

STUDY

Requested by the CULT Committee



# Implementation of the revised Audiovisual Media Services Directive

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Background Analysis  
of the main aspects  
of the 2018 AVMSD revision



**Culture and Education**



Policy Department for Structural and Cohesion Policies  
Directorate-General for Internal Policies  
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RESEARCH FOR CULT COMMITTEE

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# Implementation of the revised Audiovisual Media Services Directive

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Background Analysis  
of the main aspects  
of the 2018 AVMSD revision

## **Abstract**

This Background Analysis covers the main novelties and changes that came with the revision of the AVMSD by Directive (EU) 2018/1808. It presents implementation issues concerning the application of the country-of-origin principle, new rules on VSPs as well as for the promotion of European works and discusses questions of coherency and consistency of the regulatory framework before closing with an overview of further relevant aspects.

This document was requested by the European Parliament's Committee on Culture and Education.

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## LIST OF ABBREVIATIONS

|                 |  |
|-----------------|--|
| <b>AVMSD</b>    | Audiovisual Media Services Directive   |
| <b>AVOD</b>     | advertising-based video on demand  |
| <b>cf.</b>      | confer   |
| <b>CJEU</b>     | Court of Justice of the European Union   |
| <b>CiTiP</b>    | European University Institute, Centre for Information Technology and Intellectual Property |
| <b>CMPF</b>     | Centre for Media Pluralism and Media Freedom   |
| <b>CSAM</b>     | child sexual abuse material  |
| <b>CULT</b>     | Committee on Culture and Education   |
| <b>DG</b>       | Directorate-General (EU Commission)  |
| <b>DSA</b>      | Digital Services Act   |
| <b>DMA</b>      | Digital Markets Act  |
| <b>e.g.</b>     | for example  |
| <b>EAO</b>      | European Audiovisual Observatory   |
| <b>EC</b>       | European Community   |
| <b>ed./eds.</b> | editor(s)  |
| <b>EMFA</b>     | European Media Freedom Act   |
| <b>EMR</b>      | Institute of European Media Law  |
| <b>EPG</b>      | Electronic programme guide   |
| <b>EPRS</b>     | European Parliamentary Research Service  |
| <b>ERGA</b>     | European Regulators Group for Audiovisual Media Services                                   |
| <b>et al.</b>   | and others   |
| <b>et seq.</b>  | and the following  |

|                |  |
|----------------|--|
| <b>etc.</b>    | et cetera  |
| <b>EU</b>      | European Union   |
| <b>i.e.</b>    | that means   |
| <b>ibid</b>    | in the same place  |
| <b>IViR</b>    | Institute for Information Law of the University of Amsterdam                         |
| <b>HK-MStV</b> | Heidelberger Kommentar Medienstaatsvertrag Jugendmedienschutz-Staatsvertrag          |
| <b>JIPITEC</b> | Journal of Intellectual Property, Information Technology and Electronic Commerce Law |
| <b>MoU</b>     | Memorandum of Understanding  |
| <b>OJ</b>      | Official Journal of the European Union   |
| <b>para.</b>   | paragraph(s)   |
| <b>RDTI</b>    | Revue du Droit des Technologies de l'Information                                     |
| <b>SMIT</b>    | Studies in Media, Innovation and Technology  |
| <b>SVOD</b>    | subscription-based video on demand   |
| <b>TCO</b>     | Regulation on preventing the dissemination of terrorist content online               |
| <b>TFEU</b>    | Treaty on the Functioning of the European Union                                      |
| <b>TV</b>      | television   |
| <b>TwFD</b>    | Television without Frontiers Directive   |
| <b>VOD</b>     | video on demand  |
| <b>VUB</b>     | Vrije Universiteit Brussel   |
| <b>VSP</b>     | video-sharing platform   |





## EXECUTIVE SUMMARY

### KEY FINDINGS

The 2018 AVMSD revision brought significant innovations in an effort to (further) achieve regulatory convergence for audiovisual content dissemination.

Clarifications and changes were made for derogation and circumvention from the country-of-origin principle but first cases illustrate a continued need to strike the right balance between reliance on the country-of-origin and safeguarding fundamental principles in targeted Member States.

New rules for VSPs are a significant step towards a more converged regulation but practical effectiveness is yet to be assessed after transposition is complete and the actual implementation in practice takes place while the cooperation mechanisms can be further tested.

Based on new promotion of European works rules, which mostly were transposed uniformly concerning share and prominence in on-demand catalogues, it is to be expected that the imposition of stricter rules on on-demand services will lead to a further increase of the supporting effect for the European audiovisual market.

Concerns about the appropriate positioning of the AVMSD arise, particularly in view of recently adopted or proposed legislative initiatives at EU level.

Cooperation mechanisms in a cross-border and cross-sectoral dimension will be key with regard to all of these implementation issues.

### Introduction

The reform of the AVMSD in 2018 has brought significant innovations. Among other things, changes affected some of the basic principles of the AVMSD such as the scope or the country-of-origin principle. These changes have become even more relevant in the context of recent developments as well as regulatory enforcement action.

This Background Analysis reflects the implementation of the revised AVMSD and possible issues that have occurred with it. The transposition deadline of September 2020 was missed by most Member States and therefore the picture of application in practice is not yet complete. It should be noted that the implementation partly also depended on the publication of Guidelines by the European Commission which only took place in July 2020.

### Country of Origin, jurisdiction, derogation and circumvention

The country-of-origin principle as cornerstone of the AVMSD was retained, but some clarifications on exceptions were made. The nearly unchanged criteria for establishing jurisdiction have proven to be efficient in assigning responsibility to Member States.

The technical criteria for a subsidiary determination of establishment for third country providers using satellite dissemination within the EU have led to problematic results by opening the benefit of the

Single Market and freedom to provide services for providers that have no attachment to the EU in relation to the editorial decision-making.

The first applications of temporary derogation measures directed against non-domestic providers show difficulties that continue to result partly from the procedural complexity. Especially the application of temporary suspension orders in the Baltic States against Russian state-controlled media outlets illustrate the need for a balancing between country-of-origin and the safeguarding of fundamental principles by targeted Member States.

The sanctions issued by the Council of the EU against certain providers after the Russian attack of the Ukraine and their confirmation by the General Court should be seen in light of a future adaptation of the abilities to respond to such situations under the AVMSD or beyond it.

## **Rules on VSPs**

The extension of the scope to VSPs was a significant step towards the creation of convergent regulation of the audiovisual media market concerning advertising and protecting minors as well as the general public. However, significant elements are left to the implementation in the Member States most of which have closely followed the measures suggested by the Directive, partly integrating them into a self- and co-regulation framework in which the national regulatory authorities have a decisive role with control and statutory powers.

Conclusions on practical effects can only be drawn in a limited way, as the transposition process has not yet been completed in an especially relevant Member State. This concerns both the scope of applicability, especially in light of the criterion of essential functionality of a service on which the Commission has published Guidelines but which ultimately is assessed by the Member State having jurisdiction, as well as the evaluation of the appropriateness of measures by VSPs.

Certainly, cooperation mechanisms of the regulatory authorities will be key and in this context ERGA has developed an adequate approach with the Memorandum of Understanding on enhanced cooperation which could be the basis for future formalisation of decision-making.

## **Rules on European works**

The AVMSD revision 2018 has comprehensively reformed the system of promotion of European works in the on-demand sector. Irrespective of the late transposition in most Member States, almost all have adopted the 30% catalogue share from the AVMSD with specificities in some Member States such as higher quotas generally or higher quotas for specific offers (e.g. public service media), separate quotas for independent productions or for domestic works. The majority of transpositions rely on the calculation method proposed in the Guidelines of the European Commission. Regarding the prominence obligation, most Member States follow the wording of the AVMSD and refer to specific ways of achieving prominence by taking up possible approaches as set out in Recital 35. With regard to the low turnover and low audience exemptions, most Member States rely on the indications made in the Commission Guidelines. The obligation to waive promotion duties due to the nature or theme of a service was enshrined explicitly in national law in about a half of the Member States. It should be noted that aspects of jurisdiction and monitoring compliance are and will be of high importance in the context of Art. 13(1) with regard to new regulatory approaches needed and in connection with jurisdiction questions based on the country-of-origin principle.

Art. 13(2) acknowledges that Member States can impose obligations to contribute financially to the production of European works but provides for limitations if such obligations are imposed on non-domestic providers. It can be noted that this possibility has so far been taken up to a limited, but

noteworthy extent vis-à-vis non-domestic providers, and it can be expected that this will be continued in the future.

## **Consistency and coherence**

The potential for conflict of the AVMSD with other legal acts and thus the need for coherence has increased significantly in recent times due to enacted or proposed legislation at EU level.

This applies first and foremost to the DSA, which not only addresses players in the distribution and value chain of audiovisual content but also has direct overlaps in its catalogue of duties with the AVMSD. The “without prejudice” clause that the DSA establishes in relation to the AVMSD, may not be sufficient to clarify practical conflict cases and provide for a clear delineation in the different supervisory regimes. The DMA, the TCO Regulation and the proposed CSAM Regulation, also have potential for conflict, especially in the area of regulating VSPs.

There are even more evident overlaps in the proposals for the EMFA and a Regulation on political advertising. Here, clarification of the priority of the AVMSD is not only to be seen in light of the endeavour to create legal certainty and ensure effective (cross-border) law enforcement but also in light of the maintenance of value decisions of the AVMSD such as the independence of supervision and the protection of editorial content.

## **Other issues and outlook**

With the AVMSD revision a number of further changes were made which are of relevance. New rules on transparency of media ownership and the rules ensuring the protection of minors concern subject areas that are strongly characterised by culturally determined peculiarities and are therefore still designed very differently at Member State level. With a few exemptions, the option to implement rules on prominence of general interest content in Art. 7a has hardly been used while Art. 7b (on signal integrity), led to quite uniform rules at national level leaning on the wording of the AVMSD.

All these rules have to be seen in relation to the institutional system of the AVMSD and of ongoing legislative proposals. Regarding evolving conditions of the audiovisual media landscape and the new legislative environment, cooperation between regulatory authorities and consistency of application of the legal framework is and will be key.

## 1. INTRODUCTION

The revision of the Audiovisual Media Services Directive (Directive 2010/13/EU; AVMSD)<sup>1</sup> in 2018 by Directive (EU) 2018/1808<sup>2</sup>, in an effort to (further) achieve convergence on the audiovisual media market, has brought significant innovations. Among other points, changes affected also some of the basic principles of the AVMSD such as the scope or the country-of-origin principle. These changes have become even more relevant in the context of recent developments as well as regulatory enforcement action.

This Background Analysis<sup>3</sup> is prepared against the background of implementation of the revised AVMSD and possible issues that have occurred with it. It needs to be noted, that the transposition deadline of September 2020 was missed by most Member States and although at the time of writing all but one State have notified the European Commission their national transposition acts, a large number of implementations took place only recently. Therefore, it is still too early to draw a full picture of the implementation and how the Directive is applied in practice. This concerns specifically some areas in which the AVMSD introduced completely new provisions such as concerning VSP providers. For the Member State transpositions, it can generally be observed that in some areas very different approaches were chosen which may lead to differing issues depending on the respective rules.

With the revision, the scope of the Directive was extended to VSP providers with separate obligations for them, while the rules applicable to linear and non-linear audiovisual media services were further aligned to reflect the realities of the changing media landscape. Substantive rules such as those on hate speech, transparency of media ownership, protection of public value content or signal integrity were newly introduced or significantly reformed such as those on the promotion of European works and the protection of minors. In addition, institutional structures concerning the oversight of the rules were adapted, which in turn have important implications for the overall shape of media regulation in the future.

The analysis will present implementation issues with these new areas of regulation introduced with the revision by taking into account the way some of these provisions have been transposed in the Member States. Importantly, where necessary, the analysis will include the two Guidelines that were published by the Commission in July 2020 to offer further guidance to the Member States when transposing and applying the Directive.<sup>4</sup> These were only published shortly before expiry of the deadline for transposition. Consequently, Member States that were intending to take them into account already in the legislative process of transposition had to wait with the finalisation of their national laws. The Guidelines are also interesting in that for the first time the AVMSD contains explicit instructions to the Commission to issue such Guidelines. In the past clarifying communications such as concerning new

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<sup>1</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Codified version), OJ L 95, 15.4.2010, p. 1–24. Corrigendum to Directive 2010/13/EU, OJ L 263, 6.10.2010, p. 15–15.

<sup>2</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69–92. Consolidated text: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010L0013-20181218>.

<sup>3</sup> This Background Analysis is complemented by a [Recommendations Briefing on 'The Implementation and Future of the revised Audiovisual Media Services Directive'](#). These two research papers were commissioned by the Policy Department as a part of concomitant expertise aiming to support the work of the CULT Committee on its ['Implementation Report'](#) on the 2018 revised Audiovisual Media Services Directive.

<sup>4</sup> Commission Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive 2020/C 223/02, C/2020/4322, OJ C 223, 7.7.2020; Communication from the Commission, Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover 2020/C 223/03, C/2020/4291, OJ C 223, 7.7.2020, p. 10–16.

forms of advertising or indications on how to report on the application of the European works provisions were shared in the Contact Committee but not expressly foreseen by the Directive. In using this new instrument of concretisation, the Directive differentiates between mandatory and optional Guidelines. Mandatory Guidelines are foreseen for a substantive matter on calculation methodology in the context of European works (Art. 13 (7)) and for a more procedural aspect of defining the scope that Member States reports should have concerning the implementation of the newly inserted provision on media literacy skills (Art. 33a (3), these Guidelines are still outstanding). Optional Guidelines are foreseen for the “essential functionality” criterion concerning VSPs (an option that the Commission used).

The European Parliament’s CULT committee has decided to present a report on the “Implementation of the revised Audiovisual Media Services Directive (AVMSD)” in the context of which this Background Analysis is produced. The European Parliamentary Research Service (EPRS) has provided an overview of the status of the transposition of the Directive<sup>5</sup>, building on the reporting and mapping of Member State legislation by the European Audiovisual Observatory (EAO).<sup>6</sup> In addition, the European Regulators Group for Audiovisual Media Services (ERGA) has accompanied the transposition of the Directive both through the daily work of its Members, the national regulatory authorities competent for the implementation of the AVMSD as well as by jointly published documents and cooperation on European level which give insights into possible implementation issues. Studies commissioned by the European Commission as well as scholarly contributions are considered in the analysis, including several studies which the co-authors of this Background Analysis have published.<sup>7</sup>

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<sup>5</sup> EPRS, *Transposition of the 2018 Audiovisual Media Services Directive*.

<sup>6</sup> These sources will be used throughout the Background Analysis, especially the continuously updated AMVS database of the EAO provides the source for comparative overviews.

<sup>7</sup> Mainly these are Cole/Etteldorf/Ullrich, *Updating the Rules for Online Content Dissemination*; Cole/Etteldorf/Ullrich, *Cross-Border Dissemination of Online Content*; Cole/Ukrow/Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*; Cole, *Overview of the impact of the proposed EU Digital Services Act Package on broadcasting in Europe*; Cole, *Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD*; Cole, *Die Neuregelung des Artikel 7b Richtlinie 2010/13/EU (AVMD-RL) Spielraum und zu beachtende Vorgaben bei der mitgliedstaatlichen Umsetzung der Änderungsrichtlinie (EU) 2018/1808*, Cole, *The AVMSD Jurisdiction Criteria concerning Audiovisual Media Service Providers after the 2018 Reform*, Cole/Etteldorf, *Von Fernsehen ohne Grenzen zu Video-Sharing-Plattformen, Hate Speech und Overlays*; additionally online sources of the Institute of European Media Law (EMR) such as the synopsis on the AVMSD and DSA (<https://emr-sb.de/synopsen/>) were used.

## 2. FOCUS AREAS OF IMPLEMENTATION OF NEW OR UPDATED PROVISIONS OR NEWLY RELEVANT ELEMENTS

### 2.1. Country of Origin, jurisdiction, derogation and circumvention

#### KEY FINDINGS

The country-of-origin principle as cornerstone of the AVMSD was retained in the last revision although some clarifications on exceptions were made. The criteria for establishing jurisdiction remain widely unchanged and have proven to be efficient in assigning responsibility to the Member States.

The technical criteria for a subsidiary determination of establishment for third country providers using satellite dissemination within the EU have proven to lead to problematic results by opening the benefit of the single market and freedom to provide the services without having any attachment concerning the editorial decision-making to the EU.

The first cases of application of the temporary derogation measures, as well as to a lesser extent of anti-circumvention measures, directed against non-domestic providers show continued difficulties stemming partly from the procedural complexity. Especially the application of temporary suspension orders in the Baltic States directed against Russian state-controlled media outlets illustrated the need for a balancing between country-of-origin and the safeguarding of fundamental principles in Member States targeted by certain audiovisual media services.

The sanctions issued by the Council of the EU against certain providers after the Russian attack of the Ukraine and their confirmation by the General Court should be seen in light of a possible future adaptation of the response abilities under the media law framework of the AVMSD or beyond.

#### 2.1.1. The Country-of-Origin principle and its exceptions

The cornerstone of the AVMSD and its predecessor, the Television without Frontiers Directive TwFD<sup>8</sup>, on the way to establish a single market for cross-border dissemination of television and later more generally audiovisual media content has always been the country-of-origin principle.<sup>9</sup> The principle as laid down in Art. 2(1) AVMSD determines the regulatory approach towards both providers of linear and non-linear audiovisual media services by determining that a provider that falls under the jurisdiction of one EU Member State only has to ensure – in principle – that it is compliant with the legal framework of (only) that specific state and is then authorised by the rule set out by the AVMSD to disseminate its audiovisual media service content across all EU Member States. The idea of having a free flow of information in which Member States ensure freedom of reception and do not restrict retransmission on their territory of the services originating in another Member State as stipulated in Art. 3(1) depends on two factors: first, the jurisdiction needs to be determined based on the criteria of Art. 2(3) and (4). Consequently, the providers in question are then monitored by the Member State having jurisdiction

<sup>8</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23–30.

