D. The Institutional Dimension: AVMSD and Beyond

I. Institutional System in the AVMSD

With the last revision, the institutional system of the AVMSD underwent significant changes.[161] Whereas the AVMSD had previously – not least in view of questions of competences of the Member States for designing the administrative structures – essentially confined itself to taking for granted the existence of regulatory authorities in the Member States that effectively enforce the implemented rules, Art. 30 now sets out much more concrete and detailed requirements.[162]

According to Art. 30(1) AVMSD, each Member State shall designate one or more national regulatory authorities, bodies, or both. The wording here is interesting, as it does not refer to the establishment or provision of a regulatory authority or body, but to the designation. The AVMSD thus assumes the transfer of tasks to an authority or body that may or may not already exist (this is the same, for example, with the DSA that does not necessitate the DSC to be a newly created authority[163]), and it does not call for the establishment of a new 'media regulatory authority'. However, Member States have to then meet requirements concerning such authorities or bodies. They have to ensure that they are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. Member States retain the possibility to set up (converged) regulatory authorities or bodies having oversight over different sectors. Recital 53 AVMSD specifies that these obligations should not preclude Member States from exercising supervision in accordance with their national constitutional law. National regulatory authorities or bodies should be considered to have achieved the requisite degree of independence if they are not only functionally but also effectively independent of their respective governments or any other public or private body.

161 See on this and for an overview of national approaches *Cappello (ed.)*, The independence of media regulatory authorities in Europe; *ERGA*, Report on the independence of National Regulatory Authorities.

162 Cf. on this *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector, Chapter D.II.2.d.(5).

163 Art. 49(1) DSA, see below D.II.1.a.

Art. 30(2) AVMSD adds that Member States also have to ensure that these authorities or bodies exercise their powers impartially and transparently and in accordance with the objectives of the Directive, in particular media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition. National regulatory authorities or bodies shall not seek or take instructions from any other body in relation to the exercise of their tasks and shall be equipped with adequate financial and human resources, which has to cover their tasks of cooperating within ERGA. The annual budgets shall be made public. Furthermore, independence also of the responsible members of such authorities or bodies is addressed in Art. 30(5) AVMSD. According to this provision, Member States shall lay down in their national law the conditions and procedures for the appointment and dismissal of the heads of national regulatory authorities and bodies or the members of the collegiate body fulfilling that function, including the duration of the mandate. The procedures shall be transparent and non-discriminatory, and they shall guarantee the requisite degree of independence. The head of a national regulatory authority or body or the members of the collegiate body may be dismissed if they no longer fulfil the conditions required for the performance of their duties, which are laid down in advance at national level. A dismissal decision shall be duly justified, subject to prior notification and made available to the public.

Recital 54 clearly puts this in light of the interest of recipients and the fundamental rights of freedom of expression and information: "As one of the purposes of audiovisual media services is to serve the interests of individuals and shape public opinion, it is essential that such services are able to inform individuals and society as completely as possible and with the highest level of variety". Besides underlining with this the need of plurality in information conveyed to the public overall, the Recital additionally emphasises the condition that editorial decisions have to remain "free from any state interference or influence by national regulatory authorities or bodies". This does not, however, mean that the authorities cannot interfere with the position of providers; much to the contrary, Recital 4 acknowledges the legitimacy of regulatory action, but it has to limit itself to "the mere implementation of law" and specifically safeguarding legally protected rights, which do not aim at limiting a particular opinion.

Finally, Art. 30(6) AVMSD calls for ensuring an effective appeal mechanism at national level against decisions of regulatory authorities and bodies,

which shall be independent of the parties involved in the appeal. All these safeguards shall be enshrined in clear terms in national law.

Before the 2018 AVMSD revision there was only a basic expectation towards a cooperation structure contained in the Directive, which required the Member States merely to take appropriate measures to provide each other and the Commission with the information necessary for the application of the Directive. Now, the conditions for this cooperation have become more concrete, and in particular Arts. 2, 3 and 4, and generally Art. 30a AVMSD, contain indications of the areas in which the cooperation takes place and how. In addition to the former wording, the provision of Art. 30a(2) AVMSD stipulates that a regulatory authority or body which becomes aware of a media service provider under their jurisdiction being wholly or mostly directed at the audience of another Member State shall inform the authority or body of that other Member State. Para. 3 of that provision goes further and lays down a formal mutual assistance rule. If, in a cross-border matter, the regulatory authority of the receiving Member State of an audiovisual offer sends a request to the authority of the Member State having jurisdiction, the latter shall do its utmost to address the request within two months. The request shall be supplemented with any information that may assist the concerned authority in addressing the request.

With the new Art. 30b AVMSD, the already existing ERGA, which was initially set up by a Decision of the Commission[164], became formally established within the AVMSD. The ERGA is now tasked with providing technical expertise, giving its opinion to the Commission and facilitating cooperation among the authorities or bodies that are its members as well as between them and the Commission.[165]

164 Commission decision of 3 February 2014 on establishing the European Regulatory Group for Audiovisual Media Services, C(2014) 462 final.

165 For further details also the ERGA Statement of Purpose, http://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-02_Statement-of-Purpose-adopted.pdf, and for details about the functioning of the Group the Rules of Procedure, last amended on 10.12.2019, http://erga-online.eu/wp-content/uploads/2020/04/ERGA-Rules-of-Procedure-10-12-2019-ver-1.pdf.

II. A Look at Media-oriented Institutional Approaches beyond the AVMSD

1. The Approach of the Digital Services Act (DSA)

The institutional system of the DSA is complex. On the one hand, this results from the DSA addressing very diverse types of actors in the digital sphere as a horizontal legal act. These range from social networks, online marketplaces or video-sharing platforms and others. On the other hand, the duties also pursue different objectives, address different risks and therefore touch on matters that are domiciled in different areas of law. These include issues of competition law, consumer protection law, data protection law, electronic communications networks and services law, the protection of minors and, importantly, also media law, each of which are areas of law with (typically) specific institutional structures based on EU legislation or the Member States approaches. It is further relevant that the DSA follows a graduated risk approach, i.e., it subjects services of different types and different sizes or reach to different sets of obligations. All of this the institutional system attempts to take into account.

a. Designation and powers of supervisory authorities

According to Art. 49 DSA, Member States shall designate one or more competent authorities to be responsible for the supervision of providers of intermediary services and for the enforcement of the DSA. In addition, the Member States shall designate one of these competent authorities as the so-called Digital Services Coordinator (DSC). The designation has to take place at the latest by 17 February 2024, which is the date for the application of the DSA. The DSC "shall be responsible for all matters relating to supervision and enforcement" of the DSA in its Member State "unless the Member State concerned has assigned certain specific tasks or sectors to other competent authorities". This means that the organisation of supervision is initially left to the Member States. They can, in principle, delegate the supervision of certain duties to one authority and the supervision of others to a different authority; they can also entrust just one authority with the complete supervision. However, and here the DSA will make a significant impact on the seemingly decentralised supervision approach, one of the authorities must be designated as DSC. The DSC in turn takes over coordination at the national level and, above all, acts as a contact point for providers, users, other authorities and the European Commission.

Art. 50 DSA places certain requirements on the DSC, including that it must carry out its tasks in an impartial, transparent and timely manner. There is no explicit requirement to lay down a specific mention and definition of independence criterion for the Member States, but they can do so by including such mention in the context of the institutional structure or by transferring the supervisory tasks to an already existing and independent authority. Additionally, Art. 50(2) DSA describes the way the powers have to be assumed by the DSC in a way that it is clear it can only "act with complete independence" if it at least has a degree of independence from influence for its powers that relate to the DSA. Recital 112 reinstates this in stronger wording by pointing out that freedom from external influence in acting under the DSA also means that the DSC has to be without "obligation or possibility to seek or receive instructions, including from the government". In Arts. 50, 51 and 56 DSA, powers are assigned to the DSC. These same powers, according to Art. 49(4) DSA, are granted in addition to any other competent authority that (and if) the Member State has entrusted with tasks under the DSA. The list is very detailed and extensive; it ranges from investigative powers (Art. 51(1) DSA) to enforcement powers (Art. 51(2) DSA) and explicitly states the power to impose fines, with certain benchmarks for these being set by the DSA itself.

