F. Approaches and National Solutions Concerning Current Challenges

I. The Degree of (Non-)Harmonisation on EU Level

As shown above and illustrated by the scenarios, the degree of harmonisation of the AVMSD is limited. This is due to the approach of minimum harmonisation, which in turn results from the limited competences of the EU in this field. Additionally, this Directive differs from later approaches in several Regulations concerning the digital environment, in that it has a more limited territorial scope, in particular when it comes to non-EU providers. It was underlined above that the possibilities of law enforcement against such providers are not harmonised by the AVMSD (see above C.III and C.IV) but left to reactions by the Member States. Furthermore, the substantive scope of application of the AVMSD is limited. It entails rules concerning only some, although very important, areas of illegal audiovisual content or behaviour by providers (see above C.II).

1. Dealing with Non-EU Providers

In view of the described developments especially in recent years with more risks emanating from non-EU providers whose audiovisual content is available in the EU, possible approaches to solve challenges for an adequate response to cross-border content dissemination in the framework of the AVMSD need to be reflected. Responding to providers from third countries has proven a significant problem in several ways.

On the one hand, a solution has to be found regarding the application of the technical jurisdiction criteria which allow for an easy access to the benefits of the Single Market rules without having a closer attachment to one of the EU Member States. The current mechanisms result in a situation where a non-EU provider, with a purely technical decision to transmit via a satellite in the EU, can benefit from the one-stop-shop mechanism by creating a simulated establishment and country of origin based on a merely technical connection. Apart from this link, such services still originate from a completely different de facto country of origin, which – being outside

of the EU – may be based on a completely different understanding of the media system and the values associated with it than in the EU. The starting point of the AVMSD, however, is that the services and offers that are included in its regulatory scope originate from (Member) States that are bound to EU values and whose national media law systems already take fundamental rights into account in a commonly accepted manner in the EU. Only because of this basis of a common ground between all Member States, a lesser degree of harmonisation concerning fundamental principles is sufficient, since a minimum guarantee is deducted from the constitution as democratic systems of all EU Member States. The supplementary link to non-EU providers via the technical link was never meant to change this by being more flexible when it comes to the type of provider or the actual content provided, simply because it stems from outside of the EU. Much to the contrary, the idea was to be able to at least safeguard the basic values and principles of the EU and its regulatory framework for audiovisual media by making even such providers fall under the jurisdiction of a Member State. With the difficulty of limited enforcement means of Member States against non-EU providers – because in direct manner they can only rely on the undertaking providing the technical service which triggers the jurisdiction, although these companies have no control over the content transmitted –, a way must be found which can guarantee the respect of certain minimum requirements in the creation of editorial content by all providers of services available in the EU. Upholding the idea of giving non-EU providers the full benefit by simply using the technical criterion is no longer appropriate without at least changing the requirements for applying this criterion.

One option, and probably the simplest, would be to drop the jurisdiction based on technical criteria altogether. When considering this option, it would need to be taken into account that, as a consequence, the more direct access to the technical provider over which the Member State has jurisdiction and with it the indirect enforcement possibility concerning the content of the media service provider would cease to exist in a harmonised manner. In other words, in such a new context each Member State would have to (and could) decide how to deal with the content of non-EU providers available on their territory, and there would not be the assignment of a responsibility to one Member State. Another option would be to add a supplementary condition that the technical link alone is not sufficient but there also has to be a more substantial connection to the market of the

given Member State – such as it is known from the GDPR or the DSA.[202] If this is not the case, the provider would remain under the jurisdiction of all Member States in parallel. As an additional or alternative option, it could be considered to place benefiting from the country-of-origin mechanism under certain basic conditions, for example that this is only possible for providers that are structured in a way to guarantee independence from state or other powers and/or are committed to basic journalistic standards (see also below for consideration under licensing conditions). For this purpose, a corresponding system for monitoring would have to be set up as is presented in the approaches in the next sections below. For these limited cases of determining jurisdiction, one could take inspiration from the mechanisms in data protection law. In that field under GDPR, the European Commission can decide by means of an adequacy decision that in a certain non-EU State there is a level of data protection provided by the legal framework existing there that is comparable to that in the EU provided by the GDPR. Data transfers to such States are then possible under facilitated conditions. Similarly, within the AVMSD – only for the purpose of determining jurisdiction – there could be such an adequacy decision on 'safe country of origins', which would establish that an adequate level of protection of basic media law standards exist that are comparable to those in the Union, at least for the harmonised areas of the AVMSD, and therefore providers from these non-EU states can profit without a problem from the technical jurisdiction link. Because there is no uniform and comprehensive media law on the level of the EU and only the basic principles of the AVMSD and the EU's fundamental values of independence, media freedom and media pluralism could be taken into account, such "adequacy decisions" would have to be taken by the Member States and not the European Commission. The decision-making could be delegated to the national regulatory authorities in their cooperation mechanism under ERGA. Such a solution would necessitate a further development of procedural means and corresponding structures within ERGA in order to ensure an appropriate use of these powers if they would be considered in the future.

202 Both the DSA and the GDPR already require a specific link to the internal market within their scope of application, which could be mirrored for jurisdiction. Art. 3 GDPR requires that the data processing, if it is not carried out by an establishment in the Union, is either carried out in connection with the offering of goods or services or the monitoring of the behaviour of Union citizens. Art. 2(1) of the DSA applies to the provision of intermediary services to EU citizens irrespective of the place of establishment of the provider.

The issue described here is connected to the lack of harmonised rules on licensing of linear audiovisual media services or to the conditions, such as a notification requirement, for providers of non-linear services in the AVMSD. These requirements for being entitled to operate audiovisual media services in the EU are left entirely to be configured by the Member States. Conversely, the legal consequence of admissibility to provide services under the law of one Member State follows directly from the Directive: the limitation of possibilities of other Member States to involve themselves in issues concerning those service providers. In regulatory practice this means that the decision of a non-EU provider to transmit in a way that allows it to fall under the jurisdiction of one – the 'technical link' – Member State is firstly a choice that the provider can make and that secondly results on all other Member States depending, at least in principle, on the enforcement of the law vis-à-vis such providers, even if indirectly via the satellite company, by this Member State. The Member State of jurisdiction is then faced with the additional challenge of whether and how it could enforce licensing conditions that would apply to regular domestic providers or, even beyond that, conditions for legal dissemination that may exist not in its own but other Member States, possibly the ones that are targeted by the service, such as, e.g., the prohibition of direct state financing or control by state entities, compliance with certain content standards or others. By law, only the legal framework of the jurisdiction Member State has to be applied, but the question would arise whether another (targeted) State could initiate an anti-circumvention procedure.

Therefore, a mechanism to overcome this structural problem needs to be found. One option could be to harmonise at least minimum requirements for licensing conditions on the basis of values and minimum expectations towards audiovisual media service providers which are common in all Member States. This could avoid that originally non-EU providers select market access in a Member State in which they can fulfil the licensing or other conditions, which they could not – due to substantive differences – if they entered the market in another Member State to which their service is directed. Criteria which could be relied on are elaborated in the following sections and concern, inter alia, criteria of independence of the provider or basic content standards but could be expanded beyond those examples. Another option could be to implement at least an easier application of the rule on prohibition of circumvention as currently laid down in Art. 4 AVMSD. If the anti-circumvention procedure remains the rule for these cases, it must be facilitated through a simpler procedure and be subject to

a lower burden of proof. For the specific case of a failure to comply with licensing conditions (or an application of those mutatis mutandis), which in all Member States can already be taken from a legally established catalogue of requirements, a separate circumvention instrument and procedure could also be considered.

Finally, and irrespective of further procedural and substantive harmonisation, the European Commission should be encouraged to explore all possibilities to foster an application of the AVMSD by the Member States – typically meaning the actions of the regulatory authorities – in a way that allows decisions by one regulatory authority taken in accordance with EU law to have full effect by avoiding any form of further dissemination of the disputed content in the Member State that took action. For the treatment of non-EU providers, but also of those against which a Member State has taken an anti-circumvention measure, this means that efforts should be coordinated in a way that ensures that these measures of one Member State are supported by complementary action of the others, especially if the possibilities to act of the Member State having taken the original action are limited and can only extend to limiting availability of a specific service or content on its territory via certain ways of distribution but not for all.

2. Degree of Substantive Harmonisation

Besides issues that arise in dealing with non-EU providers due to a lack of harmonisation and similar problems existing if one Member State has introduced stricter rules in the coordinated fields of the AVMSD and providers circumvent these by avoiding falling under the jurisdiction of that Member State, the limited degree of harmonisation in substantive terms can cause issues in the comparative treatment of providers which – without possibly passing the threshold of a circumvention – are available in, or even specifically targeted to, one Member State but falling under the jurisdiction of another. This is partly a result of the conception of the country-of-origin principle and the margin of discretion that is left to Member States when creating the transposing rules for the AVMSD. However, if some of the basic elements laid down in the Directive show a very diverse transposition on national level, this can stand in the way of effectuating the enforcement of these main elements of the law.

On the one hand, the AVMSD concerns provisions which only provide for more general conditions, leaving the Member States the mentioned wide scope for implementation. The protection of minors in the media is an illustrative example in this regard, not only if one takes a look at the general rules laid down in Art. 6a AVMSD, which apply also to VSPs in conjunction with Art. 28b(1), but also in light of growing or new risks posed in today's media environment.[203] Art. 6a(1) AVMSD obliges Member States to take appropriate measures so that audiovisual media services that have the potential to impair the development of minors are disseminated in a way that normally this age group does not "hear or see" them. There are only few indications that follow to clarify which measures are to be foreseen and how they should differentiate by level of harm, and also Recitals 19 and 20 of Directive (EU) 2018/1808 do not give a lot of additional details.