<sup>9</sup> Generally on this Cole, *The Country of Origin Principle*.

in order to ensure that they comply with the legislative framework for audiovisual media services in that Member State. This legislative framework includes the national transposition of the minimum harmonisation rules as coordinated by the AVMSD.<sup>10</sup>

It needs to be noted that from the outset the principle was not construed as being absolute but was made dependent on certain exceptional derogations and anti-circumvention measures which Member States could apply (according to Art. 2(2) TwFD). This approach that was retained throughout the revisions of the Directive in 1997, 2007 and 2018<sup>11</sup> with certain clarifications, partly codifying case law of the CJEU, concerning the question of jurisdiction being made. The idea of this approach is that Member States based on their responsibility for efficient enforcement of the applicable rules in exceptional cases need to be able to address threats to fundamental rights of others and fundamental values posed by the cross-border dissemination of specific audiovisual content and that this has to be possible regardless of the otherwise applicable designation of the jurisdiction to the country of origin.<sup>12</sup>

### 2.1.2. The amendments made by Directive (EU) 2018/1808

#### a. Temporary derogation and anti-circumvention procedures

In the recent revision of the AVMSD the system of the country-of-origin principle and the possible exceptions remained unchanged as such. However, there was a minor clarification made concerning the establishment criteria with which jurisdiction is determined. In case of uncertainty about the assignment of jurisdiction a detailed procedure was introduced. Most importantly, in line with the general alignment of rules applicable to linear and non-linear audiovisual media services, the framework for derogations and anti-circumvention procedures which used to be in two separate paragraphs of the provision depending on the nature of the service, is now unified in Art. 3 (2) and (3), wherein a distinction is made by the type of violation that gives reason for the derogation.<sup>13</sup> It is noteworthy that this separation between grounds for derogation was only introduced in the final stage of negotiations in the trilogue and was not originally foreseen. The differentiation shall lead to a facilitated and slightly accelerated procedure when reacting to risks caused by public provocation to commit a terrorist offence or more generally for public security, also allowing immediate action (according to paragraph 5) in these cases before the regular procedure is initiated.

Equally, in Art. 4 the possibility for (targeted) Member States to react to an alleged circumvention of its stricter rules (which are applicable to audiovisual media service providers) by providers under jurisdiction of another Member State that direct their content to the Member State of destination (which intends to take action for this reason), was extended to include on-demand service providers, too. This extension was based on a proposal by the European Parliament and is noteworthy, because previously the differentiation of derogation measures between the types of service providers could be explained with the intention to use an exactly parallel mechanism for on-demand service providers in the AVMSD as it previously already had been introduced in the e-Commerce Directive (Art. 3(4) thereof). For anti-circumvention measures there was (and is) no parallel mechanism in the e-Commerce Directive, not least because of the lack of a licence requirement for offering such services. With the alignment, both procedures apply in the same way to linear and non-linear services, while the exact structure of the procedure in case of derogation depends on the danger posed by the violation.

<sup>10</sup> Cole, *AVMSD Jurisdiction Criteria after the 2018 Reform*, p. 5.

<sup>11</sup> Overview of the genesis and further inclusion in the Directive's different versions including the relevant recitals of the different Directives in Cole, *AVMSD Jurisdiction Criteria after the 2018 Reform*, p. 10 et seq.

<sup>12</sup> Cf. extensively Cole/Etteldorf/Ullrich, *Cross-border Dissemination of Online Content*, p. 53 et seq.

<sup>13</sup> Cole/Etteldorf/Ullrich, *Cross-border Dissemination of Online Content*, p. 111.

The procedures of Art. 3 and 4 AVMSD belong to those parts of the Directive that do not need to be transposed explicitly in national law but instead “only” need to be respected in case of application of the procedures. However, implementation issues can be identified due to developments that were not foreseeable when the system was put in place and or when the last revision took place, as will be shown below.

#### **b. Criteria to establish jurisdiction**

In terms of the criteria to determine jurisdiction, in principle a transposition is also not necessary, as long as Member States only claim jurisdiction based on the criteria laid down in the Directive. However, in the past the Commission has urged Member States to explicitly include the criteria in their national laws<sup>14</sup> and for clarification purposes this can make sense, although indeed the decisive formulation and its interpretation is the one found in the Directive. With the 2018 revision the amendments concerning the establishment criteria were marginal. According to Art. 2(3) AVMSD this criterion follows the head office and place where editorial decisions are taken and in case of different locations of these two elements in different Member States it is a variation of situations described that helps determining the actually relevant location for jurisdiction. These criteria have generally worked in the past and the qualification of the workforce being the one that is “programme-related” (for the cases when the significant part of the workforce is decisive) by the revised Directive as well as the insertion of an explicit definition of “editorial decision” which follows previous understanding of this already existing element of the jurisdiction criteria<sup>15</sup>, lead to further clarification. Particularly relevant was the insertion in Art. 2(5a)-(5c) of an obligation to follow-up on changes occurring with the media service providers that could affect the jurisdiction as well as maintaining a publicly available database and a conflict-resolution mechanism involving ERGA in case of non-agreement between Member States about jurisdiction over a specific provider. Again, these elements of the Directive do not necessarily need a legislative implementation but contribute to a better enforcement against providers by making jurisdiction responsibilities clear(er).

Difficulties with enforcement of the regulatory framework for audiovisual media have, however, become very evident in the recent past concerning a jurisdiction element of the AVMSD that remained completely unchanged in 2018. Although the criteria determining jurisdiction according to Art. 2(4) can only become relevant if none of the constellations under paragraph 3 leads to a jurisdiction of a Member State, the cases in which it is relevant can be problematic. The reliance on a merely “technical connection” of providers to the EU Single Market for audiovisual media services as a trigger to give them the benefit of the free movement of services, allows potentially rogue providers from outside the European Union to profit from this without giving regulatory authorities of the Member States robust response possibilities in case of problems. As will be further explained below, this also becomes relevant in the context of derogation or anti-circumvention procedures.

Originally inserted in order to avoid a lack of response possibilities against content from third country providers that are available widely in the EU because of the use of a technology connected to one of the Member States, the subsidiary criteria are nowadays limited to satellite dissemination. They firstly determine jurisdiction via the uplink used on the territory of a Member State and only secondly using a satellite capacity appertaining to a Member State. The idea of such media service providers falling under the jurisdiction of the “satellite”-state if no jurisdiction exists based on establishment, was to have some form of enforcement tool. However, due to a lack of establishment of such providers, this

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<sup>14</sup> Cf. e.g. the example of Germany, on this Hartstein, in: HK-MStV, § 1 MStV no. 6, 50 et seq. For other examples referring to the criteria see overview in Cole, *The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform*, p. 40-41.

<sup>15</sup> Cf. on that Cole, *The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform*, p. 46-48.



enforcement is automatically limited to the provider of either the satellite uplink or the satellite company providing the satellite transponder being used for the specific service. The latter case currently mainly concerns two companies in the EU and as the rules on satellite capacity service are not harmonised by the AVMSD or other EU secondary law in detail, the exact reach of enforcement measures depends on the national legislative framework and administrative oversight in those concerned States, France and Luxembourg. In connection with uplinks there can be the added problem that these are more volatile and can change while being relatively easily accessible.<sup>16</sup> While all other providers that benefit from the country-of-origin need to either have a valid licence in their Member State of jurisdiction or another form of authorization or permission to disseminate, albeit without licence but according to the law of that Member State, the constellations in which the technical, “fictitious establishment”-criteria apply, may concern providers whose content is under no specific regulatory framework or at least none that is in line with the AVMSD or a national transposition respectively.

Therefore, although the last revision brought some changes while retaining the underlying country-of-origin principle, in some areas – besides the exceptional derogation possibilities which will be further discussed below – a gradual shift including elements one can refer to as country-of-destination or market-location principles have entered the Directive. Besides the possibility to impose certain obligations in the area of promotion of European works on non-domestic media service providers which will be detailed below, the jurisdiction criteria laid down for video-sharing platform providers in Art. 28a display this. Although it is a separate jurisdiction provision, it follows the same idea of one national jurisdiction to apply to a given VSP<sup>17</sup> and for that purpose relies on establishment. In case of third country providers there is a specific cascade of criteria connecting the provider to one Member State via possible parent or subsidiary companies and a “stable and effective link” to that Member State, thereby expanding the notion of responsible country of “origin” of the VSP.

### 2.1.3. Application of the temporary derogation procedure

Without going into the details of the procedural requirements which are to be fulfilled before being able to take a temporary derogation measure under Art. 3(2) or (3) AVMSD on an abstract level, instead the application cases in the past years shall be used to demonstrate the implementation difficulties. Partly the cases were initiated before the revision of 2018 but they are still relevant to illustrate the complexity of the procedure which was only amended partly since. Interestingly, the most recent case for which a Commission Decision has been published as part of the procedure is the first in which ERGA was asked to give its opinion under the revised rules.

#### a. The “Baltic cases”

In the mandatory consultation procedure for derogation the first cases in which the Commission had to issue a decision on the compatibility of national measures concerned reactions of regulatory authorities in two of the Baltic States against Russian state-owned broadcasters established in another EU Member State, which is why they are referred to here as the “Baltic cases”. It is already noteworthy that only after such a long time of application of the AVMSD (and its predecessor) did any attempted measure actually reach the stage of completing the foreseen procedure. Furthermore, since the first

<sup>16</sup> Details on all of this in Cole, *The AVMSD Jurisdiction Criteria Concerning Audiovisual Media Service Providers after the 2018 Reform*, p. 36 et seq.

<sup>17</sup> Cf. also Kukliš, *Video-sharing platforms in AVMSD: a new kind of content regulation*, p. 303, 305. Cf. also Cavaliere, *Who’s sovereign? The AVMSD’s country of origin principle and video-sharing platforms*, p. 407, 407 et seq.

steps in 2014 there is only a small number of application cases. In these cases, Lithuania<sup>18</sup> and Latvia<sup>19</sup> showed that Russian-language programmes were broadcast addressing mainly the Russian-speaking minorities in their states and were endangering public policy due to the incitement to hatred contained in the programmes. The hurdles to justify action to be taken by regulatory authorities of targeted Member States are already high concerning the nature of the violation requiring manifest, serious and grave infringements. In addition, the procedure for derogation involves information exchanges and consultations with the provider, the Member State of jurisdiction and the European Commission, each of which initiates further steps of exchange. To demonstrate these steps, a brief summary of the cases follows.

The fact that measures were introduced against Russian channels in Lithuania and Latvia in particular after 2014 should not come as a surprise, as these actions can be seen as a reaction to the Russian aggression in Ukraine in that year.<sup>20</sup> In April 2015, Lithuania formally notified to the Commission of its decision to suspend the channel RTR Planeta for a three month period. The broadcaster was deemed to fall under the jurisdiction of Sweden due to a satellite uplink used there and consultations with Swedish authorities had not led to a solution. The Commission therefore found that Lithuania had fulfilled the procedural requirements of the AVMSD. As to the nature of the programmes, the Lithuanian authority argued that a programme from March 2014 “instigates discord and a military climate and refers to demonization and scapegoating with reference to the situation in Ukraine”<sup>21</sup>. Secondly, with regards to a programme from January 2015, the authorities highlighted statements deemed to aim “at creating tensions and violence between Russians, Russian-speaking Ukrainians and the broader Ukrainian population.”<sup>22</sup> Two programmes from March 2015 were furthermore deemed to incite tension and violence not only between Russians and Ukrainians but also against the EU and NATO States. In its decision on the admissibility of the three month suspension the Commission confirmed the context with the ongoing military confrontation involving Russia and the possible tensions which could arise due to the content of the programmes.<sup>23</sup> In evaluating whether the elements of incitement and hatred were fulfilled, the Commission relied on the interpretation delivered by the CJEU in the case of *Mesopotamia Broadcast and Roj TV*<sup>24</sup>, which concerned measures by national authorities that did not fall under the AVMSD procedure but in which the Court confirmed that the

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

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

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

<sup>19</sup> Commission Decision of 3.5.2019 on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 3.5.2019, C(2019) 3220 final.

<sup>20</sup> Kokoly, *Exceptions to the Principle of Free Transmission and Retransmission of Audiovisual Media Content - Recent European Case-Law*, p. 83, 91. On the background also Broughton Micova, *The Audiovisual Media Services Directive*, p. 264, 271-272.

<sup>21</sup> Commission Decision of 10.7.2015 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 10.7.2015, C(2015) 4609 final, para. 18.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid, para. 19.

<sup>24</sup> Joint cases C-244/10 and C-245/10 *Mesopotamia Broadcast and Roj TV* [2011].

Directive's restriction of incitement to hatred is a general public order consideration that goes beyond protection of minors.<sup>25</sup>

Another three month suspension was notified to the Commission by Lithuania in 2016, which also included the suspension of the retransmission of RTR Planeta via the internet. The Commission ultimately came to the same conclusion as in its first decision.<sup>26</sup> In 2017, Lithuania again notified a suspension of RTR Planeta but this time based on new facts for a period of twelve months because of repeated violations. In its decision, the Commission noted that Member States have a margin of discretion when determining which measures are appropriate in the derogation and that the duration of a suspension would only be questioned in case where it is manifestly disproportionate.<sup>27</sup>

The facts are similar with regards to the Latvian suspension of the channel Rossiya RTR. After initiating the procedure in 2018 (which is why it still was decided according to the AVMSD rules before revision), Latvia fulfilled the procedural steps and suspended the channel for 3 months. Again, the Commission confirmed that a programme with statements by a Russian politician incited to violence, advocating for a military invasion of the Baltic States and other Member States as well as to hatred against Ukrainians, stating that they would be "attacked and completely destroyed"<sup>28</sup>.

#### **b. The CJEU judgment in "Baltic Media Alliance"**

In the case of Baltic Media Alliance the CJEU confirmed the view of the national regulatory authority of Lithuania that the disputed measure they had taken in 2016 did not fall under the temporary derogation procedure of AVMSD and therefore did not have to be notified to the Commission.<sup>29</sup> In its decision the regulator had not suspended the retransmission of the Russian-language channel NTV Mir Lithuania which was under UK jurisdiction but ordered that it could only broadcast in pay TV packages for a period of 12 months.<sup>30</sup> Even though the decision by the regulatory authority had been replaced shortly after issuance with a suspension order, the original decision reached the CJEU. The Lithuanian regulatory authority stressed that the decision was taken based on a programme on the channel containing false information which incited to hatred by falsely portraying a collaboration of Lithuanians and Latvians during the Holocaust. The authorities also found that the programme alleged the existence of neo-Nazi politics in the Baltic States which threatened the Russian minority.<sup>31</sup> In its decision, the Court emphasised that this type of action did not constitute a second control of the channel, similarly as it had decided for the measures in RojTV. To date, none of the derogation procedure cases reached the CJEU.

<sup>25</sup> Cf. on the decision in more detail Cole, *Note d'observations, "Roj TV" entre ordre public et principe du pays d'origine*, p. 50 et seq.

<sup>26</sup> Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 17.2.2017, C(2017) 814 final.

<sup>27</sup> Commission Decision of 4.5.2018 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 4.5.2018, C(2018) 2665 final, para. 26.

<sup>28</sup> Commission Decision of 3.5.2019 on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 3.5.2019, C(2019) 3220 final, para. 11.

<sup>29</sup> C-622/17 *Baltic Media Alliance Ltd v Lietuvos radijo ir televizijos komisija* [2019], para. 84.

<sup>30</sup> C-622/17 *Baltic Media Alliance Ltd v Lietuvos radijo ir televizijos komisija* [2019].

<sup>31</sup> *Ibid*, para. 79.

### c. The involvement of ERGA in the first case after revision of the AVMSD

In the first derogation case decided under the revised AVMSD, the Commission confirmed on 7 May 2021 that another 12-months suspension order of the Latvian regulatory authority against Rossiya RTR for comparable reasons as above was compatible with the provisions of the Directive.<sup>32</sup> It based its decision on an opinion of ERGA that was required under the newly formulated Art. 3(2) third subparagraph. In that opinion ERGA not only provides an extensive recollection of the facts before confirming the justification of the measure but also sets out – being the first application case – what it sees as its role in this procedure. It explains that it needs to assess the aspects that fall “within both legal and practical remit of individual ERGA members” (in this case the Latvian regulatory authority) and to extensively take account of “all the actions, or omissions thereof, of the relevant parties” by checking the complete file of a case but without having to verify the content of the established facts or doing a secondary check of the conclusions drawn by the national regulatory authority.<sup>33</sup>

#### 2.1.4. Application of the anti-circumvention procedure

If there are few cases relying on Art. 3(2) for a temporary derogation from the country-of-origin principle, the situation is even more telling when it comes to using the possibility to act against alleged circumventions of audiovisual media services providers under Art. 4(2)-(4) AVMSD.<sup>34</sup> Only once a Member State has (unsuccessfully) invoked the procedure after this had been introduced to codify CJEU case law concerning the first version of the TwFD.

Member States are free to adopt stricter rules to the providers under its jurisdiction than those foreseen in the AVMSD, as long as they do not apply these to providers under jurisdiction of another Member States. Exceptionally, however, they can do so if the service of such a provider is wholly or mostly directed towards its territory, possible issues with rules of general public interest in the targeted Member State are not complied with (possibly due to a differing legal framework in the country-of-origin) and attempts to solve the situation in mutual cooperation with the other State have not led to a result. Again, and for this procedure without the possibility to resort to emergency measures, the targeted Member State has to go through a multi-step procedure that involves the media service provider, the other Member State, the Commission and since the revision besides ERGA also the Contact Committee and has to respect the timelines foreseen. Basis for the procedure is that the targeted Member State makes a case that the reason for the provider being in the other Member State is “in order to circumvent the stricter rules” (Art. 4(3)(b)). With the revision in 2018 a clarification was inserted that the evidence to be collected for this does not mean that a specific intention of the provider has to be proven. This was possibly a reaction to the outcome of the first application case (in light of the facts of the case not surprising), in which the Commission in its Decision had declared the measures incompatible with the circumvention provision because the high threshold for showing the circumvention had not been met.<sup>35</sup> In that case Sweden invoked the anti-circumvention procedure against two providers broadcasting from the United Kingdom (still a Member of the European Union at the time). Swedish authorities had notified the Commission in October 2017 of the intention to

<sup>32</sup> Commission Decision on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council to restrict retransmission on its territory of an audiovisual media service from another Member State, Brussels, 7.5.2021, C(2021) 3162 final.

<sup>33</sup> ERGA, *Opinion on decision No. 68/1-2 of the Latvian National Electronic Mass Media Council restricting the retransmission of the channel Rossiya RTR in the territory of Latvia for 12 months*.

<sup>34</sup> Generally on Art. 4 AVMSD see Kokoly, *The Anti-Circumvention Procedure in the Audiovisual Media Services Directive*.

<sup>35</sup> Commission Decision of 31.01.2018 on the incompatibility of the measures notified by the Kingdom of Sweden pursuant to Article 4(5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services. Brussels, 31.01.2018 C(2018) 532 final.

impose fines against providers under UK jurisdiction, which it alleged were targeting a Swedish audience and had established themselves in the UK to circumvent the stricter Swedish prohibitions concerning advertisement of alcoholic beverages. The burden of proof in that case could hardly be met, because the relocation of the providers and the overall situation had occurred partly even before the TwFD had entered into force, so showing a specific intent retrospectively in a sufficient way to be used as evidence was difficult but it may not be seen as a general impossibility for adducing sufficient evidence, although – as mentioned – it remains the only case to date in which this was tried.

