



Media law enforcement without frontiers

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Leyla Keser, Christina Etteldorf, Olivier Hermanns, Susanne Lackner, Andris Mellakauls, Kerstin Morast, Anna Olsson, Francesca Pellicanò, Gábor Polyák, Jörg Ukrow



Foreword

I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us.

You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.

John Perry Barlow, "A Declaration of the Independence of Cyberspace"¹

Most readers of this publication might still remember the good old times where many (if not most) people believed that Internet should be an open, unregulated space. We are talking about the mid-90s, that is, the infancy of the Internet. Those were the good old times when you could not share YouTube (2005) videos of kitties with your Facebook friends (2004) with just a click on your iPhone (2007). A world without big data or fake news. It was quite simply a different world.

Most readers of this publication probably know that everything the Internet offers today is regulated at European level by the Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. This directive is a regulatory answer to those problems that were apparent in the year 2000. Again, a world without Facebook, YouTube and iPhones. A world without big data or fake news. Even its nickname, Directive on electronic commerce, sounds outdated, passé. Everything all those services offer and the things you can do with those little devices go way beyond just "commerce". It is about freedom of expression. It is about the promotion of European culture. It is about the infringement of copyrights on a massive scale. It is even about the preservation of free elections.

So there are those who question the application of this simple, straightforward legal solution (in a nutshell: the service provider is not responsible for the user's actions) to a world that has become way more complicated. Of course, the beauty of the e-commerce directive lies in its simplicity. Adding layers of regulation adds complexity which may lead to confusion, overlapping, and even contradiction between different legal norms.

Take the "fake news" issue, for example. This phenomenon has prompted many countries to propose regulatory action, and in every single case, controversy has followed, with accusations of censorship from different stakeholders. Indeed, the topic needs to be handled with great care: firstly, the current status of hosting providers and the prohibition of general monitoring obligations makes it very difficult to regulate this field. In addition,

¹ <https://www.eff.org/cyberspace-independence>.

the fundamental freedom of expression leaves the legislator with little room for manoeuvre.

Another option, of course, is to leave the policing of the Internet to big companies from the other side of the Atlantic... if you trust them to do so!

Whatever you might think about the amount of regulation needed or by whom it should be applied, one thing is clear: due to the Internet's cross-border nature, there is no way of effectively enforcing legislation in this field without its protection being extended beyond national borders. And that is precisely the topic of this publication, produced by the European Audiovisual Observatory in coordination with the Institute of European Media Law (EMR) based in Saarbrücken (Germany). This IRIS Special provides an in-depth overview of relevant issues, from the challenges of law enforcement in the online environment to the scope of intervention of competent public bodies concerning cross-border activities and the practices of regulatory authorities. It collects contributions from different national experts. I would like to thank (in alphabetical order) : Leyla Keser Berber (Turkey), Christina Etteldorf (EMR), Olivier Hermanns (Belgium), Susanne Lackner (Austria), Andris Mellakauls (Latvia), Kerstin Morast and Anna Olsson (Sweden), Francesca Pellicanò (Italy), Gábor Polyák (Hungary) and Jörg Ukrow (Germany/EMR).

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Strasbourg, December 2018

Maja Cappello

IRIS Coordinator

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Executive summary

The way the Internet and new communication technologies revolutionised the dissemination of audiovisual content across border has resulted in a digital cyberspace that is overwhelmed with countless amounts of content (both legal and illegal), thus raising new challenges in terms of regulation. In that regard, ensuring law and order online cannot be achieved exclusively at national levels by single states, regardless of how powerful their legal system and law enforcement measures are. This IRIS *Special* addresses the question of cross-border law enforcement in the field of audiovisual media online.

International law enforcement cooperation happens at three levels: regulatory (in terms of normative legal principles applicable under both international and domestic laws and regulations), organisational (between law enforcement agencies/bodies, but also between stakeholders themselves through self- and co-regulation), and procedural (through the different bilateral and multilateral agreements and treaties designed to guarantee the proper and smooth conduct of collaboration between those agencies/bodies).

Chapter 1 introduces the challenges facing the implementation of effective international law enforcement cooperation measures in the online environment. It identifies, *inter alia*, the complexity of transposing legal instruments between the offline and the online environments, as well as the legal uncertainty caused by the lack of harmonisation or lack of a universal understanding of certain fundamental legal principles that results in asymmetrical protection levels between different national legal systems, especially when it comes to finding the right balance between fundamental rights in cases where they may collide. Such situations often result in the absence of normative legal principles and the emergence of legal grey areas, and may affect the exercise of authority by the States and of supervision by regulatory authorities.

In any case, law enforcement measures undertaken by legislative and executive bodies must be conducted in accordance with the principles underpinned by international customary law and European law such as, for example, the principles related to freedom of expression under the European Convention on Human Rights. Such principles are accompanied by sets of rules intended to avoid administrative decisions that could conflict with each other or hinder the sovereignty of another country; those rules achieve this by (i) settling the question of jurisdiction is competent, in any particular case according to specific criteria, and (ii) referring to the country-of-origin principle in order to safeguard cross-border activities. **Chapter 2** gives an overview of the scope of possible interventions by the relevant public bodies in respect of issues involving cross-border activities, within the context of the obligations provided by national laws, but also under international and European laws.