One option to have a more common approach to categorising services (or content in such services) that may impair the development would be to reach a higher level of harmonisation concerning this understanding. However, this area is especially prone to differences based on the variety of cultural traditions in the Member States which can already be observed in the very different approaches to age groups both concerning the actual age level and the amount of different categories between 0 and 18 years of age.[204] In addition, classification decisions with effect for protection of minors in the media is often connected to assessments in other rules concerning youth protection which again is not a harmonised area of the law. The assessment of whether or not a content has an adverse effect on the development is also related to media and digital literacy of minors, which can be at different levels in the Member States.[205] Finding a uniform standard outside of the most clear-cut cases of potentially endangering content would prove difficult most likely. At the same time, the two categories identified by Art. 6a(1) AVMSD as being "most harmful", pornography and gratuitous violence, should already now be addressed with the strictest measures by the Member States, and failing to do so should be relatively easy to discover for the Commission in monitoring whether the Member States are effectively giving EU law, here the AVMSD, validity in their national legislation and its application.

203 Extensively on this *Ukrow/Cole/Etteldorf*, Stand und Entwicklung des internationalen Kinder- und Jugendmedienschutzes.

204 See above C.II.2 with further references.

205 *Ukrow/Cole/Etteldorf*, Stand und Entwicklung des internationalen Kinder- und Jugendmedienschutzes, Chapter C.IV.1.

Another option instead of considering the harmonisation of the protection-of-minors standard in terms of the content categorisation would be a greater harmonisation of technical criteria. This would lay down minimum protective measures that at least must be put in place by providers, respectively enshrined in the national legislative frameworks or their application by regulatory authorities. There is no such minimum expectation in the AVMSD nor are the conditions spelt out, although Art. 6(1) AVMSD does mention watershed rules, age verification tools or other technical measures which correspond to the widespread practice in the Member States to rely on scheduling time restrictions for broadcasting or age verifications and labelling for VoD services combined with passcode-protected access. For VSPs, the AVMSD provides a list of measures to be considered if they are appropriate and mentions age verification systems (Art. 28b(3) (f)) for the categories of potentially harmful content as mentioned in Art. 6(1) AVMSD. A clearer definition of the minimum standards to be achieved in technical regard, especially what (effective) age verification systems are, would strengthen the enforcement of the clearest of violations of the protection-of-minors standards. At the same time such harmonising would hardly affect those providers who are already striving for compliance with protection-of-minors rules in practice, including those VSPs that have applied and are continuing to apply such measures. The Member State could still retain the competence to further detail the conditions in its law and especially also be stricter when it comes to the measures required at least. Such a codification of certain conditions when disseminating content that is problematic for minors, for example with regard to pornographic content, would allow for a joint standard in the enforcement of the law by the respective regulatory authorities in charge due to the country-of-origin principle, thereby reducing potential issues deriving from the cross-border dissemination. Besides such a development, in this context it will be important that in future a more intensive assessment is made and regularly repeated whether the measures actually foreseen by the Member States suffice for a proper ('actual') transposition of the obligations laid down at least in basic terms in the AVMSD itself. This is connected to a strengthening of institutional designs and cooperation in the AVMSD (see on this below F. V)

On the other hand, the question of a possible increase in the degree of harmonisation concerns issues that are not yet taken up in the AVMSD but pose significant risks to individuals and the general public in the dissemination of audiovisual content. The evolutionary steps achieved with the revisions of the AVMSD always picked up current developments in the

media landscape and changes in consumer behaviour, most recently, for example, with the strengthening of the protection of minors in the media. The current situation described above therefore calls for future reforms to continue in this way. Namely, the dissemination of problematic content from state-controlled or -influenced providers that contains wrongful information or propaganda knowingly and with the intent of a destabilising effect has surfaced as a serious and lasting problem that should be tackled. So far, no minimum standards are laid down in the AVMSD due to the allocation of power to the Member States for such content-related questions. But due to the large-scale risk which reaches beyond individual Member States, one option could be to extend the scope of the AVMSD to such threats, at least if they are associated with risks that affect audiences and the general public in the whole or a majority of Member States of the EU.

II. Content Standards: the UK Example

The lack of harmonisation of the licensing or authorisation requirements for audiovisual media service providers and VSPs in the AVMSD means that the overall assessment of the legality of an audiovisual content offer depends to some extent on the national rules. In some States, monitoring of the offer of providers under a Member State's jurisdiction includes quite extensive content-related scrutiny, e.g. requiring providers to ensure not only the avoidance of illegal content in their offer but also a certain degree of content quality, e.g. in news programmes. This is the case for the UK, which is no longer a Member State of the EU but has transposed the AVMSD 2018 and still follows the multi-level regulatory approach as devised by the AVMSD;[206] therefore it can offer relevant insights. The content standards to be presented here have been developed for linear broadcasting services.

The main rules detailing the licensing regime for linear television services in the UK are contained in the Broadcasting Act 1996[207], while

206 Generally on Brexit and its consequences for the audiovisual sector *Cole/Ukrow/Etteldorf*, Research for CULT Committee – Audiovisual Sector and Brexit: the Regulatory Environment; *Cabrera Blázquez*, Post-Brexit rules for the European audiovisual sector.

207 https://www.legislation.gov.uk/ukpga/1996/55/contents. Depending on the type of broadcasting service it could also be a licence under the Broadcasting Act 1990, https://www.legislation.gov.uk/ukpga/1990/42/contents, which runs in parallel to the 1996 Act for this matter.

the powers of the regulatory authority in licensing and supervision are included in the Communications Act 2003[208]. The functions of the Office of Communications (hereafter Ofcom) as converged regulatory authority in charge of the broadcasting sector are detailed in part 1 of the Communications Act 2003, according to which one of its duties is to ensure that certain content standards are applied in television services that avoid violations of rights of others (Sec. 3(2)). In addition, already the licensing as such is conditional on certain criteria which aim to secure independence of the provider and a quality offer. Section 3(3) Broadcasting Act 1996 tasks Ofcom with the assessment of a person's suitability to hold a licensing agreement by conducting a "fit and proper persons test". It shall not grant any licensing agreement unless and as long as it is sure the concerned individual is a fit and proper person to hold it. As can be seen in the practical application of this test, not only objective factors in the person in question, such as, e.g., the control of it by a (foreign) state entity, but also violations of content standards can lead to a disqualification of being a person in that sense.

The general obligation to ensure the respect of certain content standards is further detailed for Ofcom by sec. 319(1) Communications Act 2003.[209] It has to set, and from time to time to review and revise, standards for the content of programmes in television services with which the aim of these standards can be achieved. The provision sets out these objectives in a detailed manner in para. 2, referring among other to protection of minors and due impartiality and due accuracy of news items. These standards have been developed in the Ofcom Broadcasting Code (with the Cross-

208 https://www.legislation.gov.uk/ukpga/2003/21/contents.

209 Ofcom is also tasked with the supervision of the BBC, according to sec. 198 Communications Act 2003 in combination with Arts. 44 et seq. of the BBC Charter, Royal Charter for the continuance of the British Broadcasting Corporation, presented to the Parliament by the Secretary of State for Culture, Media and Sport by Command of Her Majesty, December 2016, http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/2016/charter.pdf; Art. 46(7) BBC Charter states that Ofcom must secure the observance of standards in the content in the relevant UK Public Services, and the BBC Agreement (Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation, presented to Parliament by the Secretary of State for Culture, Media and Sport by Command of Her Majesty, December 2016, http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/2016/agreement.pdf) requires the BBC to observe the Standards and Fairness Codes set out by Ofcom including the Broadcasting code which is presented here.

promotion Code and the On Demand Programme Service Rules)[210]. The Code contains principles and practices which broadcasters must comply with as a minimum standard requirement. The Code and its content are based on the legislative objectives set out in the Communications Act 2003, especially in Sec. 319(2)[211], and the Code refers to the provisions in the law throughout. While doing so it also aims at offering practical guidance to the providers that are addressed by the Code, thus not only setting up rules and principles but also offering explanations to the meaning of key notions as understood by the Ofcom and even practice guidance for the broadcasters in how to apply the Code. In addition to the standards objectives of Sec. 319(2) Communications Act 2003, the Code's rules were designed by Ofcom to consider the aspects mentioned in para. 4 of that provision, such as the potential harm and likeliness of the harm caused by certain content (lit. a) or how the Code's rules contribute to maintaining the independence by considering how editorial control over the content is applied (lit. f). The content standards of the Code thereby form the basis for the permanent "fit and proper persons test" in view of the broadcast offered.[212]

As mentioned, Ofcom has to make sure that its Broadcasting Code is kept 'up to date' by revising it whenever it is deemed necessary. In actual fact, this happens quite frequently,[213] and the meaning of key notions can evolve quite significantly, as was, e.g., the case for the understanding of 'hate speech' in Section Three of the Code between the version of 2019 and the most recent of 2020. This Section, and even more so the very extensive Section One on protection of minors, shows that the Code delivers very detailed requirements of how the standards, which are laid down only in general form in the legislation itself, have to be achieved. Several categories of content are prohibited on linear services; this extends, for example, to material which is "likely" to encourage or incite the commission of crime or lead to disorder. Also the understanding of hate speech, the inclusion of

210 Broadcasting Code as last amended on 31 December 2020, https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code.

211 For parts of the Code the basis is in sec. 107(1) Broadcasting Code 1996.

212 Cf. e.g. Ofcom, Sanction (117)19 Autonomous Non-Profit Organisation (ANO) TV Novosti of 26 July 2019, no. 122 et seq., in which Ofcom discusses the possibility of proposing revocation of the licence in view of the seriousness of the breaches but concludes in view of the proportionality requirement that in that case a serious level of fine and the obligation to announce it in the programme was sufficient.

213 See overview at https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/legacy.

which can be exceptionally justified in view of the context of its placement, is broad, as it relates to expression that "spread, incite, promote or justify" hatred and as the ground on which this is based covers disability, ethnicity, social origin, gender, sex, gender reassignment, nationality, race, religion or belief, sexual orientation, colour, genetic features, language, political or any other opinion, membership of a national minority, property, birth or age. With these detailed formulations, and hate speech is just one example, the regulatory authority creates legally binding concretisations of the law, and the Ofcom can react to breaches with a finding that is published and to which sanctions can be attached, ultimately in form of a revocation of the licence.