### 2.1.5. Effects of the 2018 revision in applying the exceptional procedures

The changes made both to Art. 3 and 4 were meant to streamline the procedures and thereby contributing to giving them the actual relevance that they were supposed to have from the outset in finding the right balance between the principal application of the country-of-origin principle and the need for Member States to defend fundamental interests when being confronted with situations in which content from audiovisual media services providers are endangering these. In that regard the differentiation of procedural steps for temporary derogation depending on the type of violation was not imperative but it did lead to a more immediate reaction possibility in case of risks to public security. However, the fact that the relevant timelines in the consultation procedure were extended, rather than reduced, result in a potential measure only taking effect significantly after the violation in question has taken place. This calls for consideration of some kind of fast-track procedures between regulatory authorities/Member States and the European Commission and ERGA, if the derogation procedure is to be more effective. Alternatively, the urgency or emergency measures foreseen in Art. 3(5) which have been facilitated for use by targeted Member States, will have to be tested in future cases to see whether they can solve the timing issue sufficiently. The extension of reasons for which the procedure of Art. 3 can be invoked in combination with the broad understanding of incitement to hatred based on the CJEU's decision in *RojTV*, opens the path for using these provisions more actively by the Member States.

The same is true for Art. 4 in which the inclusion of ERGA in the consultation procedure can also have the effect of a more intensive exchange between its members on the application of certain regulatory standards and on the question for which reason a given Member State may be following a specific approach in view of general public interest matters. As the anti-circumvention measure is a permanent derogation from a situation covered by a fundamental freedom of the Treaty in contrast to temporary derogation measures to respond to risks posed by specific content, it nonetheless needs to be interpreted narrowly and will only be successfully applicable in exceptional cases, even after the revision. However, its extension to on-demand service providers could lead to more cases in the future and even more so if a comparable provision would apply to any form of audiovisual content dissemination.

An issue that remains unsolved by the last revision and which only surfaced clearly after the successful application of the derogation procedures in the Baltic cases, is the limited effect such measures have on the actual dissemination of the content. Because Art. 3 concerns a derogation of "retransmissions" on the territory of the Member State taking action, the reach is limited to an act, in which a cable or terrestrial retransmission of the content in question takes place. Even if one considers a broad interpretation of Art. 3(1) by arguing that "freedom of reception" (which exceptionally the State can deviate from) concerns any type of dissemination as the flipside of reception, the technical situation in connection with satellite dissemination renders a measure without effect concerning this method of

content distribution. The same outcome applies to online dissemination for which the limitations to react to in the currently applicable legal framework have been demonstrated elsewhere.<sup>36</sup>

There is no direct legal consequence for any other Member State resulting from the successful conclusion of the derogation procedure. This means that another Member State can also react against a provider – this possibility remains untouched by the derogation procedure as is underlined by Art. 3(4) – but is not obliged to respond in any way to the measures taken by the targeted Member State. More specifically, neither the country-of-origin of the media service provider (including in cases of third country providers e.g. the Member State from which the satellite uplink originates or which has jurisdiction over the satellite capacity provider involved in the case) nor any other Member State need to take measures to ensure that the actual reception in the targeted Member State is made impossible.

Potentially, a lack of efficient enforcement against media service providers by the Member State under which jurisdiction they fall, could be seen as an infringement in the form of an ineffective transposition and application of the AVMSD, which contains an obligation to ensure that all media service providers comply with the applicable law in that Member State. However, this would depend on an assessment by the Commission and may in practice be limited as the standards for assessing a factual situation can differ across the Member States.

#### 2.1.6. The issue of third country providers and sanctioning of Russian channels

The discussion above on measures by Lithuania and Latvia shows that the question of how to deal with Russian state-owned media providers in the EU, particularly after the invasion of Crimea in early 2014, had already been considered by several Member States even before the Russian attack against Ukraine in February 2022.<sup>37</sup> As a reaction to this attack, the EU decided on a number of economic sanctions against certain natural and legal persons linked to the Russian state as part of its Common Foreign and Security Policy (CFSP). By means of an amending Decision and Regulation the Council issued an EU-wide ban against the two Russian state-owned media outlets Sputnik and RT in their respective national versions.<sup>38</sup>

Specifically, the ban includes the prohibition for “operators to broadcast or to enable, facilitate or otherwise contribute to broadcast” of RT English, RT UK, RT Germany, RT France, RT Spanish and Sputnik. This includes “through transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications”<sup>39</sup> Furthermore, “any broadcasting licence or authorisation, transmission and distribution arrangement” with these media outlets shall be suspended. As a temporal scope, these measures are valid for six months but are to be in place “until the aggression against Ukraine is put to an end, and until the Russian Federation, and its associated media outlets, cease to conduct propaganda actions against the Union and its Member States”<sup>40</sup> and there is a prohibition of activities aimed at circumventing these prohibitions. Later the list

<sup>36</sup> Cf. on this Cole/Etteldorf/Ullrich, *Cross-Border Dissemination of Online Content*, p. 41 et seq., 221 et seq.; Cole/Etteldorf/Ullrich, *Updating the Rules for Online Content Dissemination*, p. 101 et seq., 143 et seq.

<sup>37</sup> An overview of all measures taken before this time as well as in the immediate period after is given by Cabrera Blázquez, *The implementation of EU sanctions against RT and Sputnik*. Cf. also Susi et al., *Governing Information Flows During War: A Comparative Study of Content Governance and Media Policy Responses After Russia's Attack on Ukraine*.

<sup>38</sup> Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 65, 2.3.2022, p. 5–7; Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 65, 2.3.2022, p. 1–4.

<sup>39</sup> Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 65, 2.3.2022, p. 1–4, Article 1.

<sup>40</sup> Ibid, Recital 10.

of addressees of the Decision was enlarged and the scope of prohibited activities extended<sup>41</sup> as well as the sanctions prolonged<sup>42</sup>. Although these measures are not linked to the AVMSD and the Directive does not foresee comparable measures to react on an EU-wide scale to threats to the public order by state-controlled foreign media engaging in disinformation and propaganda activities as was identified by the Council, the sanctions should be included in the discussion of implementation issues of the Directive. Although they are based on the sanctioning regime that is not media-specific, the broad discretion of the Council for the type of measures to be included in the sanctions made this “spill-over” into a media law issue possible. This raises the question whether in the future comparable possibilities should not rather be included in the legislative framework of media service provider’s oversight and thereby in connection with derogation and anti-circumvention measures of the AVMSD as described above.<sup>43</sup>

RT France brought an action for annulment against the Council measures to the General Court, relying amongst other on a violation of its freedom of expression and challenging the competence of the Council to issue such acts. In the first expedited procedure, the Court upheld in its judgment of 27 July 2022 the Council decisions as being compatible with EU law including the fundamental rights applicable in the case.<sup>44</sup> It noted the serious threat to peace at Europe’s borders and stressed that the Council has extensive flexibility to define the objectives of restrictive measures adopted in the CFSP.<sup>45</sup> Concerning the competence of the Council, the Court also noted that the uniform implementation of the temporary prohibition of the media in question could be better achieved on EU than national level.<sup>46</sup> It clearly states that sanctioning measures are possible irrespective of the jurisdiction question under the AVMSD according to which the French regulatory authority would be in charge for measures against RT France.<sup>47</sup> The Court importantly underlines the significance of audiovisual media in today’s society – which also stresses the relevance of the AVMSD framework which was not subject of this judgment – and the large-scale support of the state-funded media for Russia’s military aggression against Ukraine, leading to a justification of restrictions on the broadcasting of such propaganda activities.<sup>48</sup>

A further case is pending concerning the scope of the measures and brought to the General Court by an Internet Service Provider in the Netherlands.<sup>49</sup> Furthermore, RT France has lodged an appeal<sup>50</sup> against the judgment above as well as is bringing action against the second sanctioning Decision<sup>51</sup>. Irrespective of the outcome of those judicial review procedures, the first judgment of the General Court already directs the way forward by underlining that reactions to state-controlled media are possible as such content is contrary to the idea of independent editorial decisions that create content contributing to the shaping of public opinion. Although in the context of the need to avoid unjustified interference

<sup>41</sup> Cf. on this Cole, *EU-Rat: Weitere und erweiterte Sanktionen der EU gegen russische Inhalteanbieter*.

<sup>42</sup> Press Release of the Council of 26 July 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/07/26/russia-eu-renews-economic-sanctions-over-russia-s-military-aggression-against-ukraine-for-further-six-months/>.

<sup>43</sup> Cf. for a discussion of the measures Lehofer, *Überwachen, Blocken, Delisten - Zur Reichweite der EU-Sanktionen gegen RT und Sputnik*; Lehofer, *Kurzes Update zu den Sanktionen gegen russische Staatsmedien*; Lehofer, *EuG: Keine Nichtigerklärung der Sanktionen gegen RT France*; Voorhoof, *EU silences Russian state media: a step in the wrong direction*; Ó Fathaigh/Voorhoof, *Case Law, EU: RT France v. Council: General Court finds ban on Russia Today not a violation of right to freedom of expression*.

<sup>44</sup> Case T-125/22 RT France v Council [2022].

<sup>45</sup> *Ibid.*, para. 52.

<sup>46</sup> *Ibid.*, para. 63.

<sup>47</sup> It is noteworthy that Austria as a reaction to the sanctions amended its national audiovisual media law in order to extend the competences of the regulatory authority and give it a legal basis to take action to efficiently enforce the media-related EU sanctions. Cf. on this Cole, *Österreich: Gesetzesänderung konkretisiert Durchsetzung des EU-Verbots russischer Sender*.

<sup>48</sup> *Ibid.*, para. 152.

<sup>49</sup> GC T-307/22 A2B Connect and others/Council.

<sup>50</sup> CJEU, C-620/22P RT France/Council.

<sup>51</sup> GC T-605/22 RT France/Council.

in the activities of media service providers by regulatory authorities, the revised AVMSD contains this very idea in Recital 54. The recently proposed EMFA goes a step further by addressing the issue and suggesting in Art. 16 coordinated measures by the different regulatory authorities grouped in the Board when reacting to situations where state-controlled media are targeting audiences in the EU and due to their content pose a “serious and grave risk of prejudice to public security and defence”, thereby tying this close to the conditions of the AVMSD for derogation measures.



## 2.2. Rules on video-sharing-platforms

### KEY FINDINGS

In implementing the new rules for VSPs, most Member States have closely followed the requirements of the AVMSD, partly integrating them into a framework of self-regulation and co-regulation to a differing extent but in which the national regulatory authorities have a decisive role with control and statutory powers.

Conclusions on the practical effects of the rules can only be drawn in a limited way, as the transposition process has not yet been completed in the Member States decisive in light of jurisdiction, while the actual implementation by applying the new rules is only beginning. This concerns both the scope of applicability, especially against the background of the criterion of essential functionality, on the assessment of which the Commission has given guidance in Guidelines but which is nevertheless the responsibility of the Member State of jurisdiction, as well as the evaluation of the appropriateness of measures of the VSP providers.

What can already be stated with certainty, however, is that cooperation mechanisms of the regulatory authorities will play a key role for the efficiency of the newly introduced obligations vis-a-vis these players offering content cross-border. ERGA developed an adequate approach to this challenge with the Memorandum of Understanding on enhanced cooperation which could be the basis for future formalisation.

### 2.2.1. Responding to a changed content dissemination landscape by expanding the scope of the AVMSD

The extension of the scope of the AVMSD to video-sharing platforms was made in consideration of the need to adapt the Directive to new technical and consumption circumstances, in particular the growing importance of the Internet as an access point for audiovisual content and the convergence of media. VSPs, while not creating or editing content themselves in the way on-demand and linear providers do but rather building their business model on user-generated content and accompanying advertising, are nevertheless competing with these providers for the attention of the same recipients and advertisers. As the newly inserted definition of video-sharing platform service in Art. 1 (1) (aa) underlines, it is the activity of organizing the content on the platform – which can be seen as a curating function – that justifies a comparable but much less developed approach to regulation as for providers that hold editorial responsibility for the content they disseminate.<sup>52</sup> Unlike the previous inclusion of on-demand offerings in the scope of application of the AVMSD, the extension to VSPs is justified in the Directive not because of a format similarity to audiovisual media services but the comparability in terms of giving access to audiovisual content. Therefore, the difference between the two categories is recognised in the definition and in the separate obligations imposed on them.<sup>53</sup>

<sup>52</sup> Cf. on the discussions around their function e.g. Valcke/Lambrecht, *The evolving scope of application of the AVMS Directive*, p. 282, 296-298.

<sup>53</sup> Cf. for a more detailed description of the new rules on VSPs Kukliš, *Video-sharing platforms in AVMSD: a new kind of content regulation*; Cole/Etteldorf, *Von Fernsehen ohne Grenzen zu Video-Sharing-Plattformen, Hate Speech und Overlays – die Anpassung der EU-Richtlinie über audiovisuelle Mediendienste an das digitale Zeitalter*, p. 56, 60 et seq.

More specifically, only those offerings are within the scope of the AVMSD whose main purpose or essential functionality<sup>54</sup> is the provision of programmes or user-generated videos and for which the provider determines the organisation of this content, either manually or by automated means such as what is displayed to a specific user, the tagging of content and its sequencing, all of which can take place with the use of algorithms. The content element referring to programmes and user-generated videos justifies the inclusion in the scope of application with regard to the competitive situation with audiovisual media services providers<sup>55</sup>, and the curating element is the “counterpart” to the editorial responsibility of those other type of service providers<sup>56</sup>. As with audiovisual media services the principal purpose of a VSP doesn’t need to extend to the whole service but can also concern a dissociable section of it. With this, guidance by the CJEU case law for applying the provisions on non-linear services to online offers that do not completely fall under the Directive but have a separate section that does, was also used for VSPs.<sup>57</sup> In addition, this also clarifies that within VSPs content can be offered that in itself constitutes an audiovisual media service for which someone has editorial responsibility. Therefore, the stricter rules for such services apply to that distinct part of the VSP.<sup>58</sup>

The criterion of “essential functionality” opens up the possibility of regulating both the more obvious examples of video-sharing platforms and services such as social networks or niche-specific portals. The idea is that a sufficiently “video-intensive” offer should be covered by the scope of application. The forward-looking explicit mention of a possible extension of the VSP provisions, namely to social media services in Recital 5 retrospectively turned out to be an important step for avoiding uncertainty as to whether the outspoken goal of a service has to be the offering of videos and video-sharing to its users in order to qualify as VSP. On the contrary, it is the actual appearance of a service that determines whether the functionality of providing such audiovisual content is an essential element of the service. The Recital indicated that this is the case when it “is not merely ancillary to, or does not constitute a minor part of, the activities” of the service.

However, in light of the multifunctionality of social media services,<sup>59</sup> it seemed necessary to have further guidance if a consistent implementation of the Directive in this regard should be achieved. Therefore, Recital 5 gave the Commission an option (“where necessary”)<sup>60</sup> to issue Guidelines on how to apply this criterion while emphasizing that the perspective to be taken is that of “general public interest objectives” as being the reason why measures are expected from VSP providers, indicating that a rather broad understanding of the criterion is to be expected. The Commission used this possibility and published such Guidelines in July 2020<sup>61</sup>. Although they are not legally binding and came relatively

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<sup>54</sup> Cf. for details on the conditions of main purpose and essential functionality Kogler, *Hauptzweck und wesentliche Funktionalität der Bereitstellung audiovisueller Inhalte*.

<sup>55</sup> On the different types of content concerned cf. Valcke/Lambrecht, *The evolving scope of application of the AVMS Directive*, p. 282, 295, 299-301; for specific “atypical services” Sorban, *The video-sharing platform paradox - Applicability of the new European rules in the intersection of globalisation and distinct Member State implementation*, p. 89, 95-96.

<sup>56</sup> Cf. on the concept of “post-editorial control” van Drunen, *The post-editorial control era: how EU media law matches platforms’ organisational control with cooperative responsibility*.

<sup>57</sup> CJEU, C-347/14, *New Media Online*, ECLI:EU:C:2015:709; also C-132/17, *Peugeot Deutschland*, ECLI:EU:C:2018:85 for the aspect of the main purpose of a channel.

<sup>58</sup> Cf. explicitly Recital 3 of Directive (EU) 2018/1808; Valcke/Lambrecht, *The evolving scope of application of the AVMS Directive*, p. 282, 284 et seq. show how the discussion around qualification of dedicated channels on YouTube under the previous version of the Directive impacted the design of the VSP definition.

<sup>59</sup> Cf. for this argument of making it difficult from the perspective of providers of such services to know whether they fall in the scope EAO, *Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online*, p. 58-59.

<sup>60</sup> On the different types of Guidelines mentioned in the Directive and the distinction between binding ones as in Art. 13 (7) and optional ones as this one mentioned only in the Recitals Cole, *Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD*, p. 39 et seq.

<sup>61</sup> Commission Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive 2020/C 223/02, C/2020/4322, OJ C 223, 7.7.2020.

late in the transposition period, they have been an important reference point for delineating the scope of the AVMSD, also in the national legal frameworks.<sup>62</sup> In particular, the Guidelines identify indicators relevant for assessing if the audiovisual content is of an essential functionality relying on aspects of relevance in economic, quantitative and qualitative, monetization and revenue as well as technical (e.g. availability of tools) terms. These considerations provide clear and practical examples important for the regulatory practice while maintaining a non-cumulative and a rather flexible approach.<sup>63</sup> It needs to be noted that the Guidelines themselves only provide guidance but – as is acknowledged in the Guidelines – the decision on whether a specific service fulfils the function of provision of audiovisual content in a sufficient manner to be qualified as VSP lies with the Member State having jurisdiction over such a service according to Article 28a AVMSD. For that reason, in the national implementations, a mandate is given partly to regulatory authorities to lay out further details in statutes or other means on how to assess the nature of a provider.<sup>64</sup> It is still too early to evaluate whether the combination of Guidelines and national transpositions allows for enough clarity in borderline cases when the provisions are applied in practice.<sup>65</sup> This is especially the case, because for the major providers for which this could become relevant, the national transposition has not yet taken place, as will be highlighted in the next section.