Following this analysis, **Chapter 3** addresses these issues at national level by focusing on some of the practices of the respective regulatory authorities responsible for supervising the media, with eight country reports from Austria, Belgium, Germany, Hungary, Italy, Latvia, Sweden and Turkey. Although this selection of practices is not exhaustive, it does provide a significant snapshot of the various steps and initiatives that the national regulatory authorities of member states can take in the field of law enforcement against online audiovisual media. Each country report begins with a presentation of the national legal background in which audiovisual media services and regulatory authorities operate, depicting (in respect of the latter) the material and territorial scope of their respective jurisdictions. Next, the report describes the arsenal of tools and sanctions at their disposal to tackle unlawful content online. Such measures typically include warnings, fines, suspensions or revocations of licences. Lastly, it provides a special focus on practical experiences of law enforcement – particularly in the field of online media – along with relevant examples of the difficulties caused by cross-border infringements.

While similarities can be found in the challenges faced in regulating online audiovisual content (and the steps taken in this regard) from one country to another, many national differences remain, despite the existence of a common international legal framework. Such differences can be explained by many factors (such as cultural disparities and different state interests), but are mainly the results of the flexibility offered to member states by the Audiovisual Media Services Directive (AVMSD). This gives rise to numerous difficulties in terms of the application and enforcement of the law, especially as regards the handling of regulation on how to deal with foreign services under the AVMSD procedure. **Chapter 4** provides a thorough comparative analysis of the main findings from the country reports, by analysing common features and differences from one country to another, the nature and sources of the existing challenges, and some practical solutions already implemented by the regulators.

1. Introduction and Overview

Dr Jörg Ukrow, EMR

“The intercourse, more or less close, which has been everywhere steadily increasing between the nations of the earth, has now extended so enormously that a violation of right in one part of the world is felt all over it. ...”

Immanuel Kant, Perpetual Peace, Third Definitive Article of Perpetual Peace²

As the introductory quote shows, it has long been the consensus opinion that many current problems can no longer be solved at the level of nation states because of their cross-border dimension. Thus, in the twenty-first century, the states are more than ever dependent on opening up to each other in order to fulfil their mission to protect, defend and strengthen the public good.³

In the age of digitisation and globalisation, the protection of public interests such as the protection of minors or consumer protection is not an objective whose only points of contact are with the national legal system of a particular state. The times are finally over when this protection could be achieved mainly or even exclusively by sovereign regulation of that state. In this context, transnational approaches to responding to the development of criminal behaviour also play a role that should not be underestimated. For example, it seems that there is a growth in the willingness to establish business models that are based on the violation of human dignity, interference with the protection of minors or disregard for other forms prohibition. This is a development which can be observed, for example in the field of gambling, where many EU member states have specific restrictions on Internet-based commercial offers. Nevertheless, illegal offers that violate these restrictions are gaining an ever-greater economic importance, while the emergence and strengthening of gambling addiction is deliberately accepted.

However, globalisation not only affects the legal and illegal economy. Nation states and national law enforcement agencies have also adapted to it.⁴ Not only do law enforcement agencies collaborate internationally, resulting in transgovernmental

² Available at http://www.gutenberg.org/files/50922/50922-h/50922-h.htm#Page_117.

³ See Traudt, Gibt es im EU-Recht ein Verfassungsprinzip der Völkerrechtsfreundlichkeit?, 2017, p. 1.

⁴ See Andreas & Nadelmann, Policing the Globe. Criminalization and Crime Control in International Relations, 2006; Paun, Globalization of Law Enforcement. A Study of Transnational Public-Private Partnerships Against Intellectual Property Crimes, 2013.

networks, but their simultaneous collaboration with the private sector results in transnational law enforcement.⁵

Three different aspects of international law enforcement cooperation can be distinguished: regulatory, procedural, and organisational.

- *Normative aspects*, also known as “international prohibition regimes”, concern the criminalisation of certain activities by international law and domestic law.
- *Procedural aspects* refer to the procedure followed in law enforcement cooperation. Examples of procedural agreements are extradition treaties, mutual legal assistance treaties, and agreements on the transfer of criminal proceedings. Such treaties regulate, for example, the obligation to respond to requests for law enforcement cooperation and the conditions under which such a request can be denied.
- *Organisational aspects* of law enforcement cooperation are concerned with the facilitation of this type of cooperation. This is made possible by, for example, the establishment of personal contacts between law enforcement officers through a system of liaison officers and by the analysis of combined information gathered by several law enforcement agencies.⁶

Digital cyberspace is neither *terra nullius* nor comprehensively *terra cognita*. National law, European law and international law, including their respective fundamental and human rights dimensions, are valid both online and offline. However, when applying current law, differences between analogue and digital situations may be conceivable – differences that may speak in favour of the development of existing legislation to improve the adaptation to digital challenges, not least in order to achieve the effective protection of vital interests such as human dignity and the protection of minors.

Recent research on media usage behaviour points in the same direction of increasing importance of mobile Internet use (especially among minors), as well as minors’ growing access to unlawful audiovisual content in their own rooms at home. The growing penetration of the television market by smart televisions that enable Internet access and the increasing access of minors to “secondary” television sets are two further development trends that cumulatively add to the problem of increasingly uncontrolled access to audiovisual material, which threatens the protection of minors. Against this background, traditional parental control mechanisms with regard to minors’ use of media may prove futile. In parallel to this, the effective oversight not of the user, but of the supply side, is becoming more and more important. Law enforcement is an indispensable element of such an oversight mechanism.

In the field of law enforcement, too, legal principles and normative assessments lag the complex area of protection within cyberspace of society’s fundamental interests. So far, the *de conventione lata* existing stock of international treaty principles does not

⁵ See Paun, Globalization of Law Enforcement. A Study of Transnational Public-Private Partnerships Against Intellectual Property Crimes, 2013, p. 13; Slaughter, A New World Order, 2004, p.56.

