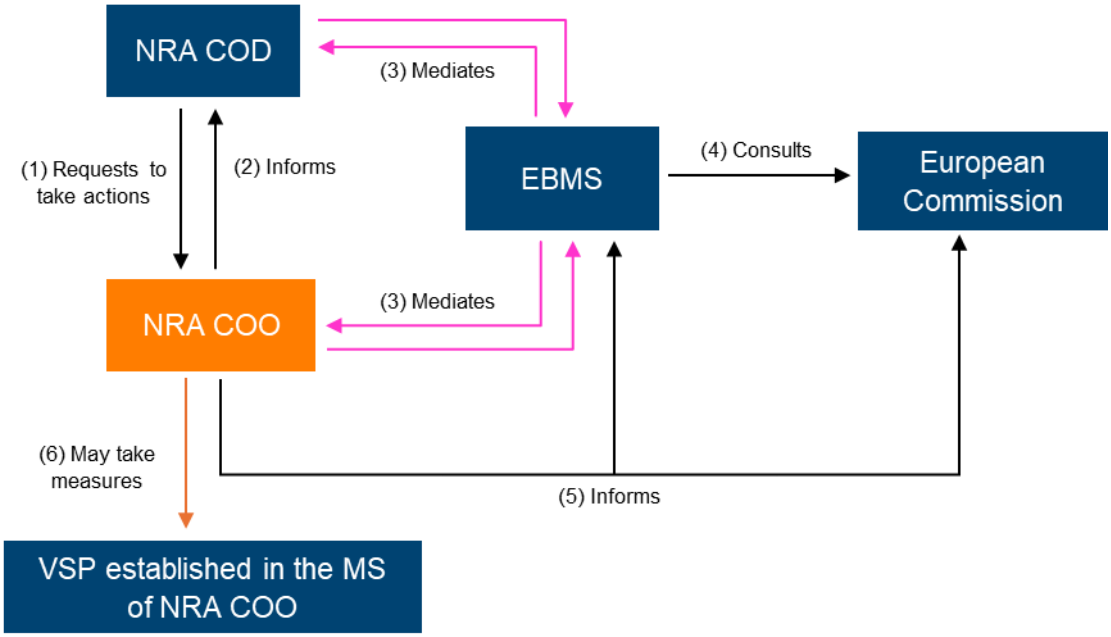

Illustration 6: Art. 15 EMFA procedure

When enforcing rules against VSPs in single cases, Member States may be further able to derogate from the ECD's country-of-origin principle, in accordance with case-law of the ECJ. A derogation procedure for this is not foreseen within AVMSD itself as Art. 28a AVMSD only refers to Art. 3 ECD. Therefore, the scope of the derogation mechanism is not aligned with the concrete rules of the AVMSD which is, in turn, the case for audiovisual media services. This duality of derogation procedures may cause confusion and legal uncertainty for NRAs applying the derogation mechanisms.

In such derogation procedure under the ECD, a Member States (usually represented by an administrative authority) asks another Member State to take measures on a service that is established in the latter Member State (1). Only if the Member State cannot or did not act following that communication (2), the Member State in representing the country-of-destination of a service can take own measures. The Commission must also be notified on the measures a Member State intends to take derogating from the country-of-origin principle (3). The measures must be proportionate and the service in question has to prejudice one of the following objectives or present a serious and grave risk to do so. The objectives are public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons; the protection of public health; public security, including the safeguarding of national security and defence or the protection of consumers, including investors (4). The Commission will decide on the compatibility of the measures taken by the Member State which is the country-of-destination to the respective service with Union law. If the Commission decides that the measures were incompatible, it will ask the Member State to stop its measures (5).