### 2.2.2. Obligations for VSP providers and implementation

Once the hurdle of qualifying an offer as a VSP under the AVMSD has been taken, Art. 28b or rather the national implementations of this provision, impose several obligations on the providers. The Member States must ensure that these providers meet their obligations by taking appropriate measures<sup>66</sup> in the context of audiovisual commercial communications and the protection of minors and the general public. In relation to audiovisual commercial communication that the VSP providers themselves market, sell or arrange, they must comply with the same substantive obligations (Art. 9(1)) as providers of audiovisual media services. However, for compliance with the obligations of the content-related provisions on commercial communication also in user-generated videos that are available on the VSP as well as for the protection of minors from content impairing their development and of the general public from certain content (terrorist offences, child pornography, racism and xenophobia), the VSP providers are only obliged to take appropriate measures to address these issues. This distinction reflects their different level of responsibility for content on their platforms and the importance of the way they monetize it. Art. 28b(3) specifies a number of measures that can be considered appropriate and fulfil the function of responding to the risks posed by certain content in light of not only the content and the harm but also the group of persons addressed and the rights and interests that are

<sup>62</sup> An overview of how the criterion and the Guidelines are used in the Member States can be found in ERGA, *Guidance and recommendations concerning implementation of Article 28b*, p. 17 et seq.; EAO, *Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online*, p. 15 et seq.; EAO, *Interactive searches across the national transpositions of the Audiovisual Media Services Directive (AVMSD Database, <https://avmsd.obs.coe.int/>)*.

<sup>63</sup> A targeted consultation on the practical application of the essential functionality criterion of the definition of video sharing platform services commissioned by the European Commission before adopting the Guidelines showed that most respondents called for a more abstract approach instead of very concrete or “mechanic” criteria. See Summary Report, <https://digital-strategy.ec.europa.eu/en/library/summary-report-targeted-consultation-practical-application-essential-functionality-criterion>.

<sup>64</sup> See on national implementation ERGA, *Guidance and recommendations concerning implementation of Article 28b*, p. 17 et seq.; EAO, *Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online*; Deloitte and SMIT, *Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD)*, p. 84 et seq.; EAO, *Interactive searches across the national transpositions of the Audiovisual Media Services Directive (AVMSD Database, <https://avmsd.obs.coe.int/>)*.

<sup>65</sup> Cf. as an example of applying the Guidelines to specific cases the paper of Oruç, *The Prohibition of General Monitoring Obligation for Video-Sharing Platforms under Article 15 of the E-Commerce Directive in light of Recent Developments: Is it still necessary to maintain it?*, p. 176, 1195 et seq.

<sup>66</sup> Cf. on measure already taken so far by selected platforms Deloitte and SMIT, *Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD)*, p. 59 et seq.

affected by applying the measures. The list of appropriate measures includes setting out standards in general terms and conditions, establishing reporting and flagging mechanisms for illegal content and labelling systems for advertising by uploaders, rating and parental control schemes, and age verification mechanisms.<sup>67</sup> However, from the perspective of the AVMSD, the decision on what is expected of providers (i.e. is appropriate) is left, at first, to the Member States, which are encouraged to adopt systems of co-regulation for this purpose (Art. 28b(4)) which further shifts the initial decision of which measures should be chosen to the actual providers.<sup>68</sup>

A first look at the rules adopted by the Member States in this regard shows that the obligation of assessing which measures are appropriate in each individual case (as mentioned above, this also depends on potential threats on the respective platform, its economic means and reach, etc.) is indeed passed on to the providers. In fact, most Member States adopted in their national transposition the obligation – addressing the providers – to take appropriate measures as well as the catalogue from the AVMSD without further specification.<sup>69</sup> Most Member States' laws are very close to the wording of the AVMSD (German community of Belgium, Bulgaria, Cyprus, Greece, Lithuania, Luxembourg and Malta). Some opted to oblige VSP providers to apply certain specific measures of those listed in Art. 28b (while omitting others) in order to fulfil the relevant categories of duties (e.g. French Community Belgium or Finland). Further detailing of the technical measures was only made in few instances (e.g. Austria for reporting mechanisms and promotion of media literacy or Hungary stating that such technical mechanisms shall not lead to ex-ante control measures or upload-filtering of content which is in line with Recital 48 AVMSD and the applicability of Art. 15 e-Commerce Directive, also referred to in Art. 28b (1)). Stricter or more far-reaching measures were adopted in very few cases also (in some Member States, such as Finland, Germany or Sweden, the duties of VSPs are also (partly) extended to certain content that is prohibited under (national) criminal law). In addition, mandates to adopt statutory authorisations specifying the appropriateness are often granted to ministries (e.g. Denmark) or regulatory authorities (e.g. Poland). Finally, in some Member States, regulated self-regulation or co-regulation<sup>70</sup> systems are implemented in more detail, in the framework of which VSPs are to a certain extent supposed to draw up codes of conduct themselves (e.g. Latvia or the Netherlands). In some Member States (e.g. Croatia, Finland and the Netherlands) such codes of conduct must be approved by the respective regulator.

In all of this, it needs to be highlighted (again) that the implementation procedure concerning the new rules for VSPs is not yet completed in all of the Member States, namely the outstanding adoption in Ireland of the draft Online Safety and Media Regulation Bill<sup>71</sup> limits the assessment that can be made at this time concerning the VSP provisions of the AVMSD. Statements about the effectiveness and possible practical consequences especially of the measures foreseen in Art. 28b can, therefore, only be made based on the rules in other Member States (some of which do not have jurisdiction over a single VSP provider falling under the Directive's definition) with limited significance at this point in time, as the practically relevant large services that reach the majority of the audience in all EU Member States

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<sup>67</sup> The measures proposed has significant overlaps with other legal acts recently enacted and addressing online actors, in particular the DSA. Cf. on possible problems arising below 2.4. Discussing governance models and interrelations in the legal framework see also Rozgonyi 2020, *Negotiating new audiovisual rules for video sharing platforms: proposals for a responsive governance model of speech online*.

<sup>68</sup> Further details eg. in Kukliš, *Video-sharing platforms in AVMSD: a new kind of content regulation*, p. 318-322; 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).

<sup>69</sup> See on national implementation ERGA, *Guidance and recommendations concerning implementation of Article 28b*, p. 17 et seq; EAO, *Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online*; EAO, Interactive searches across the national transpositions of the Audiovisual Media Services Directive (AVMSD Database, <https://avmsd.obs.coe.int/>).

<sup>70</sup> See on different systems in the context of the AVMSD in selected Member States Cappello (ed.), *Self- and Co-regulation in the new AVMSD, IRIS Special, European Audiovisual Observatory*.

<sup>71</sup> Online Safety and Media Regulation Bill 2022 [No. 6b of 2022], <https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/>.

fall under Irish jurisdiction (and will likely be qualified as VSPs under its national framework). This applies not only to the main video-sharing platforms such as YouTube but also to social media networks that could qualify as having an essential functionality that includes them in the scope of the AVMSD, such as Facebook, Instagram and – more recently – TikTok. With the status of the Bill and if it passed in that form eventually, it needs to be underlined that even then, the actual application will depend on further measures by the newly installed regulatory authority, the Media Commission (Coimisiún na Meán), which will be granted important powers to lay down the details (for example, the appointment of VSPs or the issuing of so-called Online Safety Codes to concretise the duties (appropriate measures) of VSPs).

### 2.2.3. Cooperation between regulatory authorities and ERGA's MoU

When it comes to oversight, several interesting observations can be made regarding the introduction of new rules concerning an entirely new type of addressees in the AVMSD with the VSP providers.

Firstly, the Directive generally refers to the obligations of Member States on what needs to be achieved in order to reach the goals of the AVMSD. In actual fact, after creation of the relevant regulatory framework in national law, the actual monitoring of providers' compliance and the necessary steps for implementation in practice typically and for a long time in most of the Member States are secured by dedicated authorities or bodies. Although Art. 30 AVMSD requires the designation of one or several national regulatory authorities in the context of the AVMSD implementation and sets up certain requirements for these, the Directive itself does not assign the powers and tasks to these authorities and bodies as that lies within the competence of the Member States. Consequently, it is also not laid down in the AVMSD whether the oversight for VSP providers is included in the tasks of the (existing) regulatory authorities competent for audiovisual media services or assigned to any other institution(s).

However, secondly, it should be noted that within the substantive provisions concerning VSPs, national regulatory authorities – in contrast to previous versions of the Directive in the other parts – are addressed twice: concerning access to the jurisdiction database for VSPs<sup>72</sup> and with an explicit task in Art. 28b (5), namely, the role of these authorities or bodies to assess the appropriateness of the measures taken by VSP providers.

Thirdly, in the provision on the cooperation of the national regulatory authorities and bodies in ERGA (Art. 30b) the latter is made up of institutions "in the field of audiovisual media services with primary responsibility for overseeing audiovisual media services", which may seem to indicate that there is no role in the context of VSPs. However, besides the above-mentioned explicit designation of a task for these authorities and bodies in that regard, ERGA's role is also "to provide technical expertise to the Commission: - in its task to ensure a consistent implementation of this Directive in all Member States" (Art. 30b (3) (a)) and is not limited therein to media services-related matters. Unsurprisingly, Member States have, therefore, in the majority, entrusted the same authorities for the oversight of VSP providers that were in charge of the audiovisual media sector. In contrast, some created new authorities which then encompass the existing previous competences plus added new ones.<sup>73</sup>

For these national regulatory authorities it was evident that two factors would determine the need for enhanced cooperation in order to ensure effective implementation of the VSP provider-related provisions. Firstly, the cross-border dimension is, in general, even more inherent for the VSPs than for on-demand audiovisual media services which under a comparable "platform" offer regionalized

<sup>72</sup> In the (newly inserted) provision on the database for audiovisual media services providers in Art. 2(5b) this is now also expressly included.

<sup>73</sup> Cf. the overview in EAO, *Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online*, p. 36-39 with the list of competent authorities.

versions of their services (regularly from within the same Member State of jurisdiction), while the VSP's offer (besides certain content being geo-blocked) is in principle equally accessible from everywhere in the EU, although content may be organized by recipient-specific interests (e.g. specific language content based on the location of the user). Secondly, the location of the main large providers (except for "special interest" platforms) that are likely to be qualified as VSP providers under the new rules is concentrated in one Member State. Therefore, ERGA members very swiftly initiated the creation of a more formalized cooperation system after this body had been formally recognized as the relevant forum for AVMSD-related matters by inclusion in the Directive in 2018. Although the agreement on a non-legally binding<sup>74</sup> "Memorandum of Understanding between the national regulatory authority members of the European Regulators Group for Audiovisual Media Services" (MoU) adopted on 3 December 2020 concerns generally the cooperation between the members, the motivation to create it was largely determined by the VSP-context. This is expressed in the section concerning mutual assistance, as one field coordinated by the Directive for which such cooperation is relevant is the issue of "Implementation and Enforcement" of the VSP provisions (2.1.3.4. (f)) which resulted in a dedicated section of the MoU specifically devoted to cooperation in VSP matters (2.2.1).

The cooperation aims at reaching a common understanding concerning several aspects of Art. 28b such as the agreement that the regulation – as it is put in the MoU – of the VSPs happens rather at the "macro" level responding to systemic risks rather than individual cases of illegal content present on such platforms (2.2.1.1. (d) MoU), which is an approach that was similarly chosen by the legislative bodies for the DSA. Another aspect underlined by the members of ERGA is that even where another authority should be designated with the oversight of VSPs than the national regulatory authority for audiovisual media services the latter can contribute to solving issues which may result from the fact that on the VSPs there is often content, e.g. in forms of "channels" under the editorial responsibility of a user or the VSP provider itself, that fulfils the conditions of being an audiovisual media services which by definition has to be monitored by the ERGA member (2.2.1.2. (d) MoU).

In the MoU, the members of ERGA also commit to exploring whether the installation of dedicated complaints mechanisms to be used by the national regulatory authorities, when they address VSP providers concerning problems with content on the platforms (2.2.1.3.3. MoU), could be a way to better enforce the national transpositions of the VSP-related AVMSD provisions, even where these transpositions rely on a strong role of the VSPs themselves in the form of self-regulatory approaches.

In view of the late transpositions and the fact that the MoU will especially play out in cooperation issues with the host Member State of the large VSP providers, it is too early to say whether the MoU is a sufficient instrument for enhancing the cooperation. It certainly is a very pragmatic and practice-oriented approach that helped further strengthen ERGA and shape it as the forum where cross-border issues can potentially be resolved swiftly without having to resort to lengthy procedures. In order to be successful, it necessitates an active commitment by all members which have to be adequately equipped – namely with the relevant competences – by their Member States.<sup>75</sup> Irrespective of the MoU and its role in evaluating the measures taken by VSP providers in a comparable approach, the actual

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<sup>74</sup> As expressly laid down in 4.4. of the MoU.

<sup>75</sup> Cf. on this aspect also Cole/Etteldorf/Ullrich, *Updating the Rules for Online Content Dissemination*, p. 202 et seq.; Cole/Etteldorf/Ullrich, *Cross-Border Dissemination of Online Content*, p. 258 et seq. Practical illustration also in Cabrera Blázquez/Denis/Machet/McNulty, *Media regulatory authorities and the challenges of cooperation*.

assessment of these measures has not led to any extensive results yet, because of the short time of applicability of the relevant rules.<sup>76</sup>

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<sup>76</sup> A first overview of the measures – without yet being assessed by the regulatory authorities – can be found Deloitte and SMIT, *Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD)*, p. 53 et seq. and in EAO, *Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online*, p. 57 et seq. for input by the concerned platforms and p. 43 et seq. for a comparative overview of the powers of the national authorities to conduct the assessment of the VSP measures.

## 2.3. Rules on European works

### KEY FINDINGS

While national rules transposing Art. 16 and 17 AVMSD for linear services were not significantly changed, comprehensive reforms took place regarding Art. 13.

With regard to the obligation for on-demand service providers to reserve a share of European works in their catalogues almost all Member States have adopted the 30% level with specificities in some Member States such as higher quotas in general or higher quotas for specific offers (e.g. public service media), separate quotas for independent productions or for domestic works. The majority of transpositions rely on the calculation method proposed in the Guidelines of the Commission.

With regard to the prominence obligation, most Member State laws directly follow the wording of the AVMSD which includes referring to specific ways of how prominence can be achieved by taking up possible solutions as set out in Recital 35.

Aspects of jurisdiction and monitoring compliance are and will be of high importance in the context of Art. 13(1) in the further application.

As regards Art. 13(2), levy obligations are now imposed on on-demand services providers in some Member States ranging from 1.4% to 5.15% of turnover and direct investment obligations for non-domestic providers are found in about a third of Member States for non-linear and in about a quarter for linear service providers. It can be expected that more Member States will impose financial obligations on (non-domestic) on-demand providers in future.

### 2.3.1. The system of promoting European works

According to the AVMSD one of its core goals is to ensure that European works<sup>77</sup> as an output of the European film industry are not only produced due to demand but also receive sufficient airtime and, more recently, are promoted by giving them in certain audiovisual media services a prominent positioning. Again, this element of the Directive was already inserted in the first version of the Television without Frontiers Directive 89/552/EEC of 3 October 1989<sup>78</sup> and remained untouched when it comes to the obligations of television – or, as they are referred to in the Directive since 2007, linear audiovisual media service – providers.

Concretely, the Directive lays down that where practicable and by appropriate means, broadcasters shall reserve a majority proportion of their transmission time for European works (Art. 16) and at least 10 % of their transmission time or alternately, at the discretion of the Member States, at least 10 % of their programming budget for European works created by independent producers, including allocating an appropriate share for recent works in this category (Art. 17). Both promotion obligations

<sup>77</sup> It needs to be recalled that the definition of European works according to the AVMSD includes productions from signatory states to the European Convention on Transfrontier Television of the Council of Europe which is why this aspect of possible negative consequences of the United Kingdom leaving the European Union was not relevant, because productions from that State continue to be relevant for quota and shares calculations by providers under the AVMSD. Cf. on this already Cole/Ukrow/Etteldorf, *Audiovisual Sector and Brexit: the Regulatory Environment*.

<sup>78</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23–30.



only concern the programming time that is not allotted to news, sports events, games, advertising, teletext services and teleshopping and the Directive aimed at reaching the quota progressively by taking into account the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public. For purely local broadcasters, the obligation was waived (Art. 18). As these elements of the European works provisions remained unchanged in the 2018 reform, an implementing mandate was not triggered by Directive (EU) 2018/1808. The majority of Member States did not foresee any significant substantive reforms affecting the promotion obligations for broadcasters but stuck to the frameworks they had developed in the past by exercising their margin for action in this field.<sup>79</sup>

Conversely, while a first extension of obligations concerning European works towards on-demand (non-linear) audiovisual media services providers was achieved by Directive 2007/65/EC, the relatively open and generally formulated contribution of these providers to the promotion goal was significantly amended, and the obligations made much stricter with the introduction of a catalogue share and a prominence obligation with Directive (EU) 2018/1808.<sup>80</sup> These significant changes will also be reflected in the reporting of the most recent period covering 2020-21, when a majority of Member States implemented the Directive's new provisions of 2018.

It is noteworthy that the reference to financial obligations of service providers as one way of promoting European works, e.g. by obliging direct investments, are not necessarily such that are addressed by Art. 13(2) AVMSD and the discretion this leaves to the Member States but can also be obligations that stem from the film funding laws in the Member States, leading to an intertwining of these two systems. As the film fund systems depend on national law – even though these may be subjected to scrutiny under EU state aid law – these may be more easily amended and possibly more regularly adapted than changes initiated by the less frequent adaptations of the AVMSD. During the relevant period of consideration for this report, the media sector has suffered severely in economic terms from the consequences of the Corona pandemic. Although it may seem slightly paradoxical due to the increasing demand for information and a boost in digitalization, advertising revenues for media service providers declined heavily.<sup>81</sup> A lot of the benefit for an increased viewer-base went to the profit of a small number of on-demand service providers.<sup>82</sup> As a reaction to this, numerous supportive measures were introduced by many Member States, many of which are still in place. Such measures e.g. reduced or even froze levy obligations of broadcasters to relieve them financially.<sup>83</sup> However, as these measures can be classified as a (temporary) economic reaction to an emergency situation and not as a

<sup>79</sup> Cf. on the implementation of the provisions on the promotion of European works here and in the following: European Audiovisual Observatory *Mapping of national rules for the promotion of European works in Europe*; Graham et al., *Study on the Promotion of European Works in Audiovisual Media Services* (SMART 2016/006); Komorowski et al., *Obligations for VOD providers to financially contribute to the production of European works*.

The regular reporting on the implementation of Art. 13, 16 and 17 AVMSD by the European Commission based on the reports of the Member States and an independent study, covered the application of Article 13 of the AVMSD for the period 2011-2014 and the application of Articles 16 and 17 AVMSD for the period 2013-2014 with the last published study 2020 (Graham et al., SMART 2016/006). The following reporting period from 2015 to 2019 will confirm the transposition situation in the same way and the report is due to be published very soon (SMART 2019/0037), the study for the most recent reporting period from 2020 to 2021 is being prepared currently (VIGIE-2021-0509) and – as far as legal provisions in the transposition are concerned – will confirm the situation as described in the mapping of the European Audiovisual Observatory.