⁶ See Paun, Globalization of Law Enforcement. A Study of Transnational Public-Private Partnerships Against Intellectual Property Crimes, 2013, p. 14 et seq.

deliver sufficient solutions to the modern challenges of cross-border threats to internationally recognised objects of protection, such as human dignity and the protection of minors. For example, the concern to protect children from harmful influences that can come from the media has not found any recognition in the form of a corresponding prohibition in the UN Convention on the Rights of the Child. Even in terms of customary international law, one cannot yet speak of a *ius digitalis emergens* in view of these challenges.

This problem exists even in an area such as Europe, which has a comparatively high degree of internal coherence within the legal framework. For the distribution of media content – whether terrestrial, or via cable, satellite or the Internet – there are different rules and standards in Europe. An EU-wide harmonisation of rules governing media infrastructure has taken place only in part – not completely. This holds true even more if one looks beyond the borders of the EU, given that coordination efforts at the level of the Council of Europe are even more limited. However, neither traditional broadcast nor Internet-based media services stop at national borders. On the contrary, for technical as well as legal reasons, media content is widely accessible across borders. Only very few states have enacted legal provisions preventing offers emanating from their territories from extending to third countries. In any case, the designers and proponents of such precautions should at least be required to justify them in view of the universally safeguarded freedom of expression and information. However, in many cases, offers from abroad do not comply with the regulatory standards in the receiving state, even if they are regarded by the legal system of the state of origin as being legally compliant.

In addition to such offers – in respect of which a violation of interests protected in the receiving State could be viewed as causing collateral damage to cultural diversity with regard to the prevailing domestic understanding of, for example, human dignity and the protection of minors or consumers – there are a variety of cases in which providers from abroad consciously and intentionally act on the market of the receiving state in a way that violates the substantive legal requirements of that state ... not least by targeting specific groups through offers in the language of the receiving state.

It would constitute not only a politically problematic but also legally questionable response to these challenges if transnational law enforcement were to be permanently placed at the complete discretion of the states concerned. The past decades have been characterized by a continuously increasing opening of media markets in Europe and globally. If diverging understandings of the protection of fundamental interests would be accompanied by a complete lack of reaction ability by States with a higher level of protection, the latter would have to accept that decisions by third states indirectly lower their level of protection. This potentially could damage the idea of a regulatory philosophy that is aimed at geographical opening. In the light of recent judgments on the coherence of regulatory systems, such an asymmetry in the protection of vital interest would rather threaten the possibility of regulation at a supranational or international level and could thus trigger additional erosion of audiovisual media law.

Yet potential regulatory action against foreign offers and/or providers cannot be conclusively and exclusively scrutinised in terms of national law. Issues of public international law (such as the sovereignty of third states in a personal and/or territorial respect) and its limits play an important role in such situations. Another important issue is

the question of under what circumstances national regulatory authorities can claim cross-border authority under public international law. In addition, for areas with harmonised law at the supranational level, limitations on such potential authority also need to be considered. This is especially relevant with regard to the requirements of the EU Audiovisual Media Services Directive (AVMSD) and its cornerstone of the country-of-origin principle. The question regarding under which circumstances home-country authority may be disregarded have still not been fully clarified, either in the existing or in the revised AVMSD. Although the AVMSD in both versions provides procedures for deviation from the country-of-origin principle, owing to the very limited practice in the field there is not sufficient legal clarity and certainty about the extent of the power of member states to apply the procedure. This concerns, for example, the unsolved question of who should provide the necessary assistance or the supporting arguments for such decisions. Therefore, one can conclude that we are far from having a fully clarified or routine situation in the application of the exceptions to the country-of-origin principle.

The legal uncertainty that comes with the above-described situation – not only for national regulatory bodies and authorities, and not even only for any public authorities but also for content providers – is reinforced by the specifics of the online context and the potential of Internet and digitisation. Online media and content, in particular, already have a cross-border “predisposition” for purely technical reasons and are moreover only partially regulated by specific legal principles. If dangerous or illegal content is available online it is a completely different situation than, for example, the dissemination of illegal content on a one-time airing via television. The wide availability can result in a perpetuation of the dangers and consequences of the content and possibly also discourage broad action by national regulatory authorities and bodies, as well as by others, in light of the vast dimension of the problem. A cost-benefit analysis can discourage national regulatory authorities and bodies from exercising their mandate to oversee providers and content when effective and timely enforcement appears doubtful and the exercise of supervision is not specified in detail, but is rather discretionary in that respect. In view of the large amount of illegal content offered on the Internet, concurrent action is not possible against all relevant providers, even when using considerable resources; so a systematic approach by the responsible authority is important.

As the principle of sovereignty of states is regarded as being very strong, it automatically leads to enforcement deficits by states when a situation is concerned that touches upon another state’s sovereignty. The law has become fragile with respect to digital challenges. There is a search for new structures that would enable and guarantee functional, meaningful and effective task fulfilment, and it is believed that these can be found in the forms and “laws” of the market order. Co-regulation and self-regulation are means to react to these challenges.

The constitutional and administrative system of the rule of law is based above all on the categories of jurisdiction and responsibility. Notwithstanding the recognition of self-regulation and co-regulation as instruments of law enforcement by the EU and the Council of Europe, clear assignments of competence and responsibility are prerequisites for legitimate exercise of power, oversight and accountability. This relationship is lost when clear allocations of authority are replaced by agreements, deals, alliances, round tables, formal agreements, “gentlemen’s agreements”, and other forms of cooperation that

do not carry liability in themselves, and therefore allow responsibility to appear to be of secondary relevance.