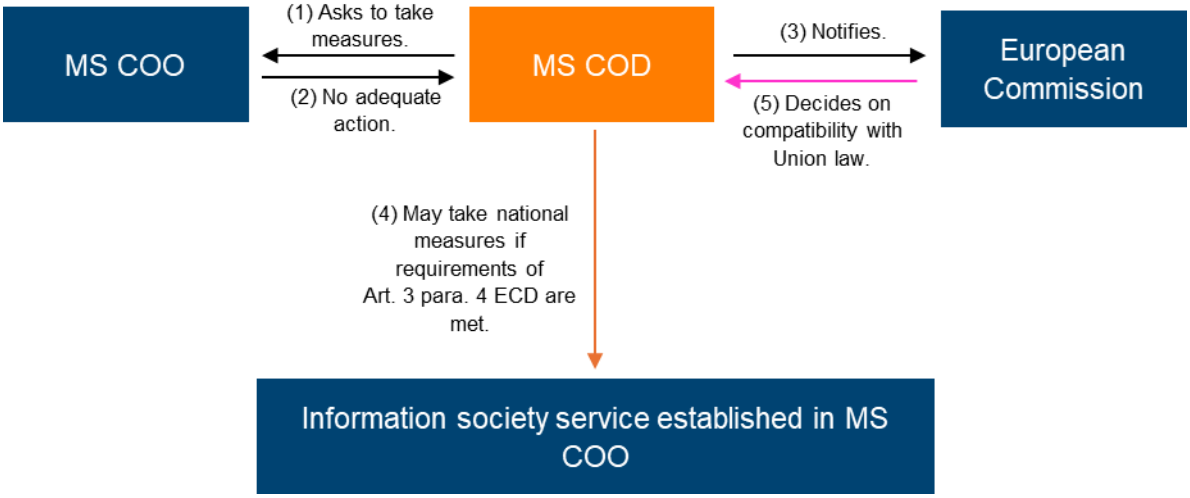

Illustration 7: Art. 3 ECD procedure

4.3 Systemic violations of the DSA by VLOPSEs

Scenario one: *alleged systemic violation (i. e. insufficient content moderation, systemic incompliance with the obligations associated with orders under Art. 9 DSA) of the DSA within the field of competences of ERGA members*

The DSA designates a regulatory role for the European Commission, exclusively overseeing Section 5 of Chapter III for designated VLOPSEs. For all other provisions, the oversight for designated VLOPSEs is shared with the DSCs.

NRAs which are also DSCs can send a reasoned request to the Commission to assess a measure using the procedure under Art. 65(2) DSA (1). The request needs to contain all relevant information. NRAs which are competent authorities under the DSA may be consulted by the DSC in their Member State on such request or make their DSC aware of a situation that should be flagged to the Commission within their field of competences.

DSCs and competent authorities will subsequently provide the Commission with relevant information for the case (2). This can include experiences from enforcing other powers in relation to the VLOPSE in question, i. e. the services compliance with orders under Art. 9 DSA as applicable or relevant research as well as other information that the Commission might request from ERGA. ERGA, as a regulatory network, has established a mutual information exchange[2] with the Commission whenever the Commission's investigations concern issues under ERGA's remit. As a result, ERGA and its members can actively support the Commission when enforcing the DSA in relation to online media and content. After that, the Commission takes the case and informs all DSCs and the VLOP/VLOSE in question about the initiation of proceedings (3). The EBDS will provide its views on the case (4) and, ultimately, the Commission may take regulatory action, in line with its competences (5).

[2] See press release by the Commission of 04th June 2024: https://digital-strategy.ec.europa.eu/de/node/12745

