

## C. The Audiovisual Media Services Directive (AVMSD): The Status Quo

### *I. The Latest 2018 Revision in a Nutshell*

The latest revision of the AVMSD took place in 2018 and was initiated by a Green Paper on media convergence<sup>83</sup>. This Green Paper had raised the question of the timeliness of the existing regulation – which had last been amended in 2007 and codified in 2010 into Directive 2010/13/EU – and in 2016 resulted in a proposal by the European Commission with concrete adjustments to several important elements of the Directive including its scope of application. After an intensive two-year trilogue process, during which significant changes were made to the original text at the initiative of the European Parliament and the Council,<sup>84</sup> the negotiation process ended with the publication of Directive (EU) 2018/1808/EU in the Official Journal of the EU on 14 November 2018.

The significance of this latest reform lies, among other things, in the next step of extending the scope of application to the category of video-sharing platforms (VSP), which were introduced as a new addressee of the Directive.<sup>85</sup> The extensions were made in consideration of the need to adapt the provisions to new technical conditions, in particular in the form of the growing importance of the internet and the convergence of media. Additionally, changes in recipient behaviour and new conditions on the advertising market were further drivers for the revision.

Subsequently, the rules already applicable to video-on-demand services since the previous revision in 2007 were aligned closer with those applic-

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83 Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, COM/2013/0231 final.

84 A detailed comparison of the proposed changes both to the recitals and substantive provisions in the Common Approach by the Council and to the Position of the European Parliament in a synopsis to the original proposal of the Commission and the final outcome can be found at *Institute of European Media Law (EMR)*, DSA synopsis (version of 19.05.2022), <https://emr-sb.de/synopsis-dsa/>.

85 In more detail on this *Valcke/Lambrecht*, The evolving scope of application of the AVMS Directive; more general *Broughton Micova*, The Audiovisual Media Services Directive.

able to the television (linear services) sector, although they were not completely merged. VSPs by contrast are – besides being defined – subjected to certain similar provisions, for example in the area of protection of minors and the general public as well as advertising, but by a separate section from which these other rules are only referenced. The VSP rules recognise that, unlike audiovisual media service providers, VSPs do not (in that function) provide their own content and, as intermediaries, only have limited influence on that content, but also that they are still susceptible to rules due to their organisational control in the way the content generated by others is disseminated and brought to the attention of the consumers.<sup>86</sup>

The new rules of the AVMSD 2018 do not only concern the (more intensive) inclusion of existing and new players but also cover a variety of substantive changes and additions, such as some minor change in wording concerning the jurisdiction criteria with regard to the country-of-origin principle, the significant change of the provisions on the protection of minors and against hate speech, the modernisation of the promotion obligations for European works<sup>87</sup>, the tightening of qualitative, and the liberalisation of quantitative, advertising provisions, the so-called signal integrity and the obligation of the Member States to contribute to the promotion of media literacy. In addition, institutional and formal procedural rules were introduced, which in turn have important effects on the overall shape of media regulation. This concerns not only the provisions on the competent regulatory authorities of the Member States, including a commitment to stronger cooperation between these bodies, but also additional dimensions of regulation namely by including self- and co-regulatory approaches, which are encouraged and strengthened by the new rules. Formally such approaches include the use of so-called codes of conduct. These innovations with regard to the institutional structure and cooperation mechanisms, which are especially relevant concerning the approach to

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86 In more detail on this *Kukliš*, Video-sharing platforms in AVMSD: a new kind of content regulation; see on the implementation of the provisions for VSPs *Deloitte/SMIT*, Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD), pp. 25 et seq.; *EAO*, Mapping report on the rules applicable to video-sharing platforms – Focus on commercial communications; *EAO*, Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online.

87 In more detail on this *Apa/Gangemi*, The promotion of European works by audiovisual media service providers; *Psychogiopoulou*, The Audiovisual Media Services Directive and the promotion of European works: cultural mainstreaming revisited.

(cross-border) dissemination of audiovisual content, are discussed in more detail below (see D.I).

## *II. Illegal Content under the AVMSD*

In principle the AVMSD still follows the approach of minimum harmonisation as originally foreseen when the Directive was created in 1989. Nonetheless, in the meanwhile the AVMSD has expanded to contain a variety of rules declaring certain content or its dissemination in a certain way to be illegal. It is necessary to analyse these substantive rules in more detail as they are of particular relevance for the question of enforcement concerning audiovisual content. Only those situations that fall within the coordinated field of the AVMSD are covered by the country-of-origin principle and the accompanying rules that require from Member States to guarantee free reception and dissemination and only allow for derogation when following the procedures foreseen in Art. 3 AVMSD. The same applies to the anti-circumvention rule of Art. 4 AVMSD which only limits a Member State if the stricter rules adopted by it concern the coordinated field by the AVMSD. The scope of the rules of the AVMSD also determine whether there are (potential) overlaps with other rules at EU or Member State level and whether and how the relationship between these needs to be clarified in the future for law enforcement purposes.

The most relevant provisions in the present context are those concerning the protection of the general public from certain illegal content (Art. 6), the protection of minors from content that is harmful to them (Art. 6a) and certain qualitative advertising restrictions (Art. 9).

### *1. Incitement to Violence or Hatred based on Discrimination*

According to Art. 6(1) AVMSD, Member States shall ensure that audiovisual media services do not contain any incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the EU. These grounds are sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. Art. 6(1) thus contains an incitement element and a discrimin-

ation element, and only for these situations with a cumulative fulfilment of both elements the rule of the AVMSD applies, which is the case in a comparable way in the self-regulatory approaches for platforms in this area at EU level (EU Code of conduct on countering illegal hate speech online). In other words, content, even if it is repulsive, glorifies violence, is harmful or intensely defamatory, is excluded from the scope of application if it lacks an element of discrimination listed therein. The reason for this threshold is that the AVMSD with this provision aims to protect the general public from lasting dangers, which are only regarded as given if there is not only an incitement to a reaction against persons from a certain group or against the group itself but also this incitement is grounded in one of the specific discrimination reasons mentioned.

Furthermore, Art. 6(2) AVMSD obliges the Member States to ensure that audiovisual media services do not contain public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541<sup>88</sup>. This part of the provision covers the comparatively narrow area of terrorist offences. These are international acts that may seriously damage a state or an international organisation by aiming to intimidate a population, unduly compelling governments or destabilising or destroying fundamental structures of a state. While the actual offence described therewith is narrow, the obligation to stop any provocation extends to any form of making available to the public such content and considers an endorsement of terrorist offences to be sufficient to fulfil the conditions of the provision, which was inserted not only in reaction to a growing number of incidents amounting to terrorist offences in EU Member States but also in light of the proliferation of such content especially disseminated online. The incitement to commit other types of criminal offences, even if these would constitute a considerable threat to public security and order, is not covered by the scope of application of the AVMSD and specifically its Art. 6. In particular incitement to crimes which may be illegal under national criminal law is not addressed by the AVMSD.

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88 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, pp. 6–21.

Compared to the previous version of the Directive<sup>89</sup>, the scope of Art. 6 was significantly amended in 2018. On the one hand, the incitement part of the provision was extended to cover violence and no longer only hatred, while the grounds of discrimination were furthered in comparison to the previously addressed race, sex, religion or nationality. Both changes were partly motivated by a step towards more coherence with other existing legislation. As Recital 17 underlines, the extension to include violence – being a step even more threatening than hatred – refers to the notion as included in the Council Framework on combating racism and xenophobia from 2008<sup>90</sup>. Since the CFR had become a binding instrument with the Treaty of Lisbon and contains a specific provision of types of discrimination that have been identified as a fundamental rights violation, it was regarded as the appropriate solution to not have a separate list of discrimination grounds in the AVMSD but rely on the one in the CFR and refer to it. The inclusion of public provocation to terrorist offences is a completely new insertion, but as described above it remains limited to a specific context as is generally the case with this content-restricting provision.

What is worth highlighting is that Art. 6 AVMSD since the revision in 2018 now explicitly clarifies that the provision with which Member States are obliged to ensure that providers under their jurisdiction to not include in their services content that fulfils the above mentioned elements is an addition to the basic obligation to respect and protect human dignity. Again, this follows the clear and strong commitment to the protection of human dignity in Art. 1 CFR, which is unconditional, but it is important that there are more reasons for content restrictions to be imposed against service providers than the two cases mentioned explicitly in Art. 6(1) lit (a) and (b). Art. 6(2) AVMSD acknowledges that content restrictions can infringe fundamental rights, namely freedom of expression (as well as freedom of the media), which is why it reiterates that measures to be taken in the context of combatting the illegal content addressed by Art. 6(1) AVMSD need to respect the principle of proportionality and the principles set out in the CFR. The prohibitions concerning incitement to violence or hatred leave

89 Cf. *Institute of European Media Law*, AVMSD synopsis 2018, available at <https://emr-sb.de/synopsis-avms/>.

90 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328, 6.12.2008, p. 55).

the Member States little room for manoeuvre, so they are implemented comparatively uniformly on the national level.<sup>91</sup>

## *2. Content Endangering Minors*

With Art. 6a AVMSD, concerning the protection of minors from certain content in audiovisual media services, a uniform rule addressing both linear and non-linear service providers was included. Previous to 2018 there were two separate Arts. 12 and 27 addressing the protection of minors, and the obligations concerning non-linear services were much more lenient than those for television broadcasters. This provision addresses content which is not regarded as illegal per se but only if it is disseminated in a way that it can endanger the vulnerable group which is protected by the provision, namely minors.

According to Art. 6a(1) AVMSD, Member States shall take appropriate measures to ensure that audiovisual media services which may impair<sup>92</sup> the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see them. This does not only concern the services in their entirety but actually means content offered on such services, as is evident from the last part of para. 1 and from the formulation of Recital 19.

Art. 6(3) AVMSD supplements this with the requirement of providing in addition sufficient information to viewers about the potential impairment. Personal data of minors collected by media service providers (e.g. via age verification mechanisms) shall not be used for commercial purposes (Art. 6(2) AVMSD). Although there are some further details that are laid down in the provision, e.g. in para. 1 the concrete mention of possible ways to avoid the consumption by minors (selecting the time of the broadcast, age verification tools or other technical measures) or requiring a kind of graduated system according to which the application of the measures shall be proportionate to the potential harm of the programme, these provisions leave room to Member States how to ensure an appropriate level of protection for minors. Neither it is specified what is specifically considered to

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91 Although some Member States opted to impose stricter rules by including also certain content which is illegal under criminal law. Cf. on this *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, p. 26.

92 The condition of a “serious” impairment was dropped in the 2018 reform.

be detrimental to the development of minors nor is there a fixation of specific groups of minors to be covered. However, it needs to be underlined – and this is especially relevant when it comes to analysing the adequacy of Member State rules and the application of these rules in practice – that the provision does clarify that the most harmful content is identified as being gratuitous violence and pornography. This in turn means that, if the most effective measures have to be taken to ensure that this especially risky content for the vulnerable group is not accessed by its members, the lack of any instruments or measures concerning such content would certainly be inadequate.

Because of the leeway the provision leaves in detail, the systems for the protection of minors from harmful media content differed in the various Member States before<sup>93</sup> the 2018 reform, and they continue to do so<sup>94</sup>. This ranges from differences in the regulatory system in general (partly statutory law, partly co- and self-regulatory systems, partly different regulation of public service and commercial broadcasters or of linear and non-linear offerings etc.) to different approaches to what ‘impairment’ means (for some Member States ‘only’ pornography and gratuitous violence, for some ‘already’ bad language or erotic scenes) and differences in age categories or technical measures provided for. More specifically, while most Member States rely on watershed-based limits accompanied by on-screen icons, content rating and special warnings to ensure the protection of minors in linear services, some go beyond this by establishing additional time limits and more granular age categories and even see need to rely on parental control measures and other technical means.<sup>95</sup> Whether and to what extent these rules also apply to non-linear services also varies greatly in the Member States.<sup>96</sup> For cross-border law enforcement, these differences lead to a situation in which there may not be the same contact persons for each issue, for example, within the authorities convened in ERGA, which has the

93 Cf. *Cappello (ed.)*, The protection of minors in a converged media environment, pp. 25 et seq.; *ERGA*, Report on the protection of minors in a converged environment.