<sup>80</sup> Cf. on the promotion obligations generally Psychogiopoulou, *The Audiovisual Media Services Directive and the promotion of European works: cultural mainstreaming revisited*, p. 32 et seq.; Apa/Gangemi, *The promotion of European works by audiovisual media service providers*, p. 326 et seq.; for a more critical viewpoint see Papp, *The Promotion of European Works: An Analysis on Quotas for European Audiovisual Works and their Effect on Culture and Industry*.

<sup>81</sup> Carlini and Bleyer-Simon, *Media Economy in the Pandemic: A European Perspective*.

<sup>82</sup> Grece, *Trends in the VOD market in EU28*.

<sup>83</sup> Cf. on this European Audiovisual Observatory, COVID-19 TRACKER, available at <https://www.obs.coe.int/en/web/observatoire/covid-19-audiovisual-sector-measures>. ERGA (Action Group 2), *Economic impact of the COVID-19 crisis on the media and audiovisual sectors*.

(permanent) reaction to an identified cultural policy development by specific Member States (and especially not in the application of the AVMSD framework), they will not be discussed here.

### 2.3.2. The amendments by Directive 2018 and the new framework for on-demand services

As mentioned above, the legal framework for linear services in the Member States' transposition of the AVMSD remains widely unchanged after the last amending Directive entered into force. This also means that the differences remain in the implementation across the Member States, which result from their margins of manoeuvre. For example, some Member States impose higher quotas than the above 50% (majority of transmission time)<sup>84</sup> or impose promotion obligations also specifically for domestic works<sup>85</sup>. Also, the definitions for the terms such as "independent"<sup>86</sup> or "where practicable"<sup>87</sup>, which are not defined in more detail by the AVMSD, continue to have Member State-specific meanings. This leads to different requirements for providers under different jurisdictions, which is not surprising as it is in line with the idea of national transpositions taking into account the cultural and economic characteristics of the respective Member State and its audiovisual market.

#### a. From general promotion obligations to catalogue shares and prominence

The legal situation concerning on-demand audiovisual media services has undergone a fundamental change in the last AVMSD revision. With that, Art. 13 moved from imposing previously very general duty on on-demand service providers to also contribute to promoting European works, leaving both the Member States for transposition and providers themselves a large discretion when deciding on how to reach the obligations. This first approach to the topic has turned into a concrete duty with an equally concrete (minimum) implementation mandate directed at the Member States. The European Commission's REFIT assessment had identified the "lack of a level playing field between traditional broadcasting and on-demand services" as one of three main problems and thus focal points of the reform, not least because of the low level of requirements imposed by some Member States on on-demand services that had created gaps in the supply and promotion of European content on those services.<sup>88</sup>

Before the revision Member States merely had to ensure that on-demand audiovisual media services, where practicable and by appropriate means, promote the production of and access to European works. As examples of such means, financial contributions to the production and rights acquisition or the share and/or prominence of European works in the catalogue of programmes were mentioned as possible solutions for respective obligations on national level. Since the wording of Art. 13 until 2018 only made it mandatory to ensure appropriate promotion but not to determine the "how" or the actual implementation of concrete rules, this led to a very fragmented situation in the Member States. Approaches ranged from rules merely established in connection with film to which also on-demand service providers would have to contribute to an actual adoption in the national law of the general formulation of the AVMSD (as was done by most Member States) or concrete rules with specific quotas of European works also for on-demand services, in that case via a share in the catalogue. Now Art. 13(1) AVMSD requires Member States to ensure that all these providers that are under their jurisdiction

<sup>84</sup> For example in general in Estonia, Spain, Greece, Croatia, France, Italy and Latvia, or for specific providers such as public service broadcaster e.g. in Croatia or Hungary.

<sup>85</sup> For example in Hungary or France.

<sup>86</sup> While most of the Member States have adopted very specific and differing definitions under which circumstances a producer is to be seen as "independent" from a broadcaster, for example in Germany or Sweden there is no specification in the law on this notion.

<sup>87</sup> A majority of Member States does not rely on the wording "where practicable and by appropriate means" at all, i.e. making quotas mandatory, or rely on the wording of the AVMSD leaving it up to regulatory authorities to assess whether the obligations have to be met but do not include any further interpretation in the law itself.

<sup>88</sup> Commission staff working document, SWD(2016) 168 final, p. 23 et seq.

secure at least a 30 % share of European works in their catalogues and – as an additional obligation which does not exist in this way for linear services, at least not in the AVMSD itself – ensure the prominence of those works. With regard to possible measures that ensure prominence of such works, Recital 35 contains some relevant specifications, highlighting that the labelling in the metadata of audiovisual content that qualifies as a European work should be encouraged (so that such metadata are available to media service providers) and that prominence can be inter alia ensured through a dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of European works in campaigns of that service or a minimum percentage of European works promoted from that service's catalogue (e.g. by using banners or similar tools).

However, the revision of the AVMSD brought another important element in the imposition of new obligations. As these may turn out to overburden certain “small” providers, a solution was introduced in Art. 13(6) AVMSD, which exempts (in a binding manner) providers with a low turnover or a low audience from the catalogue share and prominence obligation of Art. 13(1) AVMSD. In addition, it opens for Member States the possibility for waiving the obligations from providers which are not generally exempted if the obligations or requirements would be impracticable or unjustified by reason of the nature or theme of a specific audiovisual media service. As a result, after 2018, the vast majority of Member State rules applicable to on-demand providers in this area needed to be revised.<sup>89</sup>

Irrespective of the late transposition in most Member States, regarding the quota to be provided in catalogues, almost all Member States have adopted the 30% quota from the AVMSD. There are only some variations in a few Member States (e.g. France with a generally higher quota of 60%, Austria with a higher quota of 50% for VOD offers of the public service provider or Italy and Portugal with special quotas also for independent productions (comparable to the separate obligation that exists for linear providers)). One specificity that several Member States applied, is the separate consideration of domestic works through specific shares of the catalogue (in parts of Belgium, Spain, France, Italy, Portugal, Slovenia and Hungary). With regard to the prominence obligation, most Member State laws directly follow the wording of the AVMSD. Many Member States additionally refer in the law (e.g. Bulgaria or Croatia) or in binding statutes of the competent national regulatory authorities (e.g. Germany) explicitly to specific ways of how prominence can be ensured, thereby “implementing” the possible solutions as set out in Recital 35.

Although the obligation of 30% as a share of the catalogue is clearly formulated, the calculation method of how this threshold is to be observed remains open in the AVMSD. As this question is highly relevant, the legislative bodies in the 2018 revision requested the Commission in Art. 13(7) to issue guidelines on this question (as well as on the definition of low audience and low turnover according to the exemption provision in Art. 13(6)) in order to ensure a more coordinated approach. Besides the question of which legal value such guidelines would have<sup>90</sup> in the national implementation, it turned out problematic that the Commission published its “Guidelines on the calculation of the share of

<sup>89</sup> See for national transposition European Audiovisual Observatory *Mapping of national rules for the promotion of European works in Europe*; Graham et al., *Study on the Promotion of European Works in Audiovisual Media Services*; Komorowski et al., *Obligations for VOD providers to financially contribute to the production of European works*; ERGA, *Overview document in relation to Article 13(1) of the Audiovisual Media Services Directive*; ERGA, *Report: Transposition and implementation of Article 13(1) of the new AVMSD – Ensuring prominence of European works in the catalogues of on-demand audiovisual media services*; Cabrera Blázquez et al., *Investing in European works: the obligations on VOD providers*, including accompanying tables of that publication; CMPF et al., *Study on media plurality and diversity online*, p. 86 et seq.; Capello (ed.), *Prominence of European works and general interest content* (forthcoming 2022).

<sup>90</sup> Cf. extensively on this Cole, *Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD*.

European works in on-demand catalogues and on the definition of low audience and low turnover”<sup>91</sup> only in July 2020 and thus only just about two months before the end of the implementation period (19 September 2020) and at a time when the procedures for national implementation measures had already been initiated or partly completed in the Member States. Some Member States have therefore resorted to referring in their laws to the (not yet issued) Commission Guidelines for the concretisation of calculation methods, which appears problematic from a legal certainty point of view. Also, significant differences – the same applies to the exceptions provided for in Art. 13(6), which will be shown below – can be observed with regard to the calculation methods to be used, such as differing temporal indicators (according to which period is chosen for calculation of the share) or the measurement basis (e.g. the question of title-count in series with different episodes). The Commission Guidelines on the calculation of the share of European works in on-demand catalogues opt for a calculation per title and explain what constitutes a title in this sense<sup>92</sup>, clarifying that the 30 % share of European works has to be secured in each of the national catalogues (where applicable) offered by VOD providers offering their service in multiple Member States, and, with regard to the temporal dimensions leave it up to Member States to freely decide if providers are required to ensure compliance with the quota at every point in time or on average over a pre-determined period.

#### **b. Defining Exemptions in Commission Guidelines**

As mentioned previously, with the newly formulated Art. 13 AVMSD, a mandatory exemption provision was inserted in paragraph 6 which links to providers that have a low turnover or reach a low audience, the meaning of which are to be laid down in Commission Guidelines according to Art. 13(7). These guidelines of June 2020 lay down in more detail what is only included in rather general terms in Recital 40 of Directive (EU) 2018/1808 that sets out the goal of not undermining market development and not hindering the entrance of new players into the market. For low turnover it is explicitly mentioned in the Recital that the determination of this threshold has to take into account the different sizes of audiovisual markets across the Member States, meaning that a “small provider” in terms of turnover on one market could be a market leader in another.<sup>93</sup> For the audience share the Recital indicates that this is not a straightforward criterion either and exemplifies that it could be determined “on the basis of viewing time or sales”. Consequently, the approaches suggested by the Commission in the Guidelines have a potentially important role to play in harmonizing the approaches.

For low turnover the Commission references the concept of microenterprise developed in Recommendation 2003/361/EC and relies, in general, on a total annual turnover not exceeding EUR 2 million.<sup>94</sup> However, especially in smaller Member States, the overall market characteristics may suggest the application of lower thresholds and the Guidelines recognise that it can be justified and proportionate to exempt also micro enterprises by applying lower thresholds, as long as the enterprises

<sup>91</sup> Communication from the Commission, Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover 2020/C 223/03, C/2020/4291, OJ C 223, 7.7.2020, p. 10–16.

<sup>92</sup> More obvious is the clarification that several films of a „franchise“ each count as one title although the decision concerning series or “formats presented in a serialized manner” which are grouped in seasons was not the only possible way as the Commission “takes the view that one season of a series should correspond to one titles” and argues with the way these are created from investment to marketing (Guidelines point 2), thereby reducing the possibility to factor in high numbers by creating many individual episodes in a season in order to reach the European works share. But even in this context the Guidelines acknowledge that it has to be assessed in consideration of the specific aspects of the case, meaning that exceptionally the individual episode can be similarly in importance (and budgetary effort) like a feature film and can then be counted as individual title.

<sup>93</sup> Cf. more extensively on this Cole, *Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD*.

<sup>94</sup> Cf. on the Recommendation of 2003 and its roles as reference point Cole, *Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD*, p. 37 et seq.

profiting from that have a share of less than 1 % of the overall revenues in the national audiovisual markets concerned.

As regards the low audience exemption, the Guidelines take a differentiated approach, depending on the type of service. For on-demand services, they consider it appropriate, in principle, to exempt them if they have an audience share of less than 1 % in the Member State concerned. The methodology is an important question because there are no comparable industry standards for audience measurement as for linear services. The threshold is to be based on the sales data concerning a specific service, which is already suggested by Recital 40. This in turn means, according to the Guidelines, the number of active users of the service – with differences due to the type of service, e.g. subscribers in the case of SVOD or unique visitors in the case of AVOD – “divided by the total number of users of (similar) VOD services available on the national market and multiplied by 100 to obtain a percentage”<sup>95</sup>.

### 2.3.3. Monitoring of and compliance with different promotion obligations

#### a. Supervising the introduction of new measures by AVMS providers

With regard to Art. 13(1), it should also be pointed out that aspects of jurisdiction and monitoring compliance with the rules are particularly important. Especially for the area of prominence, new methods, if necessary also of a technical nature, will have to be developed by the media regulatory authorities in order to monitor and ensure compliance. Blueprints from the broadcasting sector will not be applicable as such because no comparable obligation existed previously. Moreover, based on the country-of-origin principle, the Member State of establishment decides with its national legislation which rules specifically apply to a provider under its jurisdiction (including possible additional obligations and exemptions), and the respective authority is responsible for supervision. In contrast to television services, the specificity here is that larger cross-border providers offer different national catalogues more frequently and in a broader manner.

For the applicable rules this means that the specific obligations (as far as Art. 13(1) leaves room for interpretation on the Member State level) could differ between a national catalogue of a multi-country provider and a catalogue from a purely domestic provider from the point of view of users. For example, the respective provisions of the law in the Netherlands<sup>96</sup>, with which the catalogue of inter alia Netflix Latvia or Netflix France have to comply with, do not contain specificities on how to ensure prominence and do not establish quotas for domestic works. In contrast, the Latvian law foresees that VOD providers under its jurisdiction have to promote the accessibility and visibility of European works, including by tagging them or designing a separate section or search tools for them. The French law requires a 40% quota for domestic works for providers under French jurisdiction. Furthermore, national catalogues must also be monitored (in foreign languages) by the supervisory authority that has jurisdiction, i.e. the Dutch supervisory authority must also monitor the catalogues of all other Member States to ensure compliance and document this in its duty to report (Art. 13(7) AVMSD) to the Commission. Cross-border cooperation between the regulatory authorities is therefore also important here (cf. already remarks under 3.1). In this light, the work of the ERGA on the transposition and implementation of Article 13(1)<sup>97</sup> should be pointed out. Given that in most Member States the

<sup>95</sup> Guidelines (ibid, n 91), point 4.1.1.

<sup>96</sup> Art. 3.29c(2) of the Mediawet (Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet (Mediawet 2008)), latest version accessible at <https://wetten.overheid.nl/jci1.3:c:BWBR0025028&z=2022-07-01&g=2022-07-01>) only stipulates that European works on an on-demand commercial media service shall be brought to the attention of the public by the media institution providing the on-demand commercial media service.

<sup>97</sup> ERGA (Subgroup 1), *Transposition and implementation of Article 13(1) of the new AVMSD – Ensuring prominence of European works in the catalogues of on-demand audiovisual media services*.

prominence and quota obligations for on-demand audiovisual media service providers had been only recently added into national legislation, the ERGA report of 2021 with regard to monitoring concluded that most of the national regulatory authorities did not (yet) need to carry out a full control or monitoring of these rules but rather most of them still needed to implement concrete processes, both regarding the type of information collected and/or its assessment.

Regarding the efficiency of the prominence measures, it was noted that some regulatory authorities ask on-demand media service providers to communicate the actual consumption of European works by their users, to evaluate the prominence measures' impact.<sup>98</sup> Some of them are in the process of developing an online portal where providers can report on their quotas and prominence obligations. As regards labelling in metadata, the standardization of the classification as European works and the creation of an adequate European database should be done by a European entity according to most of the ERGA members.<sup>99</sup> ERGA highlights three aspects with a need for further examination: A re-examination of the monitoring process once the systems are established, obtaining comparative data on the relevance of national VOD providers in the overall global market, and a reflection on labelling in metadata<sup>100</sup>.

#### **b. The (potential) cross-border dimension of financial obligations imposed on providers**

Another major change to Art. 13 in the revision of 2018 concerns a possibility granted to Member States, which can potentially trigger intensive and extensive cooperation in cross-border matters by the national regulatory authorities in order to manage this possibility where it has been implemented. The completely new provision of Art. 13(2) AVMSD was introduced in light of already enacted (or announced plans to do so) rules by Member States with which certain financial obligations are imposed on "non-domestic" media service providers that are established outside of their territory but target recipients in the territory of the given Member State. Such measures led to a state aid case that Netflix initiated against the Commission for declaring some Member States provisions compatible with the competition rules.<sup>101</sup> In the view of observers, these regulatory initiatives had documented a shift of audiovisual policymakers redefining policy goals by putting emphasis on economic objectives, leaving purely cultural standpoints in the background by addressing big and globally acting on-demand service providers not with counter-regulation but rather by involving them in the cultural policy framework although based on an economic rationale<sup>102</sup> in order to respond to the disruption of local

<sup>98</sup> CMPF et al., *Study on media plurality and diversity online*, p. 91, highlights with regard to monitoring compliance with Art. 13(1) that nearly all implementations refer to the possibility and competence of a national regulatory authority to sanction upon (repeated) non-compliance and notes that the specified sanctions make no distinction between compliance to the obligation to respect a quota or to ensure due prominence of these works, so that it is unclear how a national regulatory authority would assess non-compliance to the due prominence obligation.

<sup>99</sup> Furthermore, on the type of metadata contained in audiovisual works to be used for the labelling of European works, most of the ERGA members agreed on the main country of production provided by the content providers (licensors), cf. ERGA (Subgroup 1), *Consistent implementation and enforcement of the new AVMSD framework*, p. 7.

<sup>100</sup> CMPF et al., *Study on media plurality and diversity online*, p. 129, highlights (in the context of prominence in light of both, Art. 7a and 13(1) AVMSD), that access to rich and high-quality metadata can ensure that the content and services are more easily found and shown on the UI homepage, as well as through the search and browsing functions. However, access to metadata seems to be particularly challenging especially for national media organisations, such as national commercial and public service broadcasters.

<sup>101</sup> The German rule at issue, which obliged Netflix, like other VOD providers based outside Germany, to pay a levy to the German film fund for its offer in Germany, had been approved by the Commission in a state aid procedure. Netflix had challenged this before the General Court of the Court of Justice of the European Union, citing an impairment of its fundamental freedoms but failed (Case T-818/16, ECLI:EU:T:2018:274). Among other things, Netflix had failed to show that their services had been materially interfered with and individually concerned by the changes in the German law, which could have been done, e.g., by filing national levy orders or such type of action. Apple also contested the Commission decision and also failed before the General Court (Case T-101/17 ECLI:EU:T:2018:505) and finally also discontinued the appeal it had raised before the CJEU (Case C-633/18 P, ECLI:EU:C:2019:455).

<sup>102</sup> Kostovska, Raats, Donders, *The rise of the 'Netflix tax' and what it means for sustaining European audiovisual markets*.

markets<sup>103</sup>. While there was some uncertainty about the admissibility of such measures under EU law, the State aid cases had settled the manner but there was a further question as to how such measures fit into the regulatory framework of the AVMSD and the country-of-origin principle.