Globalisation, like any other form of internationalisation, means an opening-up of the constitutional state to the outside world; in view of the possibilities of communication, it also means a delimitation of the nation state as the historical basis of the constitutional state. With the dissolution of the boundaries, the nation state loses one of its characteristic features, and the question therefore immediately arises as to how constitutional and administrative categories and principles relating to the nation state can “survive” in a globalised world. Decisively, it will depend on how, in accordance with the changed circumstances, the constitutional values realised through historical experience (which are documented in the guarantee of liberty and the control of power) are preserved against the background of changed structures and how, in a changed form, they can be made to work.⁷ At this point this *IRIS Special* will also take a look at current practical and media policy developments in order to underline the potential danger that results from the wide availability of online media and content.

In the first part of this publication, taking into account administrative, constitutional, European and international law aspects, consideration will be given to the question of the extent to which national regulatory authorities or other relevant public bodies can be considered to have jurisdiction over foreign providers and for “incoming” content. In addition, it will also discuss what types of supervisory measures are possible and how these can be enforced against cross-border providers.

The second part contains country reports from Austria, Belgium, Germany, Hungary, Italy, Latvia, Turkey and Sweden which provide an insight into the practice of the respective national regulatory authorities responsible for supervising the media. In the light of the legal background presented in the first part of this publication, as well as a brief presentation of the national legal bases for assessing the legality of content and sanctioning, the reports shall focus on practical experience in law enforcement, in particular with regard to online media. This will reflect different regulatory approaches chosen and new initiatives aimed at establishing a more level playing field towards comparable content offered via different channels.

⁷ See Ossenbühl, *Öffentliches Recht im Umbruch*, Akademie-Journal 2/2002, pp. 4 et seq.

2. Framework for law enforcement against online and foreign content providers

Dr Jörg Ukrow, EMR

2.1. The level of the national constitutional frameworks

It cannot be inferred from the commitment to European integration made in the constitutions of the Council of Europe member states or from their open attitude towards globalisation processes that enforcement authorities are basically prevented from taking measures against third-state providers because of a comprehensive obligation to respect the behaviour of these states. Such an approach would enable the country-of-origin principle⁸ to gain general application in the European context and the danger of conflicting administrative decisions would at the same time be permanently limited, but this might happen at the cost of the insufficient safeguarding of interests protected under a state's constitution, such as the protection of minors.

If this risk to interests (which are in many cases also protected as fundamental rights that are officially recognised by states) is to be avoided, the informal toleration of certain private conduct by a European third state cannot have the general effect of completely blocking a state's own action as a sovereign entity.⁹

In addition to this continuing openness of national constitutions towards the institution of measures *vis-à-vis* third states, there is a fundamental-rights dimension that has the effect of inducing states to take action. According to developing constitutional scholarship, the fundamental rights enshrined in the European Convention on Human Rights (ECHR) – like those laid down in national constitutions – do not constitute only rights of defence against disproportionate interference by the state with the personal freedom they guarantee; rather, the state has a general obligation to enact legal rules to protect its citizens' fundamental rights. A state wishing to prevent breaches of these rights meets such obligations to provide protection not only by taking action but also by

⁸ See section 2.4.1.

⁹ There is also at any rate the possibility of lodging a complaint with the Commission, which can if necessary institute infringement proceedings against the other member state. The initiative to launch such proceedings can even be taken by the member state affected by this inaction.

introducing measures that ward off dangers to a fundamental freedom posed by third parties.¹⁰

These obligations, which are grounded in fundamental rights that states have an obligation to protect, are not exclusively directed at lawmakers. The obligation of state bodies to provide protection can also encompass measures undertaken by the executive to prevent the risk of fundamental rights being jeopardised.¹¹

The decision on how an obligation to protect fundamental rights is to be met is taken first and foremost by the legislative and executive bodies on their own authority. It is their prerogative to assess what measures are appropriate and advisable in order to guarantee effective protection. Judicial scrutiny, whether within the national legal framework or by the European Court of Human Rights, is accordingly limited to an examination of whether the state authorities have clearly violated the basic decisions embodied in fundamental rights.¹²

The broad scope for assessment, evaluation and organisation is not fully exploited when it is obvious that the protective measures taken are completely inadequate or inappropriate, so the scope for action is limited in a very small number of exceptional cases by the principle that it is not permissible to take insufficient action (the state must not secure its citizens' fundamental rights by using measures that fall short of those required).¹³

2.2. Law enforcement from the point of view of fundamental rights

Under Article 10 (1) of the ECHR, “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”.

The communication freedoms – freedom of information, freedom of expression and freedom of mass media communication – enshrined in Article 10(1) of the ECHR, as in similar constitutional provisions, are fundamental for a free democratic community. As

¹⁰ See in particular ECtHR, judgment of 20.10.2005, Application No. 74989/01, *Ouranio Toxo and Others v. Greece*, para. 37; judgment of 06.11.2012, Application No. 47335/06, *Redfearn v. the United Kingdom*, paragraphs 42 ff., and, for example, Daiber, in Jens Meyer-Ladewig et al. (eds.), *EMRK. Handkommentar*, 4th ed. 2017, Art. 11, paragraphs 60 ff.

¹¹ See BVerfGE (Official Collection of Federal Constitutional Court Decisions) 49, 89 (140 ff.); 52, 214 (220); 53, 30 (57).

¹² See on this in particular ECtHR, judgment of 24.07.2012, Application No. 40721/08, *Fáber v. Hungary*, para. 39 and for example Birgit Daiber, in Jens Meyer-Ladewig et al. (eds.), *EMRK. Handkommentar*, 4th ed. 2017 Art. 11, para. 62 and from national case law BVerfGE 4, 7 (18); 27, 253 (283); 33, 303 (333); 36, 321 (330 f.).