94 Cf. the individual transpositions in the Member States that one can consult in (non-official) English translations at European Audiovisual Observatory, Revised AVMSD Tracking Table (including country fiches), <https://www.obs.coe.int/en/web/observatoire/avmsd-tracking>.

95 European Commission, Staff working document: Reporting on the application of Directive 2010/13/EU “Audiovisual Media Services Directive” for the period 2014–2019, SWD(2020) 228 final, p. 8.

96 *ERGA*, Report on the protection of minors in a converged environment.

power to initiate enforcement proceedings. In addition, lack of substantive harmonisation of what constitutes potentially endangering content – at least if it is not pornography and gratuitous violence, for which there is also no definition in the AVMSD – can make it difficult in practice to determine whether at all the other regulatory authorities would categorise the content as problematic.

It should be further pointed out that the provision prohibiting data processing is not directly aimed at the protection of minors in the media (otherwise the provision likely would have been formulated more broadly in the sense of a general prohibition of the processing of personal data of minors for commercial purposes) but rather is a protection mechanism in light of data protection rules which was necessitated by the risk situation created with the actual mechanism for the protection of minors in the media. Concretely, such mechanisms, with which, e.g., age-restricted access is enabled concerning content of potentially impairing nature, may come with collection and processing of data, such as the name and age or other personal data of the consumer. For this reason, the definition of a minor for this purpose does not depend on the perspective of the protection of minors in the media but of data protection law, where there is also no uniform definition in the sense of an EU-wide (as mentioned above) or even worldwide uniform age limit.<sup>97</sup>

The protection of minors is further supplemented within Art. 9(1) lit. (e) and (g) AVMSD for the area of advertising: audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages nor cause physical, mental or moral detriment to minors. According to Art. 9(3) AVMSD, codes of conduct, the creation of which the Member States shall foster within systems of self- and co-regulation, shall aim to effectively reduce the exposure of minors to audiovisual commercial communications for alcoholic beverages overall. In the same manner as for Art. 6a AVMSD, further details of this element of protection of minors is provided for in Art. 9 AVMSD: an impairment is in particular deemed to be seen in the direct addressing of minors to buy or hire a product or service

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97 Although the GDPR calls for special protection of minors, it does not contain a definition. It only sets a limit of 16 years for the ability to give consent but allows deviations down to 13 years at Member State level, so that very inconsistent rules have emerged in the national area (cf. for an overview <https://euconsent.eu/digital-age-of-consent-under-the-gdpr>), which cause problems for supranationally operating providers in particular when it comes to implementation.



by exploiting their inexperience or credulity, in the direct encouragement to persuade their parents or others to purchases, in the exploitation of the special trust minors place in parents, teachers or other persons, or by unreasonably showing minors in dangerous situations. Beyond these clarifications there is ample room for implementation by the Member States outside the aforementioned categories on the national level – with the same consequences for enforcement in cross-border cases in the area of advertising.

### 3. *Certain Types of Commercial Communication*

Besides the specific protection of minors from certain commercial communications, there is a general restriction on certain types of such commercial communication. These restrictions partly declare some commercial communication illegal per se, while for other legal types of commercial communication there are certain limitations in the way they can be designed and disseminated.<sup>98</sup>

There are a number of different qualitative advertising provisions in Art. 9 AVMSD as well as in Art. 10 (on the recognisability of sponsorship) and Art. 22 AVMSD (on alcohol advertising). In the present context, the provision of Art. 9(1)(c) is particularly noteworthy. It states that audiovisual commercial communications shall not prejudice respect for human dignity, include or promote any discrimination and encourage behaviour prejudicial to health or safety or grossly prejudicial to the protection of the environment. For the first part there is a close link to Art. 6(1) AVMSD, but also the other restrictions aimed at protecting health and the environment address advertising content that is potentially harmful for the public or society. In comparison with other parts of the AVMSD, these provisions are very concrete, addressing very specific behaviours in a harmonised way across the EU. However, the area of advertising, in particular, is characterised by the fact that the objective here is not to disseminate illegal content but always to market services and products in the most attention-grabbing and psychologically incisive way possible. Thus, complaints will regularly concern borderline cases that require the responsible regulatory authorities or bodies to make an assessment, such as whether a commercial commu-

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98 Cf. on the novelties under the 2018 reform *Cabrera Blázquez et al.*, Commercial communications in the AVMSD revision.

nication ‘promotes’ a certain behaviour or whether it only portrays it in a neutral way; another example would be whether a certain representation is discriminatory or only plays on (existing) prejudices. These assessments may vary from one Member State to another and will depend on long-standing interpretation of consumer protection rules.

This can be illustrated by the example of human dignity: although human dignity is globally enshrined in various human rights instruments and national constitutions, or at least recognised by national constitutional jurisprudence, its meaning and interpretation is nevertheless territorially very different because it is shaped by religious, moral and societal traditions.<sup>99</sup> Through its enshrinement in the CFR of the EU, it is also subject to the jurisdiction of the Court of Justice of the EU that already decided on human dignity in cases predating the Charter. In these cases the Court acknowledged that there may be different interpretations of what exactly is covered by human dignity, which is why it refrained from giving more indications than general criteria for interpretation by the national courts<sup>100</sup> without evaluating the specific item of content<sup>101</sup>. This can make it difficult to take a unified position in enforcing the law when regulatory authorities from different Member States are involved.

#### 4. Application of the Rules to VSPs

The three topical areas covered by the provisions mentioned above are by their systematic positioning in the Directive applicable to both linear and non-linear audiovisual media services. With the 2018 revision the legal framework of substantive rules was partly extended to apply also to

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99 *Le Moli*, The Principle of Human Dignity in International Law, pp. 352 et seq.

100 For example, in its judgement of 17 February 2016 (*Sanoma Media Finland – Nelonen Media*, ECLI:EU:C:2016:89), the CJEU held that for television advertising and teleshopping to be readily recognisable and distinguishable from editorial content as required by the AVMSD it might be sufficient for providers to use only one of the means referred to in the AVMSD (optical, acoustic or spatial).

101 Cf. for example CJEU, Case C-36/02, *Omega*, ECLI:EU:C:2004:614. In this judgement, the CJEU ruled that restrictions on the freedom to provide services are possible if they are based on public interests that are motivated by the protection of human dignity. The case concerned the ban on so-called killing games in laser arcades, which German authorities had imposed on the grounds of violation of human dignity. The CJEU did not comment on the criteria as to whether this actually constituted a violation of human dignity but left this to the national courts.

video-sharing platforms (VSPs) as mentioned above.<sup>102</sup> Besides a specific jurisdiction provision in Art. 28a AVMSD, the following provision lays down the substantive requirements that Member States have to extend to VSPs.

According to Art. 28b(2) subpara. 1 AVMSD, VSP providers have to comply – in the same way as audiovisual media services – with the rules on audiovisual commercial communication laid down in Art. 9(1) AVMSD whenever the respective audiovisual commercial communications is marketed, sold or arranged by them. Concerning user-generated content which is disseminated on VSPs, the AVMSD expects a lower level of compliance, thereby recognising the limited control VSP providers have on such content in contrast to audiovisual media service providers that fully control (with editorial responsibility) the composition of their programmes. Therefore, Member States have an obligation to ‘only’ ensure that VSP providers take “appropriate measures” to protect certain groups or all viewers from certain risks that are addressed by the AVMSD.

The protection obligation extends to the protection of minors as well as the general public from programmes, user-generated videos and audiovisual commercial communications in the same way as it is foreseen for audiovisual media services in Art. 9(1), Art. 6a(1) and Art. 6 AVMSD. With regard to Art. 6(2), Art. 28b AVMSD goes even beyond that including besides terrorist offences also other criminal offences under Union law, namely offences concerning child pornography as set out in Art. 5(4) of Directive 2011/93/EU<sup>103</sup> and further offences concerning racism and xenophobia as set out in Art. 1 of Framework Decision 2008/913/JHA.

Art. 28b(3) AVMSD contains some concretisations for measures which can be regarded as ‘appropriate’ by stating that appropriateness shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected, and the rights and legitimate interests at stake; in addition it provides a list of possible measures to be implemented by VSP providers (e.g. age verification and labelling mechanisms, parental control and notification/flagging systems). In a similar way as for the protection of minors, the measures

102 Cf. on this and the following also *Kukliš*, Video-sharing platforms in AVMSD: a new kind of content regulation.

103 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, pp. 1–14.

implemented must be put in relation to the risks to be addressed. And in result, the AVMSD leaves the specifications up to the Member States and, furthermore, encourages them to the use of co-regulation systems by doing so, which means a lower level of uniformity across Member States can be the consequence.

A first look at the implementations of the VSP provision on national level shows that the assessment of appropriate measures to be taken is, on first level, essentially passed on to the providers.<sup>104</sup> Most Member States laws are very close to the wording of the AVMSD (German community of Belgium, Bulgaria, Cyprus, Greece, Lithuania, Luxembourg and Malta), i.e. obliging VSP providers to take appropriate measures and, by taking up the list of the AVMSD, providing for such possible measures. Some Member States opted to oblige VSP providers to apply certain specific measures from within those listed in Art. 28b (while omitting others) as a minimum requirement (e.g. French Community Belgium or Finland), some detailed the technical measures (e.g. Austria for reporting mechanisms and promotion of media literacy or Hungary clarifying the interrelation to Art. 15 e-Commerce Directive), and a few Member States adopted stricter rules (in some Member States, such as Finland, Germany or Sweden, the duties of VSPs are also (partly) extended to certain content that is prohibited under (national) criminal law). The roles assigned to regulatory authorities in this process are different as well. They diverge between involving them on the ‘first level’ of the assessment of appropriate measures, i.e. by conferring to the regulatory authorities statutory powers of concretisation or giving them an essential role in the drawing of codes of conduct (*ex ante*), and involving them on the ‘second level’, i.e. by tasking them with overseeing

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104 Cf. on this and the following the overviews of national implementations on VSP rules in *Deloitte/SMIT*, Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD), pp. 83 et seq.; *ERGA*, Guidance and recommendations concerning implementation of Article 28b, pp. 17 et seq.; *EAO*, Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online; *EAO*, Mapping report on the rules applicable to video-sharing platforms – Focus on commercial communications; for a more detailed insight *EAO*, Interactive searches across the national transpositions of the Audiovisual Media Services Directive (AVMSD Database, <https://avmsd.obs.coe.int/>).

the measures taken by VSP providers and assessing their appropriateness (ex post).<sup>105</sup>

Concerning VSPs, the illegality of certain content can be regarded differently at national level and therefore also in the enforcement of the law. Although key elements for illegality are prescribed by the AVMSD, including which elements of protection are relevant (protection of minors, of the general public, against certain audiovisual commercial communication), differences can result from the margin in implementing the rules in consideration of own constitutional traditions and national legislative solutions. Especially which concrete measures can be expected from the VSP providers as 'appropriate' depends on the national framework; thus, the providers' assessments based on this and ultimately – at least in principle – on the evaluation of the measures by the regulatory authorities of the Member State in which the respective provider is established.

### III. The Country-of-Origin Principle and Derogation Procedures – Art. 3 AVMSD

#### 1. Background to the Country-of-Origin Principle

##### a. Introduction of an explicit rule to devise responsibility of Member States

When the European Economic Community set out to harmonise certain rules of Member States concerning television broadcasting in order to act towards the creation of a single market of television media content, a necessary precondition was seen in offering legal certainty to those providers that would utilise the new possibilities. Based on a market situation in which broadcasters needed licences – issued by Member State authorities – as a basis for their offer of television services to the viewers, the compromise between harmonisation of rules and respecting Member States' retained powers for regulating the media was found as follows: every provider with establishment in one of the Member States was to be treated as falling under the jurisdiction of this Member State irrespective of the service offered and to which populations it was addressed. That Member State would then

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105 For a regulatory perspective on issues in the context of implementation see *ERGA (Subgroup 3)*, Implementation of the revised AVMS Directive; *ERGA (Subgroup 3, Taskforce 2)*, Video-Sharing Platforms under the new AVMS Directive.

be able – and at the same time be obliged – to guarantee compliance of the provider with the applicable rules, as it would have a direct access to the provider both in the license award procedure and later in monitoring the service. All other Member States, on the other hand, would be in a situation to accept a reception and transmission of such services on their territory even without being able to fully apply their own legal framework to it, because the harmonisation as achieved with the Television without Frontiers Directive<sup>106</sup> would ensure that some fundamental rules are to be respected in all Member States.