Despite the high level of detail of these powers, there is still an important implementation obligation for the Member States. Art. 51(6) DSA demands from Member States to lay down specific rules and procedures for the exercise of the powers that have been defined by the previous para. 1 to 3. Especially, it shall be ensured that the exercise of those powers is subject to adequate safeguards contained in national law in compliance with the Charter and general principles of Union law. What may seem to give Member States some leeway on how to achieve the concrete functioning of the authority in order to ensure an effective use of the powers is in actual fact a pre-determined relatively narrow framework.

b. Competences in cross-border matters and with regard to very large providers

With regard to competences in cross-border matters, the DSA in principle follows the country-of-origin principle. It provides, however, for important deviations from that principle. According to Art. 56(1) DSA, the Member State in which the main establishment of the provider of intermediary services is located shall have exclusive powers to supervise and enforce the

DSA provisions in view of that provider. If a provider has no establishment in the Union, the Member State where its legal representative resides or is established shall have the powers as clarified by Art. 56(6) DSA. To this point, the DSA approach is similar to the system provided for in the AVMSD, which creates additional links besides the establishment. However, there are some significant exceptions to the principle as mentioned.

Legal representatives of non-EU-established providers need to be appointed according to Art. 13(1) DSA, giving the provider the choice of jurisdiction from within those Member States in which the service is offered. As the DSA follows the market place or market location approach, all intermediary service providers that are present on the EU single market by way of offering services in at least one of the Member States are confronted with this obligation. If non-EU providers do not follow their obligation to appoint a legal representative in the EU, they are faced with the negative consequence that all Member States have the power to enforce the DSA for that provider. With regard to the enforcement of the rules, the DSA thus is again comparable to the AVMSD. The latter leaves the power of Member States to deal with non-EU-based providers of audiovisual media services untouched both in terms of substantive law and enforcement, while the DSA is directly applicable in such cases but it is only the enforcement element that can be undertaken by all Member States in parallel. Consequently, if a DSA-covered provider does not appoint a legal representative, every Member State has the power of enforcing the obligation of the DSA to appoint a legal representative. Once the provider has appointed a legal representative, the competence for supervising that provider would be with the Member State in which the representative was appointed.

The most important exception to this general system of powers of supervisory authorities, according to Art. 56(2) DSA, is the exclusive assignment of supervision and enforcement powers to the Commission when very large online platforms (VLOPs) and very large online search engines (VLOSEs), and the obligations the DSA imposes on these specifically, are concerned. This exception also applies in case a non-EU-based provider did not appoint a EU representative as mentioned above. For Section 5 of Chapter III of the DSA with special duties only for such very large providers, this power is fully assigned to the Commission, and for all other obligations of the DSA it is construed as additional layer besides the powers of the DSC of the Member State of establishment of that provider (Art. 56(3) DSA). In the latter case, the DCS of the Member State of establishment is competent

unless the Commission has initiated proceedings. In other words, the Commission may draw the power to itself by initiating proceedings against a very large provider. The supervision, investigation, enforcement and monitoring powers concerning VLOPs and VLOSE are substantiated further in Section 4 of Chapter IV, Art. 66 DSA. Even before initiating proceedings against a very large provider, the Commission may exercise investigative powers concerning such providers, either on its own initiative or following a request of a DSC in case that DSC has reason to suspect that a provider of a VLOP or VLOSE has infringed the provisions of Section 5 of Chapter III or has systemically infringed any of the provisions of the DSA in a manner that seriously affects recipients of the service in its Member State (Art. 65 DSA). The Commission is, therefore, vested with comprehensive powers of investigation and enforcement vis-à-vis VLOPs and VLOSEs, as the further elaboration in Arts. 67 et seq. DSA demonstrates.[166]

c. European Board for Digital Services

According to Art. 61 DSA, an independent advisory group of DSCs on the supervision of providers of intermediary services named "European Board for Digital Services" (hereinafter EBDS, the DSA refers to "the Board") is established. The EBDS, once established, will be composed of the Member States' DSCs who shall be represented in meetings by high-level officials. Other competent authorities that have been entrusted with specific operational responsibilities under the DSA in national law may also participate to meetings of the EBDS as the provision of Art. 62(1) DSA states. It will be chaired by the Commission which will convene the meetings, prepare the agenda in accordance with the tasks of the Board and provide administrative and analytical support. The Commission will also be charged with approving the rules of procedure the EBDS will have to adopt, which puts the Commission in an important position. In the actual work of the EBDS, the Commission will not have any voting rights, while each Member State has one vote, irrespective of whether additional authorities besides the DSC participate in the work of the EBDS.

166 Critical in light of independence of supervision, required from national competent authorities but not from the Commission, *Buiten*, The Digital Services Act from Intermediary Liability to Platform Regulation, para. 78; *Buri*, A Regulator Caught Between Conflicting Policy Objectives; *Wagner/Janssen*, A first impression of regulatory powers in the Digital Services Act.

The main task of the Board is to advise its members, the DSCs, and the Commission in order to contribute to the consistent application of the DSA. It shall ensure effective cooperation, including contributing to guidelines and analysis, and to especially assist the DSCs and the Commission in the supervision of very large online platforms. These tasks are concretised by a non-exhaustive list in Art. 63 which refers, inter alia, to a support of joint investigations or the issuing of opinions and recommendation. These activities are more of a supportive nature and do not in themselves have directly legally binding effects. However, if competent authorities do not follow the opinions, requests or recommendations addressed to them by the EBDS, they shall provide the reasons for this choice, including an explanation on the investigations, actions and the measures that they have implemented as appropriate. In that regard there is a justification need when national authorities want to deviate from the Board's positioning. The EBDS may also recommend that the Commission initiate the drawing up of voluntary crisis protocols for addressing crisis situations (Art. 48), and it is involved in the drawing up of codes of conduct (Art. 45). Apart from that, there are regular information obligations of the Commission towards the EBDS on the exercise of its supervisory measures.

Concerning some matters, the powers of the EBDS reach further and give the possibility to take more binding positions. For example, in the case of violations of Section 5 of Chapter III (additional obligations for VLOPs and VLOSEs), an extended supervisory system is provided for under Art. 73 DSA. Before issuing a non-compliance decision vis-à-vis VLOPs and VLOSEs, the Commission shall inform and involve the EBDS in a procedure and finally "take utmost account" of the Board's position. In the crisis response mechanism (Art. 36 DSA), the Commission has to consult the EDSB and also take utmost account of its recommendation. But even in these cases a directly legally binding character of the EDSBs actions is not foreseen.

d. Cooperation structures

In addition, the DSA also provides for comprehensive duties to cooperate between different actors.[167] In addition to the generally formulated duty in Art. 56(5) DSA for close cooperation between Member States (here not

167 See on this *Smith,* Enforcement and cooperation between Member States in a Digital Services Act.

the DSCs but the Member States are addressed) and the Commission in law enforcement and supervision, Art. 56(7) DSA provides (in the case of failure to appoint a legal representative by the obliged provider) for an extensive duty of information of the DSC: Where a DCS intends to exercise its powers, it shall notify all other DSCs and the Commission and ensure that the applicable safeguards afforded by the Charter are respected, in particular to avoid that the same conduct is sanctioned more than once for the infringement of the obligations laid down in this Regulation. Where the Commission intends to exercise its powers, it, too, shall notify all DSCs of that intention. Following such notifications, other Member States shall not initiate proceedings for the same infringement as referred to in the notification.

Art. 57 DSA contains rules on mutual assistance. This shall include, in particular, a regular information exchange and the duty of the DSC of establishment to inform all DSCs of destination, the EBDS and the Commission about the opening of an investigation and the intention to take a final decision in any DSA-rules application, including the assessment of the case at hand. For the purpose of an investigation, the DSC of establishment may request other DSCs to provide specific information they may have. The receiving DSCs have to comply with this request without undue delay and no later than two months after reception, unless they can rely on the reasons provided for in Art. 57(3) DSA, such as a lack of sufficient specification of the request, an impossibility to provide the information or the request being incompatible with Union or national law. Such a refusal has to be justified.

For these purposes of providing relevant information, an information exchange system shall be established by the Commission (Art. 85 DSA). This shall provide the place for communication and exchange of information between the Commission, the DCSs and the EBDS.

Arts. 58 and 59 DSA contain a specific procedure for cross-border issues when a competent DSC does not act on its own behalf in view of a possible infringement of a provider under its jurisdiction. In that case, either a DSC of destination, in case of suspicion of an infringement negatively affecting recipients in its Member State, or the EBDS, in case of a request from at least three DSCs of destination, may request the DSC of establishment to assess the matter and to take the necessary investigatory and enforcement measures to ensure compliance with the DSA. If the Commission has already initiated an investigation for the same infringement, this specific procedure does not apply.

