

## G. Conclusion: On the Way to Enhanced Efficiency and a Modernised Regulatory Framework

Fundamental rights and values call for the establishment of a safe, free and pluralistic environment for the dissemination of audiovisual content in order to adequately and comprehensively protect citizens and the society in the Union, irrespective of the nature of the harmfulness of the content, the means of dissemination and the disseminator. However, regulation and enforcement still depend on whether and under which legislation a content is illegal, through which channels and from which territory the content is disseminated and by whom. Depending on this, enforcement is associated with different prospects of success and different procedures with different timescales. Different regulatory authorities under different legal frameworks can be competent or must be involved in the proceedings.

As demonstrated in the context of this study, the major problems in this respect are related to the existing enforcement mechanisms, in terms of both their substantive and territorial scope and their procedural design. This relates in particular to taking action against unlawful audiovisual content from foreign countries. This is linked to institutional challenges and insufficient binding cooperation structures.

These problems will necessitate an adaptation of the applicable legal framework in medium term in order to ensure a better fundamental-rights-based enforcement of the law in cases of cross-border dissemination of audiovisual content.<sup>270</sup> In short term the agreement of joint minimum standards between the regulatory authorities and bodies of the Member States in the framework of ERGA is a path to be further pursued to find answers to the most pressing difficulties of enforcement identified. One of these areas for coordination is the application of the ‘technical criteria’ under Art. 2(4) AVMSD, which establish jurisdiction. In a future revision of the Directive it should be considered to give up these criteria or combine them with additional requirements that ensure some form of attachment to

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<sup>270</sup> Further recommendations on developing the legal framework in light of experiences with the AVMSD implementation have been presented by the authors of this study in a policy briefing for the CULT Committee of the European Parliament, cf. *Cole/Etteldorf*, Research for CULT Committee – The Implementation and Future of the revised Audiovisual Media Services Directive (Policy Recommendations).

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the legal order of the EU with regard to the editorial work of the provider concerned. Requirements of a more substantial connection to a receiving state could be derived from legal frameworks in other sectors, such as the DSA or the GDPR, both including such approaches. The introduction of mechanisms of this kind would allow to retain the country-of-origin principle of the AVMSD as one of its cornerstones.

The strengthening of such mechanisms in order to ensure a closer attachment to the legal frameworks of the markets in which the provider's service is available and to which it is addressed needs to be accompanied by clear substantive rules that reflect the newly developed dangers created in the audiovisual sector. The question should be further debated in this context whether the material scope of application of the AVMSD should not be expanded again and existing coordinated areas should be concretised in the sense of common minimum definitions.

The principle of a media environment with providers that are independent from being controlled by the state is a fundamental element of this legal order as well as is the monitoring of content by bodies that are detached from the regular executive system of the state. Laying down minimum requirements in this respect in the coordinated law should be analysed as an option for the future. Within this minimum framework Member States would be able to retain or design their own approach to this type of 'state detachment' in their national media laws. A broad interpretation of this 'distance' from the state is preferable and would mean that authorities that are subject to orders from the executive are included in the notion of not fulfilling this standard. With such a broad interpretation it would then be possible for these bodies to react in a robust manner to the further dissemination of services for which the media provider lacks independence or does not comply with minimum content standards. The aim of such reactions is the protection of the population in the EU Member States. Independence of media providers is connected to a relevant media pluralism which necessitates the creation of a framework that avoids undue dominance of specific providers.

The legal framework which is relevant besides the rules of the AVMSD provides in parts answers to the challenges of audiovisual content dissemination, but legal mechanisms established are not yet sufficient. This applies on the one hand to the DSA, in relation to which the Member States must now prepare the oversight structures also concerning the moderation of audiovisual content when creating or assigning competent supervisory authorities or bodies. On the other hand, this applies to the proposed EMFA,

which aims to address precisely the problem of cross-border cooperation in addressing challenges coming from the cross-border dissemination. Those rules as proposed would fall short of actually guaranteeing full independence of the structures. The central role of the European Commission in both mentioned legal acts, but especially in the procedures foreseen in the EMFA, is problematic if taken a look at from a media law perspective. An additional problematic layer results from the division of competences between EU and Member States level. The approaches identified in this study, for example from EU data protection law, mechanisms in Germany concerning 'Staatsferne' (detachment from the state) or content standards for broadcasters in the UK, can offer inspiration for a future strengthening of both independence and its interconnection with existing structures.

With a view to the illustrative scenarios used in this study it is evident that the consideration of the institutional form of oversight is of utmost importance for enforcement in cross-border cases. In combination with the country-of-origin principle there need to be cooperation structures on European level, in which the authorities and bodies entrusted with the monitoring in the Member States can jointly respond to certain challenges. In addition, formalised and legally binding cooperation and joint decision-making should be achieved and further detailed in the law in future. In this respect, the study has taken up various approaches and examined them in the light of experience gained in practice to date, especially in other related sectors than the audiovisual media services. The study shows that looser forms of cooperation structures, such as those in the AVMSD or the EECC, which have been increasingly strengthened over time, have their limits when it comes to enforcing the law and harmonising the application of the law, at least as far as binding and thus robust requirements are concerned. Stronger structures such as those in the DSA or, even more, in the GDPR offer added legal certainty and effective possibilities for taking action. With regard to the latter, however, experience shows that new challenges are also associated with this, which must be taken into account in a future legal instrument, especially in light of specificities of supervision in the media sector and the competences of Member State authorities and bodies. ERGA has already created under the given legal framework an agreement between its members for a fostered cooperation with the internal Memorandum of Understanding. This can serve as basis for the further evolution of the AVMSD or – as this will change the AVMSD according to the proposed draft – the European Media Freedom Act. Such a development should consider relevant experience from other areas of law, such as especially data

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protection, in order to strengthen the enforcement of the law in the context of cross-border dissemination of audiovisual content in the future – a goal that is becoming increasingly important in light of developments in the recent past.