¹³ See on this also Susanne Moritz, *Staatliche Schutzpflichten gegenüber pflegebedürftigen Menschen*, 2013, p. 115 and for example BVerfGE 56, 54 <80>; 77, 170 <215>; 92, 26 <46>; 125, 39 <78 f.>

rights of defence against the state, they guarantee the individual's self-determination in the area of communication through protection against state interference in the communication process.¹⁴ In order to examine whether such interference with fundamental rights has taken place, it is necessary to start from the modern concept of interference, which is understood as any state action that renders behaviour protected by fundamental rights entirely or partially impossible – i.e. any encroachment on fundamental rights attributable to the state.¹⁵

However, the importance of fundamental communication rights extends beyond this function of warding off state interference. In fact, depending on the guarantee content and the nature of the case the indirect obligation of private individuals to observe fundamental rights can be close to or even the same as that of the obligation of a state. For the protection of communication, this comes into consideration in particular when private companies undertake the provision of the basic framework of public communication themselves and thus assume functions that, like the safeguarding of post and telecommunications services, used to be assigned to the state as public service tasks.¹⁶

However, under Article 10(2) of the ECHR the exercise of the communication freedom enshrined in Article 10(1) “carries with it duties and responsibilities”. It “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

If state authorities decide to introduce such a restriction, they must, according to more recent legal opinion, take care to ensure the coherence of their measures in order to safeguard public-interest objectives as an element of the proportionality of the interference with the fundamental right or fundamental freedoms. Accordingly, a measure restricting a fundamental right or freedom is only compatible with the proportionality principle if it actually meets the objective of achieving its goal “in a consistent and systematic manner”. The key function of the consistency requirement is to examine the motives of state action, and in particular to see whether the restriction on rights or freedoms has not been motivated by selfless public-interest objectives but by financial or business interests.¹⁷

¹⁴ See on this for example Gilbert-Hanno Gornig, *Äusserungsfreiheit und Informationsfreiheit als Menschenrechte*, 1988; Niels Lutzhöft, *Eine objektiv-rechtliche Gewährleistung der Rundfunkfreiheit in der Europäischen Union?*, 2012.

¹⁵ See for example Christian Hillgruber, “Grundrechtlicher Schutzbereich, Grundrechtsausgestaltung und Grundrechtseingriff”, in Paul Isensee/Kirchhof (ed.), *Handbuch des Staatsrechts. Bd. IX - Allgemeine Grundrechtslehren*. third ed. 2011, § 200 paragraphs 89 ff.

¹⁶ See Federal Constitutional Court *Fraport* judgment of 22.02.2011, Case 1 BvR 699/06, para. 59.

¹⁷ See CJEU *Liga Portuguesa* judgment, 2009 Collection, I-7698 (para. 61); *Carmen Media Group* judgment, 2010 Collection, I-8175 (paragraphs 55 and 64).

2.3. Law enforcement from the point of view of primary EU law

It is in keeping with the character of the EU's legal order as a "self-contained regime"¹⁸ that EU law governing the relationship of member states to one another constitutes a *lex specialis vis-à-vis* international law and is accordingly superimposed over international law. In particular, when a member state suspects that another member state has behaved or is behaving unlawfully it cannot directly call for countermeasures under international law or claim powers that may be inferred from international law when EU law contains rules that take precedence.¹⁹

Essentially, as far as the relationship of EU member states to one another in the EU's internal market is concerned, there is, firstly, provision for dispute settlement mechanisms.²⁰ Secondly, how they interact with one another is determined by such considerations as the country-of-origin principle.²¹ In the context of the fundamental freedoms of the EU's internal market, this principle has grown to become a mainstay of the European internal market (not only in respect of services) through the case law of the CJEU.²² The idea behind the principle is that an economic actor originating from a member state must comply with the legal rules of its country of origin but not additionally have to observe those of the country or countries for which its goods or services are destined; it thus avoids additional burdens in financial, organisational and staffing terms and, therefore, the kind of double and multiple checks that restrict cross-border trade.²³

Even if under international law a "secondary check" could be carried out, for example, with regard to a possible breach of the law by the receiving state when an item is imported into its territory or a service is received, the country-of-origin principle means this does not apply to the (cross-border) fundamental freedoms. It at any rate excludes freedom of movement of services under Articles 56 ff. TFEU, which is relevant in the case

¹⁸ See among many others Oliver Dörr, in Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, Baden-Baden 2016, on Article 47 TEU para. 104.

¹⁹ See, for example William Phelan, "What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime", *International Studies Review* 14 (2012), 367 (373, 375).

²⁰ See on its exclusivity Article 344 of TFEU and, for example, Tobias Lock, *Das Verhältnis zwischen dem EuGH und internationalen Gerichten*, 2010, pp. 155 ff.

Particularly important from the point of view of legal doctrine seems to be treaty-infringement proceedings brought by one member state against another under Article 259 TFEU, although this hardly ever happens in practice because the Commission is usually approached when a breach of EU law is suspected. See, for example, Bärbel Sachs, *Die Ex-officio-Prüfung durch die Gemeinschaftsgerichte*, 2008, pp. 39 ff.

²¹ For a general discussion of the country-of-origin principle, see, for example, Katrin Schilling, *Binnenmarktkollisionsrecht*, Berlin 2006, pp. 74 ff., and Stephan J. Waldheim, *Dienstleistungsfreiheit und Herkunftslandprinzip*, Göttingen 2008, pp. 127 ff.