In legal terms, this approach was achieved by laying down as cornerstone of the TwF Directive, which was retained ever since and is still the basis of the AVMSD, the country-of-origin principle (COO).<sup>107</sup> Art. 2(1) AVMSD states accordingly that a provider of audiovisual media services – since 2007 this extends beyond linear television services also to non-linear, i.e. on demand services – that falls under the jurisdiction of a Member State based on the criteria laid out in the following paragraphs must, in principle, comply “only” with the rules of its “home Member State”. Whenever it is in conformity with that legal framework it is not only authorised to disseminate its services all across the single market, but the other Member States may not subject the provider to rules applicable to those providers under its own jurisdiction, e.g. licensing requirements. Importantly, the formulation of this rule in Art. 2(1) AVMSD does not take the perspective of the providers profiting from the legal certainty the country-of-origin principle gives them; instead it emphasises the obligation of the competent Member State to ensure that the providers under its jurisdiction “comply with the rules of the system of law applicable to audiovisual media services”.

However, the country-of-origin principle was from the very beginning of its introduction conditional on several requirements and not designed as being absolute in its validity or applicability across all elements of regulation of providers that, in principle, are covered by the country-of-origin principle. On the one hand, the country-of-origin principle limits other

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106 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, pp. 23–30.

107 Extensively on the country-of-origin principle *Cole*, The Country of Origin Principle; *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp. 110 et seq.; *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, pp. 143 et seq.

Member States than that of establishment in respect of action against a provider only in the areas harmonised by the Directive, or in the words of the Directive the “fields coordinated” by the TwFD/AVMSD. On the other hand, reliance on the country-of-origin principle necessitates actual compliance with the legal framework of the country of establishment – which includes the Directive’s provisions that have to be transposed into the national frameworks of all Member States<sup>108</sup> – and on the side of the Member State concerned the actual monitoring and enforcing of the rules. In case of a failure to do so or if there are risks for overriding public interest goals posed by infringements of service providers, the Directive consequently introduced exceptional measures that Member States other than the establishment Member State can take. This backstop was deemed necessary so that all Member States, based on their responsibility to address risks to fundamental rights and fundamental values, would be able to deal with dangers coming from cross-border dissemination of audiovisual content even though in principle another Member State should be in charge of that specific provider and its compliance with the rules.<sup>109</sup>

In view of this system, it is evident that the assignment of jurisdiction, i.e. the decision about which Member State is in charge of a specific provider within the single market, is key for the functioning of the country-of-origin principle. Therefore, over time the criteria with which jurisdiction is to be established according to Art. 2(3) and (4) AVMSD were refined, partly integrating the interpretation by CJEU jurisprudence.

#### b. The consequence of the country-of-origin principle in the AVMSD

As mentioned, several consequences are attached to the country-of-origin principle in the AVMSD. A provider active on the single market and with establishment in one of the Member States receives legal certainty as to which ‘system of law’ it has to comply with. In a certain way, the choice of establishment – if it is not a circumvention situation (see below C.IV.2) – is a choice of law.<sup>110</sup> Although this choice leaves a variety of different legislative frameworks to choose from, each of those is comparable in that

108 Cf. on this *Cole*, The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform, p. 5.

109 This system was extensively presented in *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, pp. 53 et seq.

110 See on this also *Harrison/Woods*, Jurisdiction, forum shopping and the ‘race to the bottom’.

the main elements of the AVMSD are transposed within the margin left to the Member States but which nonetheless lead to a certain uniformity at least in the wording of the applicable laws.

In addition to the provider's perspective, the most important consequence is the responsibility created by the choice of establishment of the provider on the side of the Member State that automatically becomes competent. The Member States cannot choose for which providers they want their framework to apply, but the establishment – according to the criteria of the AVMSD – by the provider automatically leads to jurisdiction and with it to the responsibility to actively ensure compliance of that provider with the standards deriving from the AVMSD itself. Thus, these standards reflect not only the minimum harmonisation level achieved by the AVMSD but also the minimum compliance assurance that Member States have to realise for 'their' providers. This does not hinder the introduction of stricter rules than the minimum harmonisation even in the fields that are harmonised by the Directive – a possibility explicitly authorised under Art. 4(1) AVMSD (see further below C.IV). These rules may then only be directly applied to the providers under own jurisdiction. Member States are hindered by the country-of-origin principle, however, of undermining the minimum harmonisation level by either not having a sufficient (in view of the transposition requirement) legislative framework or by not enforcing it efficiently against providers under their jurisdiction.

In view of Member States that are not directly competent for a specific provider because it does not fall under their jurisdiction, the country-of-origin principle has the consequence of not being able to impose its own legal framework to these providers. This consequence of the principle is limited as was mentioned above. The restriction of imposing measures against such providers only concerns the coordinated fields of the Directive, and, more importantly, the Directive itself foresees exceptions to the application of the country-of-origin principle and includes two detailed procedures for measures that the 'receiving' Member State can take based on content emanating from a provider under the jurisdiction of another Member State.

For providers not established in the EU and therefore not falling under the mechanism in Art. 2(3) (see on this below C.III.2.c), there is no limitation for the jurisdiction of each Member State; as a consequence they can apply any rules they may have set up for such information society services.



c. Other codifications of the country-of-origin principle

As has been presented in previous studies,<sup>111</sup> the country-of-origin principle was not only enshrined in the AMVSD but also in other legislative acts of relevance for the audiovisual media/content dissemination sector.<sup>112</sup> Although the application of the fundamental freedom to provide services does not necessitate per se the application of a country-of-origin principle, restrictions of cross-border trade even without an inclusion of the country-of-origin principle in secondary law would need to be proportionate and comply with Union law more generally, in particular with fundamental freedoms.<sup>113</sup> In case of inclusion of the country-of-origin principle in a given piece of legislation, the question of assignment of responsibility to a Member State and the limitation for others is more clear.

Firstly, in the context of this study it is relevant to question whether the rule was extended to VSPs when these were included in the scope of application of the AVMSD with the revision in 2018. Although the scope of the Directive was indeed extended to include these new types of providers, they are separately addressed in an own chapter (IXa.). Besides the relevant definitions for these actors in Art. 1 AVMSD, there are no further references to VSPs at the beginning of the Directive. Chapter II with the general provisions clearly limits these provisions to audiovisual media services and thereby a category distinct from VSPs. For VSPs there is therefore a specific jurisdiction rule included in Art. 28a AVMSD. Paragraph 1 of that provision addresses the regular case according to which the provider falls under the jurisdiction of that Member State in which it is established. For the purpose of the notion of establishment for these types of providers a reference is made to Art. 3(1) ECD, which – as will be shown below – includes the country-of-origin principle read in connection with Art. 3(2) ECD.

For VSPs without an establishment in an EU Member State, with Art. 28a (2)–(4) AVMSD the Directive sets up a specific rule, with which a broad interpretation of what other links of providers can be used to assume an establishment. Mainly this relates to other parts of an undertaking that may

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111 *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp.173 et seq.; *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, pp. 143 et seq.

112 See more generally on the country-of-origin principle and its inclusion in legislative acts concerning other sectors *Sørensen*, in: *Nordic & European Company Law*, LSN Research Paper Series No. 16–32.

113 More detailed *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, pp. 144 et seq.

not be offering the VSP service but being addressable by a Member State due to an establishment which then is used to bridge to the actual VSP service provider within that larger undertaking or group. Similar to the multi-layered rules on how to determine which Member State is actually in charge in case of several establishments of audiovisual media service providers, the rule for VSPs clarifies these different combinations. Originally, the jurisdiction rule for VSPs was included as the legislators wanted to avoid a situation in which VSPs, which in the most important cases were originally not EU-based companies, would be able to evade the new rules by not establishing themselves in an EU Member State while being active there with other economic activities. Recital 44 underlines the goal of ensuring that “it is not possible for an undertaking to exclude itself from the scope”. In practice, since the transposition of the AVMSD in the Member States this residuary clause for non-established companies has not become very relevant, as the providers that were in focus when creating the new rules – but also many others – have actual establishments in one of the EU Member States for their VSP activity, which is why no other ‘deemed to be established’-link is needed.

Therefore, although the VSP jurisdiction provision is separate from the rules for audiovisual media services, with its reference to the ECD it follows the same idea of one national jurisdiction, the one where it is established, to apply to a given VSP.<sup>114</sup> In that way the approach resembles the country-of-origin principle. This observation is underlined by the reference to Art. 3 ECD in order to determine when a VSP is deemed to be established. Besides the AVMSD, it is, secondly, the ECD that has prominently featured in its ‘internal market clause’ the country-of-origin principle and the limitation in Art. 3(2) ECD that Member States may not restrict services falling under the scope of the ECD and coming from other Member States. Although in detail the enshrinement of the country-of-origin principle is different here from the AVMSD, for the main elements it is the same approach.<sup>115</sup> The starting point is the assignment of ensuring compliance with the ECD to the Member State that is the country of establishment – origin – of the information society service. This shall again lead to legal certainty for the providers which can then offer their services across the

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114 Cf. also *Kukliš*, Video-sharing platforms in AVMSD: a new kind of content regulation, p. 305. Cf. also *Cavaliere*, Who’s sovereign? The AVMSD’s country of origin principle and video-sharing platforms, pp. 407 et seq.

115 Cf. the comparison made in *Cole*, The Country of Origin Principle; cf. also *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp. 99 et seq.

single market on the basis of compliance with the rules of their home country, including the rules resulting from very first harmonising steps for e-commerce services achieved by the ECD. The non-interference by other Member States is the other consequence, but also here there are exceptions to the rule and Member States may take measures against providers not under their jurisdiction. For providers not established in a Member State of the EU, as is the case for the country-of-origin principle in the AVMSD, there is no limitation for the jurisdiction of each Member State; therefore these Member States can apply any rules they may have set up for such information society services.

The internal market clause of the ECD and the country-of-origin principle laid down therewith are not affected by the entry into force of the DSA. Although the Regulation amends certain parts of the Directive and deletes them, this only concerns the liability privilege provisions of Arts. 12 to 15 ECD, as Art. 89 DSA shows. In addition, as the substantive rules are laid down in the DSA itself in binding form, there is no question of inclusion of a country-of-origin principle in regard to substantive rules. However, the question of establishment is still relevant in a comparable way as with the country-of-origin principle, but here – as Art. 56(1) DSA states – in order to determine which Member State has the power to supervise and enforce the rules of the DSA. In this light, it is rather a procedural than a substantive jurisdiction choice that can be made by the providers when deciding on their main establishment (for EU-based providers).

## 2. Current Scope of the Country-of-Origin Principle

### a. The determination of jurisdiction concerning a provider

As a basis of the country-of-origin principle, rules on clearly determining jurisdiction are essential. Art. 2(2) AVMSD relies for this either on an establishment (further detailed in para. 3) or – only in a subsidiary manner if the criteria of para. 3 are not met – on the criteria which can be applied to providers not established in the EU under certain conditions (further detailed in para. 4).<sup>116</sup>

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116 Cf. extensively on the following *Cole*, The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform; *Weinand*, Implementing the EU Audiovisual Media Services Directive, pp. 57 et seq.

As the standard case to decide on jurisdiction, the provision sets the criterion of the establishment of the provider.<sup>117</sup> This is defined in para. 3 and contains a number of constellations reflecting that many undertakings active in the media sector are active in multiple territories and therefore often have company structures with several offices in different Member States. In principle, jurisdiction is determined by the place of establishment, whereby the location of the media service provider's head office is decisive in different variations. Establishment according to Art. 2(3) has two cumulative elements: the head office of the provider and the place where editorial decisions about the audiovisual media service are made. There are different constellations of these two elements possible, depending on whether both are located in one Member State, in two different or several Member States or when decision-making takes places outside of the EU.<sup>118</sup> If an establishment is not clear by referring to the seat, then one has to rely on the criterion on the relevant workforce's location, and under certain circumstances it then depends on the place of first activity of the provider.