In the former version of Art. 13(1) on-demand service providers were obliged in a more general manner to promote European works, and one possibility for such promotion was mentioned as being financial contributions that these could make towards European works.<sup>104</sup> Art. 13(2) acknowledges since its introduction in 2018 that Member States can impose obligations to contribute financially to the production of European works, including via direct investment in content and contribution to national funds.<sup>105</sup> It then authorizes Member States which have such systems in place to extend these not only to (“domestic”) audiovisual media service providers under their jurisdiction but also those established in other Member States but targeting audiences in their territory (“non-domestic” providers). Providing more detail, Recital 38 mentions as possible criteria to identify when “non-domestic” providers in this context are targeting a state not only the main language used but also the advertising of and within the service.<sup>106</sup> This provision, however, does not trigger an implementation obligation by the Member States but on the contrary only clarifies that such measures are allowed – taking into account the freedom to provide services and the aforementioned country-of-origin principle – because there is a direct link between such financial obligations and the different cultural policies of the Member States (cf. Recital 36). In addition to this general authorization, there are conditions under which circumstances such obligations may be imposed; Art. 13(2), (3) and (6) set out limitations to be observed concerning non-domestic providers by only allowing proportionate and non-discriminatory obligations, which are to be based only on the revenues earned in the targeted Member States. Additionally, if such a case occurs, the Member State of establishment shall take into account financial contributions imposed by other targeted Member States (if applicable) when deciding on the level of contributions expected by that provider in its own country (of origin). These conditions add to the general compliance requirement with State aid rules of the EU. Furthermore, as with the obligations under Art. 13(1), Member States have to exempt from the possible application of financial obligations to non-domestic providers those providers who have a low turnover and low audience, as the provision of Art. 13(6) explained above extends to measures under Art. 13(2). Therefore, Member States also have the possibility of exceptionally waiving obligations to specific providers for the reasons mentioned there.

There are several particularities to be highlighted with regard to Art. 13(2). First, unlike Art. 13(1), Art. 13(2) allows for financial obligations to be imposed on both types of audiovisual media services (the former heading of Chapter IV “provisions applicable only to on-demand audiovisual media services”, was accordingly deleted with the reform without being given a new title, so it is now only “Chapter IV”). This also applies to the limitations imposed by Art. 13(2) (proportionality and non-discrimination requirement), (3) (based on turnover only in the targeted state) and (6) (the exemptions), which is why the Guidelines of the European Commission partly distinguish the exceptions between on-demand and linear services. Specifically, concerning low audience, an audience share of 2% of broadcasters in

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<sup>103</sup> Lotz, *The Multifaceted Policy Challenges of Transnational Internet-Distributed Television*.

<sup>104</sup> Cf. on this Donders et al. *Obligations on on-demand audiovisual media services providers to financially contribute to the production of European works: An analysis of European Member States' practices*.

<sup>105</sup> Cf on a differentiation between types of financial obligations and their relation to the country-of-origin principle Apa/Gangemi, *The promotion of European works by audiovisual media service providers*, p. 326, 338 et seq.

<sup>106</sup> Recital 38 states that the assessment if a provider is targeting a territory with its offer should be done on a case-by-case basis referring to indicators such as advertisement or other promotions specifically aiming at customers in its territory, the main language of the service or the existence of content or commercial communications aiming specifically at the audience in the Member State of reception.

the targeted Member State is regarded as an appropriate threshold for broadcasters and can be measured by reference to viewing time as the industry standard.<sup>107</sup>

The motivation for introducing the possibility of extending financial obligations to cross-border situations was mainly to include on-demand service providers, a few of which dominate the market across the EU and are located in typically one Member State while rolling out services catering for different audiences in the other Member States. Therefore, Recital 37 underlines that the proportionality requirement needs to specifically consider the position of broadcasters which have already in the past been the main investors in the production of European works and should not be overburdened by additional obligations. While this aspect of proportionality to be considered by the targeted Member States is only laid down in a Recital, Art. 13(3) itself requires the Member States of establishment to take into account any financial contributions (additionally) imposed by the targeted Member States, if and when imposing a financial contribution on its domestic providers. In contrast, targeted Member States do not have to take into account obligations (already existing in parallel) in other targeted Member States within the framework of proportionality but nonetheless are limited by being allowed only to base the obligation on the revenues the provider earns in that Member State. Except for the above-mentioned limitation in Art. 13(3), the scope of Art. 13(2) is limited exclusively to financial obligations for non-domestic providers and, therefore, a cross-border setting. The Guidelines acknowledge this by explicitly pointing out that they do not apply to situations in which a Member State limits financial obligations to domestic media service providers.<sup>108</sup> However, such obligations for cross-border providers at the national level are or will often be integrated into existing and long-established systems of film funding<sup>109</sup> and do not stand separately, which could lead to some complexity when for non-domestic providers, other (AVMSD-based) rules have to be observed while the Member States are free within their cultural policy to impose rules on domestic providers. The Guidelines partly take up this issue by stating that, in any case, the aim of the exemptions provided in Article 13(6) AVMSD is not to replace exemptions established at the national level but to provide specific safeguards for cross-border providers. The Guidelines further specify that for the cross-border application, adjustments might regularly need to be made, differentiated by whether the obligation is in direct investment or levy payment or other solution, depending on the size of the market. Concretely, on-demand services with a lower turnover than 2 million Euro might be included or linear providers with a lower audience share than 2% if they are especially relevant for investments (such as pay TV services), if necessary for the sustainability of the national film funding system.

Levy obligations that have the goal of supporting the national film funding systems are now imposed on on-demand providers in some Member States, including, for example, parts of Belgium, Germany, Denmark, Spain, France, Croatia, Poland, Portugal and Romania, ranging from 1.4% to 5.15% of turnover in the Member State concerned. Direct investment obligations (in rights acquisition and production) for non-domestic providers are found in about a third of Member States for on-demand providers (up to now, 13 Member States have imposed financial obligations on VOD providers in general)<sup>110</sup> and about a quarter of Member States for TV providers.<sup>111</sup> It can be noted that the possibility

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<sup>107</sup> Guidelines (ibid, n 91) point 4. This results in the majority of broadcasting services falling below the threshold as is pointed out there; cf. also Cole, *Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD*, p. 45 et seq.

<sup>108</sup> Guidelines (ibid, n 91), point 2.

<sup>109</sup> As was the case for the introductory mentioned state aid case from Germany.

<sup>110</sup> Kostovska et al., *Investment obligations for VOD providers to contribute to the production of European works: A 2022 update*.

<sup>111</sup> European Audiovisual Observatory *Mapping of national rules for the promotion of European works in Europe*; Graham et al., *Study on the Promotion of European Works in Audiovisual Media Services*; Komorowski et al., *Obligations for VOD providers to financially contribute to the production of European works*; Komorowski et al., *Obligations for VOD providers to financially contribute to the production of European works, a 2021 update*; Kostovska et al., *Investment obligations for VOD providers to contribute to the production of European works: A 2022 update*;



of imposing financial obligations on cross-border providers has so far been taken up rather cautiously, but still to a noteworthy extent. It can be expected that this may change concerning on-demand providers in the future due to audience trends (especially among younger age groups<sup>112</sup> and promoted by the steep increase in popularity during the pandemic<sup>113</sup>) and the fact that the most popular offers here are those of cross-border providers competing with national offers. In order to level the playing field between local and foreign on-demand services, extending existing obligations to providers established in other Member States is a likely option.<sup>114</sup>

As the different elements of the revision of the European works promotion provision in Art. 13 demonstrate, the cooperation between the Member States, namely their regulatory authorities, will be key in the collection of comparable data on the use of the different options but even more so in order to monitor the proportionality requirement in the application of the cross-border options concerning financial obligations.

This will include identifying the effects of the different systems put in place in order to evaluate their impact and serve as a discussion basis for future amendments either in the national regulatory frameworks – e.g. by extending or reducing financial obligations in scope – or in a possible next revision of the AVMSD. In such a process, the fact that VSPs were included in the scope of the AVMSD in 2018 but are not covered by promotion obligations for European works will likely be considered again. Although the nature of such platforms relying on user-generated content explains this policy choice, the viewing habits and comparability of certain content on those platforms question whether they should not also contribute to the promotion and preservation of the European audiovisual heritage.

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ERGA, *Overview document in relation to Article 13(1) of the Audiovisual Media Services Directive*; ERGA, *Report: Transposition and implementation of Article 13(1) of the new AVMSD – Ensuring prominence of European works in the catalogues of on-demand audiovisual media services*; Cabrera Blázquez et al., *Investing in European works: the obligations on VOD providers*, including accompanying tables of that publication; Capello (ed.), *Prominence of European works and general interest content* (forthcoming 2022).

<sup>112</sup> Cf. Smahel et al., *EU Kids Online 2020*.

<sup>113</sup> Cf. eg. Kantar, *The Future Viewing Experience*.

<sup>114</sup> Komorowski et al., *Obligations for VOD providers to financially contribute to the production of European works*, p. 32.

## 2.4. Consistency and coherence: interplay with other legislative acts

### KEY FINDINGS

While the interrelationship of the AVMSD with other legal acts has hardly been problematic in the past, the potential for conflict and thus the need for consistency and coherence has increased significantly in recent times due to enacted or proposed legislation at EU level in the “digital decade”.

Namely, the DSA addresses players in the distribution and value chain of audiovisual content and has direct overlaps with the AVMSD. The general “without prejudice” rule that the DSA establishes in relation to the AVMSD, may not be sufficient to clarify practical conflict cases and provide for clear delineation in the different supervisory regimes. The same is true, although to a lesser extent and specifically for the area of VSPs, with regard to the DMA, the TCO Regulation and the proposed CSAM Regulation.

There are even more evident overlaps in the proposals for an EMFA and a Regulation on political advertising, which address issues directly relevant for the (audiovisual) media sector. Here, the clarification of the priority relationship of the AVMSD is not only to be seen in light of the endeavour to create legal certainty and ensure effective (cross-border) law enforcement but also in light of the maintenance of value decisions of the AVMSD such as the independence of supervision and the protection of editorial content.

### 2.4.1. Reasons for prevalence of the AVMSD in the past and recent developments

With its origins in the TwFD, the AVMSD has been in force for over three decades. The fact that in the past, it was rarely the subject of debates about its interaction with other legal acts and its coherence is mainly due to three aspects: From the very beginning, the TwFD was intended to achieve minimum harmonisation in order to enable and facilitate the cross-border transmission of television services in the internal market, so that it established a concise but limited sector-specific framework of rules which therefore correlated less frequently with other regulations; the AVMSD as sectoral law did not necessarily overlap with other sectoral approaches and only more recently horizontal legislative acts regulating the EU Digital Single Market have become more relevant; the TwFD/AVMSD is at the heart of Union “media law”, i.e. in an area in which the EU has only limited competences<sup>115</sup> based on its ability to regulate single market related matters. It is therefore not surprising that the AVMSD does not – like many other legal acts – have a general provision detailing its relationship to other legal acts. In general terms, only Art. 4(7) AVMSD determines the relationship to the e-Commerce Directive, a reference to this horizontal legal act that was originally inserted when the scope of the TwFD was extended to on-demand service providers with Directive 2007/65/EC and potential overlaps became relevant. Since then, and now especially relevant in view of VSPs, the provision establishes a rule-exception relationship according to which Directive 2000/31/EC shall (continue to) apply unless otherwise provided for in the AVMSD but in case of a conflict, the AVMSD shall prevail (again unless otherwise provided for in the AVMSD).

<sup>115</sup> Extensively Cole/Ukrow/Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*.

Where overlaps could occur, the other legal acts (passed later than the TwFD) clarified their relationship to the AVMSD by giving this Directive precedence. For example, the Directive on Services in the Internal Market<sup>116</sup> of 2006 stipulated the primacy of sectoral law (“shall prevail”), explicitly including the AVMSD; the Tobacco Advertising Directive<sup>117</sup> of 2003, as well as the Technical Standards and Regulations Directive<sup>118</sup> of 1998 (which is now applicable in the codified version of 2015<sup>119</sup>), stated in their Recitals that they are “without prejudice” to the AVMSD and the CabSat Directive<sup>120</sup> finally was declared to be supplementary to the AVMSD (at that time all still referring to the TwFD). Thus, the relationship was clear and did not lead to legal disputes that would have necessitated clarification by the CJEU. Partly this can also be explained by the fact that the legal acts mentioned above regularly referred to very specific areas (e.g. tobacco advertising, advertising for medical products<sup>121</sup>) or specifically dealt with (only) technical aspects of television broadcasting and not, as in the case of TwFD/AVMSD, with content-related issues.

In the recent past, however, this situation has fundamentally changed, essentially attributable to the (still progressing) convergence of the media landscape, the rise of digitalization and globalisation.<sup>122</sup> On the one hand, the TwFD evolved to the AVMSD and has been changed since. It remains sectoral law following the approach of minimum harmonisation but the spectrum of rules as well as the actors addressed has been significantly expanded. It now also contains, for example, a set of basic rules concerning protection of minors and society from (certain) illegal content, which apply not only to television broadcasters but also to on-demand audiovisual media services and VSPs. On the other hand, the regulatory environment, in which also AVMSD is placed, has changed considerably, especially in the “digital decade” proclaimed by the EU by which Europe shall be made “fit for the digital age”, leading to several changes in existing and proposals for new legal acts.<sup>123</sup> Within this framework, a wide variety of rules from different sectoral perspectives were predominantly used to address different types of platforms with new responsibilities. There are overlaps with the AVMSD either because the players addressed by the AVMSD (partly) themselves fall under the relevant definitions adopted by the new rules or because these platforms, as so-called intermediaries, are of great relevance for the distribution and value chain of audiovisual content or ultimately because the rules apply to market participants with whom the providers covered by the AVMSD compete with for audience and advertising shares.

<sup>116</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68.

<sup>117</sup> Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 152, 20.6.2003, p. 16–19, consolidated version: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02003L0033-20030620&qid=1666271991197>.

<sup>118</sup> Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations OJ L 217, 5.8.1998, p. 18–26 (no longer in force). This Directive went even a step further and explicitly included the national transpositions of the TwFD in Recital 21 with the clear wording that the new Directive “accordingly covers neither national rules and regulations transposing Directive 89/552/EEC, as amended by Directive 97/36/EC, or any future amendments [...]”.

<sup>119</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241, 17.9.2015, p. 1–15.

<sup>120</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15–21. On the background and its interaction with the AVMSD cf. Cole, *Retransmission of broadcast signals by cable in hotels - An analysis of the EU CabSat-Directive in light of a pending CJEU case*, p. 4–5.

<sup>121</sup> Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ L 311, 28.11.2001, p. 67–128) declared its application without prejudice to certain provisions of the AVMSD as well.

<sup>122</sup> See extensively Cole/Etteldorf/Ullrich, *Cross-Border Dissemination of Online Content*, p. 53 et seq.; Cole/Etteldorf/Ullrich, *Updating the Rules for Online Content Dissemination*, p. 81 et seq., 107 et seq.

<sup>123</sup> Cf. the priorities of the European Commission 2019-2024, [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en).

This applies on the one hand to the rules contained in the AVMSD but on the other hand also to the rules which the AVMSD deliberately omits in order to leave them to Member States' media regulation by giving them leeway for regulatory action in those fields.

#### 2.4.2. The new Digital Services Act package and its interaction with the AVMSD

It is especially relevant to take a closer look at the Digital Services Act Package in this context, consisting of the recently agreed Digital Services Act (DSA)<sup>124</sup> and Digital Markets Act (DMA)<sup>125</sup>.

##### a. The DSA Regulation

The DSA aims to create a safe, predictable and trustworthy online environment by establishing harmonised rules for the provision of so-called intermediary services. This includes not only an inclusion of the liability privilege rules of the e-Commerce Directive – with few changes made – but also the separately applicable obligations for such services, which essentially revolve around their handling of illegal content. For the media sector, the DSA is significant for the above-mentioned reasons because, on the one hand, it regulates the distribution channels for (their) media content and, on the other hand – and perhaps even more importantly – it regulates competitors in the audience and advertising market, which have so far been subject to hardly any or much less intensive regulations concerning the content of disseminated information compared to detailed regulations for the media, although they play a central role for content distribution online.<sup>126</sup> Overlaps with the AVMSD, therefore, arise at several points. Some players – especially VSPs but possibly also certain audiovisual media services that offer content online in a comparably designed manner – are addressed by both sets of rules imposing obligations on them. At the same time, in particular, the rules of the DSA concerning (very large) online platforms and online search engines impact the (dissemination of) audiovisual content provided for in services that fall under the AVMSD.

Several examples can illustrate this: According to Art. 26(2) DSA, an online platform (which could be a VSP) is obliged to provide users with a function with which they can declare whether the content they upload constitutes or contains commercial communications, while Art. 28b(3) AVMSD obliges Member States to ensure that VSPs comply with the rules on commercial communication of the AVMSD (Art. 9), stating that measures shall consist (inter alia) of “having a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications as far as they know or can be reasonably expected to know”. This means that AVMSD and DSA are applicable in parallel to exactly the same situations, except that the DSA is stricter and, as a Regulation, directly binding, whereas the AVMSD leaves the Member States room for manoeuvre.

Similar conclusions can be drawn regarding the labelling obligations of providers (both audiovisual media services and VSPs) under Art. 9 AVMSD and the transparency of advertising under Art. 26(1) DSA. A further example concerns Art. 6 and 6a AVMSD, according to which Member States shall ensure that audiovisual media service and (in conjunction with Art. 28b) VSP providers take appropriate measures to protect, inter alia, minors from content impairing their physical, mental or moral development and the general public from content containing incitement to violence or hatred which for VSPs may include establishing and operating transparent and user-friendly flagging and reporting mechanisms. The DSA, in turn, does not impose directly active obligations, such as deletion or blocking obligations,

<sup>124</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p. 1–102.

<sup>125</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1–66.

<sup>126</sup> Cf. on the relevance of the DSA for the broadcasting sector also in light of the AVMSD Cole, *Overview of the impact of the proposed EU Digital Services Act Package on broadcasting in Europe*, p. 8 et seq.

for illegal content but it achieves this indirectly by obliging hosting providers (again, it could be a VSP provider) to set up notification procedures, which in turn can result in knowledge about illegal content giving rise to liability and results in the need to handle that issue promptly, carefully, free from arbitrariness and objectively. What is illegal, however, is not determined by the DSA itself but is left to other rules stemming from the EU (such as the AVMSD) and national law (e.g. implementing media law). The fundamental problem lies in the fact that it is not clear at what “degree” of illegality one should presume a content to be illegal in the context of the DSA rules: is “illegal” a notion closely related to criminal law or – which is the more obvious broad understanding of the term as indicated in Recital 12 – any type of reason leading to illegality, such as content that is “only” harmful to certain groups (such as minors) or if it is in violation of transparency requirements (e.g. labelling of advertising). Depending on the interpretation, this could lead to a specific item of audiovisual content of an audiovisual media service provider that is distributed on a corresponding online service of its own or of a third party and is completely legal under the AVMSD (or the respective national frameworks), having to be treated as being illegal under the DSA. Or conversely, content being illegal under the AVMSD might not be covered by the notion under the DSA.