Ofcom has used its powers in supervising broadcasters that are bound by the Broadcasting Code and has not only come to findings of breaches but also connected these with severe penalties. Recent examples concern the breach of the impartiality and accuracy obligations for news items, and an illustrative example of the implications of the Code is the Sanctioning Decision against ANO TV Novosti for breaches in the RT programmes which was decided on 26 July 2019.[214]

Recent examples in practice illustrate the importance of the standards set in the Code and of Ofcom's role in ensuring that the UK Broadcasting sector remains protected. For example, the decisions taken against Russian-based service providers illustrates this fact. The sanctioning decision is based on an extensive presentation of the elements of the legal framework, and the actual assessment of each programme is considered in a breach decision of 20 December 2018.[215] The two decisions show that a detailed analysis and evaluation of content is undertaken by the national regulatory authority and includes the consideration of the high value of freedom of speech while applying limits to this deriving from the Broadcasting Code.

214 Ofcom, Sanction (117)19 Autonomous Non-Profit Organisation (ANO) TV Novosti of 26 July 2019. RT's challenges against this decision were rejected before the courts, and the Supreme Court declined the request for appeal before it, cf. https://www.ofcom.org.uk/news-centre/2022/supreme-court-will-not-hear-rt-appeal.

215 Ofcom, Broadcast and On Demand Bulletin, Issue 369 of 20 December 2018, https://www.ofcom.org.uk/__data/assets/pdf_file/0020/131159/Issue-369-Broadcast-and-On-Demand-Bulletin.pdf, pp. 4 et seq.; the individual programme analysis starts at p. 25.

In the sanctioning decision an overview of previous precedents is given, which are indicative of the regular application of this power of Ofcom.[216]

Another important example, which again manifests that a critical review of content even of political nature by an independent regulatory authority is possible without being in violation of freedom of expression, is the case against the channel CGTN, which was a service of Star China Media Limited broadcasting under an Ofcom licence. There were numerous investigations, findings of breaches and sanction decisions for breach of the impartiality requirement and unfair treatment.[217] Interestingly, the last sanctioning decision was taken even after the licence of CGTN had been revoked. The revocation decision was based on the fact that the licence holder was not the entity controlling the channel but another corporation that was under direct control of the ruling party in China, which is a breach of the fit and proper requirement that requires independent providers.[218]

With regard to Russian programmes, Ofcom initiated several further investigations after the Russian Federation started the war against Ukraine, looking at the coverage of the respective events.[219] Before these investigations were concluded and after the channel had already stopped broadcasting in the UK due to the sanctions imposed by the EU on all RT outlets, the licence was revoked. The Ofcom no longer deemed ANO TV Novosti to be fit and proper to hold broadcast licences, and it not only referred to the (lack of) compliance history and previous decisions or to the ongoing investigations but also alleged that there was no independence from state control by the Russian Federation and finally that the new law passed in Russia which criminalises independent journalism if it reports in deviation

216 Ofcom, Sanction (117)19 Autonomous Non-Profit Organisation (ANO) TV Novosti of 26 July 2019, pp. 30 et seq.; investigations and decisions are made public and can be researched at https://www.ofcom.org.uk/about-ofcom/latest/bulletins/broadcast-bulletins.

217 Cf. e.g. Ofcom, Broadcast and On Demand Bulletin, Issue 403 of 26 May 2020, https://www.ofcom.org.uk/__data/assets/pdf_file/0031/195781/The-World-Today-and-China-24,-CGTN.pdf (Breach Decision); Sanction 145 (21) Star China Media Limited of 27 August 2021.

218 Ofcom, Notice of revocation of Licence Number TLCS000575 held by Star China Media Limited under section 238(4) of the Communications Act 2003 and Condition 28(2)(a) of the Licence of 4 February 2021, https://www.ofcom.org.uk/__data/assets/pdf_file/0025/212884/revocation-notice-cgtn.pdf.

219 Investigations started on 28 February and 2 March 2022, https://www.ofcom.org.uk/news-centre/2022/ofcom-launches-investigations-into-rt and https://www.ofcom.org.uk/news-centre/2022/ofcom-launches-a-further-12-investigations-into-rt.

from the official position of Russia made it per se impossible for the licence holder to comply with the rules of the Broadcast Code.[220]

The example of content standards and the requirements to be able to act as provider of audiovisual media services according to the law in the UK shows that judging about content even with the consequence of limiting or stopping entirely the transmission of content or a service altogether is part of the monitoring and enforcement of compliance with the law. Evaluating the position of a provider and being able to declare it unfit for a licence or authorisation, for example based on a lack of independence from a state, is a solution that could serve as basic standard also in the EU context. The importance of independence and detachment of providers from state influence will be presented in the following section by the example from Germany.

III. The Idea of 'Staatsferne' on a European Level

1. The Principle of 'Staatsferne' in the German Framework

The so-called 'Staatsferne' is a concept which in Germany is derived from the fundamental right of freedom of broadcasting of Art. 5 para. 1 sent. 2 Alt. 2 of the Basic Law (Grundgesetz) and applies to offers from public service and private broadcasting.[221] It applies similarly to the press for which it is derived from the freedom of the press laid down in the same provision.[222] The 'Staatsferne' principle can be translated as 'state neutrality' or 'detachment of the State' indicating that it is not absolute in the sense that no connection at all can exist between State power(s) and providers covered by the principle, but that it is important that a distance (or: detachment) of the state is guaranteed to ensure independence. It is based on the notion that state power in all its parts is subject to control and criticism by the general public, in which broadcasting plays a decisive role

220 Ofcom, Notice of a Decision under Section 3(3) of the Broadcasting Act 1990 and Section 3(3) of the Broadcasting Act 1996 in Respect of Licences Tlcs 000881, Tlcs 001686 and Dtps 000072 Held by Ano Tv-Novosti of 18 March 2022, https://www.ofcom.org.uk/__data/assets/pdf_file/0014/234023/revocation-notice-ano-tv-novosti.pdf, no. 59.

221 On the concept with further references and a comparison to possible approaches under EU law *Hain*, Das Gebot der Unionsferne der Medien, pp. 433 et seq.

222 German Federal Constitutional Court 20.12.2011 – VI ZR 261/10 = NJW 2012, 771.

in informing the public because of its special broad impact, topicality and suggestive power and must therefore be free from state influence in the way described. The Federal Constitutional Court, as the supreme guardian of the German constitution, not only sees this independence from the state as an indispensable condition of freedom of broadcasting but demands from the legislator to guarantee it in the design of the legal framework applicable to the media providers concerned.[223]

The requirement of state neutrality in this sense means first of all that the state may neither directly or indirectly control an institution (in the case of public service entities) or company (in the case of commercial undertakings) which provides broadcasting services.[224] The state may not itself be a broadcaster, nor may it exercise a controlling influence on the content disseminated by broadcasters.[225] This extends to a prohibition of only indirect and subtle influence.[226] It serves to prevent the political instrumentalisation of broadcasting, because otherwise its contribution to using fundamental rights could no longer exist.[227] Although the principle applies to both 'pillars' of what in Germany is understood as the dual system of broadcasting media by public service and commercial providers, there are some distinctions with regard to the details of scope and design.

For private broadcasting, the deductions following from the freedom of broadcasting prohibit the legislator to create rules that would allow the state to directly or indirectly control broadcasting service providers. This prohibition is consequently laid down in the applicable statutory law, which is an interstate treaty between the 16 federal states and can be found in the law of each of the Länder. It is § 53 para. 3 of the Interstate Media Treaty

223 Cf. on this and the following extensively *Dörr*, Der Grundsatz der Staatsferne und die Zusammensetzung der Rundfunkgremien; *Dörr*, Die Bestimmung des § 58 des Saarländischen Mediengesetzes (SMG) und die Vorgaben der Rundfunkfreiheit des Art. 5 Abs. 1 Satz 2 des Grundgesetzes (GG).

224 German Federal Constitutional Court 28.2.1961 – 2 BvF 1/60, 2 BvG 2/60 = BVerfGE 12, 205 – para. 184.

225 German Federal Constitutional Court 5.2.1991 – 1 BvF 1/85, 1/88 = BVerfGE 83, 238 – para. 490.

226 German Federal Constitutional Court 4.11.1986 – 1 BvF 1/84 = BVerfGE 73, 118 – para. 141 et seq.; 5.2.1991 – 1 BvF 1/85, 1 BvF 1/88 = BVerfGE 83, 238 – para. 471 et seq.; 22.02.1994 – 1 BvL 30/88 = BVerfGE 90, 60 – para. 146 et seq.

227 German Federal Constitutional Court 22.02.1994 – 1 BvL 30/88 = BVerfGE 90, 60 – para. 146, 147.

(MStV)[228] that prohibits a broadcasting licence to be issued to legal persons under public law or to political parties and electoral associations, which applies mutatis mutandis also to foreign public or state bodies. However, there need not be an absolute separation between state and broadcasting. For example, the Federal Constitutional Court has ruled that the legislature, with the objective of guaranteeing state neutrality, may restrict the influence of political parties, even though these are not directly attributable to the state but take an important role in constituting state power in the parliament, but it may not go so far as to prohibit any participation of parties in broadcasting companies below a controlling threshold, because of the strongly protected freedom of political parties.[229]

The principle of state neutrality must also be taken into account when structuring the supervision of private broadcasting, i.e. specifically concerning the legal status of the broadcasting supervisory authorities (which fall under Länder law). Therefore, the task of supervision has to be assigned to bodies that as organisational units are legally independent of the state, which is the case for the 'state media authorities' (Landesmedienanstalten) of the Länder. They are institutions under public law but must be able to carry out their activities independently and on their own responsibility within the legal framework, i.e., they must not be bound by orders or instructions and must not be subject to any state influence on the way in which they carry out their statutory tasks.[230] Supervision of the work of these authorities is strictly limited to a confined control of legality, and pluralistically composed bodies with representatives of society are integrated into the decision-making procedures of the authorities.