Only for situations in which companies operate in some way or other within the EU but without having an establishment according to Art. 2(3), a set of ancillary or subsidiary criteria are applicable as detailed in Art. 2(4). These technical criteria were mainly meant to target the situation of content disseminated on the territory of the EU which had emanated from third countries and for which, due to the use of technology linked to a Member State, there is at least a potential avenue for law enforcement. It was not originally meant to establish a way for any third country provider to be able to use the single market dissemination possibilities without actually being integrated in the market of a Member State. In cases where the dissemination infrastructure is located within or attached to a EU Member State, it is regarded to be appropriate to be able to apply the rules of the Directive, e.g. concerning prohibition of incitement to hatred as a public interest goal. Specifically, the technical criterion refers either to the provider using a satellite up-link in a Member State or a satellite capacity appertaining to a Member State.

If neither of those criteria bring a clear result on establishment, the Directive refers in an ancillary way to the notion of establishment as men-

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117 This was already made clear by Recital 10 of Directive 97/36/EC: "establishment criterion should be made the principal criterion".

118 Detailed overview *Cole*, The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform, pp. 30 et seq.

tioned in the TFEU in the chapter on the fundamental freedoms. Finally, para. 6 excludes from the scope of the Directive services that are meant for reception outside the EU and cannot be received by standard equipment in an EU Member State, which then also excludes the assignment of a country-of-origin principle.

The revision of 2018 brought some marginal changes to the establishment criteria, in the context of which part of the workforce is potentially to be considered in the determination of whether a main establishment is given (the ‘programme-related’ workforce) and by inserting a definition of ‘editorial decision’, which is in line with the previous understanding of this element of the jurisdiction criteria.<sup>119</sup> Besides these clarification, the important change by inserting Art. 2(5a)–(5c) AVMSD was the inclusion of a procedure with which Member States regularly have to check about their jurisdiction – in order to ensure they fulfil their supervision tasks for all relevant providers –, make the jurisdiction publicly known and, if necessary, rely on a newly created conflict-resolution mechanism about jurisdiction matters involving ERGA.

b. The necessary distinction between EU-based providers and third country providers

One important aspect of the country-of-origin principle as it is included in the AVMSD needs to be highlighted as it is connected to some recent challenges of the application of the Directive. The country-of-origin principle is structured in a way that not only providers with a regular establishment in one of the possible countries of origin, the states to which the AVMSD applies, can benefit from the principle but under certain narrow conditions also providers from third countries, as was explained above. This choice of regulatory approach was motivated in view of ensuring some form of reaction to content from such providers that is available widely across the Member States of the EU and uses a technology in dissemination that gives the actual possibility to intervene through one of the Member States. As such providers do not otherwise fall under the scope of the Directive, they therefore do not necessarily have to respect (comparable) standards concerning the content offered in their services, since this is depending on the legal framework (and enforcement of it) in their originating countries.

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119 Cf. on that *Cole*, The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform, pp. 46–48.

The extension of jurisdiction criteria was regarded to be an appropriate answer to this. In the currently applicable form, the subsidiary technical criteria are, however, limited to satellite dissemination of services as both elements of Art. 2(4) AVMSD refer to this technology.

If a third country provider is regarded to fall under the jurisdiction of a Member State due to this technical link to the single market, there is a consequence which was not the intention when including the technical criteria. Those providers can fully benefit of the free movement of their services in the single market although they regularly do not fall under the same type of monitoring than providers ‘properly’ established in the Member State in question. In other words, the narrow entry door of using a satellite-related dissemination with a connection to one of the Member States opens widely to a use of market freedoms that is equal to those providers that are fully under the obligations of the provisions of the AVMSD and its transposition in the national law of the Member State of establishment. The latter may even depend on a license or other authorisation before providers can offer their service. Any other requirements that third country providers using satellite technology may have to comply with, for example in order to be allowed to use a satellite service by an undertaking in one of the Member States, depends on whether or not there are specific rules for this in the domestic law. There is no detailed harmonisation of this aspect in EU law. The first technical criteria refers to the use of a technology, the uplink, which is volatile, can change relatively easy, may not even be entirely clear at any given time (e.g. if several uplink agreements exist) and is readily accessible on the market. The second technical criteria is in practice of high relevance only for two of the Member States, as satellite capacity service providers in France and Luxembourg offer transponder services to the market.<sup>120</sup>

From the perspective of regulatory authorities concerned, dealing with illegal content disseminated by third country providers via relevant satellite technology is potentially problematic for several reasons. There may already be a question of competence to act, as the content providers themselves do not have a direct relationship with that authority.<sup>121</sup> In terms of focus of attention when monitoring the domestic market for audiovisual content

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120 Extensively on this *Cole*, The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform, pp. 36 et seq.

121 For example, in the context of possible consequences to be requested from a satellite company in France concerning the economic sanctions of the EU against the providers of Russian programmes, the French regulatory authority was in doubt

services – assuming a clear competence to do so –, typically such offers will not have the same significance as, for example, the main linear and non-linear services from providers falling under jurisdiction of that Member State or other EU Member States due to direct establishment. Therefore, the capacities of an authority in monitoring and enforcing might rather be concentrated on this main category of providers. It needs to be further considered that measures potentially taken by an authority will not be directed against the actual provider of the illegal content but a technical intermediary which may lead to a higher proportionality threshold and which may be technically difficult to achieve for the provider, e.g. in case of an order to interrupt dissemination of a programme which is included in a package with other (not affected) programmes for which a transponder capacity has been rented. Finally, and from the perspective of other Member States and their regulatory authorities, if they detect the illegality of content by a provider falling under the jurisdiction of a Member State due to the technical criteria, the AVMSD does not contain a procedure with which that Member State or its regulatory authority can be addressed resulting in a mandatory response.

The very different situation of third country providers and regularly established providers in EU Member States as illustrated here results in a clear distinction of the country-of-origin principle as applied to them.<sup>122</sup> The current rule in the AVMSD does not reflect this distinction; nevertheless it has consequences in dealing with current challenges, as will be further explained below.

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whether it was competent to order the interruption of the satellite service for providers covered by the sanction. Its competence to act was clearly confirmed, however, in a ruling of the Conseil d'état (Decision of 9.12.2022, no. 468969; <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-12-09/468969>). The French regulatory authority followed the court's decision in its final decision of 14.12.2022 (<https://www.arcom.fr/nos-ressources/espace-juridique/decisions/decision-du-14-decembre-2022-mettant-en-demeure-la-societe-eutelsat-sa>). For an overview of the sanctions against RT and Sputnik see *Lehofer*, EuG: Keine Nichtigerklärung der Sanktionen gegen RT France; *Lehofer*, Kurzes Update zu den Sanktionen gegen russische Staatsmedien; *Lehofer*, Überwachen, Blocken, Delisten – Zur Reichweite der EU-Sanktionen gegen RT und Sputnik; *Cabrera Blázquez*, The implementation of EU sanctions against RT and Sputnik.

- 122 Cf. also *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, pp. 15 et seq.; *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive (Policy Recommendations), pp. 3 et seq.



c. Specific challenges

(1) The actual jurisdiction criteria and their application

The application of the jurisdiction criteria, namely whether the conditions of an establishment in the meaning of Art. 2(3) AVMSD are fulfilled, have worked well in practice over time, especially since the early jurisprudence of the CJEU on this question was integrated in the first revision of the TwF Directive. There have been a few instances where the establishment decision by a Member State was challenged by others, e.g. because it was questioned whether the head office of a specific provider was the place where the editorial decisions are taken.<sup>123</sup> But in the vast majority of cases, the establishment criteria brought clear results. With the insertion of an additional definition in the AVMSD 2018 on “editorial decision” in Art. 1(1) (bb) and with the addition of the programme relevance of the concerned workforce when applying the criteria, the interpretation of the previous provision was confirmed. More transparency in practice will be created by the publicly available database listing jurisdiction over providers, because potential double-jurisdiction instances will be immediately visible to the Member States, regulatory authorities, ERGA and the Commission, as they become evident when entering the data about jurisdiction decisions. Therefore, Art. 2(5c) also introduced a formal procedure for resolving possible conflicts of jurisdiction, which with involvement of ERGA leads to a final allocation of jurisdiction in such cases.

The jurisdiction list, which does not only exist for audiovisual media service providers according to Art. 2(5b) AVMSD but also for VSPs according to Art. 28a(6) AVMSD, will serve an additional purpose. It will be visible which Member State is in charge of a specific provider and therefore has the obligation to ensure that that provider complies with the legal framework applicable. This can substantiate further any request from one Member State (through its regulatory authority) to another (or its regulatory authority) to take action against a provider under its jurisdiction. In view of an effective enforcement of the minimum harmonisation standards of the Directive also concerning VSPs and on-demand services which may not be mainly active in the country of establishment and for which typically no

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123 See, for example, the underlying dispute to the (inadmissible) preliminary reference procedure in CJEU, case C-517/09, *RTL Belgium SA*, ECLI:EU:C:2010:821. The same constellation has been brought to the attention of the Court again recently in the pending cases *RTL Belgium and RTL BELUX*, C-691/22 and C-692/22.



licensing requirements are foreseen – this in turn is the explanation why in the past there has been less regulatory scrutiny in comparison to linear providers –, this visibility of jurisdiction is a first important step to avoid that jurisdiction responsibilities are not assumed by a Member State.

In applying the jurisdiction criteria, it is important to follow the hierarchy of the criteria. Beside the fact that the technical criteria of Art. 2(4) AMVSD are subsidiary to those in Art. 2(3) AVMSD, Art. 2(3) (a) AVMSD, which is based on establishment, is the regular case if both relevant elements of the provider are present in the same Member State. If such a constellation is applicable, there is no need to check for any of the other criteria. More importantly, the criteria are based on objective factors and not a subjective understanding of the provider, which leads to an automatic establishment of a provider if the criteria are fulfilled. Attempts at disguising an actual establishment by claiming not to be present in one of the EU Member States in order to be able to rely on the technical criteria only to benefit from access to the single market are therefore not possible under the provisions of the AVMSD.<sup>124</sup>

## (2) The situation of third country providers or licences

As described above, although the AVMSD in principle is aiming at regulating providers established within the EU Member States, through the technical criteria there is an extension up to a certain extent to third country providers if these are using a satellite dissemination with a link to a Member State and thereby being deemed under jurisdiction of that Member State. The jurisdiction system established by the Directive was initially not designed for providers who broadcast from outside the EU, which is why Member States themselves remain responsible for such offers, for example, in case they intend to take action against illegal content. It is

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124 An example of such an attempt was the activity – before suspension of all channels due to the sanction decision of the EU – of RT DE which claimed it would not fall under jurisdiction of Germany and did not have to apply for a license in order to be able to broadcast. The decision of the regulatory authority was confirmed by the administrative court of Berlin in interim proceedings (decision of 17.3.2022, no. 27 L 43/22, ECLI:DE:VGBE:2022:0317.27L43.22.00). See for a summary of the case *Medienanstalt Berlin-Brandenburg*, press release of 18.3.2022, <https://www.mabb.de/uber-die-mabb/presse/pressemitteilungen-details/verwaltungsgericht-berlin-bestaetigt-mabb-im-fall-rt-de.html>.

only different in case there is a technical link, which is actually a simulated or artificial link to the jurisdiction of a Member State. Providers being linked to the scope of the AVMSD 'only' by using a satellite uplink or capacity do not subject themselves to the full media law regime of the Member State which has jurisdiction in contrast to the situation if they had a regular establishment there. In practice, only two Member States, or more specifically two satellite providers located in those two Member States, are the ones that can create the link to the satellite capacity and thereby jurisdiction under that criterion. The administrative practices in those two Member States differ concerning the way the satellite providing companies are treated, at least until now.<sup>125</sup>

With regard to the satellite uplink criterion, many Member States can be concerned. The problem here is that the uplink can be volatile, meaning it can change relatively easy from Member State to Member State and also in multiple instances. Renting uplink capacities is relatively easily accessible. As a result of these factors, it can become unclear in practice which Member State can claim, and has to apply, jurisdiction to a given audiovisual media service provider if the uplink is the only criterion creating jurisdiction. It is therefore not surprising that in such uncertain cases the main focus of regulatory authorities – if they have power of approaching the service providers of the uplink (or the above-mentioned satellite capacity providers) at all – is not on these services but on their domestic services, respectively those for which they have clear responsibilities in their monitoring and enforcement activity.