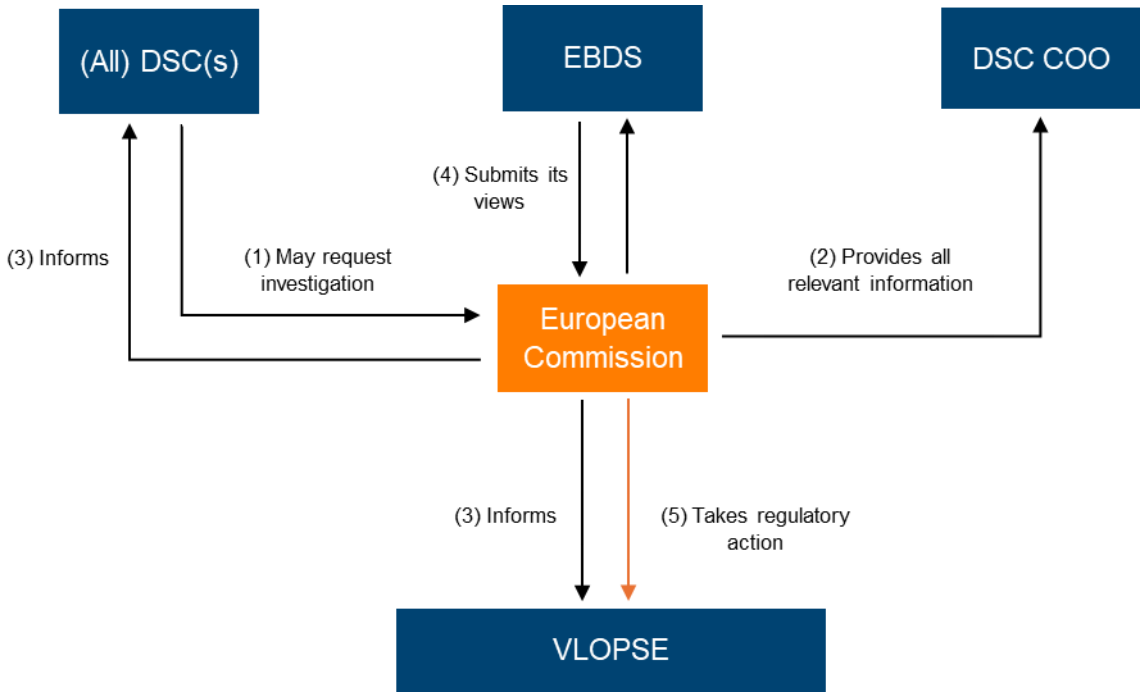

Illustration 8: Art. 65(2) DSA procedure

4.4 Media services from outside the Union

***Scenario one**: media services from outside the Union prejudice or present a serious and grave risk of prejudice to public security*

Art. 17 EMFA – which will enter into application in May 2025 – provides a mechanism for coordinating measures against media services from outside the Union as defined in Art. 17(1) EMFA, regardless of their means of distribution. In a given case, at least two NRAs request coordination regarding a service prejudicing or presenting a serious and grave risk of prejudice to public security (1). The Media Board will coordinate measures (2), in consultation with the Commission (3), and may issue an opinion (4). The NRA does its utmost to take the opinion of the Media Board into account (5). Member States should ensure that there are no obstacles preventing NRAs from taking into account the opinion taken by the Media Board.

This new procedure may prove useful in the future to allow joint action against malicious actors from outside the Union. Although the provision is without prejudice to Art. 3 AVMSD, there may be potential interdependencies stemming from this provision as it may affect the ability of authorities to take effective action against the transmission of services from outside the Union. It is important to keep the alignment of this procedure with the derogation procedure of Article 3 AVSMD to ensure full effectiveness of art. 17 EMFA once it can be applied mid next year.