²² Important for the genesis of the principle are in particular the CJEU's *Dassonville* judgment, 1974 Collection, 837 ff., and its EuGH *Cassis de Dijon* judgment, 1979 Collection, 649 ff., as well as, especially regarding freedom of movement of services its *van Binsbergen* judgment, 1974 Collection, 1299, paragraphs 10/12 and its *Webb* judgment, 1981 Collection, 3305 ff.

²³ See Haucap/Kühling, *Systemwettbewerb durch das Herkunftslandprinzip: Ein Beitrag zur Stärkung der Wachstums- und Wettbewerbsfähigkeit in der EU? – Eine ökonomische und rechtliche Analyse*, 2013, p. 3 et seq.

of audiovisual media (including new information and communication services).²⁴ Responsibility for checking the legality of a service thus always lies with the country of origin, and a legally provided service may then always be offered and implemented across borders. The background to this is the freedom to choose the location of a registered office, which means that in the internal market freedom of establishment enables companies and self-employed persons to freely choose where their registered office is situated.²⁵ States in whose territory such a service is ultimately used are only empowered to carry out a check and take measures against the service in exceptional instances – namely when a written or unwritten reason justifying the restriction on the free movement of the service has been provided and been applied in a proportionate way. If secondary law exists that sets out the fundamental freedoms in concrete terms, then these harmonising rules must be examined as a matter of priority. Examples of such secondary law are in particular the Audiovisual Media Services Directive and the e-Commerce Directive (ECD).

The restriction on action by member states against foreign providers owing to the supremacy of European law (also) only applies in the area of application of the free movement of services²⁶ if the provider has its registered office in another EU member state or in a third state that is a party to the Agreement on the European Economic Area. However, providers that have no registered office either in the EU or in the EEA are subject to the general rules of international law.

2.4. Law enforcement from the point of view of secondary EU law

In the area of the audiovisual media, secondary EU law has led to the extensive harmonisation of legal bases in the EU member states, albeit neither with regard to staffing nor in material terms. This legal framework also contains general provisions, relevant for this publication, on the enforcement of the substantive rules of this harmonised law. This applies in particular to the procedural provisions of the AVMSD and the e-Commerce Directive, which will be briefly described below, including with regard to their partially divergent approaches.

²⁴ On the free movement of services in the media field, see, for example, Fink/Cole/Keber, *Europäisches und Internationales Medienrecht*, 2008, paragraphs 35 et seq.

²⁵ See, with regard to the state of transmission principle, the Television without Frontiers Directive Jackie Harrison and Lorna Woods, *European Broadcasting Law and Policy*, 2007, pp. 174 et seq.

²⁶ This is different with regard to their *erga omnes* effect for the free movement of capital and payment transactions in the EU.

2.4.1. The Audiovisual Media Services Directive

The Audiovisual Media Services Directive (AVMSD) sets out the legal framework in accordance with which action against cross-border providers of linear television, on-demand video services and video-sharing platforms (included in the revised Directive,²⁷ which shall be implemented in the member states by 19 September 2020) may be taken by the member states in the material area co-ordinated by its provisions – especially audiovisual commercial communication, the protection of minors and combating racial hatred – provided that they have their registered office in another EU member state.

2.4.1.1. The country of origin principle

The country-of-origin principle has been one of the structural principles of the AVMSD from the outset. It means that the legitimacy of a certain audiovisual media service (and in future that of a video-sharing platform) depends on the law of the state in which the provider has its registered office. In order to enable the free flow of information, the other member states must generally rely on the assessment made by the the country of origin, and there is no provision for the receiving state to carry out a supplementary check. This gives a provider from another EU member state certainty with regard to planning and legal obligations for the entire internal market if it complies with the legal framework of its “home state”. In addition, other member states can assume that a minimum level of content-related rules have been observed because the Directive has brought about a (minimum) degree of harmonisation – for example as far as rules for the protection of minors are concerned.

The country-of-origin principle is laid down in Article 2(1) of the AVMSD:

Each Member State shall ensure that all audiovisual media services transmitted by media-service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.” An initial consequence of this is that every member state is obliged to establish which providers are subject to its jurisdiction and then to check that they organise and distribute their service in compliance with the rules applying in that state.

The criteria for deciding when a provider comes under the jurisdiction of a member state are laid down in Article 2(2)-(5). Under paragraph 3, the place of establishment is determined on the basis of the location of the media service’s head office, if editorial decisions are also taken there. If these two elements differ, the Directive refers in particular to a quantitative criterion (a “significant part” of the workforce). Paragraph 4 applies when the criteria set out in paragraph 3 cannot be implemented (for example

²⁷ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_2018.303.01.0069.01.ENG&toc=OJ%3AL%3A2018%3A303%3ATOC.

because there is no head office in the European Union) and refers to “technical connecting points” in the case of satellite transmission, which are then connecting points in a jurisdiction. If the question of which member state has jurisdiction cannot be answered under paragraphs 3 and 4, then jurisdiction lies, under paragraph 5, with the member state in which the media-service provider is established within the meaning of Articles 49-55 of the TFEU.

If a provider falls under a jurisdiction, the (EU) member states must monitor that provider’s compliance with their own respective regulatory frameworks. On the one hand this includes (in the light of the transposition obligation) the national form of all the rules laid down in the Directive itself; on the other hand, it also comprises any provisions that may be stricter (compared with the Directive and in the area that it harmonises) and may, under Article 4(1), at any rate be applied by the member states to providers falling under their respective jurisdictions.

Article 3(1) of the Directive goes hand in hand with the home-country control principle in that the media-service provider always has the right to retransmit its content to other EU member states without any restriction being imposed by the state receiving such a retransmission. However, there are possible exceptions to this obligation and these are detailed below.