In addition, a problem is to be seen in the fact that these exceptional constellations that create jurisdiction without an actual establishment only refer to one specific dissemination technique. The creation of jurisdiction is limited to the context of satellite dissemination, and equivalent rules to deal with non-EU providers in the online dissemination of audiovisual (media) content are missing. Thus, it is only in the case of dissemination via satellite that Member States, at least potentially, can exceptionally derogate from applying the country-of-origin principle by obstructing the free reception and retransmission of an audiovisual media service (see below C.III.3) even if it is a third country provider which falls under jurisdiction of another Member State due to the technical criteria. No such possibility exists under

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125 Cf. for recent developments in France concerning the undertaking Eutelsat above fn. 121.

the AVMSD in case of online dissemination. In such cases restrictions to the freedom to provide such services across borders – if coming from another provider of another Member State and only if ‘properly’ established there, as clearly derives from Art. 3(1), (2) in combination with Art. 2(c) ECD – could only be taken under the procedure of Art. 3(4) and (5) ECD.<sup>126</sup> These procedures do not necessarily fall under the competence of the regulatory authorities for audiovisual media services so that the two approaches under AVMSD and ECD already fall into different enforcement systems. As the substantive provisions of the AVMSD do not make a distinction between methods of dissemination (if an audiovisual media service is concerned and it falls in the same category as the one compared to), it may seem contradictory from the perspective of recipients that the question of how to react to possible illegal content especially from third countries depends to a large extent on how this content is distributed to their end devices.

Concretely, this situation results in the following consequence in case of an illegal content coming from a third country provider, even if it has a licence for its service from that third country: if it is a ‘pure’ non-EU provider, the competence for supervisory measures depends on whether a Member State provides for substantive provisions and procedures to deal with such constellations under its own legal framework, as all Member States remain in charge. On the other hand, it depends whether a given Member State – or the competent regulatory authority – even regards a particular situation as being problematic. Where such need for action is seen, each EU Member State in which the content is disseminated can take action if the service or content is regarded by the respective national legal framework to be illegal. There is then no coordinated approach between these States, unless such an approach can be established through bilateral or multilateral coordination, which could be possible within the framework of the ERGA and only insofar as the respective national legal systems of the Member States concerned and willing to cooperate allow for comparable possibilities of reaction. If, however, there is no need seen to react or a national legislative framework does not foresee a reaction, then there is a falling apart of regulatory reaction across Member States. If there is jurisdiction over the non-EU provider – via the technical link –, then the reaction depends only on that one Member State (if it is not for the use

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126 Cf. on this extensively *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, pp. 174 et seq., pp. 253 et seq.

of the exceptional procedures described below). In both situations there would not necessarily be the same result or effect in all Member States, even though potentially an offer available across the single market may be endangering for all parts of it.

### 3. Possibilities and Procedures to Derogate from the Country-of-Origin Principle

#### a. Explaining the system

Even if jurisdiction of a Member State over an audiovisual media service provider exists due to the criteria mentioned above, the standard of law enforcement reached by the competent Member State may not be regarded as satisfactory from the point of view of some or all other Member States affected by the service in question. This is especially relevant if a service even targets a specific Member State – more precisely its population – transmitting it from another Member State, because in that case the illegality of content or services available may not be very relevant for the Member State having jurisdiction in contrast to the targeted/receiving Member State, e.g. because of language reasons. Therefore, as mentioned, the AVMSD included from the outset the possibility for Member States to exceptionally be able to derogate from the country-of-origin principle and the connected obligation not to restrict freedom of reception or retransmission of incoming services.

The system for such temporary derogations is laid down in Art. 3(2), (3) and (5) AVMSD and was overhauled by the revision in 2018 in an extensive manner.<sup>127</sup> In short, the procedure is a multi-step process that can be used in case a Member State successfully can claim a serious violation of specific rules of the AVMSD by a non-domestic provider and includes that provider, the country of origin and the European Commission. As it is an exception to the otherwise binding principle of not restricting incoming signals and challenges the activity of the country of origin, that Member State is included in the procedure in order to safeguard an interest of both

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127 On the previous system which was different for some of the procedural steps and especially differentiated between derogations for linear and non-linear services, the latter being aligned (then) with the procedure in the ECD for information society services, cf. *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, p. 114; *Cappello (ed.)*, Media law enforcement without frontiers, pp. 16 et seq.

Member States concerned. As will be shown in more detail in the following section, since the revision in 2018 the ERGA also plays an important role in the procedure.

In more detail, the procedure works as follows and is conditional on several steps, while being only limited to certain areas. Namely, as Art. 3(1) AVMSD states, the principle of free reception and retransmission only binds the Member States and prohibits any restriction if the reason for doing so falls “within the fields coordinated by this Directive”. Difficulties may therefore already arise in determining whether a certain situation falls under the coordinated matters, because otherwise a Member State can take restrictive measures without having to follow the procedure of Art. 3 AVMSD. This can be the case, for example, when it comes to harmful content such as disinformation, which is not regulated in itself by the Directive. The CJEU has confirmed in the past that there are measures possible on the basis of issues that are possibly partly regulated in the Directive but not for the specific aspect used by the Member State in the specific situation. Such issues concerned, for example, consumer protection rules which are also the basis for parts of the rules of the AVMSD but (at the time of the decision even more so) are not comprehensively dealt with by the AVMSD in every regard.<sup>128</sup> Nonetheless, for illegal or harmful content, e.g. due to violation of rules for the protection of minors, the fact that there are general rules which need to be detailed further by the Member States means that the area is within the coordinated field. This question also plays an important role in the anti-circumvention context (see below C.IV.2).<sup>129</sup> Recital 10 of Directive (EU) 2018/1808 contains a declaratory statement that measures taken by Member States outside of the coordinated field have to respect the principle of proportionality as they affect the freedom to provide services if audiovisual media services are concerned. It furthermore underlines that

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128 CJEU, joined cases C-34, C-35/95 and C-36/95, ECLI:EU:C:1997:344, *Konsumentombudsmannen v. De Agostini and TV-Shop*; cf. also Case C-11/95, ECLI:EU:C:1996:316, *Commission v. Belgium*, esp. para. 34.

129 In that context cf. CJEU, Case C-555/19, ECLI:EU:C:2021:89, *Fussl Modestraße Mayr*; *Cole*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, pp. 7 et seq. for one example concerning commercial communication rules. For measures taken that concern audiovisual media services but are instruments not within the coordinated field cf. CJEU, Case C-622/17, ECLI:EU:C:2019:566, *Baltic Media Alliance*, para. 72 et seq.

the measures taken are not allowed to amount to preventing retransmission in case of television broadcasts.<sup>130</sup>

The actual procedures for derogation depend on which violation is claimed. Art. 3(2) AVMSD concerns reactions to violations of Art. 6(1)(a) AVMSD – incitement to hatred – or Art. 6a(1) AVMSD – protection of minors against hearing or seeing potentially harmful content. The infringement must have been manifest, serious and grave. Alternatively, a prejudice or serious and grave risk of such prejudice of public health is addressed by this provision. Art. 3(3) AVMSD concerns violations of Art. 6(1)(b) AVMSD – public provocation to commit terrorist offences – or a prejudice or serious and grave risk of prejudice to public security. The second procedure concerns violations that are regarded to be even more serious, which is why the other conditions for this procedure are (slightly) lighter than for Art. 3(1) AVMSD. In addition, Art. 3(5) AVMSD even foresees an accelerated procedure for urgent cases in which the procedural inclusion of the other parties and the review of compatibility of the measures takes place only after the measures have already been put in place; this special urgency procedure only relates to the category of violation covered by Art. 3(3) AVMSD.

For Art. 3(1) AVMSD the violation has to have taken place twice during the period of the last 12 months before the derogation consideration is initiated. In this procedure the media service provider, the country of origin and the Commission need to be informed in writing of the reasoning behind the measures and the proposed measure the Member State will take in the next case of violation. That procedure has to safeguard the right of defence of the provider concerned (Art. 3(2)(c) AVMSD), and a condition is that the attempt to cooperate with the country of origin and the Commission on this matter had not led to “an amicable settlement” within a narrow timeframe. For Art. 3(2) AVMSD an occurrence just once in the previous 12 months is sufficient, otherwise the procedure is the same as described except that the last step of consultation is not included. After the procedure is completed to this point, for both paragraphs it is then the Commission after having consulted ERGA to take a decision on compatibility of the measure with EU law. So far, not many cases have been completed under the procedure as it already existed before 2018 and since the revision. These

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130 Cf. on that CJEU, joined Cases C-244/10 and C-245/10, EU:C:2011:607, *Mesopotamia Broadcast und Roj TV*, para. 36 et seq. On that *Cole*, Note d’observations, « Roj TV » entre ordre public et principe du pays d’origine.

cases will be introduced in the following section to show the complexity of the procedure leading to long timespans between initial violations and measures finally being declared compatible with EU law in a specific case.

b. Application cases

All the cases so far involved reactions by regulatory authorities in two of the Baltic states against Russian-language and Russian state-owned broadcasting services established in another EU Member State (the “Baltic cases”<sup>131</sup>). These services were suspended from being broadcast for several months due to their content inciting hatred, which endangered social cohesion in the states concerned. In these cases, Lithuania<sup>132</sup> and Latvia<sup>133</sup> demonstrated that programmes in those services were addressing mainly the Russian-speaking minorities in their territory and endangering public policy due to the incitement to hatred contained in some of the programmes. The measures were introduced after 2014 and can be seen as a reaction to the

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131 Cf. also *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, where the cases are addressed in this way. This section here is based on that point of the Background Analysis provided by the same authors.

132 Commission Decision of 10.7.2015 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 10.7.2015, C(2015) 4609 final; Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 17.2.2017, C(2017) 814 final; Commission Decision of 4.5.2018 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 4.5.2018, C(2018) 2665 final.

133 Commission Decision of 3.5.2019 on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 3.5.2019, C(2019) 3220 final.

Russian aggression in Ukraine in that year and the subsequent increase in risk stemming from those channels.<sup>134</sup>

In April 2015, Lithuania formally notified to the Commission its decision to suspend the channel RTR Planeta for a three-month period. The broadcaster was under jurisdiction of Sweden due to a satellite uplink used in that Member State, and consultations with authorities there had not led to a solution that responded to the issues Lithuania had raised. The Commission therefore found that Lithuania had fulfilled the procedural requirements of the AVMSD. As to the nature of the programmes, the Lithuanian authority argued that a programme from March 2014 “instigates discord and a military climate and refers to demonization and scapegoating with reference to the situation in Ukraine”<sup>135</sup>. Secondly, with regards to a programme from January 2015, the authorities highlighted statements deemed to aim “at creating tensions and violence between Russians, Russian-speaking Ukrainians and the broader Ukrainian population”<sup>136</sup>. Additionally, two programmes from March 2015 were qualified as inciting tension and violence not only between Russians and Ukrainians but also against the EU and NATO States. In its decision on the admissibility of the three-month suspension, the Commission confirmed the context with the ongoing military confrontation involving Russia and the possible tensions which could arise due to the content of the programmes.<sup>137</sup> In evaluating whether the elements of incitement and hatred were fulfilled, the Commission relied on the interpretation delivered by the CJEU in the case of Mesopotamia Broadcast and Roj TV according to which the Directive’s

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134 Cf. for background *Kokoly*, Exceptions to the Principle of Free Transmission and Retransmission of Audiovisual Media Content – Recent European Case-Law, pp. 83, 91. On the background also *Broughton Micova*, The Audiovisual Media Services Directive, pp. 271–272.

135 Commission Decision of 10.7.2015 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 10.7.2015, C(2015) 4609 final, para. 18.

