

## A. Introduction

In recent years, and even in the very recent months in particular, it has become apparent that the dissemination of audiovisual content with a cross-border dimension within Europe and from outside to Europe raises fundamental questions about whether and how regulatory authorities can respond to such content in case of an issue. This question is pertinent for content in television and on-demand audiovisual media services as well as for content disseminated via video sharing platforms. The challenges stem from the division or allocation of competences between the European Union and the Member States with regard to media-law-related activities<sup>1</sup> and the question of whether existing procedures for dealing with illegal content are operational from the viewpoint of regulatory authorities charged with supervision of the audiovisual content dissemination in a Member State.

When examining challenges related to the dissemination of audiovisual content, the core element is the European Union's Audiovisual Media Services Directive (AVMSD)<sup>2</sup>. It has undergone significant changes by a recent revision in 2018; now the implementation of the new rules on national level must prove itself in practice. Especially Arts. 2 to 4 of the AVMSD, which determine the state with jurisdiction over audiovisual media service providers and possibilities to exceptionally deviate from the basic principle of jurisdiction of the country of origin, are crucial. In addition, territorial jurisdiction and powers for supervising audiovisual content from service providers not established in an EU Member State have become particularly relevant.

When searching for answers to these fundamental issues, the focus stays on the AVMSD, but it is no longer sufficient to look only at that and the

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1 Extensively on this aspect *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector; see also in light on the online environment specifically *CMPF/CiTIP/IViR/SMIT*, Study on media plurality and diversity online, p. 1 et seq.

2 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), OJ L 95, 15.4.2010, pp. 1–24.

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E-Commerce Directive (ECD)<sup>3</sup> as in the past. In the meanwhile, a complex network of rules at EU and national level has to be taken into account. This development towards new building stones on EU level has become even more intensive with the entry into force of the two Regulations from the EU's Digital Services Act Package, the Digital Markets Act (DMA)<sup>4</sup> and, in the current context especially relevant, the Digital Services Act (DSA)<sup>5</sup>. The DSA imposes a series of obligations on online actors who are intermediaries for audiovisual content, following a graduated approach of responsibility in dealing with, and in the context of, illegal content which includes audiovisual content. Due to intersections of the AVMSD with the DSA, it is of special interest how the country-of-origin principle laid down in the AVMSD plays out with the market location principle the DSA follows in its territorial scope. This is also linked to a requirement to establish the necessary supervisory structures, which to a large extent is left to the Member States. By 17 February 2024 at the latest, when the relevant rules of the DSA will become applicable, the Member States must designate a/ several competent authority/authorities under the DSA and one of them as Digital Services Coordinator (DSC), who will play a central role in the DSA and in national and supranational supervisory cooperation. While the Member States are currently in the process of meeting this challenge, which necessarily must take into account specificities of content and media-related approaches to supervision, further proposals of the European Commission are on the table, which in case of adoption will further impact the regulation of the audiovisual sector and supervisory structures, which in turn determine the effectiveness of enforcement.

The most important current Proposal linked to the dissemination of audiovisual content is the Proposal for a European Media Freedom Act

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<sup>3</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, pp. 1-16.

<sup>4</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, pp. 1-66.

<sup>5</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, pp. 1-102.

(EMFA)<sup>6</sup>, which was published on 16 September 2022. At this stage it is still a Proposal, the controversial discussion of which in the legislative procedure has only just started, but it potentially will have a significant effect in addressing challenges of cross-border dissemination of audiovisual content in the future, depending on whether a final text will be adopted and what it will look like. One of the key elements of the EMFA are the proposed institutional and cooperation elements. When assessing audiovisual content and deciding on possible measures against its dissemination, the institutional dimension plays an important role, as do the procedures foreseen. The requirement of a supervision that is independent of the state or the guarantee of a reaction to possibly problematic content which is neutral and detached from state orders necessitates institutional guarantees of independence of the decision-making bodies. This does not only apply in a domestic context, in which Member States have the competence to structure and allocate powers to the concerned bodies, but also in cross-border situations and (possible) cooperation schemes on a supranational level.

Certain questions arising from the cross-border dissemination of audiovisual content in Europe have been addressed in detail in previous studies, on which this present study builds. Firstly, there was a focus on identifying problems arising from the (then existing) legal framework with a focus on the deficiencies posed by the E-Commerce Directive.<sup>7</sup> Secondly, there was a study that analysed options of the EU on developing a future framework for the online content dissemination and assessed the proposal for a DSA in light of the value for better solutions.<sup>8</sup> Based on the findings of those studies, their presentation in several stakeholder meetings and conferences and in response to more concrete announcements for legislative plans of the European Commission, which materialised in the publication of the EMFA Proposal, the State Media Authority of North Rhine-Westphalia has tasked the Institute of European Media Law (EMR) with a follow-up study focussing now on the most pressing areas for reform of the regulatory framework especially in view of issues that have surfaced in the application of the AMVSD-framework. As the recent revision is still in the phase of being “newly” applied in the Member States and in cooperation structures

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6 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.