Art. 58(3) DSA contains requirements for such requests, including a description of the relevant behaviour of the provider and a reasoning for the alleged infringement. The DSC of establishment shall then "take utmost account" of the request and, without undue delay and in any event not later than two months following receipt of the request, communicate to the requesting DSC and the EBDS the assessment of the suspected infringement and an explanation of any investigatory or enforcement measures taken or envisaged in relation thereto. Where the DSC of establishment considers that it had received insufficient information about the alleged violation, it can request such information from the requesting DSC or the EBDS, which leads to a suspension of deadlines. In the absence of a communication within the period, in the case of a disagreement of the EBDS with the assessment or the measures taken or envisaged or in the cases of failed joint investigations (Art. 60(3) DSA), the EBDS may escalate the matter to the Commission (Art. 59 DSA). After having consulted the DSC of establishment, the Commission has to assess the matter within two months following this referral and, in case of issues seen with the actions of the DSC of establishment, can request the DSC of establishment to re-asses the case taking utmost account of the views and the request for review by the Commission.

2. The Proposed Future Cross-border Cooperation Mechanism of the EMFA

In its Chapter III, the EMFA Proposal provides for a framework for regulatory cooperation and "a well-functioning internal market for media services". In doing so, the institutional and cooperation structures included in Sections 1 to 3 of the chapter are fundamentally based on the AVMSD and would amend the AVMSD including deleting rules on ERGA which would be replaced by the EMFA provisions. In addition, these sections contain significant innovations, in particular concerning more formalised cooperation structures, by building on the MoU achieved within ERGA between its Members and setting up new mechanisms in the oversight of providers between the national regulatory authorities and the European Commission.[168]

168 For a more detailed overview and assessment of the EMFA Proposal see *Etteldorf/Cole*, Research for CULT Committee – European Media Freedom Act - Background Analysis.

a. National regulatory authorities or bodies

As a starting point, EMFA relates to the supervisory structure as established by the AVMSD by referring in Art. 7(1) to Art. 30 AVMSD and declaring that the national regulatory authorities or bodies under the AVMSD shall be responsible "for the application of Chapter III" of EMFA and have to exercise their powers in the context of the Regulation with the same independence and other requirements as stipulated for them in Art. 30 AVMSD. In addition to Art. 30(4) AVMSD, which already ensures this for the tasks under the AVMSD, Art. 7(3) EMFA repeats the requirement that Member States have to ensure adequate financial, human and technical resourcing for them so that they can carry out their extended tasks under the Proposal.

Art. 7(4) EMFA demands that the national regulatory authorities or bodies shall have appropriate powers of investigation with regard to the conduct of natural or legal persons to which Chapter III applies. Especially important is the power to request relevant information from these persons within a reasonable time period which they need for carrying out their tasks.

b. Role of the Commission

In strong contrast to the approach in the AVMSD, the European Commission would play a central role in the way the EMFA Proposal devises the cooperation of authorities and the handling of cross-border matters.

As with other legislative acts, it is the Commission's tasks to evaluate the functioning of the EMFA (Art. 26 EMFA), but it shall also more generally be in charge for monitoring the internal market for media services, including analysing risks that exist and the overall resilience of the market (Art. 25). The Commission is granted several harmonisation powers in that it cannot only regularly issue opinions on any matter related to the application of the EMFA and the national rules implementing the AVMSD (Art. 15(3) EMFA), on media market concentration (Art. 22(2) and Art. 21(6) EMFA) or on national measures affecting the operation of media service providers (Art. 20(4) EMFA). Beyond that it has the power to issue guidelines on the practical application of audience measurement (Art. 23(4) EMFA), on the factors to be taken into account when applying the criteria for assessing the impact of media market concentrations on media pluralism and editorial independence by the national regulatory authorities or bodies (Art. 21(3) EMFA) and on the form and details of declarations to

be provided by VLOPs (Art. 17(6) EMFA). Most importantly, the design of the cooperation structures in the proposal involves the Commission heavily in the tasks of the supranational body European Board for Media Services (hereinafter referred to as "EBMS") that is to replace the ERGA (see below). However, EMFA does not clarify to what extent guidelines and opinions of the Commission are binding or how the involvement of the Commission relates to the position of the independent regulatory authorities.

c. European Board for Media Services

Art. 8 aims to establish the EBMS, which shall replace and succeed the ERGA. The EBMS shall act in full independence when performing its tasks or exercising its powers, in particular neither seek nor take instructions from any government, institution, person or body (Art. 9). However, this notion of independence is without prejudice to the competences of the Commission or the national regulatory authorities or bodies in conformity with the EMFA.

Just like the ERGA, the EBMS shall be composed of representatives of the national regulatory authorities or bodies. Other than the AVMSD, which did not contain any internal procedure rules for ERGA, Art. 10 EMFA explicitly states that each member shall have one vote, which leads to the necessity of appointing a joint representative who is able to exercise this right to vote in case of a Member State having more than one regulatory authority or body in charge of the sector. Several aspects of how ERGA has been functioning in practice since its establishment are proposed to be included in the binding text of the Regulation, such as the formal representation by its Chair, which is elected for two years amongst its members by a two-thirds majority of members with voting rights. Differently from the AVMSD, where only a Commission representative participates in ERGA meetings, the EMFA stipulates that the Commission shall "designate" a representative to the Board which shall participate not only in all meetings but all activities of the EBMS, albeit without having voting rights. In addition, the EBMS Chair shall keep the Commission informed about the ongoing and planned activities of the Board and shall consult it in preparation of the EBMS's work programme and main deliverables. The reliance on the Commission as foreseen in the proposal goes further in that agreement has to be sought with it when deciding on internal rules of procedure and when inviting external participants to meetings.

The tasks of the EBMS are considerably expanded compared to those assigned to the ERGA under the AVMSD. According to the long list provided for in Art. 12, it remains that the EBMS under the EMFA (just like ERGA under AVMSD) shall provide "technical expertise" to the Commission, promote cooperation and the effective exchange of information, serve as a forum to exchange experience and best practices and give opinions when requested by the Commission. However, the conditions for this work change significantly under EMFA if compared to the relatively basic pronouncing of ERGA's activities in the AVMSD. For the latter only certain cases were detailed in which the ERGA had to respond to requests of the Commission. In the EMFA Proposal it is stated that the EBMS shall not only support the Commission through technical expertise (Art. 12 lit. (a) EMFA) but advise the Commission, where requested by it, on regulatory, technical or practical aspects pertinent to the consistent application of the EMFA and implementation of the AVMSD and on all other matters related to media services within its competence. Where the Commission requests advice or opinions from the Board, it may indicate a time limit, taking into account the urgency of the matter. The EBMS shall not only promote cooperation and the exchange of experience and best practices but is equipped with more concrete tasks (Art. 12 lit. (i) to (m) EMFA) to:

- upon request of at least one of the concerned authorities, mediate in the case of disagreements between national regulatory authorities or bodies, in accordance with Art. 14(3) EMFA;
- foster cooperation on technical standards related to digital signals and the design of devices or user interfaces, in accordance with Art. 15(4) EMFA;
- coordinate national measures related to the dissemination of, or access to, content of media service providers established outside of the Union that target audiences in the Union, where their activities prejudice or present a serious and grave risk of prejudice to public security and defence, in accordance with Art. 16(1) EMFA;
- organise a structured dialogue between providers of very large online platforms, representatives of media service providers and of civil society, and report on its results to the Commission, in accordance with Art. 18 EMFA;[169]

169 Critical on this in conjunction with Art. 17 EMFA *van Drunen/Helberger/Fahy*, The platform-media relationship in the European Media Freedom Act, arguing that the

– foster the exchange of best practices related to the deployment of audience measurement systems, in accordance with Art. 23(5) EMFA.

The powers of the EBMS to issue opinions are significantly expanded and connected to specific provisions and tasks covered in the EMFA. However, these powers are, as a rule, dependent on either a request by the Commission (as regards national measures and media market concentrations likely affecting the functioning of the internal market for media services) or even an agreement with the Commission (as regards requests for cooperation and mutual assistance between national regulatory authorities or bodies, requests for enforcement measures in dispute cases and national measures concerning non-EU providers). The only case where the EBMS can issue opinions without involvement of the Commission is on draft national opinions or decisions where the EBMS can assess the impact on media pluralism and editorial independence of a notifiable media market concentration where such a concentration may affect the functioning of the internal market.