136 Ibid, para. 18.

137 Ibid, para. 19.



restriction of incitement to hatred is a general public order consideration that goes beyond protection of minors.<sup>138</sup>

An additional three-month suspension was notified to the Commission by Lithuania in 2016, which also included the suspension of the retransmission of RTR Planeta online, for which the Commission confirmed the compatibility, too.<sup>139</sup> In 2017, Lithuania again notified a suspension of RTR Planeta, but this time based on new facts for a period of twelve months because of repeated violations. In that decision it is important that the Commission underlined a margin of discretion of the Member States to determine the appropriate measures. Therefore, the duration of a suspension would only be questioned by the Commission if it were manifestly disproportionate, which was not the case here.<sup>140</sup>

Latvia notified a suspension of the channel Rossiya RTR. After initiating the procedure in 2018, Latvia fulfilled the procedural steps and suspended the channel for three months. The Commission confirmed in the same way as in the Lithuanian cases that a programme with statements by a Russian politician incited to violence, advocating for a military invasion of the Baltic States and other Member States as well as to hatred against Ukrainians, stating that they would be “attacked and completely destroyed”<sup>141</sup>. In the first derogation procedure decided under the revised AVMSD, the Commission confirmed that another twelve-months suspension order of the

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138 CJEU, joined Cases C-244/10 and C-245/10, EU:C:2011:607, *Mesopotamia Broadcast und Roj TV*, para. 36 et seq. On that *Cole*, Note d’observations, « Roj TV » entre ordre public et principe du pays d’origine, pp. 50 et seq.

139 Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 17.2.2017, C(2017) 814 final.

140 Commission Decision of 4.5.2018 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 4.5.2018, C(2018) 2665 final, para. 26.

141 Commission Decision of 3.5.2019 on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 3.5.2019, C(2019) 3220 final, para. 11.

Latvian regulatory authority against Rossiya RTR for comparable reasons was compatible with Union law.<sup>142</sup> As will be explained below, an important novelty of the revised procedure is the inclusion on ERGA and the need for it to provide an opinion, in which it explained its own understanding of the new role and presented extensively the facts as provided for by the national regulatory authority.<sup>143</sup> The assessment by ERGA and the Commission included the checking of having taken the procedural steps as well as whether the substantive arguments concerning the violation were convincing; the ERGA had supported in its finding the proportionality of the action by the regulatory authority, as it was subsequently also concluded by the Commission.

All these cases were initiated and decided before the Russian federation started the war against Ukraine in February 2022. They show that, although there is a procedure to react to problematic content, if the Member State with jurisdiction does not do so, the time-lag is highly problematic and the effectiveness of the measures depends on what the targeted Member State is able to do; namely, if the programme is also disseminated by satellite, it needs to rely on the procedures provided for in Arts. 3 and 4 AVMSD. The cases decided so far give an indication on how the procedure can be successfully applied, but at the same time the cases concerned violations that were clear; so the substantive assessment based not last on an earlier case decided by the CJEU which necessarily resulted in supporting the findings of the national regulatory authorities. Therefore, it is mainly the acknowledgement of the proportionality of the measure – both concerning the type of measure (e.g. order for suspending retransmission of a channel to a cable network provider) and for how long it was applied – that contributes to building a catalogue of measures which can be used in other comparable cases. Nonetheless, as mentioned, with only a handful of cases this is very limited, and the cases mainly concerned television broadcasters, for which the measures imposed – e.g. on cable network providers available in those Member States – were quite obvious. In this light it cannot be concluded that the procedure under Art. 3(2), (3) and (5) AVMSD is so

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142 Commission Decision on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council to restrict retransmission on its territory of an audiovisual media service from another Member State, Brussels, 7.5.2021, C(2021) 3162 final.

143 ERGA, Opinion on decision No. 68/1–2 of the Latvian National Electronic Mass Media Council restricting the retransmission of the channel Rossiya RTR in the territory of Latvia for 12 months.

far a strong instrument in maintaining the interest of Member States being targeted by illegal content from providers under jurisdiction of another Member State.

The only CJEU case that can add to the understanding of the reach of the procedure is the already mentioned confirmation in *Baltic Media Alliance* that the national regulatory authority of Lithuania had taken a measure against a non-domestic provider that was not an application of the derogation procedure, because it did not constitute in restricting retransmission of the service in question.<sup>144</sup> The authority had originally not suspended the Russian-language channel NTV Mir Lithuania broadcasting under UK jurisdiction for violations comparable to those mentioned above and based on wrongful information in the programmes leading to incitement; instead it had limited the way the channel could be disseminated in Lithuania, namely for a twelve-month period only in pay-TV packages. The Court's decision only concerned this measure although the national regulatory authority had subsequently moved to a suspension order soon after the original decision. Because the CJEU had only been asked by the referring national court whether or not the measures fell under the AVMSD procedure and had to be assessed for proportionality under those provisions, the answer neither had to check the proportionality of the actual measure nor discuss any other point after underlining that the measure was below the effect needed to be covered by a restriction under Art.3(1) AVMSD. Therefore, no additional indications on the actual procedure exist so far by the CJEU.

#### 4. Institutional Cross-Border Cooperation: The Role of ERGA

##### a. The definition of ERGA's role in the AVMSD

With the reform of the AVMSD in 2018, ERGA was assigned a specific role in the cross-border enforcement through the derogation procedure of Art.3 AVMSD. This concerns first the above-mentioned involvement in specific cases when a Member State invokes its derogation power under para. 2 and 3, but not in the urgency procedure under para. 5 (which relates only to violations as included in the procedure under para. 3). The Commission shall request the opinion of ERGA before taking a decision

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144 CJEU, Case C-622/17, ECLI:EU:C:2019:566, *Baltic Media Alliance*, para. 84.

on the compatibility of the Member State's derogation measure with Union law. This leads to an information of all the representatives of Member States regulatory authorities united in the ERGA about such a case, which already can help in order to draw attention to an issue regarded as exceptionally problematic by the Member State intending to take a measure. This information from ERGA to its members is also referred to in Art. 30b(3)(c) AVMSD, according to which it has to provide its members with information on the application of Art. 3 AVMSD in particular. Already in the previous version of the Directive and maintained still in Art. 30a(1) AVMSD, the mutual information flow necessary for the application of, inter alia, the derogation procedure was stipulated. Originally (in the previous Art. 30) it was a request that Member States provide each other and the Commission with the necessary information, now it is the national regulatory authorities and bodies as well as the Commission. In addition, there is a specific encouragement for a close cooperation between two Member States in case of a provider under jurisdiction of one of those States that is targeting the other (para. 2 and 3).

Although the information flow under Article 30b(3) from Commission to ERGA is not regulated in a temporal sense, the obligation to request the opinion under Art. 3(2) and (3) as well as the task of the ERGA under Art. 30b(3) (d) AVMSD to give the opinion necessitate a swift forwarding of the information as the Commission is bound to a three-months decision period by Art. 3 AVMSD counted from the moment of receipt of the measures taken by a Member State, and this decision has to include the opinion of ERGA as well as keeping the Contact Committee duly informed during the procedure. In the first case under this new procedure, after having completed the initial steps foreseen, the Latvian regulatory authority adopted its restrictive measure on 8 February 2021 and notified the Commission by letter of 12 February; ERGA was requested for an opinion already on 15 February and adopted it on 10 March; in between the broadcaster concerned by the measure had been invited to comment on the procedure by the Commission, which then took the final decision on 7 May 2021.<sup>145</sup> Another indication of expected time-frames can be deducted from Art. 2(5c) AVMSD. According to that provision, if there is a dispute

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145 Commission Decision on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council to restrict retransmission on its territory of an audiovisual media service from another Member State, Brussels, 7.5.2021, C(2021) 3162 final, no. 7 et seq.

about jurisdiction between two Member States in the context of derogation (or anti-circumvention) procedures, the Commission can request ERGA to provide an opinion on the matter, in which case this shall be delivered within 15 working days.

The role of ERGA in connection with this procedure has a second dimension. Art. 3(7) AVMSD, introduced in 2018, foresees a regular exchange of experiences and best practices by the Member States and the Commission regarding the procedure set out in Art. 3. This exchange shall take place in the framework of the Contact Committee and ERGA. In its final report on the implementation of the revised AVMSD Directive from the end of 2019, the ERGA noted that its members are detecting an increasing number of infringements that contain cross-border-elements, in particular in the online environment. It took note of the procedures foreseen in Arts. 3, 4 and 30a AVMSD concerning the essential rules of cooperation but pointed out the difficulties to reach satisfactory outcomes in practice. Furthermore, the ERGA remarked they apply to individual cases only and do not establish a general and ongoing cooperation of NRAs, which would be essential to ensure effective enforcement and at the same time preserve the efficiency and stability of the country-of-origin principle.<sup>146</sup> The cooperation Art. 3(7) does not provide for concretely binding or even periodic reporting obligations, an information exchange system or which conclusions should be drawn from this exchange, which is why ERGA Members agreed on further procedural details for cooperation via internal rules of procedure (which ERGA is authorised to adopt under Art. 30b(4) AVMSD) and, more importantly, on a Memorandum of Understanding that will be presented in the next section.

Concerning the role of ERGA in the Art. 3 AVMSD procedure, it should be reminded, as shown above in the first application case, that ERGA has described its approach to preparing its opinions on restrictive measures by one of its members by assessing the aspects that fall “within both legal and practical remit of individual ERGA members”, meaning it has to consider the relevant national legal framework under which the member operated and to extensively take account of “all the actions, or omissions thereof, of the relevant parties” by checking the complete file of a case but without

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146 ERGA Subgroup 3, Implementation of the revised AVMS Directive – Final Report, 2019, [https://erga-online.eu/wp-content/uploads/2020/01/ERGA\\_2019\\_SG3\\_Report-1.pdf](https://erga-online.eu/wp-content/uploads/2020/01/ERGA_2019_SG3_Report-1.pdf).

having to verify the content of the established facts or doing a secondary check of the conclusions drawn by the national regulatory authority.<sup>147</sup>

b. The Memorandum of Understanding between ERGA Members

After ERGA was established formally as part of the institutional structure of the AVMSD with its revision in 2018, its members, the national regulatory authorities, identified the need to further develop and formalise the elements of cooperation as laid down in basic terms in the scope of powers mentioned in the AVMSD. Especially the future oversight of VSPs was regarded to necessitate an agreement on cooperation between each other. This was regarded to be especially necessary because, in contrast to audiovisual media services, content available on the VSPs is generally equal for viewers across all EU Member States, and it is also consumed as such, although content may be organised by recipient-specific interests, for example by recommending only specific language content based on the location of the viewer. In addition, a challenge was assumed that would come with the concentration of the location of many of the major VSPs in one Member State due to their establishment and a (possible) difficulty if all enforcement measures would depend only on that one regulatory authority of the Member State in question.

The agreement on a “Memorandum of Understanding between the national regulatory authority members of the European Regulators Group for Audiovisual Media Services”<sup>148</sup> (MoU) adopted on 3 December 2020 lays out the cooperation between the members in general terms, but also for specific areas such as the VSP-context. It is not a binding document but a commitment by the ERGA Members to apply these ‘rules’ in their cooperation in future.<sup>149</sup> The result of such collaboration and information exchange shall lead to a more consistent implementation of the AVMSD across all Member states.

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147 ERGA, Opinion on decision No. 68/1–2 of the Latvian National Electronic Mass Media Council restricting the retransmission of the channel Rossiya RTR in the territory of Latvia for 12 months. See also above C.III.3.b.

148 ERGA, Memorandum of Understanding between the national regulatory authority members of the ERGA, dated 3 December 2020, [https://erga-online.eu/wp-content/uploads/2020/12/ERGA\\_Memorandum\\_of\\_Understanding\\_adopted\\_03-12-2020\\_1.pdf](https://erga-online.eu/wp-content/uploads/2020/12/ERGA_Memorandum_of_Understanding_adopted_03-12-2020_1.pdf).

149 Cf. also point 4.4. of the MoU on the “non-legally binding” character.

In a brief overview, part 1 of the MoU is about the objectives and principles of cooperation, while part 2 sets out in detail the mechanisms of cooperation between the regulatory authorities. A first important point is that single points of contact are established to receive requests for cooperation from other authorities and that it is laid down when and how requests for cooperation should be issued and how they should be responded to. The MoU distinguishes between requests for information, for example about a particular provider established in the Member State of the receiving authority, and requests for mutual assistance, regarding the implementation and enforcement of the revised AVMSD. The latter can be issued, e.g., when the requesting authority finds that an implementation or enforcement matter relating to the AVMSD has arisen within its territory while jurisdiction over the provider is with another Member State. In order to avoid certain difficulties that have shown in the past concerning procedures included under the AVMSD, the MoU foresees for urgent cases that the requesting NRA may issue an accelerated request for mutual assistance.