As an example to illustrate this, the State Media Act of North Rhine-Westphalia[231] stipulates that the State Media Authority of North Rhine-

228 Interstate Media Treaty (Medienstaatsvertrag, MStV) as of 14–28 April 2020 (GVBl. pp. 450, 451, BayRS 02–33-S), amended by Art. 1 of the Treaty of 21 December 2021 (GVBl. 2022 pp. 313, 396).

229 German Federal Constitutional Court 12.03.2008 – 2 BvF 4/03 = BVerfGE 121, 30 – para. 98 et seq.

230 German Federal Constitutional Court 4.11.1986 – 1 BvF 1/84 = BVerfGE 73, 118 – para. 166 et seq.

231 State Media Act of North Rhine-Westphalia (LMG NRW) of 2 July 2002, last amended by Art. 3 of the Act on the Adaptation of the Police Act of the State of North Rhine-Westphalia and Other Acts to the Telecommunications Telemedia Data Protection Act of 13 April 2022 (GV. NRW. 2002, p. 334), https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=2&gld_nr=2&ugl_nr=2251&bes_id=5079&aufgehoben=N&menu=1&sg=.

Westphalia (NRW) is a public law institution with legal capacity and has the right of self-administration (§ 87). The extensive incompatibility clause states that its bodies (the Media Commission and the Director) may not be members of the federal or state government, members of the legislative or decision-making bodies of the EU, the Council of Europe, the federal government or a state, election officials, employees of supreme federal and state authorities or party members with executive positions. The Media Commission consists of 41 members, of which only a small share is delegated by the Landtag (one member per parliamentary group, eight members altogether). According to § 94(3), the independence of the decisions of the Media Commission must be ensured in organisational and financial terms. To this end, the Media Commission is to be provided with the necessary financial and human resources. In the performance of their duties, the members shall represent the interests of the general public and shall not be bound by orders or instructions (§ 95). There are rules against a conflict of interests (§ 96) and against unjustified dismissal (§ 97). The director also enjoys protection against dismissal (§ 101(2)). According to § 117, the State Media Authority of NRW is only subject to limited control of legality by the Minister President, with the possibility of legal action before the administrative courts in case of an intervention by the supervision; in contrast there is no control of the authority's decision-making in technical regard.

Similar considerations apply to public service broadcasting.[232] The special characteristic in this context is that the state, as a mandatory task in the interpretation of the fundamental right of Art. 5 Basic Law by the Federal Constitutional Court, has to ensure the basic supply of the population with broadcasting by creating and maintaining public broadcasting. It must organise the framework and legal remit of the public service broadcasters in the law. At the same time, to comply with the principle of state neutrality, it must ensure that the organisation of the programme and its concrete contents are not in any way integrated into the regular performance of state tasks but are designed as activities of separate entities under public law.[233]

232 On the application of the principles of control bodies created for the public service broadcasting also to the national media regulatory authorities cf. *Dörr*, Die Bestimmung des § 58 des Saarländischen Mediengesetzes (SMG) und die Vorgaben der Rundfunkfreiheit des Art. 5 Abs. 1 Satz 2 des Grundgesetzes (GG).

233 German Federal Constitutional Court 28.2.1961 – 2 BvG 1/60, 2 BvG 2/60 = BVerfGE 12, 205; 4.11.1986 – 1 BvF 1/84 = BVerfGE 73, 118; 5.2.1991 – 1 BvF 1/85, 1/88 = BVerfGE 83, 238; 22.02.1994 – 1 BvL 30/88 = BVerfGE 90, 60.

This extends to the question of 'supervision' of the broadcasters, which are only subject to control by internal, independent control bodies, and there can only be very limited legality control from the outside. On the question of how the internal control bodies are to be legally structured, the Federal Constitutional Court has laid down very specific requirements in several judgments.[234] In the composition of the bodies, the number of representatives attributable to the state (e.g. delegated by the respective parliaments) must be limited to a maximum of one third; if such members are foreseen, they must reflect the diversity of political actors, and representatives of the executive may not have a determining influence in any way in these bodies. The legislator must ensure, through incompatibility rules, that the members have a sufficient detachment from state-political decision-making contexts and that they are guaranteed personal freedom and independence within the framework of their duties. Therefore, at the level of the law of the Länder, there are also provisions on the composition of the supervisory boards and on their independence and freedom from instructions, which are similar to the rules on the state media authorities mentioned above by way of example. The supervisory boards of the public broadcasters are also not subject to technical supervision but only to limited legality control.

2. Suitability on Union Level

In essence, the requirement of state neutrality – including in the supervision – is aimed at ensuring neutrality and independence of the programme of the media service providers because of the influence this content has on the democratic opinion-forming process of the population. Because this is part of the democratic process, it is important that it is not determined by the powers which the population decides about in elections. As not only the actual programme of a provider can be influenced directly but also the fear or actual application of sanctioning gives a similar interference possibility, it is important that the principle also applies to the supervision with its monitoring and sanctioning powers. The German model of 'Staatsferne' as strongly fortified is shaped by the negative historical experiences from the domination of the media apparatus by the National Socialists and the reaction of the post-war reorganisation of the media (and especially broad-

234 Instead of many see German Federal Constitutional Court 25.03.2014 – 1 BvF 1/11 und 1 BvF 4/11 = BVerfGE 136, 9 – para. 46 et seq.

casting) sector. When discussing the extent to which such an approach can be transferred as principle to Union level or whether it is already enshrined there, too, the aspect of neutrality of the programme as well as the supervision must be distinguished.

With regard to the second aspect of guaranteeing state-free or neutral supervision, an anchoring point can already be found in the current AVMSD. Since the 2018 revision, Art. 30 contains several provisions aiming for an 'independent' supervision. It states that Member States shall ensure that regulatory authorities are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. They shall be able to carry out their tasks without instructions, have their own budgets, the "requisite degree of independence" shall be guaranteed in the appointment and dismissal of lead members of the regulatory authority, and they may only be dismissed if the conditions of appointment laid down in national law no longer prevail.[235] Although the AVMSD clearly acknowledges that the way supervision is organised may depend on the national constitutional requirements, the conditions for it should be clearly regulated in the legal frameworks of the Member States. Recital 53 of Directive (EU) 2018/1808 specifies this further by stating that national regulatory authorities or bodies should be considered to have achieved the requisite degree of independence if they are functionally and effectively independent of their respective governments and of any other public or private body. Although the criteria are not as specific as required by the German Federal Constitutional Court for the composition of supervisory boards and as they have been implemented in statutory law, this new rule in the AVMSD is nevertheless very similar to the principle of the state neutrality of supervision.[236] Although political independence is not explicitly mentioned, the wording in the text and the recitals, especially regarding the independence from instructions, show that this is meant in the context of independence. A similar wording can be

235 Cf. on previous analysis of the independence analysis of NRAs the studies *Schulz et al*., INDIREG, and *Cole et al*., AVMS-RADAR, which were prepared for the European Commission, and the criteria of the Media Pluralism Monitor that relate to the position of authorities (see on this for the latest report https://cmpf.eui.eu/mpm2022-results/).

236 Cf. also *Hain*, Das Gebot der Unionsferne der Medien, p. 440, who argues that the principle of "Union detachment of the media" ("Unionsferne") already follows from the protection of media pluralism on EU level.

found in the European Electronic Communications Code (Art. 8)[237], which is also entitled "political independence". However, the details are left to the Member States, which takes into account the existence of different systems in the Member States and reflects the cultural diversity approach of the Directive.

With regard to the prohibition of dominant influence on media by state or other actors, the constitutional traditions in Europe are very different, especially with regard to the establishment of public broadcasting. Historically, the models in Europe have grown differently, in particular concerning the development of public service systems in Western Europe and the formerly state-controlled broadcasters in the East.[238] These differences still exist in some regard today.[239] In particular, so-called 'state media' still exist in Europe, but in differing structural designs. Although 54 % of these fall into the category of independent state media (independent public media, independent state-managed, independent state-funded and independent state-funded and state-managed media), there are still large gaps in the degree of independence and state detachment territorially between systems in Western and Eastern Europe.[240] Concerns have been raised in particular on the rise of private capture models where state authorities and political parties in power gain control over the editorial agenda of numerous privately owned media outlets through private stakes, which could be observed for example in the EU Member States Hungary and Poland as well as in the candidate countries Serbia and Turkey.

This trend may make a further harmonisation and an agreement on the exact meaning of 'state influence' difficult. The degree of state funding of the (audiovisual) media depends on the given structures of the respective

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

238 *Bajomi-Lazar/Stetka/Sükösd*, Public Service Television in European Countries, pp. 355, 360 et seq.

239 Cf. recently with regard to public service media *Cabrera Blázquez/Cappello/Talavera Milla/Valais*, Governance and independence of public service media; with regard to public service and commercial broadcasting in light of media ownership *Cappello (ed.)*, Transparency of media ownership, I.

240 Cf. on this and the following *Dragomir/Söderström*, The State of State Media, pp. 18 et seq. According to this study, more than 40 % of the independent state media in Europe and seven out of the 11 independent public media outlets are based in Western and Northern Europe. In contrast, the state media in Central and Eastern Europe and Turkey continue to act mostly as government mouthpieces, accounting for more than 85 % of all state-controlled and state-captured media in Europe.

(audiovisual) media market, which is very different in the Member States, so that a full harmonisation of participation rules or generally financing rules would not appear realistic. The question is rather whether the aspects relevant to the German approach to state neutrality, i.e. how a financial participation or even the operation of a broadcasting company may (not) have a dominant influence on the programme and with that on public opinion forming, are amenable to a uniform understanding on the basis of common democratic considerations in Europe. Without an explicit counterpart in the text, situated in the context of the Recitals to Art. 30 AVMSD, Recital 54 of the Directive actually already takes up this aspect. Because one of the purposes of audiovisual media services is to serve the interests of individuals and shape public opinion, it is essential that such services are able to inform individuals and society as completely as possible and with the highest level of variety. That purpose can only be achieved if editorial decisions remain free from any state interference or influence by national regulatory authorities or bodies as the Recital puts in very clear words. 'Interference' in that sense is only allowed for the mere implementation of law and serving to safeguard a legally protected right which is to be protected regardless of a particular opinion, which relates to the enforcement of the law as underlying this study, too. This very strong commitment of the AVMSD to a principle of state detachment not only of the providers but also of the supervision has potential to be further and more explicitly expanded in the legislative framework in the future. The proposal of the EMFA, as presented in the next section, picks this up.