In addition, the EBMS is tasked with "assisting" the Commission when it draws up the above-mentioned guidelines with respect to the application of the EMFA and of the national rules implementing the AVMSD. The same applies concerning factors to be taken into account when assessing the impact of media market concentrations (Art. 21(3) EMFA) and aspects of audience measurement (Art. 23 EMFA).

d. Cooperation structures

Based on the more formalised cooperation procedures that the ERGA members developed in the – legally non-binding – MoU as presented above, Art. 13 of the EMFA Proposal contains rules on structured cooperation between national regulatory authorities or bodies. Art. 13(1) EMFA stipulates that any regulatory authority or body can request cooperation or mutual assistance at any time from another for the purposes of exchange of information or taking measures relevant for the consistent and effective application of the EMFA and the AVMSD. Such a general mutual assistance idea is more concretely put for certain issues: in case of a serious and grave risk of prejudice to the functioning of the internal market for media

concept leads to a "privatisation of fundamental rights governance" as regards the important roles given to platforms.

services or to public security and defence, Art. 13(2) EMFA provides for "accelerated" cooperation and mutual assistance. In all cases, in order to secure a manageable workflow, such requests shall contain all relevant information (Art. 13(3) EMFA), and the requested authority or body can, by providing reasons, refuse it in case it is not competent for the matter or fulfilling the request would infringe Union or Member State law. In any case, the requested authority or body shall inform the requesting authority or body on progress made and shall do "its utmost" to address and reply to the request without undue delay. These notions clearly integrate the efforts for a more speedily cooperation as included in the MoU. The requested authority shall provide intermediary results within the period of 14 calendar days from the receipt of the request, and for accelerated cooperation or mutual assistance the requested authority shall even (finally) address and reply to the request within 14 calendar days. If the requesting authority is not satisfied with the measures taken or if there is no reply at all to its request, it shall again confront the requested authority giving reasons for its position. If the requested authority continues to disagree with that position or again does not react at all, either authority may refer the matter to the EBMS. Within 14 calendar days from the receipt of that referral, the EBMS shall issue – again "in agreement" with the Commission – an opinion on the matter, including recommended actions. This opinion is not binding for the requested (competent) authority, but it shall, however, "do its outmost to take into account the opinion".

A specific mechanism is proposed in Art. 14 as regards enforcement vis-à-vis VSPs. Any national regulatory authority or body may request the competent authority to take necessary and proportionate actions for the effective enforcement of the obligations imposed on video-sharing platforms under Art. 28b AVMSD. The requested national authority or body shall, without undue delay and within 30 calendar days, inform the requesting national authority or body about the actions taken or planned. In the event of a disagreement regarding such actions, either the requesting or the requested authority or body may refer the matter to the EBMS for mediation in view of finding an amicable solution. If no amicable solution can be found, both may request the EBMS to issue an opinion, in which it shall assess the matter without undue delay and in agreement with the Commission. If the EBMS then considers that the requested authority has not complied with a request, it shall recommend actions. The requested national authority or body shall, without undue delay and within 30 calendar days at the latest from the receipt of the opinion, inform the Board,

the Commission and the requesting authority or body of the actions taken or planned in relation to the opinion. However, neither a binding effect of the opinion nor an obligation to take (utmost) account of it is put on the competent authority. The need for closer cooperation especially in the VSP area is also documented by a specific section in the MoU which would be reflected in the inclusion of dedicated procedures foreseen in the EMFA Proposal.

Finally, Art. 16 EMFA contains a provision on the coordination of measures concerning media service providers established outside the Union. This provision is a reaction to difficulties observed when trying to achieve a common reaction to the risks created by dissemination of Russian channels in the EU after the Russian Federation started war against the Ukraine. The procedure shall allow for other ways to react to dangers from such external influence than 'only' by the possibility of issuing economic sanctions as was the case for the Russian channels in 2022 (see above). Concretely, the EBMS shall coordinate measures by national regulatory authorities or bodies related to the dissemination of, or access to, media services provided by such media service providers that target audiences in the Union where, inter alia in view of the control that may be exercised by third country governments or other entities of the states over them, such media services prejudice or present a serious and grave risk of prejudice to public security and defence. In that light, the EBMS may, in agreement with the Commission, issue opinions on appropriate national measures, to which all competent national authorities (not only the authorities or bodies under EMFA or AVMSD) shall do their utmost to take them into account.

III. Other Oversight Systems and Their Institutional Structure

1. Overview of Comparable Approaches

Other systems of supranational cooperation, which are not in the direct context of the media or content dissemination sector, show responses to similar cross-border challenges, which is why they merit a comparative analysis.

In this context, competition law is an interesting sector to begin with, as there are some overlaps with media law in practice, especially with regard to business models and the media markets. Although competition

law is based on a different legal environment than, e.g., the AVMSD, EU norms on competition law are highly relevant. With its basis in primary law (Arts. 101–109 TFEU) and the approach concerning actions of undertakings (or States) of significance for the EU due to the market impact, it is worth considering the extensive powers the European Commission as the executive body in these cases has. In addition to EU competition law there is also national competition law of the Member States, which addresses anti-competitive concerns on the level of the specific Member States. The supervisory authorities are interconnected in an EU-wide exchange when it comes to the application of EU Competition law. Council Regulation (EC) No. 1/2003[170], detailing the application of Arts. 102 and 103 TFEU, had significantly modernised competition law and thereby created an interaction between the different levels of supervision. It empowers (and obliges) Member State competition authorities to apply EU competition rules, and it introduces a number of rules on cooperation between the Commission and these authorities (mandatory) and between the authorities among each other (optional).[171] In principle, however, the national authorities retain their competences for those cases that they are in charge of. In contrast to other areas, there are no consistency or coherence procedures foreseen that would allow other non-affected authorities to be involved in a specific case.

There are, however, rules on cooperation in the sense that, e.g., a suspension possibility concerning proceedings in cases where the matter is already dealt with by another competition authority is foreseen. Essentially, the provisions concern general cooperation and, more importantly, the exchange of information. Although a specific forum for this exchange is not formally established by the Regulation, Recital 15 states that "the Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation". This mandate has developed into the European Competition Network (ECN), which has since served to exchange and develop best practices and to monitor developments from a

170 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pp. 1–25.

171 See on this in detail with an early assessment of the effectiveness of the cooperation structures *Mataija*, The European competition network and the shaping of EU competition policy. For a more recent evaluation *Vantaggiato/Kassim/Wright*, Internal network structures as opportunity structures: control and effectiveness in the European competition network.

cross-border perspective.[172] Statistics show that valuable insights into the exchange of information can be gained from this.[173] The technical instruments used in the ECN certainly provides a valuable experience for other sectors. Furthermore, recommendations and best practices, for example on investigative and decision-making powers,[174] that have been developed in the ECN can serve as source of inspiration for other authorities which have a task to cooperate with each other. From a legal point of view, however, the flexible but non-binding cooperation structures among the Member State authorities are not suitable for gaining insights for strengthening law enforcement in the cross-border dissemination of audiovisual content.

More robust cooperation structures and tasks of supranational bodies, however, can be found in electronic communications law and data protection law. Due to the facilitation of cross-border cooperation with such structures – at least in principle – a more intensive look at these sectors will be taken in the following.

2. The Approach in the European Electronic Communications Code

Another sector that lends itself in principle to a comparison of institutional structures is the electronic communications sector. After all, the transportation of content (also) is an element of the dissemination of media and communication. With the European Electronic Communications Code (EECC)[175], the rules applicable to this sector at EU level have recently been consolidated and reformed into a uniform set of rules. Unlike with competition law, here the conditions for the legal framework are comparable to the field of audiovisual media (law): In essence, it is a EU Directive that must be implemented in national law and imposes certain obligations on the providers of electronic communications networks and services. The institutional system is in basic terms comparable to that of the AVMSD.

172 Cf. Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, pp. 43–53.

173 See https://competition-policy.ec.europa.eu/european-competition-network/statistics_en.

174 See https://competition-policy.ec.europa.eu/european-competition-network/documents_en.

175 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), OJ L 321, 17.12.2018, pp. 36–214.

a. Independent supervisory authorities

Member States shall ensure that each of the tasks laid down in the EECC is undertaken by a competent authority. Even more so, Art. 3 EECC stipulates that national regulatory and other competent authorities shall contribute within their competence to ensuring the implementation of policies aimed at the promotion of freedom of expression and information, cultural and linguistic diversity, and media pluralism. This closely links the EECC to the media sector itself. The EECC lays down rules on the independence of national regulatory and other competent authorities (Art. 6 EECC), appointment and dismissal of members of national regulatory authorities (Art. 7 EECC), political independence and accountability of the national regulatory authorities and regulatory capacity of national regulatory authorities (Art. 9 EECC), which are similar to the rules of Arts. 30 et seq. AVMSD.