This illustration shows why the interconnection between the Directive and Regulation should be further clarified, not least as this impacts the completely different supervisory and sanctioning systems under AVMSD and DSA. While the reference to the e-Commerce Directive in the AVMSD can be maintained (while in future making a direct reference to the DSA), it is more complex when it comes to the provision in the DSA. Art. 2 (4) DSA now states that the DSA is without prejudice to the rules laid down by other Union legal acts regulating other aspects of the provision of intermediary services in the internal market or specifying and complementing this Regulation, in particular, Directive 2010/13/EU. What, at first glance, appears to be a clear priority relationship in the sense of a primary *lex specialis* (AVMSD) versus a *lex generalis* (DSA) may seem less obvious when taking a closer look at the examples given above. For example, concerning commercial communication, Recital 68 no longer speaks of “without prejudice” but of the DSA “complementing” the AVMSD. In Recital 10, the closing “however” phrase – which was highly controversial in the trilogue<sup>127</sup> – waters down the clarity of the priority relationship: *“However, to the extent that those Union legal acts pursue the same objectives as those laid down in this Regulation, the rules of this Regulation should apply in respect of issues that are not addressed or not fully addressed by those other legal acts as well as issues on which those other legal acts leave Member States the possibility of adopting certain measures at national level”*. This reads more like a collision rule, which ultimately gives priority to the DSA as a directly applicable Regulation at EU level if the AVMSD or its relevant national implementation does not regulate an issue concerning intermediaries at all or fully, which can be subject to interpretation. This relationship is especially important in the cases where the AVMSD deliberately does not regulate at all or fully in order to leave the rulemaking to the Member States (“fields not coordinated by this Directive” and stricter rules, cf. the section on Art. 3 and 4 AVMSD above). If this relationship is therefore not (more) clearly established, for example, in the context of a reform of the AVMSD, a regulatory authority under the AVMSD would not only have to deal with the provisions of the AVMSD when performing its supervisory tasks.<sup>128</sup> Still, it would also regularly have to ask itself what the purpose of the specific rule of the AVMSD is, whether it fully regulates the matter and whether it can now act itself or must turn to the Digital Services Coordinator in its Member State (which does not necessarily have to be and often will not be the media

<sup>127</sup> Institute of European Media Law (EMR), *DSA synopsis*.

<sup>128</sup> Cf. for an overview in the context of the AVMSD, practical experiences from selected countries in enforcement and on potential problems arising Cappello (ed.), *Media law enforcement without frontiers*.

regulatory authority, depending on how Member States implement the institutional structures of the DSA).

## b. The DMA Regulation

The overlaps are not only clear but also explicit in the case of the DMA: it does not only directly address providers falling under the AVMSD scope by referring to “video-sharing platform services within the meaning of Article 1(1)(aa) of Directive 2010/13/EU” (Art. 2 para. 8 DMA) but also actors in the audiovisual distribution and value chain such as online search engines (relevant for the findability of audiovisual content), online social networking services (relevant for the distribution of audiovisual content), virtual assistants (relevant for the navigation towards audiovisual content) and online advertising services (relevant for the financing of audiovisual content) as long as they are provided by gatekeepers which the European Commission will designate based on certain criteria of market dominance in the upcoming months.<sup>129</sup> In terms of substantive provisions, the key norms are Art. 5-7 DMA, which contain a number of specific obligations that gatekeepers have to comply with as well as some indications on how concretely appropriate measures to achieve compliance with these obligations can be agreed upon between the providers of the services and the Commission. The obligations concern partly the behaviour towards business users of the gatekeeper services and partly rights granted for end users which includes customers of the business users of the gatekeeper services.

To demonstrate possible interrelations with the AVMSD<sup>130</sup>, the example of Art. 5(4) can be briefly invoked: According to this provision, the gatekeeper – again, in this example, it could be a VSP – shall allow business users, free of charge, to communicate and promote offers to end users acquired via its core platform service also by other means than using the gatekeeper services. Art. 28b in conjunction with Art. 9 AVMSD, on the other hand, sets out some obligations (and limitations) with regard to audiovisual commercial communication and technical measures VSPs have to implement. Furthermore, Art. 6(5) stipulates that gatekeepers – this could apply to a search engine – shall apply transparent, fair and non-discriminatory conditions to ranking results, while Art. 7a AVMSD encourages Member States to take measures to ensure the appropriate prominence of audiovisual media services of general interest, which could include rules for online search engines obliging them, e.g. to prioritise certain public value content. These provisions do not correlate per se but potential conflicting situations should be avoided by further clarification of the interrelation, especially as there is no general provision in the substantive part of the DMA laying down rules on its interrelation besides competition law (which is laid down in Art. 1(6) DMA), while the AVMSD is one of the rulesets of Union law (and national transposition rules) that are mentioned in Recital 12 in view of which the DMA should apply only without prejudice.

### 2.4.3. Regulation of countering the dissemination of specific types of content

The Regulation on addressing the dissemination of terrorist content online (TCO Regulation)<sup>131</sup> follows, at first, a clearer approach in expressly addressing its interrelation with the AVMSD. According to Art. 1(5), the TCO Regulation generally shall be “without prejudice” to the AVMSD and specifically the latter shall “prevail” when a situation concerns audiovisual media services as defined by the AVMSD. This collision rule is put in more concrete terms in Recital 8 by stating that in conflict situations, AVMSD has primacy. Still, at the same time the obligations of other providers, particularly VSPs under the TCO

<sup>129</sup> Cf. on the key elements of the DMA Cole, in: Cappello (ed.), *Unravelling the Digital Services Act package*, p. 81 et seq.

<sup>130</sup> Cf. on the relevance of the DMA for the broadcasting sector also in light of the AVMSD Cole, *Overview of the impact of the proposed EU Digital Services Act Package on broadcasting in Europe*, p. 22 et seq.

<sup>131</sup> Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, PE/19/2021/INIT, OJ L 172, 17.5.2021, p. 79–109.

Regulation, shall remain unaffected. For VSPs, it may not seem clear whether in case of possible overlaps with the obligations stemming from combatting content covered by Art. 6(1)(b) AVMSD (public provocation to commit a terrorist offence), within the framework of which VSP providers must also take certain appropriate (technical) measures according to Art. 28b, there is a twofold obligation, as also under the AVMSD, there is a comparable set of measures that Member States can foresee similar to the catalogue of Art. 5 TCO.

#### 2.4.4. Conclusions also to be drawn in light of recently proposed new legal acts

Although there is no obvious collision that specific rules have created in one of the more recent legislative acts of the Union with pre-existing obligations under the AVMSD, this section has shown that the standard formulation “without prejudice” to express a relationship between two sets of rules only works without a problem if there is actually no overlap in practice. As demonstrated, this is not the case with the aforementioned legislative acts “interacting” with the AVMSD and contributing to a network of sectoral and horizontal rules. This conclusion suggests that in future, a clarification of the ongoing relevance of the rules of the AVMSD where there are potentials for overlaps, especially concerning VSPs but not exclusively in relation to these providers, should be achieved in the sense of a clear priority rule.

This is all the more true with regard to other regulatory initiatives at EU level that have the potential for overlap with the AVMSD because they deal with media and/or audiovisual content but are still in a pending legislative process.

This is particularly evident in the proposed Regulation to create a European Media Freedom Act (EMFA)<sup>132</sup> that the European Commission published in September 2022. With it, besides new provisions being enacted, the AVMSD would be amended when it comes to institutional structures. Therefore, no general “shall not affect rule” in relation to the AVMSD could be included but such a clarification exists towards DSA and DMA (Art. 1(2) EMFA proposal), so that any shortcomings of the uncertain relationship with the AVMSD as described above could be further fostered. But the other rules also have the potential for overlap: Potential overlaps and clarification needs could exist when it comes to the prohibition of interference with editorial policies and decisions (Art. 4(2) EMFA proposal) when regulatory actions of supervisory authorities are taken under the AVMSD. Similarly, it needs to be carefully assessed whether new information obligations for news providers (Art. 6 EMFA proposal) interact with information obligations of any type of audiovisual media services (Art. 5(1) AVMSD) and how rules on market concentration (Art. 21 et seq. EMFA proposal) relate to existing national rules on transparency of media ownership in transposition of the AVMSD (Art. 5(2) AVMSD). Also, requests for enforcement of obligations by VSPs, as foreseen in Art. 14 EMFA proposal, are closely intertwined with the general VSP obligations according to Art. 28b AVMSD).

Moreover, the proposed Regulation on political advertising<sup>133</sup> also concerns an area very close to the media sector. This Regulation shall lay down harmonised transparency obligations for providers of political advertising and related services, as well as rules on the use of targeting and amplification techniques in the context of the publication, dissemination or promotion of political advertising that involve the use of personal data. According to Art. 1(4)(f) of the proposal, the Regulation shall be (again) “without prejudice” to the AVMSD. However, Recital 58 already draws some connecting lines to the AVMSD by suggesting that Member States “may designate, in particular,” the national regulatory

<sup>132</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, COM/2022/457 final.

<sup>133</sup> Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, COM/2021/731 final.

authorities or bodies under Article 30 AVMSD for the oversight of the proposed Regulation and Recital 60 points to ERGA in light of making the best use of existing cooperation structures. Despite these clear references, Recital 57, which emphasises the need to establish coherence with the supervisory system and cooperation mechanisms of the DSA, lacks a corresponding emphasis also for the supervisory system and cooperation mechanisms (including the involvement of the Contact Committee under Art. 29) of the AVMSD.<sup>134</sup> In light of the fact that the Regulation is not limited to the provision of specific services but rather covers the preparation, placement, promotion, publication and dissemination of political advertising (broadly defined as “message by, for or on behalf of a political actor, unless it is of a purely private or a purely commercial nature or which is liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour”) irrespective of the means used for this purpose, which in principle can be carried out by all services (broadly defined as “any self-employed economic activity, normally provided for remuneration”), hence also by audiovisual media services and VSPs, this correlation is especially significant. As already mentioned, a “without prejudice” rule is only sufficient if there is no potential for conflict, which can be conceived for these two legal acts, especially in the context of the protection of editorial content of audiovisual media service providers sought by the AVMSD. This concerns, in particular, also political reporting, which can be characterized by a certain tendency and falls in principle under editorial freedom as long as certain safeguards are respected.<sup>135</sup>

Finally, the proposed Regulation laying down rules to prevent and combat child sexual abuse (CSAM Regulation)<sup>136</sup> also contains the rule that it shall not affect the rules laid down by the AVMSD, whereby Recital 7 CSAM Proposal, differently worded, again speaks of “without prejudice”. Hosting services (which may include VSPs) will not only have risk assessment obligations imposed by this proposal but also (active) risk mitigation obligations in relation to child abuse material within their offerings. This goes as far as so-called detection orders with which hosting providers can be obliged to actively detect such content. Here too, there is potential overlap with the obligations of VSP providers under Art. 28b in conjunction with Art. 6 and 6a AVMSD. Besides, the proposal also addresses (at least indirectly) issues of media literacy and the protection of minors in (online) media<sup>137</sup> – both aspects being also addressed by the revised AVMSD. The CSAM Regulation is also intended to be *lex specialis* to the DSA (Recital 8 CSAM Proposal), which means that existing coherence problems can be further reinforced.

<sup>134</sup> See in this sense also Draft of the Committee on Culture and Education for the Committee on the Internal Market and Consumer Protection on the proposal for a regulation of the European Parliament and of the Council on transparency and targeting of political advertising (COM(2021)0731 – C9-0433/2021 – 2021/0381(COD)), 21.6.2022, [https://www.europarl.europa.eu/doceo/document/IMCO-PR-732754\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/IMCO-PR-732754_EN.pdf); as well as Rapporteur Verheyen, Amendments 27-175, Draft opinion (PE735.573v01-00), 9.9.2022, [https://www.europarl.europa.eu/doceo/document/CULT-AM-736395\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/CULT-AM-736395_EN.pdf).

<sup>135</sup> The latter which is also to be addressed by the proposed EMFA.

<sup>136</sup> Proposal for a regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse, COM/2022/209 final.

<sup>137</sup> See on this aspects Draft opinion of the Committee on Culture and Education for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse (COM(2022)0209 – C9-0174/2022 – 2022/0155(COD)), 18.10.2022, [https://www.europarl.europa.eu/doceo/document/CULT-PA-737365\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/CULT-PA-737365_EN.pdf).



### 3. OTHER ISSUES AND OUTLOOK

#### KEY FINDINGS

The new rules on transparency of media ownership and the fostering of rules ensuring the protection of minors in the AVMSD concern subject areas that are strongly characterised by culturally determined peculiarities and are therefore still designed very differently at Member State level.

The new rules in Art. 7a (prominence of general interest content) and Art. 7b (signal integrity), are a reaction to new distribution channels for audiovisual content that called for new regulatory approaches. While Art. 7b contains an implementation mandate to the Member States and has therefore led to quite uniform rules at national level leaning on the wording of the AVMSD, the implementation of the option provided for in Art. 7a has been hardly used. With the exception of a few comparatively intensive rules, an evaluation of the "implementation" of Art. 7a is difficult because the provision leaves the Member States a wide margin of manoeuvre and in many Member States there are different must carry/must offer systems in place that are stemming partly from other sectoral or general laws.

All these rules need to be considered in light of the institutional system of the AVMSD and the cooperation structures provided there and in other sectoral rules.

The revision of the AVMSD 2018 concerned a number of further changes that are worth mentioning even though they can only be briefly highlighted in the context of this study.

#### 3.1. Member State possibility to enhance media ownership transparency

One novelty is the introduction in Art. 5(2) of rules on transparency of media ownership into the harmonised area of the AVMSD. However, this does not extend to a transposition mandate but allows Member States to go further in the information requirements they impose on media service providers, by obliging those under their jurisdiction to make accessible detailed information concerning their ownership structure if such rules are proportionate. The regulation thus only concerns the (formal) transparency of media ownership but does not introduce substantive rules on the structure of media ownership.<sup>138</sup> The area of (specific) media concentration law is therefore still not addressed by the AVMSD or other applicable rules at Union level and is not part of merger control competences of the European Commission.<sup>139</sup> It is left to national rules<sup>140</sup>, although for the future, it is proposed that the issue is in part to be dealt with in EMFA.

<sup>138</sup> For details see Cappello (ed.), *Transparency of media ownership*.

<sup>139</sup> Although the European Commission also examines media mergers, these investigations under its competence for competition law are based solely on economic factors and not on the power to shape opinions which is the focus point of media concentration law. Rather Art. 21(4) of the Merger Regulation (Council Regulation (EC) No 139/2004) allows the Member States to prohibit mergers which from a purely competition law perspective would be accepted, if they appear problematic due to aspects of plurality of media for example. See extensively 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.4.

<sup>140</sup> See on this Deloitte and SMIT, *Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD)*, p. 129 et seq.

Art. 5(2) AVMSD leaves the “if” and the “how” of implementation essentially to the Member States. In particular, this concerns, as Recital 16 points out, which information, if any, is to be made transparent and which actors (possibly also other media providers beyond the scope of AVMSD) are addressed. The actual use of the possibility granted in Art. 5(2) by the Member States is not easy to document, partly because it is of purely optional nature, and partly because such transparency rules may also be found in laws applicable to all undertakings (for example in the context of the implementation of the Anti-Money Laundering Directive<sup>141</sup>).<sup>142</sup> Such rules may also exist unconnected to the AVMSD as general transparency laws (for example in Bulgaria, Portugal and Sweden) as well as those being directed (also) at media actors outside the scope of the AVMSD (e.g. in Germany, Greece or Luxembourg for the print sector).<sup>143</sup> Some countries have specific transparency rules on media ownership for broadcasting (Poland, Romania and Sweden) or for audiovisual media (Belgium, France, Latvia, Romania and Spain), which should now be considered in the context of Art. 5(2). It is important to note the diversity of approaches as to what and how much information is to be made transparent, who is (and who is not) considered to be an owner in this sense, or how and to whom the information is made transparent (e.g. publicly, in a register, with a (not necessarily AVMSD) regulatory authority, etc.). Often, such rules are also linked to national media concentration law, which in turn uses different approaches and is strongly determined by different other national policy objectives.

### 3.2. The newly formulated rules on the protection of minors

The protection of minors is another example of an area covered by other national policy objectives in the Member States but that has been reinforced by an extended scope and an increased level of detail in the AVMSD. With Art. 6a AVMSD a uniform rule on the protection of minors in all audiovisual media services was included, combining the previously separate Art. 12 and 27. According to 6a (1) Member States shall take appropriate measures to ensure that audiovisual media services which may<sup>144</sup> impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see them. Art. 6a (3) supplements this with the requirement of also providing sufficient information to viewers about the potential impairment. In addition, personal data of minors collected by media service providers (e.g. via age verification mechanisms) shall not be used for commercial purposes (Art. 6a (2) AVMSD).

Although there are some further details included, e.g. that such measures may include selecting the time of the broadcast, age verification tools or other technical measures, and that they shall be proportionate to the potential harm of the programme, the new rules leave room to Member States to ensure an appropriate level of protection for minors in their territory. There is also no specification as to what kind of content is considered to be detrimental to the development (although at least gratuitous violence and pornography are mentioned as examples of particularly harmful content). Accordingly, the systems for the protection of minors in the media – which have traditionally developed in Member States policy independently from harmonisation in the audiovisual sector –

<sup>141</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, pp. 73–117.

<sup>142</sup> See on interrelations of this in the AVMSD context in detail Cole/Etteldorf, in: Cappello (ed.), *Transparency of media ownership*, p. 20 et seq.

<sup>143</sup> See on national implementation Cappello (ed.), *Transparency of media ownership*, p. 20 et seq.; Deloitte and SMIT, *Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD)*, p. 187 et seq;

<sup>144</sup> The condition of a “serious” impairment was dropped in the 2018 reform but the structure of the new provision allows a graduated response by Member States to different degrees of risks by the content in question.

differed in the various Member States before<sup>145</sup> and still<sup>146</sup> differ after the 2018 reform.<sup>147</sup> This includes for instance differences as to the regulatory system in general which relies partly on statutory provisions, provides partly for co- and self-regulatory systems, in some aspects regulates differently public and private broadcasters as well as linear and non-linear offerings. Furthermore, there are different approaches to what “impairment” means, which in some Member States is “only” pornography and gratuitous violence, in others “already” inappropriate language or erotic scenes. There are also differences regarding age categories and required technical measures. To exemplify the diversity one can refer to the protection of minors rules for linear services, for which most Member States rely on watershed-based limits accompanied by on-screen icons, content rating and special warnings, while some go beyond this by establishing additional time limits and more granular age categories and even see the need to rely on parental control measures and other technical means.<sup>148</sup> Whether and to what extent these rules also apply to non-linear services varies greatly.<sup>149</sup>

The differences mentioned – although it needs to be acknowledged that with the revision in the AMVSD there is a more harmonised approach – are highly relevant for the question of law enforcement, which has recently become an important issue especially in the online environment (where impairing actors are possibly only partially covered by the scope of the AVMSD and are acting across borders from one Member State (of jurisdiction) addressing audiences in other Member States).<sup>150</sup>

### 3.3. Rules on the distribution of content

Directive (EU) 2018/1808 also responded with several provisions to new distribution ways of audiovisual content driven by digitisation, responding to identified risks relating to the accessibility, findability and integrity of specific categories and namely of public value content.