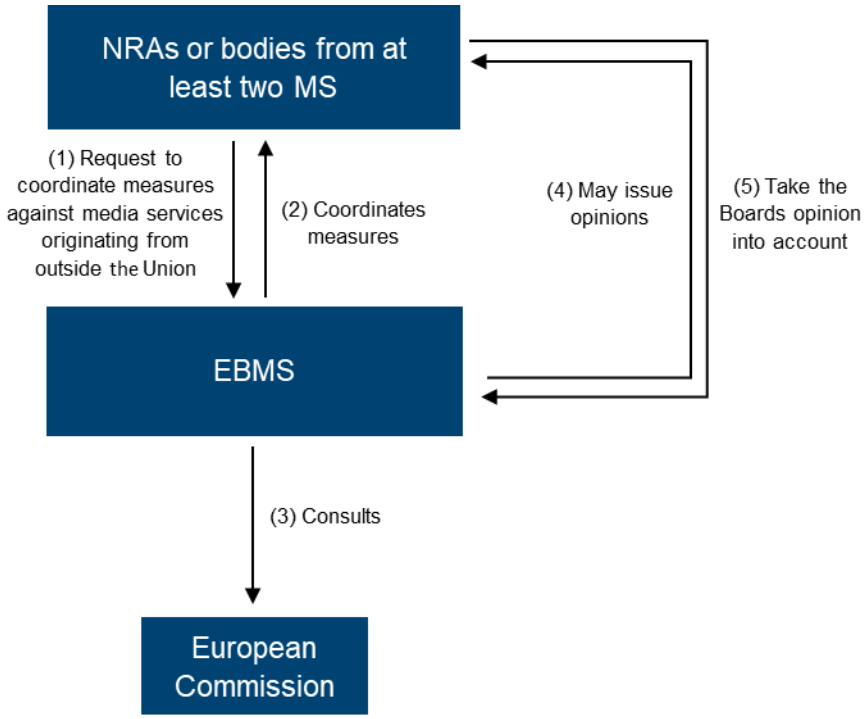

Illustration 9: Art. 17 EMFA procedure

5. Smoothening of the cross-border procedures under AVMSD and ECD – recommendation for a coherent approach regarding cross-border enforcement mechanisms towards audiovisual media services and online platforms

After considering the new procedural options for NRAs following EMFA and the DSA, it is necessary to assess whether the well-known procedures as required by the AVMSD and the ECD are fit for purpose and whether these procedures still smoothly interlock with the new cooperation and enforcement mechanisms. Given the complexity of the new regulatory framework, especially the new cross-border procedures, ERGA considers it essential to re-evaluate the effectiveness of the long-established cross-border enforcement mechanisms. While ERGA regards the country-of-origin principle as the cornerstone of the European regulatory framework for media and digital services, recent regulatory challenges surfacing must be addressed by European lawmakers. In an upcoming review of the AVMSD, ERGA recommends to the Commission to assess an alignment with the new cross-border mechanisms in three key areas:

5.1 Adjustments ensuring a complementary functioning of the procedures in place to tackle MSPs from third countries in Art. 3 AVMSD and Art. 17 EMFA

Under the technical criteria of Art. 2(4) AVMSD, the EU's country-of-origin principle extends to certain services from third countries. This means they are subject in principle to regulation under the AVMSD but this happens without regulators being able to easily ensure services' compliance with the rules of the AVMSD. Since these services are not based in an EU Member State, enforcement by the responsible regulatory authorities is typically difficult or even impossible (e.g. no licensing procedures or domestic address for administrative orders).

5.1.1 Challenges

Currently, due to legal constraints, authorities may lack the tools to take effective action against third-country broadcasters. This is particularly true when such services are broadcasted via satellite or internet[3]. Nevertheless, robust enforcement mechanisms are urgently needed to protect European audiences.

Art. 17 of the EMFA can be viewed as a first step – and its concrete practical implications can only be reviewed once it is applicable starting from May 2025: It empowers the Media Board to coordinate actions by national regulators and to issue opinions when measures are proposed against a third-country media service. Member States shall ensure that national laws do not prevent authorities from considering the Media Board's opinion when considering taking action. A lasting solution, however, will require an amendment to the AVMSD.

In cases of regulatory action against third-country broadcasters, such as those under control of a foreign state, two key issues have emerged with the application of this principle, as already mentioned in the 2023 ERGA report on the practical application and future of cross-border enforcement of media law:

- An unintended protection for third-country services arises due to the technical criteria in Art. 2(4) AVMSD for determining jurisdiction;
- Legal enforcement is complicated by the vague wording in Art. 3 AVMSD regarding the guarantee of free reception.

To find answers to these problems one needs to analyse possible implications of changes to the legal framework. Modifying the jurisdiction regime in Art. 2(4), for instance, may solve issues by implementing a country-of-destination principle for real third-country broadcasters. However, such changes could result in unwanted side effects. The fact that there is a chance to intervene on the side of technical distribution ensures some effective enforcement mechanism. Further, with Art. 17 EMFA, the Union took an approach allowing coordination amongst media regulators having the potential to allow effective measures even if violations mainly occur in countries of destination.

At the same time, Art. 3(1) of the AVMSD requires that if an audiovisual media service falls under the jurisdiction of an EU Member State, other Member States must ensure free reception and refrain from blocking retransmission for reasons covered by the directive. However, this presents challenges in practice.