In light of possible cross-sector structures on national level, Member States may assign other tasks provided for in the EECC and other Union law to national regulatory authorities, in particular those related to market competition or market entry. Where those tasks related to market competition or market entry are assigned to other competent authorities, they shall seek to consult the national regulatory authority before taking a decision. This structure is at least comparable to the structures provided for in the DSA related to the DSCs and their interaction with other national competent authorities.

b. Competences and tasks

Unlike in the AVMSD, a basic framework of tasks to be assigned as a minimum requirement to the competent authority is already specified by the EECC itself. Regulatory authorities shall be responsible at least to contribute to the protection of end-user rights in the electronic communications sector, in coordination, where relevant, with other competent authorities, and for performing any other task that the EECC reserves to them. In addition to this general allocation of tasks, the individual parts and chapters of the EECC dealing with specific regulatory areas (spectrum allocation, market entry etc.) contain specific assignments of tasks to the national regulatory authorities.

c. The Body of European Regulators for Electronic Communications

The supranational cooperation body for national supervisory authorities in the electronic communications sector is the Body of European Regulators for Electronic Communications (BEREC). It had also pre-existed[176] but is now established by Regulation (EU) 2018/1971 itself.[177] BEREC comprises a Board of Regulatory authorities and working groups. The Board is composed of one member from each Member State appointed by the national regulatory authority that has primary responsibility for overseeing the day-to-day operation of the markets for electronic communications networks and services under the EECC. Each member has one right to vote. With regard to other authorities which are assigned with certain tasks under the EECC, Art. 5(1) subpara. 2 provides that for the purposes of contributing to BEREC's tasks national regulatory authorities shall be entitled to collect necessary data and other information from market participants. The Commission participates in all deliberations of the Board of Regulators, albeit without the right to vote, and shall be represented at an appropriately high level. Art. 8 Regulation (EU) 2018/1971 contains a provision on independence concerning BEREC: When carrying out the tasks conferred upon it and without prejudice to its members acting on behalf of their respective national regulatory authorities, the Board of Regulators shall act independently and objectively in the interests of the Union, regardless of any particular national or personal interests, and, without prejudice to coordination, the members of the Board of Regulators and their alternates shall neither seek nor take instructions from any government, institution, person or body.

Art. 10 EECC interlinks the whole Directive closely to BEREC. Member States shall ensure that the goals of BEREC of promoting greater regulatory coordination and consistency are actively supported by their respective national regulatory authorities and that national regulatory authorities take utmost account of guidelines, opinions, recommendations, common posi-

176 Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337, 18.12.2009, pp. 1–10.

177 Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No. 1211/2009, OJ L 321, 17.12.2018, pp. 1–35.

tions, best practices and methodologies adopted by BEREC when adopting their own decisions for their national markets.

The provisions of the EECC foresee repeatedly a central role for BEREC in the procedures, especially in the various cooperation mechanisms and the development of guidelines for the consistent application of the EECC. This concerns, for example, the development of guidelines for uniform notifications by electronic communications service providers (Art. 12(4) EECC) or templates for information requests (Art. 21(1) EECC), information rights vis-à-vis Member States in connection with complaints procedures (Art. 31(3) EECC) and participation in procedures for cross-border dispute resolution (Art. 27 EECC), for the uniform application of remedies (Art. 33 EECC) and on harmonisation measures (Art. 38 EECC).

However, as a rule, this does not entail any binding powers of BEREC. This is true both vis-à-vis the national regulatory authorities – according to Art. 10(2) EECC, these shall 'only' take utmost account of the BEREC guidance – and vis-à-vis the European Commission. Within the EECC, the Commission is granted substantial powers, in particular with regard to the harmonisation of divergent national implementations by supervisory authorities (Art. 38 EECC) or the creation of binding guidelines in the context of the consistent application of the EECC (Art. 34). In doing so, the Commission shall, as well, take utmost account of the opinion of BEREC. For example, according to Art. 38 EECC, where the Commission finds that divergences in the implementation by the national regulatory or other competent authorities of the regulatory tasks could create a barrier to the internal market, the Commission may adopt recommendations or decisions by means of implementing acts to ensure the harmonised application of the EECC. In such a case it is obliged to take utmost account of the opinion of BEREC. BEREC's possibilities in this context go further as it may, on its own initiative, advise the Commission on whether a measure as described should be adopted in order to achieve the objectives set out in Art. 3 EECC. In that way, BEREC has an important role to play, even if its positions do not have a directly binding effect.

d. Cooperation and consistency

Art. 5(2) EECC contains a more general rule on cooperation: National regulatory and other competent authorities of the same Member State or of different Member States shall, where necessary, enter into "cooperative arrangements" with each other to foster regulatory cooperation. Further-

more, national regulatory authorities, other competent authorities under the EECC and national competition authorities shall provide each other with the information necessary for the application of the EECC (Art. 11 EECC).

Moreover, various specific cooperation mechanisms are scattered throughout the EECC and concern individual (sometimes very different) mechanisms of regulation of the electronic communications sector. Of these rules, the mechanisms in Arts. 27 and 32 et seq. EECC are particularly relevant.

Art. 27 EECC contains a mechanism for the resolution of cross-border disputes between undertakings themselves, which is a different matter than a potential conflict between regulatory authorities concerning a question of competence. Any party may refer a dispute arising under the EECC between undertakings in different Member States to the national regulatory authority or authorities concerned (without their right to bring an action before a court being curtailed by this). Where the dispute affects trade between Member States, the competent national regulatory authority or authorities shall notify the dispute to BEREC in order to bring about a consistent resolution of the dispute. BEREC shall then issue an opinion inviting the national regulatory authority or authorities concerned to take specific action in order to resolve the dispute or to refrain from action. This opinion shall be issued in the shortest possible timeframe and in any case within four months if it is not for exceptional circumstances. The national regulatory authority or authorities concerned shall await BEREC's opinion before taking any action to resolve the dispute. There is an urgency procedure foreseen, in which any of the competent national regulatory authorities may, either at the request of the parties or on its own initiative, adopt interim measures exceptionally if it is necessary to safeguard competition or protect the interests of end-users. Any obligations imposed on an undertaking by the national regulatory authority as part of the resolution of the dispute shall take utmost account of the opinion adopted by BEREC and shall be adopted within one month of such opinion.

Another mechanism of interest in the context of cross-border enforcement are the provisions on the consolidation of the internal market for electronic communications services. If a national regulatory authority intends to take a measure that falls under certain provisions of the EECC, which are predominantly of cross-border relevance, and which would have an effect on trade between Member States, it shall publish the draft measure and communicate it to the Commission, to BEREC and to the national

regulatory authorities in other Member States, at the same time stating the reasons for the measure (Art. 32(3) EECC). National regulatory authorities, BEREC and the Commission may comment on that draft measure within one month. The draft measure shall not be adopted for a further two months if that measure aims to regulate certain issues with cross-border relevance (respectively define a relevant market or designate an undertaking as having significant market power) and if the Commission has indicated to the national regulatory authority that it considers that the draft measure would create a barrier to the internal market or if it has serious doubts as to its compatibility with Union law and in particular the objectives referred to in Art. 3 EECC. The Commission shall inform BEREC and the national regulatory authorities of its reservations in such a case and simultaneously make them public. BEREC, in turn, shall publish an opinion on the Commission's reservations, indicating whether it considers that the draft measure should be maintained, amended or withdrawn, and shall, where appropriate, provide specific proposals to that end. The Commission shall take utmost account of this opinion by taking its reasoned final decision within the hold-still period mentioned before deciding that either the regulatory authority concerned shall withdraw the draft measure or lift its reservations.

In the first case, the national regulatory authority shall amend or withdraw the draft measure within six months. Where the draft measure is amended, the national regulatory authority shall undertake a public consultation and notify the amended draft measure to the Commission, thus starting the described procedure again. However, in exceptional circumstances there is a comparable urgency procedure foreseen as described above, according to which a national regulatory authority may immediately adopt proportionate and provisional measures if this is needed to safeguard competition and protect the interests of users. It shall then, without delay, communicate those measures, with full reasons, to the Commission, to the other national regulatory authorities and to BEREC. A decision of the national regulatory authority to render such measures permanent or extend the period for which they are applicable shall be subject, however, to the regular procedure described.

Both examples show a detailed procedural fixation in the EECC of cooperation between the relevant national authorities concerning their work in relation to cross-border matters. In those procedures the role of BEREC as the forum to deal with the issues and ensure a possibility for all concerned Member States (through their authorities) to bring in their view-

point is manifest. The opinions of BEREC are central to the procedures, which also is the case for the Commission in exercising its powers, as both Commission and regulatory authorities need to consider them carefully and, by taking utmost account of them, need to provide a justification if they do not follow them.

3. The Approach in the General Data Protection Regulation

a. Fundamental rights basis

The core of data protection law in the EU and thus the underlying basis of legislation is the fundamental right to protection of personal data as laid down in Art. 8 CFR. According to this, everyone has the right to the protection of personal data concerning them, while such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or another legitimate basis laid down by law. Furthermore, unlike other fundamental rights, Art. 8(3) CFR contains very concrete requirements for supervision that follow directly from the fundamental right: compliance with the rules emanating from Art. 8 CFR shall be subject to control by an independent authority. The establishment of independent supervisory authorities is thus an essential component of protecting individuals with regard to the processing of personal data.[178] These authorities are seen as "the guardians of those fundamental rights"[179]. It follows that the independence requirement must guide not only legislation at both the EU and national level, as these are charged with the application of EU law such as the "General Data Protection Regulation" (GDPR), but the rules on this structural aspect must be interpreted in the light of fundamental rights, taking into account the case law of the CJEU.[180] Already the

178 CJEU, Case C-614/10, *Commission/Austria*, ECLI:EU:C:2012:631, para. 37; Case C-518/07, *Commission/Germany*, ECLI:EU:C:2010:125, para. 23.