The relevance of cooperation concerning VSPs as the basis of the MoU can be seen in that there is a dedicated section concerning VSP matters (section 2.2.1) and the “Implementation and Enforcement” of the AVMSD provisions on VSPs are addressed specifically (point 2.1.3.4. (f)). In dealing with problems concerning content on VSPs, the MoU stresses the use of a ‘macro’ level and systemic approach to regulation rather than individual cases of illegal content present on such platforms (point 2.2.1.1. (d)), which is an approach comparable to that adopted in the DSA regarding systemic risks. Referring to the E-Commerce Directive, the MoU also finds that the mere existence of harmful or illegal content does not automatically constitute a failure by the VSP to take appropriate measures. The section develops new directions for application of the rules concerning VSPs in monitoring these. For example, the MoU recognises that a regulatory authority, even when it does not supervise a VSP, may contribute to finding solutions to regulatory challenges. The regulatory authorities commit to exploring whether dedicated complaints mechanisms used when they address VSP providers could provide added value (point 2.2.1.3.3.). Overall, the MoU supports a pan-European approach towards the regulatory aspects of Art. 28b AVMSD. Part 3 of the MoU concerns the administration, including reporting, mediation between the authorities in case of dispute and the role of the dedicated ERGA Action Group.



Even though the MoU is not legally binding, it is a remarkable effort of self-organisation of authorities across 27 EU Member States in trying to achieve the common goal of enforcing the legal standards set by the AVMSD concerning providers that have a reach across the EU from the outset. It is a form of 'internal procedure' that has the advantage of being able to reflect practical knowledge on how cooperation can work on a daily basis. The disadvantage is that its functioning depends on the voluntary commitment of all of the members. In addition, in order to be successful, the collaboration does not only need active commitment but the regulatory authorities have to be adequately equipped with the appropriate powers and resources by the Member States to be able to dedicate part of their activity to dealing with cross-border issues along the lines of the MoU.<sup>150</sup>

### 5. Interim Conclusion on the Derogation Mechanism

As presented, the 2018 revision of the Directive brought a significant change to the derogation mechanism. By aligning the procedures for linear and non-linear services, which were previously separate and for the latter followed exactly the same procedure as for information society services under the ECD, and amending some of the procedural requirements, a streamlining of the procedures was planned to make the application more easily. However, the final result has not changed the main issue of the time-lag between the moment a regulatory authority sees the need to react to an issue and the conclusion of the procedure. Being able to resort to an urgency procedure without having to wait for any reaction, e.g. by the Commission or the Member State of jurisdiction, has paved the way for a more effective use of the procedure; however, it is limited to the most dangerous situations.

The reaction to Russia's propaganda activities by means of the EU sanctioning regime, which took place on a different legal basis, underlines the necessity of identifying a better possibility to react to problematic content in the context of the AVMSD framework if audiovisual media services are concerned. While adding some additional possibilities in the proposal for

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150 Cf. on this aspect also *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, pp.202 et seq.; *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp.258 et seq.; practical illustration also in *Cabrera Blázquez/Denis/Machet/McNulty*, Media regulatory authorities and the challenges of cooperation.



the EMFA is one way forward, this would not amend the derogation (and anti-circumvention, see below) procedures of the AVMSD as suggested at the moment. The ‘fast-track procedures’ that the regulatory authorities have developed in some parts of ERGA’s MoU are a way of effectuating the derogation procedure. Additionally, the urgency measures allowed under Art. 3(5) AVMSD will show by more frequent use if they are sufficient to respond more effectively to problems of cross-border content dissemination or whether they need to be extended.

An issue that remains unsolved by the last revision and which only surfaced clearly after the successful application of the derogation procedures in the ‘Baltic cases’ is the limited effect such measures have on the actual dissemination of the content. Art. 3 AVMSD concerns a derogation from not restricting ‘retransmissions’ on the territory of the Member State taking action, therefore it is limited to cable or terrestrial retransmission of the content. A broad understanding of Art. 3(1) AVMSD, which mentions that a targeted Member State can deviate from the principle of ‘freedom of reception’, could be in the direction that it concerns any type of dissemination as the flipside of reception. Nonetheless, the technical situation in connection with satellite dissemination renders a measure concerning this method of content distribution without effect if the Member State or its competent regulatory authority that can impact the satellite dissemination itself do not take additional action to remedy the situation. They are, however, not directly obliged by the AVMSD to do so under the provisions of the derogation procedure. This problem occurs also with regard to online dissemination of the same content. Without a legislative amendment, the effectiveness of the derogation procedures will probably remain limited.

#### *IV. The Possibility of Member States to Enact Stricter Rules– Art. 4 AVMSD*

##### *1. The Question of Scope: Fields “Coordinated” by the AVMSD*

In addition to temporary derogation measures, Member States exceptionally have the possibility to deviate from the country-of-origin principle in treating audiovisual media services providers that do not fall under their jurisdiction but that of another Member State. The procedure of Art. 4 AVMSD allows for anti-circumvention measures in case that a provider has evaded stricter or more detailed rules that the Member State has in place concerning providers under its jurisdiction in comparison to the standards

of the AVMSD that have to be in place in all Member States. If it can be proven that the provider in question only established itself in another Member State to avoid application of these stricter or more detailed rules and the service is nonetheless mainly directed at the Member State with the additional layer of rules, then such providers can be exceptionally subjected to specific measures aiming at compliance with these rules. Before presenting the procedure, two conditions need to be briefly recalled.

Firstly, the Member State intending to take measures must have stricter or more detailed rules in place in having used its possibility to ‘discriminate’ not against other EU nationals (or service providers from other EU Member States) but against its own nationals (or domestic providers). Such reverse discrimination is possible under EU law as long as it respects other conditions of EU law. This possibility is explicitly included in Art. 4(1) AVMSD for the stricter treatment of domestic audiovisual media services providers. Secondly, the procedure only needs to be initiated, however, if the stricter or more detailed rules are “in the fields coordinated by this Directive” – a limitation of the application of the country-of-origin principle from the outset as it also applies in the derogation mechanism presented above. In other words: besides being able to introduce stricter or more detailed rules even in the areas for which the AVMSD creates a minimum harmonisation, Member States can – and have to, as Art. 2(1) AVMSD states – apply their legal framework which audiovisual media services providers have to comply with. The same test as described above for the derogation procedure (see C.III.3.b) is relevant under the anti-circumvention provision. In some instances, the relation of national rules to the coordinated fields are clear, e.g. if stricter rules are introduced for commercial communication prohibiting or limiting more than is already the consequence of Art. 9 et seq. AVMSD. This was the case in the only application of Art. 4 AVMSD so far, as will be shown below. But it can be more difficult to distinguish when rules prohibit harmful content, which is also the case for the rules of Art. 6 and 6a AVMSD, while these are limited in reach.<sup>151</sup>

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151 For a discussion of the concept *Cole*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, pp. 7 et seq.

## 2. Procedure for Tackling Circumvention Situations

### a. Explaining the system

Member States can apply stricter rules compared to the minimum level provided for in the AVMSD, i.e. the “field coordinated by this Directive”, on audiovisual media service providers under their jurisdiction, as Art. 4(1) AVMSD explicitly states, as long as these measures are compliant with EU law. When a Member State has such stricter rules, the procedure laid down in Art. 4(2) to (5) AVMSD contains a mechanism to apply such rules also to providers which are not under its jurisdiction but have established themselves in another Member State and therefore are under the jurisdiction of that State.<sup>152</sup> Thus, this mechanism applies only to providers which are established in a Member State according to an establishment based on the criteria in Art. 2(3) AVMSD. For non-EU providers, Member States are anyway free to apply their national rules without having to resort to Art. 4 AVMSD.

The procedure in Art. 4 AVMSD is aimed at resolving the situation in which the Member State of jurisdiction enforces the law as applicable to a provider under its jurisdiction although the service by that provider targets another Member State which has stricter rules than the ones in the AVMSD and, in the constellation given, incidentally also those in the country of origin. It shall apply if the fact that the provider is established in that country of origin and not in the destination State of its service is to avoid falling under the stricter rules. In that sense it is a further exception to the applicability of the country-of-origin principle ensuring a balancing between the interests of both States and the provider concerned.

The rules have to be more detailed or stricter and the service has to be wholly or mostly directed towards the territory of the Member State intending to apply the procedure. The question of targeting is one of the difficult parts of the assessment in the procedure.

If a Member State wants to take appropriate measures against the ‘circumventing’ provider, first the multi-step procedure of Art. 4(2) to (5) AVMSD need to be completed.<sup>153</sup>

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152 Generally on Art. 4 AVMSD see *Kokoly*, The Anti-Circumvention Procedure in the Audiovisual Media Services Directive.

153 Cf. also *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, pp. 20, 21.

In the first step (Art. 4(2) AVMSD), the receiving Member State may make a substantiated request to the Member State having jurisdiction to address the issue while both Member States shall cooperate sincerely and swiftly with a view to achieving a mutually satisfactory solution. The Member State having jurisdiction shall then request the media service provider to comply with the “rules of general public interest” in question, i.e. the stricter or more detailed rules by the requesting Member State. It shall regularly inform the requesting Member State of the steps taken to address the problems identified and, within two months of the receipt of the request, shall inform the requesting Member State and the Commission of the results obtained and explain the reasons, if applicable, where a solution could not be found. Either Member State may invite the Contact Committee to examine the case at any time.

If the receiving Member State is not satisfied with the results of the intervention of the Member State having jurisdiction, i.e. if the provider still does not comply as required under its national law or if there has simply been no reaction within the given timeframe, it can enter a second step according to Art. 4(3) AVMSD. Taking this next step has changed requirements since the 2018 reform. The receiving Member State has collected relevant evidence that the media service provider in question established itself in the Member State of jurisdiction in order to circumvent the stricter rules it would have to adhere to if it were established in the requesting Member State. As further clarified, such evidence shall allow for the circumvention to be reasonably established, without the need to prove an intention of the media service provider to circumvent the stricter rules. Recital 11 of Directive (EU) 2018/1808 mentions that a set of corroborating facts should be established. If that is successfully done, the receiving Member State may initiate the proceeding further described in Art. 4(4) AVMSD in order to adopt measures against the provider which have to be objectively necessary, non-discriminatory and proportionate. Before applying them, it first needs to notify the Commission and the Member State with jurisdiction of its intention to take the measures which it has to describe in a substantiated manner, and it also has to give the media service provider the opportunity to express its views (Art. 2(4) lit. a) and b) AVMSD).

The concluding step of the procedure is that the Commission after having requested an opinion by ERGA and having kept the Contact Committee duly informed of the procedure has to decide about the compatibility of the measures with EU law. There is a time limit for the decision, which needs to be taken within three months of the receipt of the notification

of the intended measures, but this time limit can be expanded for the necessary period if the Commission asks the requesting Member State for additional information where needed (Art. 4(5) AVMSD).

With a positive decision of the Commission, the Member State without jurisdiction can then take the necessary measures it had announced; in case of a negative decision, it has to refrain from such an intervention.

#### b. Application case

Compared to the few cases that have occurred under the derogation mechanism as described above, an analysis of the effectiveness and practical operation of the circumvention mechanism based on precedents is even less fruitful. In fact, only once a Member State has (unsuccessfully) invoked the procedure after this had been introduced to codify CJEU case law concerning the original version of the TwFD.<sup>154</sup>

In that case Sweden invoked the anti-circumvention procedure against two providers broadcasting under jurisdiction of the United Kingdom, which was still an EU Member State at the time. Swedish authorities had notified the Commission in October 2017 of the intention to impose fines against these providers, which it alleged were targeting a Swedish audience and had established themselves in the United Kingdom only in order to circumvent the stricter Swedish rules which prohibited advertisement of alcoholic beverages. At the time, the Swedish law contained a strict ban on alcohol advertising, while the UK legislation applicable to audiovisual media services did not. The AVMSD standard in this regard (laid down now in Art. 9(1)(e) AVMSD) only requires Member States to ensure that audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages; therefore the Swedish law had to be considered as stricter as addressed by Art. 4 AVMSD. However, the burden of proof in light of a circumvention could hardly be met in that case, because the relocation of the providers and the overall situation had occurred partly even before the original TwFD entered into force. Therefore, showing a specific intent retrospectively after such a long time in a sufficient way to

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154 Cf. also *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, pp. 20, 21 where this case is also taken up.

meet the threshold of the procedure (which was still the one before the revision in the 2018 Directive) was difficult from the outset. Accordingly, in its Decision the Commission declared the measures incompatible with the anti-circumvention provision because the evidence provided had to be regarded insufficient in light of the threshold for showing the circumvention.<sup>155</sup>

The introduction of a clarification in Art. 4(4) AVMSD in the 2018 reform – the evidence to be collected in order to give ‘proof’ of the circumvention does not mean that a specific (subjective) intention of the provider has to be proven but that a more objective assessment of the actual circumvention has to be undertaken – meets the difficulty of the one application case that existed before. It is not an easy task to show such circumvention even now, and it was already possible before. As it is an exceptional procedure, only future applications will show whether it can help to answer certain cross-border enforcement challenges. As with the derogation procedure, the anti-circumvention measures can be taken against audiovisual media services providers, both linear and non-linear, but the procedure does not extend to VSPs.