There is also a safeguard mechanism to avoid a “race to the bottom” through what is known as “forum shopping”: if specific violations of the Directive do not lead to consequences from the supervisory authority in the country of origin, authorities in the receiving state can derogate from the retransmission requirement, subject to a procedure laid down in the Directive. Furthermore, in the case of linear services it may under certain circumstances be assumed that a provider that transmits from abroad but only targets an audience in the home country is circumventing the latter’s laws, and the relevant supervisory action may then be taken.

2.4.1.2. Exceptions to the country of origin principle under the AVMSD

2.4.1.2.1. Situations not covered by the co-ordinated area

In derogation from the home-country control principle, national regulators could also undertake measures against foreign providers of audiovisual media services with a registered office in another EU member state if these measures are based on grounds outside the fields co-ordinated by the Directive. However, whether this may be deemed to be the case is interpreted in a restricted fashion according to current Court of Justice of the EU (CJEU) case law.²⁸

Especially with regard to the protection of minors from harmful content in the case of audiovisual media services that fall within the scope of the Directive, the

²⁸ See CJEU, *Commission v. Belgium*, Case C-11/95, 1996 Collection, I-4115; joined cases C-34, C-35/95 and C-36/95, *Konsumentombudsmannen v. De Agostini and TV-Shop*, 1997 Collection, I-3843.

harmonisation that has taken place is probably so extensive as to render unnecessary any secondary checks by the receiving member state.

2.4.1.2.2. Exceptional derogation due to violations

Another exception to the retransmission requirement follows from Article 3(2) of the Directive for linear services and from paragraphs 4 to 6 for non-linear services. This exception, the purpose of which is to prevent a “race to the bottom” through “forum shopping”, applies only to “provisional” (i.e. time-limited) measures in the interests of the protection of minors and human dignity. Account also needs to be taken of the resulting cumbersome procedure, which renders the rule difficult to apply in practice.

Specifically, the Directive provides that use may be made of the possibility of derogation in the case of a television broadcast when it “manifestly, seriously and gravely infringes” the provisions of Article 27(1) or (2) of the Directive concerning the protection of minors or the ban under Article 6 on incitement to hatred based on race, sex, religion or nationality and when such an infringement has taken place on two occasions over the previous 12 months. Even then, however, it is necessary for the receiving state to meet obligations with regard to consultation and the provision of information before it is allowed to derogate from the retransmission requirement. The derogation will then be examined by the European Commission. If the latter establishes that it contravenes European Union law, the measure must be terminated. Recital 43 of the AVMSD also emphasises that, according to the case law of the CJEU, it should be assumed that this possibility, like any exception or restriction on the free movement of services, “must be interpreted restrictively”.

With regard to non-linear services, paragraphs 4 to 6 of Article 3 follow the same approach but are based on the same provisions in the e-Commerce Directive.²⁹ Moreover, they do not explicitly refer – as in the case of linear services – to substantive rules of the AVMSD. The measures must be aimed at achieving one of the objectives mentioned, which also include consumer protection in addition to safeguarding public order, which expressly encompasses the protection of minors and of human dignity. They must only be directed at providers whose services adversely affect one of the objects of protection or at least present “a serious and grave risk of prejudice to those objectives”. Furthermore, the measures must be proportionate. Although this latter precondition is not explicitly mentioned in relation to the derogation from the retransmission of linear services, it is a prerequisite for observing conformity with EU law because the proportionality principle is one of the fundamental elements of European administrative law.

In contrast to linear services, paragraph 5 specifies an urgent procedure in the case of on-demand services: the obligation to provide information about a planned derogation can be dispensed with when urgent action is required – and the relevant information (including a statement of the reasons why the matter is particularly urgent) is provided later. The Commission must examine the question of compatibility with European Union law “in the shortest possible time”.

²⁹ See section 2.4.2.

Provided that the required procedural steps are complied with and the European Commission confirms its conformity with Union law, the “reception” of the content can be prevented. However, this does not include supervisory measures in the form of enforcement that directly target the foreign provider but ways of preventing the distribution of services (by involving infrastructure managers, for instance) instead of the imposition of a fine, for example.

2.4.1.2.3. Circumvention

The last possible way of circumventing the requirement of Article 3(1) of the AVMSD is provided by Article 4(2), which codifies the CJEU’s “circumvention case law” with regard to linear media services.

The aim is to cover those cases in which a member state has introduced stricter rules than those contained in the Directive and applies them to providers under its jurisdiction. When in such a case a television broadcaster under the jurisdiction of another member state “provides a television broadcast which is wholly or mostly directed towards its territory” a co-operation mechanism can be initiated. This involves the other member state being asked to take action, after which the receiving state may take unilateral measures against the provider (as if it were subject to its jurisdiction).

However, this possibility is linked to additional preconditions. For example, the procedure requires that in addition to the other member state being notified, the Commission must have previously examined the question of conformity with EU law (by contrast to the *ex-post* check in the case of provisional derogation). Moreover, this is only possible if the member state taking action concluded that the motivation for becoming established in the other member state was “to circumvent the stricter rules in the fields coordinated by this Directive, which would be applicable to it if it were established in the first Member State”. The provisions covering this possibility (i.e. mainly the request to the broadcasting state for it to take action) expressly include the protection of minors, as laid down in recital 41.

Indicators as to when the focus is on the receiving state can be inferred from recital 42 – for example, “the origin of the television advertising and/or subscription revenues, the main language of the service or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received”. It should, however, be born in mind that it is hard to establish the borderline between the no-longer-permissible use of freedom of establishment and the abusive circumvention thereof. An essential element of this freedom is that providers choose what is from their point of view the “more favourable” place of establishment in order to be subject to the jurisdiction of this other member state.