179 CJEU, Case C-518/07, *Commission/Germany*, ECLI:EU:C:2010:125, para. 23.

180 In particular CJEU, Case C-645/19, *Facebook Ireland Ltd. a.o./Gegevensbeschermingsautoriteit*, ECLI:EU:C:2021:483; Case C-311/18, *Data Protection Commissioner/Facebook Ireland Ltd a.o.*, ECLI:EU:C:2020:559; Case C-210/16, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein/Wirtschaftsakademie Schleswig-Holstein GmbH*, ECLI:EU:C:2018:388; Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB (C-203/15)/Post- och telestyrelsen and Secretary of State for the Home Department (C-698/15)/Tom Watson a.o.*, ECLI:EU:C:2016:970; Case C-362/14, *Maximilian Schrems/Data Protection Commissioner*, ECLI:EU:C:2015:650; Case

predecessor of the GDPR[181], the Data Protection Directive[182], included the independence criterion concerning the institutions involved in supervision, and this is now further specified in the GDPR.

b. Institutional system of the GDPR

The institutional system of the GDPR is structured in correspondence with the market location principle to which the GDPR adheres.[183]

(1) Independent supervisory authorities on the national level

According to Art. 51(1) GDPR, each Member State shall provide for one or more independent public authorities responsible for monitoring the application of the GDPR. However, design and structure of these authorities are not entirely left to the Member States, as they need to comply with the conditions set out in Arts. 52 et seq. GDPR.

Art. 54 GDPR lays down binding specifications for the national law establishing the supervisory authority:

- the qualifications and eligibility conditions required to be appointed as a member of each supervisory authority;
- the rules and procedures for the appointment of such members;
- the duration of the term of the members (in principle no less than four years);
- whether and, if so, for how many terms the members can be re-appointed;
- the conditions governing the obligations of the members and staff (prohibitions on actions, occupations and benefits incompatible therewith

C-288/12, *Commission/Hungary*, ECLI:EU:C:2014:237; Case C-518/07, *Commission/Germany*, ECLI:EU:C:2010:125; Case C-614/10, *Commission/Austria*, ECLI:EU:C:2012:631.

181 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, pp. 1–88.

182 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, pp. 31–50.

183 Cf. on this and the following already *Cole/Etteldorf/Ullrich*, Cross-border dissemination of online content, pp. 134 et seq.

during and after the term of office and rules governing the cessation of employment);
– a duty of professional secrecy both during and after their term of office.

Art. 53 GDPR provides further conditions for the members of supervisory authorities (i.e. the persons acting with responsibility and being entrusted with the supervisory powers under the GDPR), which derive from the independence criterion and must be safeguarded in national law. They must be appointed by means of a transparent procedure by the national parliament, government, head of State or an independent body; shall have the qualifications, experience and skills required to perform their duties and exercise its powers; and shall only be dismissed in cases of serious misconduct or if they no longer fulfil the conditions required for the performance of the duties.

In addition, Art. 52 GDPR contains further specifications on the concept of independence. It requires that supervisory authorities act with "complete independence" in performing their tasks and that their members "remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody", which includes state influence but also orders from any other external sources. Beyond formal orders, the safeguard goes further and means that members shall not be put under any form of external pressure.[184] Furthermore, they shall refrain from any action incompatible with their duties and shall not engage in any incompatible occupation, whether for profit or not (Art. 52(3) GDPR), meaning they must act objectively and impartially.[185] With regard to adequate resources, Art. 52(4) GDPR stipulates that Member States have to ensure that each supervisory authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board, and is free to choose its own staff under its directions. The authorities are subject to financial control, which, however, needs to ensure independence by establishing separate, public annual budgets, which may be part of the overall state or national budget.

The CJEU oversees compliance with these provisions and has already given a number of clarifications. In infringement proceedings brought by

184 CJEU, Case C-518/07, *Commission/Germany*, ECLI:EU:C:2010:125, para. 18.
185 CJEU, Case C-518/07, *Commission/Germany*, ECLI:EU:C:2010:125, para. 25.

the European Commission, the institutional systems set up in Germany[186], Austria[187] and Hungary[188] were found to be (partly) unlawful and thus in breach of the Treaties because of violations of the independence requirement, although those cases still concerned the national implementation of the less concretely formulated independence provision in Art. 28 of the former Data Protection Directive.

(2) Competences and tasks

According to Art. 57(1) GDPR, each (national) supervisory authority shall monitor and enforce the application of the GDPR on its territory. This needs to be read in context with the territorial scope of the GDPR (Art. 3), linking the application either to the establishment of a controller or processor in the Union or to the processing of personal data of EU citizens by a controller or processor established outside the Union. In terms of jurisdiction, this means that, in principle, each authority is competent for data processing on its territory, i.e. regularly when either the data subject and/or the processor/controller is located/established in its Member State. However, in the case of cross-border data processing, which is regularly synonymous with the cross-border provision of services, the result of this competence rule is that several authorities may be in charge simultaneously.

To prevent an inconsistent application of the GDPR, the Regulation therefore provides a 'one-stop-shop' mechanism for these cases. According to Art. 56(1) GDPR, for processing operations carried out across borders, there is a specific assignment of jurisdiction: the supervisory authority of the controller's or processor's main establishment (or single establishment) in the EU is the competent so-called lead supervisory authority. Where there is a lack of such an establishment, jurisdiction remains within the competence of all supervisory authorities concerned by the activities of that processor or controller. Also, the principle of a lead supervision does not apply when it comes to data protection violations that only relate to the company's establishment in one Member State or only significantly affect citizens in one Member State. This again results from the approach of the GDPR that aims at an effective application based on the potential or actual impact on a given market location. When there is a connection to one

186 CJEU, Case C-518/07, *Commission/Germany*, ECLI:EU:C:2010:125.
187 CJEU, Case C-614/10, *Commission/Austria*, ECLI:EU:C:2012:631.
188 CJEU, Case C-288/12, *Commission/Hungary*, ECLI:EU:C:2014:237.

Member State due to the specific impact on that market or because an alleged violation only took place at the establishment in that Member State, there is a duty to inform the supervisory authority that would normally be the lead authority, which can, but does not have to, take over the proceedings. If it does so, the coherence and consistency mechanisms of Arts. 60 et seq. GDPR apply here as they do in the other cross-border situations foreseen by the law.

Although setting up such a mechanism based on previous experience of very diverse transposition of the Data Protection Directive was an important step towards coherent application of the GDPR, it is associated with challenges in practice. This starts already with the issue of determining jurisdiction over a processor or controller. On the one hand, this concerns the determination of the lead authority in specific cases. The Art. 29 Working Party, the predecessor of what became the more elaborate European Data Protection Board (EDPB), had issued Guidelines on this, which contain details on definitions such as "cross-border processing", "main establishment", or "substantially affects" (market location relevance).[189] On the other hand, this also concerns exceptions to the principle by rules in other secondary legislation or practical circumstances. For example, the one-stop-shop mechanism does not apply in the context of the ePrivacy Directive[190], i.e. when it comes to data processing for the purposes of electronic communications. It may also be difficult, especially in the case of large tech companies, to determine by which sub-unit of the company (e.g. company headquarters in the US, European headquarters in Ireland, branches in other Member States) the data processing in question is carried out or whether the different parts of the undertaking are to be regarded as joint controllers, which then has consequences for jurisdiction.[191]

189 Guidelines for identifying a controller or processor's lead supervisory authority, adopted on 13 December 2016 as last Revised and Adopted on 5 April 2017, https://ec.europa.eu/newsroom/article29/items/611235.

190 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, pp. 37–47, as amended by Directive 2009/136/EC, OJ L 337, 18.12.2009, pp. 11–36.

191 Cf. on these aspects for example the decision of the French data protection authority on Google of 6 January 2022, English press release available at https://www.cnil.fr/en/cookies-cnil-fines-google-total-150-million-euros-and-facebook-60-million-euros-non-compliance.

(3) The European Data Protection Board

According to Art. 68 GDPR, the above-mentioned EDPB is established as a body of the Union with own legal personality and is composed of the head of one supervisory authority per Member State and of the European Data Protection Supervisor or their respective representatives. There is a strong commitment in the GDPR to the independence of the work of this body: while it is already composed of independent supervisory authorities (both national and the EDPS), Art. 69 GDPR orders the EDPB to act independently when performing its tasks.