### *3. Institutional Dimension*

In parallel to assigning ERGA a specific role in the cross-border enforcement through the derogation procedure of Art. 3 AVMSD with the reform of the AVMSD in 2018, the same was done for the anti-circumvention procedure of Art. 4 AVMSD. In coming to its decision about compatibility of the national measures, the Commission shall request the opinion of ERGA according to Art. 4(4)(c) AVMSD. Even before that, the jurisdiction over a provider may be in question in issues concerning a question of circumvention by that provider. Art. 2(5c) AVMSD foresees that in such disputes ERGA provides an opinion to the Commission if it so requests, and the Commission, in its decision on compatibility of national measures, also has to take a final decision on the jurisdiction question. For the purpose of Art. 4 AVMSD, the involvement of ERGA also leads to an information of

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155 Commission Decision of 31.01.2018 on the incompatibility of the measures notified by the Kingdom of Sweden pursuant to Article 4(5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services. Brussels, 31.01.2018 C(2018) 532 final.

all its members about the pending matter, as Art. 30b(3)(c) AVMSD gives ERGA the task to provide its members with information on the application of Art. 4 AVMSD. And as it was the case in the previous version of the Directive for Art. 3 AVMSD, the mutual information flow necessary for the application for the circumvention procedure derives from the previous Art. 30 AVMSD – then still addressing the Member States – and now for the regulatory authorities from Art. 30a(1) AVMSD.

#### *4. Interim Conclusion on the Circumvention Mechanism*

With the 2018 revision of the Directive the conditions for application of the anti-circumvention procedure were facilitated slightly, especially concerning the clarification of the burden of proof of such circumvention. However, there have not been any new application cases since the first and so far only case on alleged circumvention of stricter commercial communication rules was unsuccessfully completed. What is more relevant with the changes is that the first step of the procedure in Art. 4(2) AVMSD addresses the ‘spirit’ in which cross-border issues should be resolved between Member States and their regulatory authorities in question: they shall cooperate closely and sincerely, they shall aim at achieving swiftly a solution which is satisfactory for both sides. As this was not always the case in the past, the national regulatory authorities convened in ERGA have already addressed the issue of improved cooperation in cross-border matters by agreeing on the MoU presented in detail above. The formal inclusion of ERGA in the procedure after the revision can contribute to a more intensive exchange between its members also on the question of differing standards in the legal frameworks applicable to audiovisual media services.

As the anti-circumvention measure is a permanent derogation from a situation covered by the fundamental freedom of the Treaty and the country-of-origin principle in contrast to temporary derogation measures to respond to risks posed by specific content, it will continue to have a limited relevance in quantity, and the conditions need to be interpreted narrowly. However, the extension to on-demand service providers by the revision could lead to more cases in the future, and even more so if a comparable provision would apply to any form of audiovisual content dissemination. In addition, effective enforcement of the minimum standards, as laid down in the AVMSD, by all Member States and their regulatory authorities may respond to some issues of treatment of service providers that are under

the jurisdiction of other Member States, which may make it unnecessary to consider resorting to the procedure of Art. 4(2) to (5) AVMSD. In that regard, the relevance of Art. 4(6) AVMSD about effective enforcement can also play a role, which will be presented in the next section.

#### *V. Demanding Effective Compliance and Enforcement – The Relevance of Art. 4(6) AVMSD*

Between 2014 and 2019 a significant number of Member States reported that they encountered issues in relation to incitement to hatred or protection of minors with regard to content of audiovisual media service providers originating in other Member States. Several Member States had used one of the cooperation mechanisms as provided in Arts. 3 and 4 AVMSD and analysed in detail above. In the report on the application of the AVMSD – considering the time period before its revision in 2018 – some of these Member States flagged that the outcome of the cooperation was not entirely satisfactory, either because the procedures were regarded as too cumbersome and time consuming or because the authority of the country of origin did not grant their request for assistance or to take measures against a provider. In addition, other Member States reported on issues regarding providers originating from third countries and the measures that were taken in these cases.<sup>156</sup> Overall, although the cooperation procedure in general was not questioned, the finding clearly underlines that the complexity of the procedures are not regarded as sufficient in ensuring that the regulatory authorities can fulfil their oversight and enforcement tasks.<sup>157</sup>

Although the 2018 revision also took this issue into consideration and attempted at streamlining some of the steps of the procedures of Arts. 3 and 4 AVMSD, the alignment of these procedures for both categories of audiovisual media services did not lighten the conditions and therefore did not facilitate their application. In some aspects, the procedures were even adapted to running for even longer time periods. It was an important step that, irrespective of the limited usability of these two specific cooperation procedures, a more general agreement on how to enhance cross-border cooperation between national regulatory authorities was found in the above

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156 See European Commission, Staff working document: Reporting on the application of Directive 2010/13/EU “Audiovisual Media Services Directive” for the period 2014–2019, SWD(2020) 228 final, pp. 4 et seq.

157 Ibid, p. 6.



described Memorandum of Understanding. It is also not surprising that the call for further formalisation of this cooperation, namely by including more rules on this in the actual Directive or another legal act, continued after the first period of application of the MoU in order to gain legal clarity.

This discussion is reflective of the expectation towards competent regulatory authorities to fulfil the task of enforcing the applicable law. Although the procedures contained in the AVMSD address the Member States and foresee obligations or possibilities of these to take measures against certain media service providers, the actual implementation of the procedures is typically in the realm of the regulatory authorities of the Member State(s) in question. The same is true for a provision in the general section of the AVMSD that has hardly been addressed in scholarship and certainly not in jurisprudence: according to Art. 4(6) AVMSD, Member States shall, by appropriate means, ensure, within the framework of their national law, that media service providers under their jurisdiction effectively comply with the Directive. This compliance is not only achieved by the legislative framework but – “effectively” – by the monitoring and, if necessary, sanctioning of the providers typically by a national regulatory authority. The provision, which is placed within the Article dealing with anti-circumvention measures, merits a brief discussion.

Already the TwFD from 1989 contained in its Art. 3(2) the rule that Member States shall, by appropriate means, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction comply with the provisions of the Directive. The placing in that provision is to be explained with the fact that Art. 3 of the original Directive only briefly stated that Member States were free to enact stricter rules (laying down what already follows from the possibility of reverse discrimination under EU law) without yet having a procedure in case a provider acts to circumvent these rules. In connection with that, the Member States’ obligation (irrespective of such possible stricter rules) was underlined to ensure that at least the (minimum) rules of the Directive are enforced.

In 1997, the rule of Art. 3(2) TwFD was importantly amended by adding the word “effectively” (comply with). This was aimed to emphasise even more the requirement that Member States, in order to strengthen the country-of-origin principle, make sure that the minimum level of harmonisation as provided for by the Directive is actually achieved by an effective enforce-

ment of the rules.<sup>158</sup> It was seen as conditional, according to Recital 16 of that Directive, to “preserve free and fair competition between firms in the same industry”. Interestingly, a novelty of the 1997 revision was later dropped – without specific explanation – in the 2007 furthering of the Directive into an Audiovisual Media Services Directive: Art. 3 had been expanded by a para. 3 that indicated that measures to be taken by Member States – obviously referring to para. 2 and the compliance obligation although in that provision “means” are mentioned – should include “appropriate procedures for third parties directly affected, including nationals of other Member States, to apply to the competent judicial or other authorities to seek effective compliance according to national provisions”. There is no explicit trace of this provision any longer. It had followed such remedy provisions that were also contained in other consumer protection legislative acts. The deletion of this provision does not mean that legal remedies no longer have to be made available for third parties, as this already follows from the general obligation to foresee effective judicial remedies for individuals.<sup>159</sup>

In 2007, this expectation of effective compliance was extended to non-linear services and the numbering changed to Art. 3(6), while with the revision in 2018 it was moved to Art. 4(6). The 2018 amendments touched the provision only with a minor clarification by deleting the words “the provisions of” (this Directive) and declaring what was already the case before: the compliance requirement concerns the Directive as such and therefore not only the provisions within the Directive but also the national transposition acts.<sup>160</sup> So, more than 30 years after the creation of the TwFD we (still) have in Art. 4(6) the requirement that Member States shall, by appropriate means, ensure, within the framework of their national law, that media service providers under their jurisdiction effectively comply with this Directive.

The provision was retained in substance from the very beginning of the Directive until now, and the expectation of “effective compliance” within the national legal framework shows the need to not only set up

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158 Cf. also *Scheuer/Ader*, in: Castendyk/Dommering/Scheuer (eds.), Art. 3 TWFD No. 52 et seq.

159 See similarly *Scheuer/Ader*, in: Castendyk/Dommering/Scheuer (eds.), Art. 3 TWFD No. 64 et seq. and *Dommering/Scheuer/Ader*, in: Castendyk/Dommering/Scheuer (eds.), Art. 3 AVMSD No. 6.

160 Cf. for the earlier discussion *Scheuer/Ader*, in: Castendyk/Dommering/Scheuer (eds.), Art. 3 TWFD No. 61 et seq. based on the old wording.

such a framework, an obligation that stems anyway from the primary law obligation to transpose Directives and give EU law an ‘effet utile’, but to apply it in practice. As mentioned, this in turn means the application of the norms being monitored – and if necessary action taken – by the competent authorities or bodies. Although the word “enforcement” is not explicitly mentioned, this is a decisive factor of compliance. It goes beyond having regulatory authorities established but requires an adequate toolbox of supervision and enforcement powers as well as their actual use. In the cross-border context this also concerns effective remedial mechanisms and cooperation between regulatory authorities to ensure that compliance is achieved, and in case of non-compliance of a provider the country-of-origin principle can be alerted to by other Member States or in practice their national regulatory authorities. If such cooperation requirements are laid down in national law, this would extend only to the authorities of the Member States that were willing to include this form of cooperation into the tasks of the authority to enable it to ensure that all providers under its jurisdiction effectively comply. There would be no reciprocity, which is why the insertion of cooperation obligations in the AVMSD is the solution to ensure effective compliance also in cross-border cases.

The limit of the provision in Art. 4(6) is that the obligation for appropriate means to ensure compliance concerns the legal framework of the country-of-origin principle, so that other Member States cannot directly invoke this provision when assessing whether in a cross-border case a non-established provider is non-compliant. It does, however, underline the relevance that all Member States have to ensure effective compliance of “their” providers, which necessitates at least respecting the rules of the Directive such as, for example, the obligation to protect minors, because the minimum level of harmonisation is what has to be achieved at least in the national legislative framework and its enforcement. Where a Member State does not meet this effective compliance-guarantee, there is a violation of secondary law. The wording of the provision underlines the general principle of giving EU law an effective validity in national law – the above-mentioned ‘effet utile’ – by explicitly stating that systematic underperformance in terms of effective compliance of media service providers is a failure by the Member State under whose jurisdiction the provider in question falls. Such failure to comply with EU law in principle should lead to treaty infringement procedures according to Art. 258 TFEU, which the Commission in its role as ‘Guardian of the Treaties’ has to initiate when it supposes a violation of primary or secondary law by a Member State. Non-transposition of a

Directive is a clear-cut case for this, wrongful transposition when it can be proven, too, and Art. 4(6) AVMSD is reflective of violations that occur not necessarily in the legislative framework of a Member State itself but the way it is applied in practice.