The newly inserted Art. 7a AVMSD opens the possibility for Member States to take measures to ensure the appropriate prominence of audiovisual media services of “general interest”. As Recital 25 underlines and is already clear from the wording of the substantive provision, this imposes no implementation obligation for Member States. It rather clarifies that such measures intended to achieve pre-defined general interest objectives such as media pluralism<sup>151</sup>, freedom of speech and cultural diversity are not in conflict with the AVMSD as long as they are proportionate. For this reason, the AVMSD does not specify which rules can apply to which addressees and which content exactly is to be protected, as this falls within the discretion of Member States. Ensuring “prominence” of specific services or content is already advanced in the past by “must-carry” rules, such as those known from the

<sup>145</sup> Cf. Cappello (ed.), *The protection of minors in a converged media environment*, p. 25 et seq; ERGA, Report on the protection of minors in a converged environment.

<sup>146</sup> Cf. EAO, Revised AVMSD Tracking Table (including country fiches), <https://www.obs.coe.int/en/web/observatoire/avmsd-tracking>; EAO, Interactive searches across the national transpositions of the Audiovisual Media Services Directive (AVMSD Database, <https://avmsd.obs.coe.int/>).

<sup>147</sup> See in detail Weinand, *Implementing the EU Audiovisual Media Services Directive*, p. 497 et seq.; Weinand, *The revised Audiovisual Media Services Directive 2018 – Has the EU learnt the right lessons from the past?*, p. 264, 282 et seq.

<sup>148</sup> European Commission, Staff working document: Reporting on the application of Directive 2010/13/EU “Audiovisual Media Services Directive” for the period 2014-2019, SWD(2020) 228 final, p. 8.

<sup>149</sup> ERGA, Report on the protection of minors in a converged environment.

<sup>150</sup> Cf. for two recent examples the cooperation between the Spanish and the French regulatory authorities concerning a lack of sufficient age verification mechanisms on the pornography website “Jacquie et Michel” operated in Spain (CNMC, decision of 15 December 2022, <https://www.cnmc.es/sites/default/files/4320657.pdf>) or the intervention of the German regulatory authorities against three pornography websites operated in Cyprus, which was recently upheld by the courts (Higher Administrative Court of North Rhine-Westphalia, decisions from 7 September 2022, 3 B 1911/21, 13 B 1912/21 and 13 B 1913/21, see e.g. [https://www.justiz.nrw.de/nrwe/ovgs/ovg\\_nrw/j2022/13\\_B\\_1911\\_21\\_Beschluss\\_20220907.html](https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2022/13_B_1911_21_Beschluss_20220907.html)).

<sup>151</sup> Although the proposed EMFA is directed towards this goal of, inter alia, safeguarding media pluralism as well, the rules on user autonomy proposed there (esp. Art. 19) are of a consumer protection nature and – according to the proposal – would leave the prominence regimes established by Member States under the AVMSD untouched.

area of electronic communications networks and services law<sup>152</sup> (in cable and IPTV distribution or in electronic programme guides) and which have been in force in various forms in some Member States for quite some time.<sup>153</sup> While most Member States were rather reluctant for different reasons to use the Directive's new provision to introduce such obligations<sup>154</sup>, some national legislators<sup>155</sup> have introduced rules based on the impetus of Art. 7a that need to be considered in the context of the notion of findability or "must be found"-approaches. These solutions are very different in their concrete design.<sup>156</sup> Probably the most detailed regulation exists in Germany, according to which user interfaces (e.g. SmartTVs) must, among others, make the programmes and online offerings of the public service broadcasters and commercial media services easily findable, which make a particular contribution to the diversity of opinion and offerings in the German territory and thereby are regarded as having public value.<sup>157</sup> Under which criteria such a public value is to be assumed, is determined by the law (Interstate Treaty on Media) as well as by a statute of the German State Media Authorities (the competent national regulatory authorities under the AVMSD), which lays down the substantive criteria and procedure in more detail, and is ultimately decided in a public value procedure that was recently completed for the first time by the German State Media Authorities.<sup>158</sup> French law also focuses on user interfaces: operators of a certain reach (threshold scheme) who set the conditions for the provision of services on user interfaces must ensure adequate visibility of all or part of the services of general interest. This mainly covers offers of public service media but can be extended to other offers by the national media regulatory authority in France that sets forth the requirements in this context.<sup>159</sup> In Bulgaria<sup>160</sup> and Cyprus<sup>161</sup> the national regulatory authorities under the AVMSD are entitled to take measures to ensure prominence of general interest content.

Furthermore, according to the newly inserted Art. 7b AVMSD, Member States shall take appropriate and proportionate measures to ensure that audiovisual media services provided by media service providers are not, without the explicit consent of those providers, overlaid for commercial purposes or modified<sup>162</sup>. This provision is typically referred to as ensuring "signal integrity", although it actually goes

<sup>152</sup> Since 2002 the Universal Service Directive (Directive 2002/22/EC, Art. 31) allowed and today the European Electronic Communications Code (Directive (EU) 2018/1972, Art. 114) still allows, to impose reasonable must-carry obligations for the transmission of specified radio and television broadcast channels and services on undertakings providing electronic communications networks used for the distribution television and radio broadcasts to the public, where a significant number of end users of such networks use them as the principal means to receive radio and television broadcasts.

<sup>153</sup> Cf. already EAO, *To Have or Not to Have Must-Carry Rules*; Cappello (ed.), *Media pluralism and competition issues*; CMPF et al., *Study on media plurality and diversity online*, p. 87 et seq.

<sup>154</sup> ERGA, *Overview document on the exchange of best practices regarding Art. 7a and 7b AVMSD*, p. 5, mentions for some Member States that a transposition of Art. 7a was rejected because it would have required a concrete threat to clearly defined public interests (e.g. pluralism), which could not be identified in the specific Member State, and/or mandatory provisions were (thus) deemed excessive; Capello (ed.), *Prominence of European works and general interest content* (forthcoming 2022).

<sup>155</sup> Regulations in the Flemish Community of Belgium, Bulgaria, France, Cyprus, Germany, Greece and Portugal were explicitly put in the context of Art. 7a. However, clear statements on "implementation" in the EU 27 are difficult to make due to the aforementioned broad understanding of Art. 7a, as there are many rules that are in the context of must carry/must offer (e.g. in Ireland) or are specifically geared towards public service broadcasting (e.g. in the Netherlands or Italy). Cf. for further details the country reports in Capello (ed.), *Prominence of European works and general interest content* (forthcoming 2022).

<sup>156</sup> Cf. on national implementation ERGA, *Overview document on the exchange of best practices regarding Art. 7a and 7b AVMSD*, p. 3 et seq.; ERGA (Subgroup 3), *Overview document in relation to Article 7a of the Audiovisual Media Services Directive*, p. 8 et seq.; CMPF et al., *Study on media plurality and diversity online*, p. 86 et seq. and CMPF et al., *Study on media plurality and diversity online, Annexes*, p. 13 et seq.

<sup>157</sup> § 84 of the Interstate Media Treaty (Medienstaatsvertrag, MStV).

<sup>158</sup> Cf. press release with further references: [https://www.die-medienanstalten.de/service/pressemitteilungen/meldung?tx\\_news\\_pi1%5Bnews%5D=5038&cHash=77139b5e6e3d3171b40579f861e05d9b](https://www.die-medienanstalten.de/service/pressemitteilungen/meldung?tx_news_pi1%5Bnews%5D=5038&cHash=77139b5e6e3d3171b40579f861e05d9b).

<sup>159</sup> Art. 20-7.II of Law n° 86-1067 of 30 September 1986 on freedom of communication (Loi Léotard).

<sup>160</sup> Art. 8b Radio and Television Act (ЗАКОН ЗА РАДИОТО И ТЕЛЕВИЗИЯТА).

<sup>161</sup> Art. 30L of the Law on Radio and Television Organisations (Ο περί Ραδιοφωνικών και Τηλεοπτικών Οργανισμών Νόμος).

<sup>162</sup> Recital 26 of Directive (EU) 2018/1808 mentions exemplary cases if a programme is transmitted in a shortened form, altered or interrupted.

further by providing for the integrity of the content of audiovisual media services. These shall not be interfered with if they are distributed by other means as those opted for by the audiovisual media service providers themselves, i.e. the provision shall protect the content created under editorial responsibility and the audiovisual value chain more generally.<sup>163</sup> Unlike Art. 7a AVMSD, Art. 7b stipulates an implementation obligation, which requires Member States to also specify the regulatory details, including exceptions to the signal integrity, notably in relation to safeguarding the legitimate interests of users while taking into account the legitimate interests of the media service providers. However, according to Recital 26 of Directive (EU) 2018/1808 the authorization of the audiovisual media service provider shall not be necessary, i.e. modifications or overlays by the distributor are permitted also without such permission, if they are solely initiated or authorised by the recipient of the service (and not the distributor) for private use. The provision therefore leaves the Member States a wide margin of manoeuvre – not only does the AVMSD leave open which categories of “distributors” are targeted by such provisions on national level, as it only refers to the providers that are to be protected by such provisions, it also leaves room for the consideration of different interests by the Member States.<sup>164</sup> This discretion goes as far as leaving it open in which sectoral field the provisions are included, whether legal provisions or self-regulatory approaches are chosen, which type of enforcement by regulatory authorities is foreseen etc.

The use cases in practice are also diverse and can be based on different motivations of the overlay or modification. Such scenarios can range from filtering out information from a signal that is intended to enable viewing of the service, (own) commercial communications of distributors, user interfaces of electronic programme guides or TV recommender systems, resizing as control elements for users, edited versions of services such as previews, ad blocking or skipping possibilities.<sup>165</sup> This has led to different national implementation approaches.<sup>166</sup> The implementations range from rather detailed legal rules picking up Recital 26 (e.g. in Austria, Germany, Greece, Denmark, Hungary, Latvia, Luxembourg, Malta, the Netherlands, Poland or Portugal), to a textually more limited orientation towards Art. 7b itself (e.g. French Community of Belgium, Bulgaria, Croatia, Finland, Lithuania or Sweden), the inclusion of a statutory authorisation to lay down the details by the national regulatory authorities (e.g. Cyprus) or refraining from specific implementation and relying on existing rules without changes, as they were seen as sufficient to ensure the objectives of Art. 7b.

With regard to the diversity of actors (including intermediaries) that may be addressed in Art. 7a and 7b, the institutional dimension is also of great importance. This concerns not only the exchange between media regulators but also the cross-sectoral involvement of regulatory authorities other than the ones competent for audiovisual media services. This applies not only to cooperation in the case of supervisory measures but also to the exchange of best practices in monitoring. Particularly in the case of findability and signal integrity, technical means – such as access to metadata<sup>167</sup> – play a major role and must be taken into account in the practical implementation and supervision. ERGA highlighted

<sup>163</sup> See extensively Afilipoaie/Dewaele/Donders, “Signal integrity” in the *Audiovisual Media Services Directive: Process, positions and policies examined and explained*.

<sup>164</sup> On the margin of manoeuvre Art. 7b leaves to Member States see Cole, *Die Neuregelung des Artikel 7b Richtlinie 2010/13/EU (AVMD-RL) Spielraum und zu beachtende Vorgaben bei der mitgliedstaatlichen Umsetzung der Änderungsrichtlinie (EU) 2018/1808*.

<sup>165</sup> Deloitte and SMIT, *Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD)*, p. 364.

<sup>166</sup> Deloitte and SMIT, *Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD)*, p. 324 et seq.; ERGA (Subgroup 1), *Overview document on the exchange of best practices regarding Art. 7a and 7b AVMSD*, p. 22 et seq.; EAO, Interactive searches across the national transpositions of the Audiovisual Media Services Directive (AVMSD Database, <https://avmsd.obs.coe.int/>).

<sup>167</sup> CMPF et al., *Study on media plurality and diversity online*, p. 129, concluded that it is an additional challenge that, according to the technology manufacturers, the sharing of metadata between manufacturers and audiovisual media services’ providers hinders the smooth implementation of prominence obligations. On the one hand, by giving out their metadata, broadcasters feel that they will lose even more control over the ways in which their content is presented, curated and distributed. On the other hand, though, technology manufacturers argue that, for a correct implementation of any prominence obligation, greater and easier access to metadata is pivotal.

with regard to Art. 7a the possible problem that a too concrete (i.e. not abstract) understanding of ensuring prominence might slow down technical improvements. It pointed out the importance of a close exchange between its members especially in light of the fact that only a few Member States had implemented specific provisions on findability, making a more harmonized approach among Member States difficult and premature at the time of producing the position paper. With regard to Art. 7b, ERGA pointed to potential risks in deciding which overlays or scaling are still permissible and which are not, in the case where the action results from a user request which at the same time makes consent of the audiovisual media service provider superfluous (this can concern e.g. user-initiated splitscreen display of content and other services). It further highlighted the possible negative consequence of different (or: fragmented) regulations on national level due to the fact that it might not be feasible or commercially viable for electronic communications networks and hardware manufacturers of TV sets to develop a specific system for each country in which they sell their products.<sup>168</sup>

### 3.4. Reinforced institutional structures

Finally, all provisions mentioned in this report have to be considered in light of the institutional system of the AVMSD which is essential for monitoring and enforcement and was subject to significant changes in the 2018 revision. Until then, the AVMSD contained no specific provisions on supervision but merely assumed the existence of national regulatory authorities in certain provisions of the Directive.<sup>169</sup> Although the AVMSD, even now, neither contains particular structural supervisory requirements, the formulation of Recital 94 and Art. 30 set the expectation of independence of the regulatory entities responsible for implementing the Directive's provisions. Especially the obligation to allocate sufficient resources, ensure freedom from instructions, providing the rules in the law, specific requirements towards appointment and dismissal of members of the authorities and bodies as well as appeal mechanisms have strengthened the relevance of the regulatory instances involved within the Directive.

Member States therefore have to take the appropriate measures to implement these obligations so that their competent independent regulatory body is able to carry out the work in implementing the AVMSD impartially, transparently and efficiently. As the administrative systems are governed by national rules<sup>170</sup>, there are very different forms of supervision, which affect both structural issues (e.g. term of office of members, allocation of funds, affiliation to state authorities or ministries, etc.) and competence issues (responsibility of different authorities for different areas of the AVMSD and beyond, allocation of enforcement powers, etc.). Moreover, self-regulation and co-regulation systems also have a varying degree of importance in the Member States.

In this context, the revised AVMSD strengthened the cooperation between the Member State authorities and with the European Commission (Art. 30a) and gave ERGA an important role within the AVMSD (Art. 30b). However, Art. 30a only concerns the exchange of information and requests for mutual assistance and does not lay down detailed and continuous cooperation procedures. Art. 30b goes further by giving ERGA the legal basis within the Directive and setting out the composition as well as assigning the tasks to ERGA in the form of providing technical expertise to the Commission, and providing for a general exchange of experience, cooperation and exchange of information in the

<sup>168</sup> ERGA (Subgroup 1), *Overview document on the exchange of best practices regarding Art. 7a and 7b AVMSD*.

<sup>169</sup> Cf. on this and the following in detail Cole/Etteldorf/Ullrich, *Cross-border Dissemination of Online Content*, p. 121 et seq.

<sup>170</sup> Cf. on national supervisory structures ERGA, *Report on the independence of NRAs*; Cappello (ed.), *The independence of media regulatory authorities in Europe*; Cappello (ed.), 2019, *Self- and Co-regulation in the new AVMSD*; EMR and University of Luxembourg, *AVMS-RADAR AudioVisual Media Services- Regulatory Authorities' Independence And Efficiency Review*.

application of certain provisions of the Directive and issuing opinions at the request of the Commission. Nonetheless, there is a lack of concrete procedures, binding powers and technical means for implementing these tasks, especially in the context of cross-border procedures (Art. 3 and 4). ERGA has taken the initiative to fill this lacuna by agreeing on a Memorandum of Understanding (MoU)<sup>171</sup>, which was developed jointly by the members of ERGA and details the principles according to which these members intend to cooperate. This self-commitment of the ERGA members is a remarkable achievement paving the way for future rules manifesting such cooperation and/or granting powers to the regulatory authorities for creating such procedural rules in filling out the legal framework's provisions. It contains, for example, a commitment to establish a single point of contact for all members, procedures for dealing with requests for information and details on mutual assistance.

The proposed EMFA addresses this issue by establishing a European Board for Media Services to replace ERGA, and by laying down conditions for the Board's independence, structure and a wide range of tasks. It also proposes structured rules for concrete cooperation procedures in various areas. However, it is not clear whether and to what extent these requirements extend to all AVMSD-related matters, and to what extent procedures under the AVMSD or by national regulatory authorities take precedence. Also, the Board's powers, according to the proposal, are partly conditional on a request or other action by the European Commission, which is granted extensive powers for laying down more details in guidelines, thereby extending an approach that started with the revised AVMSD and continued in the agreement on the DSA.

### **3.5. Relevance of ongoing legislative procedures**

In light of these developments, the evaluation of the implementation of AVMSD needs to focus on the experiences and developments of recent years. It is noteworthy that the actual assessment is not as complete as it would be under normal transposition circumstances, because a large number of Member States only transposed with a significant delay. Therefore, possible issues as well as judicial work for further clarification of contentious issues in the new AVMSD are only coming to the fore after another period of application in practice. Especially the lacking and yet to be completed transposition in Ireland influences this. As significant changes were made to the Bill during the legislative procedure in preparation of the transposition, it has not been possible to rely on a more or less stable draft law anticipating what it would look like after the final voting. This situation is especially hindering, as the VSP-related provisions and their impact on the market depend largely on the national transposition by this Member State that is country-of-origin for many of the relevant providers. However, irrespective of all of this, the evaluation and lessons to be learnt for the future will automatically be linked to the dynamically evolving regulatory framework that is closely connected to the AVMSD which is why this should also be taken into account in the stock-taking.

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<sup>171</sup> ERGA, *Memorandum of Understanding between the national regulatory authority members of the ERGA*, dated 3 December 2020.

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This Background Analysis covers the main novelties and changes that came with the revision of the AVMSD by Directive (EU) 2018/1808. It presents implementation issues concerning the application of the country-of-origin principle, new rules on VSPs as well as for the promotion of European works and discusses questions of coherency and consistency of the regulatory framework before closing with an overview of further relevant aspects.

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