Since the provision is technology-neutral, it applies to reception through various means, including the internet, satellite, or cable. While "retransmission" refers specifically to cable networks, initial transmission (via satellite or internet) does not involve an intermediary, making enforcement more difficult. Blocking satellite or internet broadcasts can only be justified through exceptions to the free reception rule, but the vague wording complicates prohibitions on initial transmissions. Furthermore, technical limitations prevent satellite operators from restricting broadcasts to specific regions, making enforcement of such bans nearly impossible in practice. In recent years, internet broadcasting has become increasingly significant, posing additional regulatory challenges.

5.1.2 Solutions

In a future review of the AVMSD, two key adaptations may be considered

1. The notion for Member States to "ensure freedom of reception and (…) not restrict retransmissions" could be expanded to include "and the usage of audiovisual media services" after "reception". Additionally, the notion of "on their territory" may be deleted to eliminate technical barriers to implementing effective measures.

[3] Cf. ERGA cross-border report 2023: https://erga-online.eu/wp-content/uploads/2023/12/ERGA-SG1-Report-2023-Cross-Border-final-version-for-publication.pdf; particularly pp. 5f.

2. The derogation mechanism in AVMSD could be more closely aligned with the procedures outlined in Art. 17 of the EMFA. Art. 17 enables the Media Board to coordinate relevant measures by national authorities and issue opinions on measures against media services from third countries. Member States should ensure that their national laws do not prevent authorities from integrating the Media Board's opinions into their own measures. Similarly, AVMSD should acknowledge that authorities in a country-of-destination may enforce measures in the country-of-destination coordinated by the Media Board when a service is distributed in their country. This may be the case once a service is available via online distribution. This could be achieved by adding a new provision that enables Member State authorities to block access to media services if at least two other authorities have identified the same infringements against the provisions of the AVMSD within their territories, or if the Media Board issues an opinion under Article 17 EMFA suggesting appropriate action against a service. ERGA believes, such measures would be possible even if the infringement has not been identified by the authority in the country-of-origin. Nonetheless, if such a procedure were to be considered, it would need to be designed with utmost care to be properly protected from misuse and ensure that measures are always proportionate. Thus, such proposal would require careful consideration with respect to the fundamental right to freedom of expression and information by the legislators.

5.2 Implementing derogation procedures to ensure effective legal enforcement in cross-border regulatory processes

Both Art. 3 of the ECD and Art. 3 of the AVMSD provide derogations from the country-of-origin principle, allowing EU Member States to take measures against service providers based in other Member States. These derogations among others recognize the importance of media and cultural sovereignty, acknowledging that individual member states may have unique regulatory frameworks that reflect their specific cultural and societal values. This flexibility ensures that while the internal market promotes cross-border services, national considerations regarding media content and public policy can still be accommodated.

5.2.1 Challenges

The exceptions differ in both design and specific provisions. For instance, Art. 3(4) of the ECD permits exceptions for "public order protection," which is not included in Art. 3(2) of the AVMSD. Video-sharing platforms (VSPs) are governed by the AVMSD but, as they are online services, the matters related to the country-of-origin principle and its exceptions are governed by those from the ECD.

This results in a dual regulatory framework at the EU level concerning the country-of-origin principle. The divergence between the ECD and AVMSD introduces complexities and ambiguities in interpreting exceptions, particularly in cross-border situations. These inconsistencies can complicate the effective enforcement of laws, as regulators may face challenges in determining when and how to apply stricter national rules to providers based in other Member States, leading to potential legal uncertainty across the EU.

5.2.2 Solutions

To establish a consistent regulatory framework at the European level and address enforcement challenges, the provisions on the country-of-origin principle and its exceptions in the AVMSD, the Commission may consider a thorough review.

ERGA suggests considering aligning Art. 3 AVMSD more closely with the clearer framework of Art. 3(4) of the ECD. This would reduce legal uncertainties and create more uniform exception rules between AVMSD and ECD. VSPs, as regards the derogations procedures from the country-of-origin principle, should be treated similarly to audiovisual media services. Recital 47 of the AVMSD already acknowledges that VSPs increasingly resemble traditional media services, as they recommend and organize programs, user-generated videos, and commercial communications.