7 Cole/Etteldorf/Ullrich, Cross-Border Dissemination of Online Content.

8 Cole/Etteldorf/Ullrich, Updating the Rules for Online Content Dissemination.

and as experiences with implementation are being discussed, as the authors have developed in detail in a research for the CULT Committee of the European Parliament<sup>9</sup>, this is the time to look ahead on which answers are necessary after the recent and proposed reform stages in order to have a functioning AVMSD also in the future. Preliminary results of the study were presented at the conference “safeguarding freedom – securing justice” on 17 November 2022.<sup>10</sup> In addition to the already published Executive Summaries,<sup>11</sup> this publication gives the reader access to the full study and the first assessment of the EMFA Proposal as well as proposals for further development.

The study is structured as follows: the starting point is an overview of the challenges resulting from the “cross-border media environment in the EU”, after which an in-depth analysis of the relevant provisions of the currently applicable AVMSD with regard to the scope, in particular the country-of-origin principle, as well as its institutional structures follows. These are considered in light of the possibilities for cross-border enforcement and the Member States’ possibilities for temporary derogations from the country-of-origin principle (procedure under Art. 3 AVMSD) and for measures

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- 9 Cf. *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive. While the analysis of the European Commission is still pending, the Committee on Culture and Education of the European Parliament already published a draft report on the implementation of the revised Audiovisual Media Services Directive (2022/2038(INI)) on 17 November 2022. See on this also the Amendments to the Draft report, Petra Kammerervert (PE738.565v02-00). For an overview see also *EPRS*, Transposition of the 2018 Audiovisual Media Services Directive. Implementation in Action.
- 10 Cf. *Cole*, Answers from Academia – a legal analysis (presentation available at [https://www.die-medienanstalten.de/fileadmin/user\\_upload/Veranstaltungen/2019/2019\\_11\\_12\\_Safeguarding\\_Freedom/Cole\\_Answers\\_from\\_Academia\\_2019-11-12.pdf](https://www.die-medienanstalten.de/fileadmin/user_upload/Veranstaltungen/2019/2019_11_12_Safeguarding_Freedom/Cole_Answers_from_Academia_2019-11-12.pdf)). The conference was organised by the German Media Authorities in cooperation with the Media Authority of North Rhine-Westphalia, the EMR and the Representation of the State of North Rhine-Westphalia to the European Union; see for more details [https://www.die-medienanstalten.de/veranstaltungen/termin?tx\\_news\\_pi1%5Bnews%5D=4751&cHash=8a99243f2fa49d8435e5b6593b49dbfd](https://www.die-medienanstalten.de/veranstaltungen/termin?tx_news_pi1%5Bnews%5D=4751&cHash=8a99243f2fa49d8435e5b6593b49dbfd).
- 11 A long version can be found in English ([https://www.medienanstalt-nrw.de/fileadmin/user\\_upload/NeueWebsite\\_0120/Presse/Pressemitteilung/Gutachten\\_ExSum\\_lang\\_EN\\_Cole\\_2023\\_2.pdf](https://www.medienanstalt-nrw.de/fileadmin/user_upload/NeueWebsite_0120/Presse/Pressemitteilung/Gutachten_ExSum_lang_EN_Cole_2023_2.pdf)) and German (at [https://www.medienanstalt-nrw.de/fileadmin/user\\_upload/NeueWebsite\\_0120/Presse/Pressemitteilung/Gutachten\\_ExSum\\_lang\\_DE\\_Cole\\_2023.pdf](https://www.medienanstalt-nrw.de/fileadmin/user_upload/NeueWebsite_0120/Presse/Pressemitteilung/Gutachten_ExSum_lang_DE_Cole_2023.pdf)), a short version in English ([https://www.medienanstalt-nrw.de/fileadmin/user\\_upload/NeueWebsite\\_0120/Presse/Pressemitteilung/Gutachten\\_ExSum\\_kurz\\_EN\\_Cole\\_2023.pdf](https://www.medienanstalt-nrw.de/fileadmin/user_upload/NeueWebsite_0120/Presse/Pressemitteilung/Gutachten_ExSum_kurz_EN_Cole_2023.pdf)) and German ([https://www.medienanstalt-nrw.de/fileadmin/user\\_upload/NeueWebsite\\_0120/Presse/Pressemitteilung/Gutachten\\_ExSum\\_kurz\\_DE\\_Cole\\_2023.pdf](https://www.medienanstalt-nrw.de/fileadmin/user_upload/NeueWebsite_0120/Presse/Pressemitteilung/Gutachten_ExSum_kurz_DE_Cole_2023.pdf)).

against circumvention in case of stricter rules of a targeted Member State without jurisdiction (procedure under Art. 4 AVMSD). The cooperation structures of the regulatory bodies within the European Regulators Group for Audiovisual Media Services (ERGA) are examined in detail and compared with other institutional systems. Problematic constellations identified in the process are illustrated by exemplifying scenarios, which are then considered along different possible solutions in order to be able to deduct which steps should be taken in the future. The study concludes with considerations that need to be taken into account in the continued application both of existing and of currently proposed or future regulation that should be achieved with regard to ensuring effective law enforcement in the cross-border dissemination of audiovisual content.