According to Art. 53(2) GDPR, if more than one supervisory authority is established in a Member State, that Member State shall designate the supervisory authority which is to represent those national authorities in the EDPB and shall set out the mechanism to ensure compliance by the other authorities with the rules relating to the consistency mechanism referred to in Art. 63 GDPR. Compared to the system proposed in the EMFA, the participation of the Commission in the EDPB's work is limited: the Commission shall have the right to participate in the activities and meetings of the Board without voting right, and the Chair of the EDPB, on the other hand, shall communicate to the Commission on the activities of the EDPB, including its opinions, guidelines, recommendations and best practices. The EDPB is assigned a variety of tasks which are listed non-exhaustively in Art. 70 GDPR and relate amongst other issues to generally advising the Commission. However, it should be noted that these tasks of the EDPB can be carried out either on its own initiative or in the cases foreseen by the Regulation on a request of the Commission.

The EDPB is also involved in the procedure of drawing up codes of conduct and certification mechanisms and thereby is integrated in a co-regulatory system with the market participants. In this role, the EDPB adopts, after extensive consultations, inter alia guidance in the form of guidelines, recommendations, best practices and opinions, thus clarifying the terms of the Regulation in order to provide a consistent interpretation of the rights and obligations of stakeholders.

(4) Cooperation and consistency

Art. 60 GDPR comprehensively regulates the cooperation procedure between the lead supervisory authority and the other supervisory authorit-

ies concerned in cases of cross-border data processing, but also the cooperation between them in general. The cooperation includes the exchange of all relevant information with each other, the provision of mutual assistance at any time and, beyond that, the shared work by conducting joint operations. If a case has cross-border relevance, the lead supervisory authority has to submit a draft decision it intends to take to all other supervisory authorities and give them the opportunity to respond. In its final decision-making it shall take due account of the views expressed by the other authorities. More importantly, however, if these other authorities concerned express relevant and reasoned objections to the draft decision and the lead supervisory authority does not intend to follow them by adapting the planned decision, then the so-called consistency mechanism under Arts. 63 et seq. is triggered.

If no consensus can be found in cross-border cases, the EDPB has ultimate dispute resolution powers by being able to adopt a final decision in the matter, taking account of the reasoned objections of the supervisory authorities concerned. This decision is then binding for the lead supervisory authority (Art. 65 GDPR). Hence there is a clear consideration of the interests of all concerned authorities in order to avoid situations in which only one (the lead) authority would have come to conclusions which would have been in contradiction to the interests of the others. The decision of the EDPB is bound to a tight timeline and shall be adopted by a two-thirds majority of its members within one month from the referral of the subject-matter to the EDPB. The timeline may be extended in certain complex cases. The decision must be reasoned and addressed to the lead supervisory authority and all the concerned supervisory authorities and is binding on them. While this procedure takes place, all supervisory authorities have to refrain from adopting decisions in the subject-matter concerned. The proceedings can also take the form of an urgency procedure according to Art. 66 if there is need for accelerated action in order to protect the rights and freedoms of data subjects. In such cases a supervisory authority is allowed to adopt provisional measures immediately. The EDPBs urgent binding decision has to be adopted within two weeks by simple majority of the members.

So far, since the entry into force of the GDPR, the EDPB has adopted seven binding decisions, five of them in 2022 and one urgent binding decision. Six of them are concerned with the data processing activities of the Meta company within their services WhatsApp, Facebook and Instagram and were related to the lead supervisory authority of Ireland. From these

decisions, their course and their outcome in practice first conclusions can be drawn about the effectiveness of the mechanism and related challenges.

c. First experiences with the cooperation mechanism

By way of example, the first binding decision of the EDPB concerning Twitter and three different decisions concerning WhatsApp, including the urgent binding decision and the most recent decision, will be briefly considered. All of the decisions involved draft decisions by the Irish Data Protection Commissioner (DPC) as lead authority, which many other Member State authorities had concerns about both in terms of the substantive assessment of infringements and the calculation of the penalty.

On 9 November 2020 the EDPB delivered its first binding decision concerning the case against the social media platform Twitter, which was led by the Irish DPC due to Twitter's establishment with its European branch in Dublin (Art. 56 GDPR) but also affected a large number of Twitter users in other EU Member States.[192] The case concerned an incident on the Twitter platform which occurred from late 2018 to early 2019. Due to a bug in the Android app, posts and accounts that had been marked as private by users of the platform had been mistakenly made publicly accessible. This affected not only Irish users but users worldwide, particularly in other EU Member States. The platform duly reported the breach to the DPC, which subsequently initiated an investigation. As a result, the DPC found in particular (essentially undisputed) violations of data protection and data security law. However, since this also affected users in other Member States and justified a competence of those data protection authorities, the DPC initiated the consistency procedure. In this context, the lead DPC submitted a final draft decision against Twitter with intended sanctions to the other supervisory authorities concerned. Some national supervisory authorities made use of their right to file a reasoned objection to the draft decision. The criticism related to the scope of the breaches found, the findings on Twitter's role as (sole) data controller, the competence of the DPC and the amount of the proposed fine. In turn, the DPC rejected the other authorities' objections as "not relevant and unfounded" and thus initiated

192 Decision 01/2020 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding Twitter International Company under Article 65(1)(a) GDPR, https://edpb.europa.eu/our-work-tools/our-documents/binding-decision-board-art-65/decision-012020-dispute-arisen-draft_en.

the dispute settlement procedure provided for in Art. 63 GDPR. Due to the "complexity of the facts", the deadline for the EDPB's decision was extended, and in the end the decision was taken two years after the incidents had taken place. In the given context it is also interesting to take a look at the timetable (which is summarised in a condensed overview below) that the EDPB published with its decision in order to demonstrate the complexity and duration of this single decision on a matter which was not very complex with regard to the actual violation that had occurred:

26.12.2018	Twitter Inc. receives a bug report.
03.01.2019	After internal investigations Twitter Inc.'s Legal Team decided that the issue should be treated as an incident.
08.01.2019	After being notified by Twitter Inc (US), the Twitter International Company (TIC, established in Dublin) notifies the DPC of the incident.
22.01.2019	The DPC notifies TIC of the scope and legal basis of the investigation started.
28.05.2019 to 21.10.2019	Inquiry of the DPC takes place involving submissions by TIC.
11. and 28.11.2019	DPC corresponds with TIC and invites TIC to make further written submissions.
2.12.2019	TIC makes further submissions to the DPC.
14.03.2020	The DPC issues a preliminary draft decision to TIC, concluding that TIC infringed Arts. 33(1) and 33(5) GDPR; hence it intends to issue a reprimand in accordance with Art. 52(2) GDPR and an administrative fine in accordance with Art. 58(2)(i) and Art. 83(2) GDPR.
27.04.2020	TIC provides submissions on the preliminary draft decision to the DPC.
22.05.2020 to 20.06.2020	The DPC shares its draft decision with the other supervisory authorities concerned. Several authorities (AT, DE, DK, ES, FR, HU, IT and NL) raise objections.

15.07.2020	The DPC replies to the objections in a Composite Memorandum, declaring (why) not to follow the objections, and shares this with the other concerned authorities.
27 and 28.07.2020	In light of the arguments put forward by the DPC, two authorities drop their objections, whereas the others maintain their objections.
19.08.2020	The DPC refers the matter to the EDPB in accordance with Art. 60(4) GDPR, thereby initiating the dispute resolution procedure under Art. 65(1)(a).
09.11.2020	The EDPB adopts an Art. 65 GDPR decision in its 41st plenary session.
09.12.2020	The DPC adopts its final decision.