3. *Possible Implementation at EU Level: the EMFA Proposal*

The EMFA Proposal references 'independence' (or 'independent') numerous times and including the Explanatory Memorandum to the proposal more than 100 times, which is an indicator for the relevance of this approach that motivated the proposal. Mostly, the independence is mentioned in context with public service media and supervision over it. Art. 5 of the EMFA Proposal – concerning public service media in contrast to the national approach that encompasses both pillars – contains a provision that resembles the German principle of state neutrality to some extent:

– It stipulates that responsible persons in public service media shall be appointed through a transparent, open and non-discriminatory procedure and on the basis of transparent, objective, non-discriminatory and

proportionate criteria laid down in advance by national law. However, it defines neither this procedure further or who should be responsible for the appointment nor the criteria about which persons can be appointed, because this clearly falls in the competence of the Member States;
- It contains protection against dismissal but no further explicit protection of independent performance of duties nor specific criteria for exceptions to protection against dismissal, which are again left to national law;
- It contains requirements for adequate and stable financing of public service media and the clear rule that financing means may not interfere with independence. This provision could not go beyond a rather general statement, because it is undisputed that the definition of the public service remit and the conditions of financing are a competence of Member States[241], albeit within the framework of EU state aid rules, which are addressed in a Recital;
- It provides that Member States shall designate one or more independent authorities or bodies in order to monitor compliance with these safeguards for the independent functioning of public service media providers. This provision is not very clear, and, because it does not explicitly refer to the 'independence' of such oversight by authorities or their powers, there is even a potential conflict with standards of state detachment or neutrality as they have been developed in some Member States.

For commercial media service there is a strong reference to independence for those providers that offer news and current affairs content. Art. 6(2) EMFA Proposal stipulates that they shall take measures that they deem appropriate with a view to guaranteeing the independence of individual editorial decisions, in particular listing that editors should be free in their decision-making and that any conflict of interests should be disclosed. It is indeed interesting that Art. 6 EMFA Proposal addresses the providers themselves and not the Member States to ensure such guarantees by legal implications. In the current formulation it is still vague how individual decisions about editorial content differ from more general decisions about the editorial line of a publication, for which the explanations in the Recitals do not give much additional clarity. In contrast to the German system, the provision does not contain any statements about restrictions on the participation of state actors in the media. This is only taken up in transparency

241 See for an overview *Cabrera Blázquez/Cappello/Talavera Milla/Valais,* Governance and independence of public service media.

provisions, which make the existing Art. 5(2) AVMSD more concrete and binding. In principle, therefore, a state actor operating media could also decide on appropriate measures to safeguard its editorial (in)dependence. However, the EMFA Proposal does pick up this issue in its rules on monitoring media market concentration and audience measurement, where an emphasis is put on the observation and reaction to developments that can negatively affect pluralism.

4. Specifically: Independence of Oversight Bodies

As already explained in more detail above (D.II.2), the EMFA Proposal relies mainly on the structures of the AVMSD providing for independent media regulatory authorities and also reflects this for the EBMS which shall replace the ERGA. While general observations can be made with regard to improving the institutional system tied to the dissemination of audiovisual content (see on this in more detail below, F.V.4), in light of the principle of state neutrality the proposed rules are much less rigid and even pose a problem at least in light of the German 'Staatsferne' concept. Although the independence requirements as established by the AVMSD are not replaced or deleted by the EMFA Proposal, the lack of specific rules on participation or prohibition of participation of political actors in the regulatory authorities and of demands that these should be composed in a pluralistic way makes it possible that bodies could be involved which by the standard of national approaches would fall within the realm of the 'state' and therefore be in conflict with the state neutrality obligation. This can be argued for the extensive inclusion of the European Commission in the decision-making procedures of supervision concerning certain types of providers and for its participation in the work of the Board in addition to providing the secretariat. According to the national model as developed in Germany, 'state neutrality' does not only mean elected members of Parliament or government representatives to be a part of the 'state' but also executive bodies that are bound politically to decision orders such as, e.g., a ministry on national level. In that regard, the value of the state neutrality principle as backstop against potential undue political influence should also be considered more strongly on EU level.

IV. Co-regulatory Approaches with Different Types of Codes of Conduct

1. General Observations

Self-regulatory and co-regulatory approaches can be found in a number of legal approaches in different sectors at both EU and national level.[242] In many respects, their use is encouraged and has become a standard instrument to consider in the context of EU legislation.[243] Especially in the media sector and closely related areas of law, the implementation of such instruments is common practice.[244] With the latest reform 2018, the AVMSD has given even more prominence to such approaches by devoting an own provision (Art. 4a) to self- and co-regulation as ways to transpose the Directive's goals which Member States should specially take into account.[245]

Apart from advantages such as making the legislation more flexible and adaptable and involving the industry in rulemaking and enforcement, such approaches are associated with disadvantages, especially in terms of effective enforcement, which has already been described in detail in a previous study.[246] Co-regulatory approaches are closer to an entirely statutory approach, as in those cases self-regulatory structures are typically linked to a regulatory authority in varying forms and degrees. This can take place, for example, through participation of the authority in the creation of codes of conduct when they are developed by the self-regulatory body or the monitoring of such codes of conduct with powers of intervention in the

242 *Senden*, Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?, pp. 13 et seq.; *Senden et al.*, Mapping Self- and Co-regulation Approaches in the EU Context.

243 Interinstitutional Agreement on Better Law-Making, 2003, OJ C 321; Opinion of the European Economic and Social Committee on Self-regulation and co-regulation in the Community legislative framework, 2015, OJ C 291/29.

244 *Panteia/VVA*, Effectiveness of self-and co-regulation in the context of implementing the AVMS Directive.

245 *Cappello (ed.)*, Self- and Co-regulation in the new AVMSD.

246 Extensively *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp. 239 et seq. with further references; see also on policy concepts in the online sector *Helberger/Pierson/Poell*, Governing Online Platforms: Form Contested to Cooperative Responsibility.

event of non-compliance by the providers that have bound themselves to the code.[247]

A closer look at such systems is worthwhile in the present context and with a view to a possible design of approaches in the future. This concerns independence aspects in particular. For example, many Member States' systems for the protection of minors provide for the involvement of independent self-regulatory bodies, which are sometimes given regulatory powers, but the regular regulatory authority's powers of review and intervention then mostly remain. Examples of this are Germany[248] and the Netherlands[249]. In the advertising sector, too, there are many such systems in the Member States, which are, however, only loosely linked to the audiovisual media services regulatory authorities. An example of stronger integration of the authority even in that field is Bulgaria.[250]

2. The Example of Data Protection Law

Not only the institutional system of the GDPR as described above can serve as a valuable source of inspiration but also some specific mechanisms that have been integrated into the scheme of the GDPR. This includes, inter alia, the codes of conduct and certifications which are laid down as a regulatory instrument and possibility for EU-wide harmonisation in Arts. 40 et seq. GDPR.

Similar to the AVMSD the GDPR encourages, in certain areas, systems of self- and co-regulation. According to Art. 40 GDPR, Member States, the supervisory authorities, the EDPB and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper application of the GDPR, taking account of the specific features of the various processing sectors and the specific needs of micro, small and medi-

247 See in this context and with regard to cross-sectoral issues *Cappello (ed.)*, Media law enforcement without frontiers; *Cornils*, Designing Platform Governance: A Normative Perspective on Needs, Strategies, and Tools to Regulate Intermediaries, pp. 38 et seq.

248 *Ukrow*, in: Cappello (ed.), Self- and Co-regulation in the new AVMSD, pp. 41 et seq.; *Panteia/VVA*, Effectiveness of self-and co-regulation in the context of implementing the AVMS Directive, p. 88.

249 *Panteia/VVA*, Effectiveness of self-and co-regulation in the context of implementing the AVMS Directive, p. 95.

250 *Panteia/VVA*, Effectiveness of self-and co-regulation in the context of implementing the AVMS Directive, p. 63.

um-sized enterprises. Associations and other bodies representing categories of controllers or processors may prepare codes of conduct for the purpose of specifying the application of the GDPR while the (non-exhaustive) list in Art. 40(2) GDPR points, inter alia, to fields such as the transfer of personal data to third countries or the exercise of rights of data subjects. As a substantial requirement, Art. 40(4) GDPR stipulates that such codes of conduct shall contain mechanisms enabling a monitoring of compliance with the provisions of the codes by an independent body.

Once developed, the draft codes shall be submitted to the competent supervisory authority which then provides an opinion on their compliance with the GDPR. If the code only concerns processing activities in one Member State, the authority of that Member State can approve (or decline) them on its own. If it is about processing activities in several Member States, the competent authority shall submit it in the procedure of Art. 63 GDPR to the EDPB in order to seek an opinion of it. If the opinion of the Board approves the code, the competent authority shall then submit the opinion to the Commission, which may, by way of implementing acts, decide that the approved code of conduct have general validity within the Union ('Union codes').