Moreover, a derogation should only be allowed after consultation with the NRA in the country-of-origin. If this consultation occurs within the framework of Art. 15 EMFA, the Media Board and the Commission would already be involved in the procedures. Ensuring that the issue cannot be resolved by the NRA in

the country-of-origin is essential before allowing a derogation. Thus, further consultation with the Media Board would become unnecessary once the derogation is performed. Therefore, the derogation procedure as provided for in the ECD could serve as a model for a unified derogation mechanism in AVMSD. Such system would not change the procedural requirements for derogation procedures concerning VSPs. It would assure, though, that derogations concerning all services in scope of the AVMSD would apply to the same case groups. One may acknowledge that the case groups are already now similar. Nonetheless, it would make sense to connect derogations for VSPs more directly to the provisions of the AVMSD. Most relevantly, this change would allow for a more precise system and, therefore, would enhance legal certainty for providers and regulators.

5.3 Adjustments to the framework for provisions aiming to ensure enhancements regarding media plurality, most notably Art. 7a AVMSD:

Art. 7a of the AVMSD recognises the possibility for EU Members States to take measures aimed at ensuring the appropriate prominence of audiovisual media services of general interest. In times when reliable news sources face growing pressure due to an increasingly competitive market and evolving distribution methods, trustworthy information is becoming more difficult for audiences to find. At the same time, societies face challenges amid disinformation and information manipulation campaigns. Ensuring that accurate and reliable information is prominently available online and on device user interfaces can play a crucial role in countering disinformation before it spreads. By enhancing the visibility of credible media outlets and fostering a balanced media ecosystem, this provision supports efforts to safeguard democratic discourse and promote informed public debate, making it harder for disinformation to take root.

5.3.1 Challenges

The national transposition of Art. 7a of the AVMSD is not mandatory[4]. As a result, only a few Member States have chosen to implement this Article. As provisions are not necessarily in place in a possible country-of-establishment of a provider of a user interface, the NRA in the country in which Art. 7a AVMSD has been implemented is possibly unable to act effectively. NRAs in the country which chose to implement Art. 7a can nationally determine services of general interest, but they cannot ensure that these services are prominently displayed on user interfaces and online-platforms if the latter services are established elsewhere in the Union. Examples of such user interfaces might be the software of smart TVs, set-top boxes or other products allowing access to media services. Furthermore, since the ECD does not provide an exception for such measures, there are no derogation procedures to address these gaps.

5.3.2 Solutions

To ensure more effective enforcement of prominence provisions, Art. 7a of the AVMSD may be scrutinized in the future review aiming to establish a sufficiently flexible framework while remaining compatible with Union law.

The Commission may consider to more easily ensure the enforceability of the prominence rules regarding services classified as “of general interest” against platforms and/or user interfaces based in other Member State. To support this, it might be advantageous to integrate a practical solution that allows for the prominence of audiovisual services of general interest in national catalogues of Member States which transposed Art. 7a AVMSD. The AVMSD already provides for exceptions, such as in Art. 13(2), which permits Member States to require financial contributions from media services - including those based in other Member State - for the production of European works. However, introducing a similar exception into Art. 3 ECD would be more complex, as it would necessitate extensive amendments and potentially require reopening the ECD. Therefore, focusing on enhancing the AVMSD’s framework for content visibility is a more feasible and streamlined approach.

A possible solution could involve Member States which transposed the Article defining and listing their national services of general interest. Platforms and user interfaces could be required to ensure proper

[4] For a first overview, see ERGAs report from 2022: https://erga-online.eu/wp-content/uploads/2022/12/2022-12-ERGA-SG1-Report-Prominence_Art.7a-and-Art.-13.pdf.

prominence of these services in the country where their service is accessible to the audiences of the Member State that granted the audiovisual media services the “of general interest” status. Article 7a of the AVMSD would need to be amended to establish a requirement for services (meaning user interfaces as well as online platforms) to ensure the visibility of public-value content, ensuring consistency and effectiveness in promoting such content in the relevant Member States.

In 2025, the Media Board will continue to discuss the issue outlined above. A strong support of reliable information is a key topic to be further explored in the future.