In its assessment, the EDPB rejected several objections that the other supervisory authorities had raised against the draft decision of the DPC on procedural grounds. According to that decision, the objections did not meet the requirements of a "relevant and reasoned objection", which would have required a clear demonstration of "the significance of the risks posed by the draft decision as regards the fundamental rights and freedoms of data subjects and, where applicable, the free flow of personal data within the Union"[193]. The EDPB imposes with this standard of scrutiny a detailed duty on the other authorities concerned to provide reasons. Some of the insufficiently argued objections concerned the assessment of the roles of the different actors within the Twitter group, the competence of the DPC, the failure to issue a reprimand and the finding of breaches of the data breach notification obligation. Conversely, the objections that had requested the finding of further breaches by the DPC – essentially that Twitter had failed to comply with its obligations to ensure data security, which the bug had demonstrated – were indeed relevant and reasoned. However, the Board could not make a final determination on them, as it lacked the necessary information from (own) investigations to do so because it was bound by the scope of the DPC's investigation. As a result, only the objections from Austria, Germany and Italy concerning the amount of the fine were successful. Therefore, the EDPB required the DPC to re-assess the elements

193 Art. 4(24) GDPR.

it had relied upon to calculate the amount of the fixed fine to be imposed on TIC and to amend its Draft Decision by increasing the level of the fine in order to ensure it fulfils its purpose as a corrective measure and meets the requirements of effectiveness, dissuasiveness and proportionality. A precise amount was not specified. The DPC complied accordingly in its final decision of 9 December 2020 and imposed a fine of EUR 450,000 on Twitter (instead of $150,000 – $300,000 as provided for in the draft decision).[194]

The decisions concerning WhatsApp are much more complex. The first of a total of three concerned an urgent procedure initiated by the Hamburg data protection authority.[195] WhatsApp announced changes to its terms of use in May 2021, also to users in Germany, which, if accepted, would have essentially meant 'consent' to the merging of user data of different services of the Meta Group and its use within the entire group. With the consent to this processing was made a requirement for further use of WhatsApp.[196] The Hamburg supervisory authority, among others, considered this a significant breach of data protection law and issued a temporary and provisional prohibition order against WhatsApp and, a month later, turned to the EDPB in an urgency procedure. Repeatedly expressed concerns on the part of the Hamburg DPA vis-à-vis the Irish DPC – which had already been in dialogue with WhatsApp for some time regarding the change in the terms of use – had not brought the desired success.[197]

In the extensive (50 pages) decision of 12 July 2021, the EDPB analyses in detail the lawfulness of the processing by WhatsApp and the Meta Group along the different purposes (marketing, security etc.) and relies on the publicly available terms of use and further information on the privacy policy of the group. The result of the analysis is quite telling: "As regards the existence of infringement, based on the evidence provided, there is a high likelihood that Facebook IE already processes WhatsApp's user data as a (joint) controller for the common purpose of safety, security and

194 DPC, Decision of 9.12.2020, Case Reference: IN-19–1–1, https://edpb.europa.eu/sites/default/files/decisions/final_decision_-_in-19-1-1_9.12.2020.pdf.

195 EDPB, Urgent Binding Decision 01/2021 on the request under Article 66(2) GDPR from the Hamburg (German) Supervisory Authority for ordering the adoption of final measures regarding Facebook Ireland Limited, adopted on 12 July 2021, https://edpb.europa.eu/system/files/2021-07/edpb_urgentbindingdecision_20210712_requesthh_fbireland_en.pdf.

196 See on this and the following in more detail *Mustert*, The EDPB's second Article 65 Decision – Is the Board Stepping up its Game?.

197 See on this the timetable provided in the EDPB decision, ibid, pp. 4, 5.

integrity of WhatsApp IE and the other Facebook Companies, and for the common purpose of improvement of the products of the Facebook Companies. However, the EDPB is not in a position to determine whether such processing takes place in practice." In the end, the EDPB, therefore, ruled that there was no urgency for the DPC to adopt final measures as this would have required the existence of an urgent situation for the protection of the rights and freedoms of data subjects which the EDPB could not clarify.

While the EDPB's binding decision on WhatsApp, issued two weeks later at the end of July 2021, essentially concerned other aspects of the company's data processing,[198] the further decision of 5 December 2022[199] was again about the terms of use and related aspects of data processing in the Meta Group. The core of those proceedings goes back to a complaint from the data protection NGO noyb from 2018. After the conclusion of the investigation procedure conducted by the DPC (after more than four years), the DPC forwarded its draft decision to its colleagues in other Member States at the end of 2022. In the draft, the DPC found, in particular, a breach of transparency and information obligations, which, however, in its view did not require the imposition of a fine because a fine of €225 million had already been imposed on WhatsApp in 2021 for similar breaches over the same period. For the remainder of the complaint, the DPC considered the processing operations as described by the terms of use to be covered by the justification basis of Art. 6(1)(b) GDPR (processing for the fulfilment of contractual purposes) and thus lawful. Some authorities from other Member States saw things quite differently, which led to the initiation of the conflict resolution mechanism within the EDPB. The EDPB issued a binding decision on 5 December 2022. While the Board again rejected some objections as not relevant and reasoned, it did, in particular, instruct the DPC to amend its decision to the effect that WhatsApp could not rely on contractual purposes and had to find another justification for the processing, that breaches of other provisions also needed to be identified

198 EDPB, Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR, adopted on 28 July 2021, https://edpb.europa.eu/system/files/2021-09/edpb_bindingdecision_202101_ie_sa_whatsapp_redacted_en.pdf.

199 EDPB, Binding Decision 5/2022 on the dispute submitted by the Irish SA regarding WhatsApp Ireland Limited (Art. 65 GDPR), adopted on 5 December 2022, https://edpb.europa.eu/system/files/2023-01/edpb_bindingdecision_202205_ie_sa_whatsapp_en.pdf.

and sanctioned with a fine and that the amount of the fine would have to be reassessed. Tied to this decision, the final decision of the DPC of 12 January 2023[200] reflects this assessment and finds a violation of information obligations and Art. 6(1) due to the lack of a justification for the data processing. The finding is accompanied by the imposition of a fine of 5.5 million Euros and an order to remedy the situation within a period of six months.

However, the DPC limits this to processing for purposes of service improvement and security. It does not address processing for personalised advertising purposes, which is included in the terms of use, too, or disclosure for such purposes to Meta Group affiliates. However, the EDPB had instructed in its binding decision that the DPC would have to instigate further investigations and possibly issue a new Draft Decision in accordance with Art. 60(3) GDPR in relation to exactly that aspect: "[the DPC] shall carry out an investigation into WhatsApp's processing operations in its service in order to determine if it processes special categories of personal data (Article 9 GDPR), processes data for the purposes of behavioural advertising, for marketing purposes, as well as for the provision of metrics to third parties and the exchange of data with affiliated companies for the purposes of service improvements, and in order to determine if it complies with the relevant obligations under the GDPR". In its press release accompanying its final decision of 19 January 2023 in the other elements of WhatsApp investigation, the DPC responded to this request by the EDPB with harsh words questioning the Board's competence:

> "The DPC's decision naturally does not include reference to fresh investigations of all WhatsApp data processing operations that were directed by the EDPB in its binding determination. The EDPB does not have a general supervision role akin to national courts in respect of national independent authorities and it is not open to the EDPB to instruct and direct an authority to engage in open-ended and speculative investigation. The direction is then problematic in jurisdictional terms, and does not appear consistent with the structure of the cooperation and consistency arrangements laid down by the GDPR. To the extent that the direction may involve an overreach on the part of the EDPB, the DPC considers it appropriate that it would bring an action for annulment before the Court

200 Decision of 12 January 2023, DPC Inquiry Reference: IN-18–5–6, https://edpb.europa.eu/system/files/2023-01/final_adoption_version_decision_wa_redacted_1.pdf.

of Justice of the European Union in order to seek the setting aside of the EDPB's direction."[201]

This opinion by the DPC underlines that the GDPR has indeed introduced a conflict resolution mechanism by which other than lead supervisory authorities should be shielded against inactivity or limited investigation and enforcement efforts by the lead authority, even though in this case the concerned authority is of the opinion the EDPB is overstepping its competences in the use of the procedure. The differing opinions on the consistency procedure and the underlying reasons for its existence show that, as the practical experience gained so far proves, challenges remain even with a formalised procedure and binding decision-making powers by the cooperation structure on EU level.

On the one hand there is the difficulty to comply with the formal requirement of a relevant and reasoned objection by other authorities, which can regularly only refer to the results of the (or the lack of any) lead supervisory authority's investigations for this purpose. The same applies to the EDPB, which can only base binding decisions on the scope of the investigations as they were specified by the lead supervisory authority – as the DPC alludes to in its press release. This is particularly problematic in urgent proceedings where the state of investigation is regularly not far advanced. Outside of these emergency procedures, the procedure can take a long time: although the EDPB itself is obliged to decide within short deadlines in the consistency procedure, there are no such limits for the draft decision that triggers the consistency procedure in the first place. Only the urgency mechanism can be invoked in such cases, but the fact that such a procedure was foreseen reflects the anticipation that it would be necessary to overcome potential delays endangering a timely response to violations.

On the other hand, the limitation on the scope of the lead supervisory authority's investigation has an impact on the scope of the binding decision. As the binding decision on WhatsApp shows, the consistency mechanism does not in itself provide the EDPB with a fully effective way to steer investigations in a certain direction in order to meet doubts and requests issued by the supervisory authorities of other Member States. As the delineation of competences between national authorities and the EDPB is likely to be subjected to interpretation by the General Court and

201 DPC, press release of 19th January 2023, https://www.dataprotection.ie/en/news-media/data-protection-commission-announces-conclusion-inquiry-whatsapp.

ultimately possibly also the Court of Justice of the EU, it remains to be seen how the procedure will be framed in detail and applied in the future. Based on this, the question if and to what extent this procedure is efficient will be able to be answered better.