Codes that were approved according to this procedure can also be voluntarily joined by providers outside the scope of the GDPR, for example because they are located abroad and do not offer services directly in the EU. Such a step brings the advantage that these service providers have a confirmed adequate level of data protection in the respective area covered by the codes if they comply with them. This in turn is a prerequisite for data transfers outside the EU, so that foreign companies present themselves as attractive partners (processors) for companies in the EU (controllers). The fact that there is otherwise no supervision of foreign providers (because they do not fall within the scope of application) is compensated for by the fact that these codes must be monitored by a body that is in turn accredited by the competent supervisory authority. It is therefore an important solution to the supervision gap that otherwise may exist. The GDPR also specifies requirements for this monitoring body: it must have an appropriate level of expertise in relation to the subject-matter of the code, must have demonstrated its independence and expertise in relation to the subject-matter to the satisfaction of the competent supervisory authority and must have established procedures which allow it to assess the eligibility of controllers and processors concerned to apply the code, to monitor their compliance with its provisions and to periodically review its

operation. Importantly, for this purpose the body must have established procedures and structures to handle complaints about infringements; these have to be made transparent to data subjects and the public. Finally, the body has to be able to demonstrate to the satisfaction of the competent supervisory authority that its tasks and duties do not result in a conflict of interest. If such a body is accredited, it shall take appropriate action in cases of infringement of the code, including suspension or exclusion of the controller or processor concerned from the code, and shall inform the competent supervisory authority of such actions and the reasons for taking them. The powers and tasks of the body are without prejudice to the powers of supervisory authorities set out in the GDPR, meaning that enforcement actions can still be taken by the authorities against the processor.

A similar mechanism applies to the establishment of data protection certification mechanisms and data protection seals and marks for the purpose of demonstrating compliance with the GDPR of processing operations by controllers and processors according to Arts. 42, 43 GDPR. This type of certification shall be voluntary and available via a process that is transparent. Here, too, monitoring is carried out by an independent body accredited by the competent supervisory authority, which is also usually tasked with the certification (and the withdrawal of certificates). A certification pursuant to this mechanism does not reduce the responsibility of the controller or the processor for compliance with the law. In this context regulatory powers of the authorities are not limited, too, but they stand beside the certification. As with the above procedure, this brings the same advantages with regard to data transfers to third countries for entities that have to comply with the GDPR requirements. Furthermore, the certification visibly conveys compliance of the respective provider to the outside world, which is one of the main incentives to consider such certification.

The EDPB provides further details concerning these procedures and mechanisms via its guideline power, thus ensuring additional coherence at EU level.[251]

Such mechanisms cannot be transferred directly to the media sector or the AVMSD specifically, simply because compliance with data protection requirements is different from compliance with content standards. For

251 Cf. for example EDPB, Guidelines 07/2022 on certification as a tool for transfers Version 1.0, adopted on 14 June 2022, https://edpb.europa.eu/system/files/2022-06/edpb_guidelines_202207_certificationfortransfers_en_1.pdf.

example, the prohibition of a certain processing operation represents a completely different and, above all, less intensive interference with the rights of the processor than would be the case with the prohibition or restriction of an audiovisual content. The fundamental rights involved and the type of infringement that comes with it in these situations are not the same. Nevertheless, such mechanisms linked to an independent body, which would then be subject to the accreditation of media regulatory authorities or the ERGA, would also be conceivable for specific areas of content oversight. For example, media regulatory authorities within ERGA, or groups of media service providers themselves with approval in one way or other by ERGA, could develop codes or certification procedures that address certain basic editorial standards, with which providers covered by the codes or the certification comply, or procedures within which a medium's independence from outside influence would be evaluated and certified.[252] Media providers, both domestic and foreign, could voluntarily sign up to the regulatory framework and in return benefit from advantages such as being shielded from direct supervisory action insofar as the regulatory authorities then have to go through a process which involves the independent body before taking regulatory action directly against the provider in question. Alternatively, a corresponding seal could be awarded that informs viewers about the rules to which the medium has committed itself. However, the regulatory powers would otherwise (have to) remain unchanged, and the mechanism would be complementary to the AVMSD system.

V. Comparability of Regulatory Bodies and Cooperation Mechanisms

1. The System in the Digital Services Act

With regard to the institutional system of the DSA (see above D.II.1), it should first be emphasised that there is a need to bring it in line with the (existing) institutional framework for the audiovisual sector and also with the (previously assigned) tasks of the media regulatory authorities. This is a condition to avoid an unwanted undermining of the supervisory

252 Cf. on proposing such certification mechanisms in the EMFA in the context of content moderation *Cantero Gamito*, The European Media Freedom Act (Emfa) as Meta-Regulation, pp. 18 et seq.

structures by the newly introduced system and is to be separated from the question whether certain aspects of the DSA institutional system would be transferable to the AVMSD context. As the DSA contains many rules that directly or indirectly affect audiovisual content and providers, consistency plays a key role. This is especially true in light of the fact that the DSC has a crucial role in the supervision of intermediary services, including video-sharing platforms, but this function need not or will not necessarily fall to the media regulatory authorities in all Member States. The DSA leaves the design of the cooperation between different competent authorities at the national level to the Member States without providing any significant concretisation.[253]

However, since the DSC is also the gateway for supranational exchange in the EBDS, precise regulation of this aspect is of particular importance. There is otherwise the risk that EBDS and ERGA apply regulatory action side by side without coordinating. At least, according to Recital 134 of the DSA, in view of possible cross-cutting elements that may be of relevance for other regulatory frameworks at Union level, the EBDS "should be allowed" to cooperate to the extent necessary for the performance of its tasks with other advisory groups with responsibilities in fields such as audiovisual services as regards namely consumer protection or competition law. Furthermore, this also links to the monitoring and enforcement powers of the Commission concerning VLOPs, including very large video-sharing-platforms, which should be in line with monitoring and enforcement of Art. 28b AVMSD. A more precise regulation of this interaction would be desirable in the light of the interests protected by fundamental rights associated with the various rules, although it would then 'only' be a clarification from the perspective of the audiovisual sector in the more special legislation and not, as would probably have made more sense from the beginning, in the wider and more general horizontal legal act that for this purpose does not contain sufficient clarifications.

As far as institutional approaches from the DSA are concerned, the crucial difference between the AVMSD and the DSA is the territorial scope of application. The AVMSD does not apply directly to providers from non-EU Member States unless a technical link to a Member State exists and thereby a link to the single market can be established (cf. above at C.III.2). Regulatory intervention under the AVMSD therefore depends on

253 See on existing challenges from a media law perspective *Cabrera Blázquez/Denis/Machet/McNulty*, Media regulatory authorities and the challenges of cooperation.

whether there are any rules at all in national law and how they are designed. The DSA, on the other hand, applies if the offer is distributed in the EU (market location principle), but it bases jurisdiction in cross-border cases on the country-of-origin principle with exceptions. The mechanism of having, according to Art. 13 DSA, at least a legal representative in the EU if services are offered there is a useful way of forcing foreign providers to have a quasi-establishment in the EU and thereby bringing clearer results for matters of jurisdiction. Such an approach could only be implemented in the AVMSD context if this would then also be linked to an expansion of the territorial scope of application in the sense that content directed at the EU market would trigger such an obligation.

Besides this limitation, a mechanism as provided for in Arts. 58 and 59 DSA is worth considering for the AVMSD, too. Obviously it could then only relate to the areas that are harmonised by the AVMSD. The procedure in the DSA is about cross-border issues when a competent DSC does not act on its own behalf in view of a possible infringement of a provider under its jurisdiction. It gives other DSCs the possibility to demand an efficient enforcement of the norms by the actually competent DSC (the existence of which bars direct action by other DSCs). The specifications linked to deadlines and participation of other DSCs and the EBDS could regulate in a more concrete way what already applies under the AVMSD with the involvement of ERGA and a general cooperation requirement. In that sense the possible actions could be underlined with which affected regulatory authorities can demand (other) Member States' duties to ensure effective compliance with the rules of the AVMSD by providers under their jurisdiction.

2. The Approach of the European Electronic Communications Code

With regard to the question of whether structures from the EECC could be transferred to the AVMSD context, it should first be noted that the EECC is in principle comparable to the AVMSD in terms of its legal nature as Directive which leaves the design of institutional structures to the Member States. However, the network of rules in the EECC is more detailed and complex, as the individual parts of the Directive deal with formally and materially different areas, sometimes in a self-contained manner, and also give rise to different responsibilities and procedures. This is partly due to the unification of the rules previously spread over several Directives ap-

plicable in the sector of electronic communications networks and services into one 'code'. Many of the provisions are very technical, for example on spectrum policy or network security. This character of the substantive rules extends to the corresponding tasks of BEREC. It should also be noted that in many places of the EECC the European Commission assumes a central role with final decision-making and harmonisation powers based on the internal market relevance of certain procedures or aspects of the electronic communications sector.

It is significant that the EECC does not itself contain rules on cross-border jurisdiction assignment (although other rules such as the ECD or the DSA may be relevant in the context of providers that fall under the EECC, too), i.e., in particular it does not establish the country-of-origin principle. This different starting point is neither comparable to the AVMSD nor is it transferable to the media sector, except a complete reorganisation of the regulatory framework for this sector would be the aim. Such a different orientation is neither desirable against the background of the endeavour to maintain functioning systems nor necessarily compatible with the fundamental rights-induced necessities for content oversight. Therefore only the added value of certain mechanisms of the EECC for the AVMSD context can be considered.

The mechanism of Art. 27 EECC described above concerns disputes between undertakings in different Member States and is thus not directly relevant for the field coordinated by the AVMSD – in which audiovisual providers regularly do not confront each other directly with conflicting interests. However, a general mechanism such as in the EECC that prescribes a procedure for the settlement of cross-border disputes is certainly of interest. Without interfering with the competences of the authorities, it allows for a referral at the supranational level, here with the participation of BEREC, and sets a deadline to resolve the dispute. The dispute resolution is based on cooperative collaboration and mutual consideration between regulators, but it has the common ground that the outcome must be in line with the objectives of the EECC. This would at least provide a forum and framework for this, which has not been explicitly provided for in the AVMSD so far, at least outside the procedures under Arts. 3 and 4 AVMSD.

The mechanism for internal market procedures in Art. 32 EECC is formally comparable to the mechanisms of Arts. 3 and 4 AVMSD, although not in terms of content. It concerns only a limited area, provides for a procedure involving national authorities and their supranational body, is bound by deadlines and ends with a decision by the European Commission. Crucial

differences, however, are that it is not only about the adoption of temporary measures and the mechanism is not based on the country-of-origin principle (it is not about a derogation but about the exercise of competences). There are also more possibilities to influence the draft measure of the acting authority and not only to declare the measure either compatible or incompatible with Union law. An emergency procedure is provided for here, as in the AVMSD, but it is incorporated directly into the procedure, in that the provisional measures lead automatically to a procedure under Art. 32(3) EECC. The participation of BEREC is also more strongly formulated – taking utmost account of the opinion – than that of ERGA in the procedures according to Arts. 3 and 4. AVMSD. An orientation towards such consolidations in a future reform does not seem to be opposed by any reservations from the perspective of media law.

The same applies to the stronger involvement of BEREC. Although this is regularly not linked to binding powers, it is more specifically anchored where measures with cross-border relevance are concerned. In any case, the structures of BEREC are basically comparable to those of ERGA and focus in particular (and even more strongly) on independence. The common approaches[254], guidelines[255] or methodologies[256] published by BEREC and referring to regulatory issues could serve as a source of inspiration for the development of corresponding ones for the audiovisual sector as well – of course with appropriate consideration of media-specific particularities. The fact that this does not only have to concern the area of the primary regulatory framework but also affects other regulatory areas that are relevant for the regulatory authorities participating in the supranational body is demonstrated, for example, by BERECs recent guideline on net neutrality.[257]

254 https://www.berec.europa.eu/en/document-categories/berec/regulatory-best-practices/common-approachespositions.

255 https://www.berec.europa.eu/en/document-categories/berec/regulatory-best-practices/guidelines.

256 https://www.berec.europa.eu/en/document-categories/berec/regulatory-best-practices/methodologies.

257 BEREC, Net Neutrality Regulatory Assessment Methodology, BoR(22)72, https://www.berec.europa.eu/sites/default/files/files/document_register_store/2022/6/BoR_%2822%29_72_NN_regulatory_assessment_methodology_final.pdf.

3. Cooperation under the General Data Protection Regulation

As explained above, the institutional system of the GDPR and data protection rules on EU level more generally is essentially based on the requirements derived from Art. 8(3) CFR, which demands the independence of supervision. Supervisory authorities are seen as guardians of fundamental rights on the one hand (the protection of personal data of data subjects) and fundamental freedoms on the other (the free movement of data and thus, inter alia, the freedom to provide services of data processors). Independence is therefore regularly required to mediate between these two typically conflicting interests (interests in the protection of one's own privacy and economic/public interests in the use of third party data).

There are clear differences compared to the situation under media law. But there is still some comparability as far as recipients of media – comparable to data subjects – are affected in their interests by freedom of opinion and information, for example having access to pluralistic and independent content – and regulatory authorities are concerned with the protection of these interests. The same applies to the interests of media providers in terms of fundamental freedoms. However, in contrast to data protection law the decisive factor here is that media providers also have culturally driven interests and can derive these from the fundamental freedoms of the media. This relates to editorial freedom, for example, and is regularly parallel to (and not in conflict with) the interests of recipients. Another difference to data protection law is that the requirement of independence of supervisory authorities is not (at least not yet) derived at the European level from the fundamental right to freedom of opinion or freedom of the media.[258] Nevertheless it should be noted that there are active duties of the state to protect these freedoms, which extend to the guarantee of pluralism,[259] inclusive of ensuring that independent information is conveyed by the media in a democratic system.[260] So far, this explicitly concerns only the media providers and not the supervision. The argumentation that this independence requirement is equally essential when it comes to the supervision is a direct consequence of the need for independence in the framework of content production and dissemination, which can be affected

258 Cf. in more detail *Schulz et al.*, INDIREG, pp. 308 et seq.

259 ECtHR, no. 13914/88 15041/89 15717/89 15779/89 and 17207/90, *Informationsverein Lentia and others/Austria*, para. 38.

260 ECtHR, no. 13936/02, *Manole and others/Moldova*, para. 101.

by the monitoring body, and exactly that in turn would be problematic if it does not act independently. In some Member States, as the German example shows[261], this independence requirement for the regulatory authority is derived in this understanding from national constitutional law.

For the ECtHR the Council of Europe's Recommendation Rec(2000)23 on "the Independence and Functions of Regulatory Authorities for the Broadcasting Sector" also strongly 'suggests' this conclusion by, inter alia, emphasising that, to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector, it was essential to provide for adequate and proportionate regulation, including to establish independent authorities for the broadcasting sector.[262] However, the clarity with which independence of the supervisory authorities has been interpreted by the CJEU for data protection law has not yet been reflected for the audiovisual media sector. But the AVMSD takes up the argumentation as presented here by highlighting in Recital 54: "as one of the purposes of audiovisual media services is to serve the interests of individuals and shape public opinion, it is essential that such services are able to inform individuals and society as completely as possible and with the highest level of variety", which means that this "purpose can only be achieved if editorial decisions remain free from any state interference or influence by national regulatory authorities or bodies that goes beyond the mere implementation of law and which does not serve to safeguard a legally protected right which is to be protected regardless of a particular opinion".

Another significant aspect to consider in the comparison with an impact on the question of legislative competence of the EU is the foundation for the different areas of law. While economic and not cultural considerations are paramount for data protection law, even though there is the fundamental rights basis, this differs for the regulation of media and content. Where

261 See F.III.1.

262 Recommendation Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies, https://rm.coe.int/16804e0322. Cf. also more recently the Recommendation CM/Rec(2022)12 of the Committee of Ministers to member States on electoral communication and media coverage of election campaigns, adopted by the Committee of Ministers on 6 April 2022, and the horizontal Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance, adopted by the Committee of Ministers on 6 April 2022, which also shows the link between content producers, disseminators, users and supervision.

the GDPR impacts this sector or areas with more diversity in the Member States, it provides room for manoeuvre for Member State approaches as shown, for example, by the media privilege of Art. 85 GDPR.

It follows that systems established in data protection law cannot be transferred directly and to the full extent to the regulatory framework for the media sector, but whether such a transferal would be appropriate must be questioned for each part of the system, and it would likely need an alignment with specificities of the media sector. It should be emphasised that, unlike before the revision 2018, there is now an explicit requirement for independent supervisory authorities in the AVMSD including some details on what this means. The system is therefore now indeed already close to the system provided for in the GDPR as regards independence, even though the formulations applied are more cautious, which results from the division of competences in this field and the acknowledgement by the AVMSD of the Member States' retained competences in the field, therefore deliberately leaving a wide scope for them. With the EMFA Proposal, which includes institutional and procedural rules and was presented by the Commission as a Regulation, this understanding may be changing – at least from the perspective of the Commission.

The AVMSD in its current version refers to the regulatory authority as being "legally distinct from the government and functionally independent", while the GDPR demands that the authority "acts in complete independence", meaning it shall not be put under any external pressure. Other than Art. 53 GDPR, the AVMSD does not contain further details on the structure of the regulatory authority or the rules about the appointment of its members and the way it is established. Again, this is a result of the procedural and institutional autonomy of Member States especially in areas where they retain also substantive competences, which is the case for the media sector. If, therefore, rules comparable to the GDPR would be included in the AVMSD, this could conflict with the respective national understanding of independence of media regulatory authorities. Furthermore, a provision such as Art. 52(2) GDPR regulating that members shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether for profit or not, is not provided for in the AVMSD. Overall, the AVMSD does already provide for a high level of independence of the regulatory authority to be guaranteed by the Member States. Compliance with this standard has also been

monitored in the past.[263] The aspects of independence, which the AVMSD currently – and deliberately – leaves more open, could become subject of concretisation efforts by the CJEU in the future, thereby repeating what the Court did with the Data Protection Directive – also a Directive and not yet a Regulation as with the GDPR now – for which the Court based its interpretation of the independence criterion on the explicit guarantee deriving from fundamental rights, now specifically Art. 8(3) CFR.

The question arises, however, whether the various mechanisms of co-operation described above could be transferred to the AVMSD context. The more precise regulation of information exchange and information obligations as well as a concrete provision on requests for mutual assistance, combined with the creation of the necessary technical infrastructures, seem to make sense all across situations for which cross-border measures can be considered. The establishment of such measures does not conflict with the allocation of powers between Member States and the EU, nor do they pose a problem as such from the perspective of freedom of the media, as they do not touch the independence or powers given to the media regulatory authorities. This finding is important for cases that fall within the area harmonised by the AVMSD, because an effective handling must be ensured by the regulatory authority of the Member State of establishment within the framework of the AVMSD anyway. In the non-harmonised areas of the AVMSD, the competence of the regulatory authority of the receiving state remains in place and the mechanisms of Arts. 3 and 4 AVMSD do not apply, so in legal terms there is no need for the regulation of mutual assistance or cooperation, but practice shows certain challenges. For example, it is not always easy to assess whether a matter falls under the coordinated field or not.[264] Besides, the authority of the Member State of establishment regularly has more direct access to 'their' providers. The mechanisms mentioned – if they were introduced in comparable manner within the AVMSD – could therefore be used in these cases in order to give the authorities of receiving Member States a possibility to intervene. The exact consequence would then still depend on possibilities for action under national law in relation to the regulatory authority of establishment.

263 Cf. eg. the studies *Schulz et al.*, INDIREG, and *Cole et al.*, AVMS-RADAR, that were prepared for the European Commission as well as the criteria of the Media Pluralism Monitor that relate to the position of authorities (see on this for the latest report https://cmpf.eui.eu/mpm2022-results/).

264 *Cole*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, pp. 6 et seq.

A strengthening of ERGA based on the model of the EDPB is also possible in principle and does not meet any obvious reservations, as long as the independence and the right of initiative of this body and the individual members are preserved. Making the applicable provisions for the cooperation more concrete could serve the purpose of making the procedures more effective, whereas going too far in introducing fixed rules for the organisation and structure of the competent media regulatory authorities for these procedures may be contradictory to the question of competence of Member States and even to constitutional traditions as mentioned above.

With regard to binding decision-making powers, such as those granted to the EDPB in the coherence procedure, the different degrees of harmonisation between the GDPR and the AVMSD must be taken into account. Such procedures, which ultimately oblige the authority of the Member State of establishment to act in a certain way upon intervention of other authorities by majority decision of independent members, would also be conceivable in specified areas of audiovisual media and content regulation, such as labelling obligations for advertising or joint reactions in case of matters that affect the single market in all or many of the Member States. In the AVMSD area, in contrast to data protection law such reactions could be facilitated by the fact that the (assumed) infringement itself is visible and therefore open to assessment to all authorities, with which there is less need for lengthy internal investigations as was demonstrated above in the case of a possible data processing violation by an undertaking. If the evaluation of the situation is connected to areas with more discretion for the Member States and diverse approaches, such as for the protection of minors from harmful media, this would be much more difficult and possibly would have to be limited to clear-cut cases of infringement, addressing violations that are to be treated as such in all Member States due to the harmonisation level. It would further have to be clarified how such mechanisms could be integrated or how they would interrelate with the existing derogation and anti-circumvention procedures of Arts. 3 and 4 AMVSD.

4. Institutional Dimension of the EMFA Proposal

The existing approaches to institutional structures and cooperation means in other legislative acts in comparison to the AVMSD can be contrasted with the foreseen setup under the proposed EMFA. It should be noted,

however, that the proposal was only recently tabled and is still at an early stage of discussion in the legislative procedure, and it seems likely that there will be significant changes before this legislative act will be adopted. Some of the contentious issues that already have surfaced concern clarifications on the relationship to other legal acts, especially the AVMSD, and on the legally binding effect of some of the formal and substantive rules proposed. A further concern is the question of competence of the EU to propose a Regulation covering all the areas as included in the draft, as it is disputed whether the legal basis of internal market regulation by harmonisation of Member States rules is sufficient in view of the allocation of powers and whether the instrument of a Regulation is appropriate to address all of the points covered by the EMFA. The question of competence division is also affected by the role of the Commission in the institutional setup of the EMFA Proposal in view of the position of national regulatory authorities.[265]

Irrespective of these concerns, the EMFA Proposal acknowledges the importance of more formalised cooperation structures on EU level when dealing with cross-border matters, while suggesting solutions retaining the approach that competent authorities of the Member States should be charged with the daily supervision work. In that regard strengthening the ERGA is an important step to be welcomed, as it builds on existing structures, which were significantly furthered by the ERGA members themselves through agreeing on the MoU. Whether or not a name change – reflecting the wider scope of application of the proposed Regulation – is necessary in light of the fact that most national regulatory authorities that are members in ERGA will probably keep their names and an important focus of the Board will still be the tasks in connection with the AVMSD and thereby the audiovisual media, is not an important question. Conversely, the question of how the independence requirement, which is laid down in the Proposal both for the Members of the Board and the Board itself, is to be understood and how this is reflected in the procedures foreseen is of central importance. The strengthening of the Board as a form of 'mediating forum' of the regulatory authorities and bodies and as a joint assistance in matters that require the involvement of more than one authority rightly acknowledges that in comparison it is those regulatory authorities that have the longest standing experience and expertise in the balancing efforts necessary in order to achieve all of the goals of the EMFA. This partly is

265 Cf. on this criticism in more detail *Etteldorf/Cole*, Research for CULT Committee – European Media Freedom Act - Background Analysis, p. 14 et seq.

the result of a focus in the supervision of media and content providers that concerned entities which needed a licence as authorisation, with which typically a regulatory authority was involved in monitoring compliance with the conditions laid down therein. For other media sectors such supervision was not necessarily foreseen. In that regard the EMFA Proposal can overcome one of the potential difficulties that the DSA as horizontal regulation has created: in that context the oversight mechanisms were not specifically designed to incorporate the specificities of content supervision and enforcement against providers of such content but rather more generally as supervisory authorities for the activities of intermediaries. In the DSA framework, as shown above, it is left to the Member States whether or not they give any or a prominent role to the regulatory authority in charge of audiovisual media.

Because of this important role that is confirmed for regulatory authorities in the Member States, the cooperation forum with its diverse tasks needs to reflect requirements that are expected from the individual members of the EBMS, too. It is therefore problematic that the EMFA Proposal foresees a crucial involvement of the European Commission in several aspects and especially some of the actions of the Board can only happen at the request of, or are dependent on, the Commission. This comes in addition to providing the secretariat for the Board – as was the case for ERGA – which creates a further connection between the working procedures of the Board and the Commission services.[266]

It is problematic that the Commission is involved in the EBMS at essential points, either the EBMS is only able to act at the request of the Commission or has to reach an agreement with it. The Commission is not an independent regulatory authority like the national authorities according to Art. 30(1) AVMSD and the future Board under Art. 10 EMFA, instead it is the main executive body of the EU in which the administration is tied to the political level of the Commissioners.[267] The notion of independence not only of the media but also of their oversight, as it was demonstrated above, necessitates a different setup than, e.g., the supervision and enforcement of market rules such as product safety requirements. In addition, one of the

266 For a more detailed critical analysis *Etteldorf/Cole*, Research for CULT Committee – European Media Freedom Act - Background Analysis, p. 44, 46 et seq.

267 See on this, but in context to the Commission's role in the DSA, *Buiten*, The Digital Services Act from Intermediary Liability to Platform Regulation, para. 78; *Buri*, A Regulator Caught Between Conflicting Policy Objectives; *Wagner/Janssen*, A first impression of regulatory powers in the Digital Services Act.

goals of revising supervisory structures and cooperation forms in relation to cross-border matters is to overcome procedural complexities as they exist for some areas today and lead to potentially problematic time delays in enforcement, which is why the coordination with additional actors may run counter to this.

It should also be borne in mind that the EMFA Proposal 'delegates' important aspects to a guidelines-issuing power of the Commission. This approach is not new; e.g. in the AVMSD revision of 2018 three possible guidelines to be elaborated were included, with which Council and European Parliament accepted the need to further detail some of the Directive's provisions in order to reach – or at least contribute to – a consistent implementation in the Member States. With EMFA this goes well beyond concretisation of specific areas and concerns a Regulation which could already include binding elements without having to coordinate national transpositions. But in addition, the power extends to be able to issue such guidelines on all issues relating to the implementation of the AVMSD and the EMFA, which can be far-reaching. And even though these Guidelines would not have legally binding force, it is likely that, if they contain interpretations of the provisions, they result in a de facto binding position because Member States may not want to risk being – even if only in the view of the Commission – in violation of EU law provisions.

Another important element to consider in the legislative procedure is the reach of the power of the EBMS. Although the cooperation mechanisms in cross-border matters are significantly enlarged and the procedural possibilities spelt out, the Board does not have regular binding final decision-making powers. As was shown for other areas of law, namely the GDPR with the EDPB, such a decision-making power can help to deal with challenges in the cross-border context. For the dissemination of audiovisual content, at least when it comes to clear violations of the AVMSD standards, such powers could contribute to ensure regulatory activity and enforcement on the side of the competent authorities, even if they would have been reluctant to act on their own behalf. In that context the formal 'adoption' of some elements of the MoU of ERGA by introducing in the EMFA structured cooperation mechanisms for mutual assistance and especially by providing expedited procedures which could overcome the disadvantages of the current system under the AVMSD as well as the exchange of information in case of serious and grave risks could be helpful in further establishing these mechanisms. At the same time, a space for more detailed and more easily adaptable provisions laid down in internal procedural rules – as with the

MoU of ERGA – should be left in order to give the regulatory authorities the possibility to respond to challenges that appear in regulatory practice.

Most importantly, when inserting new institutional structures in the system of oversight of audiovisual content – and more specifically also audiovisual media services and VSPs – and combining these with procedures that would then be laid down in the legislative act itself, one should certainly consider the interplay with existing comparable procedures. More specifically, coherence requires to consider whether the introduction of the cooperation mechanisms under the EMFA are related to the procedures of Art. 3, but also Art. 4 AVMSD. And if the AVMSD is anyway amended by EMFA in view of the institutional provision, this would be the opportunity to also adapt certain procedures – if not even some of the substantive provisions – of the Directive, namely by overcoming the difficulties that have been proven in applying the procedures under those two Articles.[268]

Finally, where the EMFA Proposal addresses some of the important challenges mentioned above, the procedures and powers of EBMS are only limited in their legal consequence. For instance, where harmful content – such as "disinformation and foreign information manipulation" – posing a danger for society is concerned, Art. 18(1) EMFA limits the influence of the Board to a "structured dialogue" with VLOPs, which are otherwise addressed in Art. 17 EMFA and mainly in the DSA.[269] Additionally, this aspect shall be treated in the annual independent monitoring of the internal market for media services that the Commission would have to conduct under Art. 25 (specifically para. (3) (a)) EMFA and the findings of which shall be subject to consultation with the Board. The related provision of Art. 16 EMFA in the Section on Regulatory cooperation, which aims at coordinating measures directed against media service providers established outside the Union but targeting audiences in the EU, the services of which pose a risk to public security and defence, for example because they are under control of a third country, gives the EBMS a more active role: it shall be in charge of coordinating the measures by its members or other national authorities that are related to such a threat (Art. 16(1) EMFA) and it may issue opinions on appropriate measures which the competent national authorities should then take utmost account of in their further

268 In this light *Etteldorf/Cole*, Research for CULT Committee – European Media Freedom Act - Background Analysis, p. 20 et seq.

269 *van Drunen/Helberger/Fahy*, The platform-media relationship in the European Media Freedom Act, argue in light of transparency obligations that Art. 17 has a very limited impact anyway compared to obligations already contained in the DSA.

actions (Art. 16(2) EMFA). However, which abilities for coordination exist and what are the consequences of a possible ignoring of the opinion of the EBMS by a regulatory authority is left open. Other than with the EDPB there is no 'dispute resolution' which would give any binding power to a potential subsequent decision of the Board in case of such a conflict. As the EMFA does not replace the competence of the national regulatory authorities, this solution is understandable on first view. In light of the problems in enforcing effectively the law in cross-border situations, it is nonetheless questionable whether this approach promises sufficient results in consideration of the threats.