2.4.2. e-Commerce Directive

Not every electronic information and communication service – not even every service with audiovisual elements – falls within the scope of the AVMSD under EU law. In

particular, the Directive's restriction in respect of those services outside the realm of audiovisual commercial communication with editorial responsibility for the content offered imposes clear limits on the application of its provisions. However, services with audiovisual elements (which are accordingly not covered by the AVMSD) are usually deemed to constitute "information society services",³⁰ for which a minimum level of harmonisation was created in the EU in the year 2000 in the ECD.³¹

The country-of-origin principle is also one of the structural principles underpinning the ECD.³² Its scope is less extensive than that of the AVMSD, but it is similarly worded insofar as Article 3(1) provides that member states must guarantee that providers under their jurisdiction comply with the law (the key criterion for determining that jurisdiction being the location of the provider's place of establishment). Unlike in the case of the AVMSD, however, there are no additional elements that must be considered when determining a certain location as the place of establishment. On the other hand, under Article 3(2) the principle applies that member states must not restrict services offered within the scope of the ECD that are offered³³ by a provider from another member state within its own territory if such services fall within the coordinated field.³⁴

Under recital 22 of the ECD, "[i]nformation society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all community citizens". Certain areas, such as copyright, are excluded from this rule under Article 3(3) in conjunction with the annex to the Directive.³⁵ What is more important, however, is the fact that overall, the Directive harmonises only very few aspects; for example, it provides a ban on member states imposing an obligation to obtain authorisation, information

³⁰ For the definition of information society services, see Article 1(b) in conjunction with the appendix to Directive 2015/1535/EU. The rule itself explains the three individual parts "service provided under a distance contract", "service provided electronically" and "service provided at the individual request of a recipient", while the annex expressly states that certain services (such as broadcasting) that would be covered by the definition do not fall under it.

³¹ With regard to the possible overlapping of the regulatory area covered by the two directives, there is a hierarchy rule in the first sentence of Article 4(8) of the AVMSD, under which the provisions of the latter shall prevail. The ECD is therefore applicable unless otherwise provided in the AVMSD. In the event of a conflict between provisions of the two directives, the provisions of the AVMSD shall prevail because no use has been made in this directive of the possibility of derogation in the second sentence of this provision. See Oliver Castendyk, Egbert J. Dommering and Alexander Scheuer and Thorsten Ader, in *Castendyk/Dommering/Scheuer, European Media Law*, 2008, Article 3 AVMSD (Stricter rules/Measures against Abuse/Compliance/Co- and Self-Regulation/Relation to the E-Commerce Directive), paragraphs 13-17.

³² For an extensive discussion, see Thorsten Kramer, *Das sekundärrechtliche Herkunftslandprinzip als Regelungstechnik des Binnenmarktes*, Berlin 2005, pp. 17 ff., and Martina Blasi, *Das Herkunftslandprinzip der Fernseh- und der E-Commerce-Richtlinie*, 2004.

³³ This is not about the origin of a service (e.g. the server from which the services are made available) but rather the provider and its registered office. See Serge Gijrath, in Alfred Büllesbach, Serge Gijrath, Yves Pouillet and Corien Prins, *Concise European IT Law*, 2nd ed. 2010, Article 3 Directive 2000/31/EC, para. 1.

³⁴ See also Peggy Valcke and Egbert J. Dommering, in Oliver Castendyk, Egbert J. Dommering and Alexander Scheuer, *European Media Law*, 2008, Electronic Commerce (Directive 2000/31/EC), paragraphs 31 ff.

³⁵ Without these exceptions and the restrictions in Article 1(4) to 6, the scope of the ECD would be very broad. On the significance of these restrictions, see Ansgar Ohly, "Herkunftslandprinzip und Kollisionsrecht", *GRUR International* 50 (2001), 899 (900).

requirements for providers and exemptions from liability for specific categories of internet service providers, such as access and host providers.

In the event of the authorities of EU member states taking action against foreign services, the limits to liability under the ECD (at least in the case of a provider with a registered office or place of establishment in another EU member state) need to be born in mind. There is no comparable liability regulation within the context of the Council of Europe. However, the ECD also applies in the relationship of EU member states to the Contracting Parties of the European Economic Area.

In particular, foreign access and host providers³⁶ are also generally not liable under the ECD for data provided or stored by users and can only be held liable to a certain extent. In the case of access providers, for example, this includes the actual initiation of the transmission or making a change to the information transmitted. A host provider is only liable for data stored by users if it is aware of an unlawful activity and does not take action without delay to remove the data or disable access to it.

However, the liability rules expressly allow the EU member states to empower their courts and administrative authorities to order the service provider to terminate or prevent the breach of the law. Accordingly, the ECD does not have the general effect of blocking possible enforcement measures taken by the regulatory authorities of an EU member state against foreign providers on the basis of the laws of the member state in which a foreign provider's service is accessed.

Examples of areas not harmonised in the ECD are the protection of human dignity and the protection of minors. On the other hand, these legally protected interests can be found in the list of reasons that permit a state that accesses a foreign provider's services without having jurisdiction over that provider to derogate from the freedom-of-reception principle. The ECD and the AVMSD are broadly similar with regard to the derogation procedure (both the standard procedure and the procedure in urgent cases).

Although both derogation options are subject to an examination by the European Commission of their compatibility with EU law, the member states have retained relatively broad powers of their own to act in the case of services regulated by the ECD, including those offered by foreign providers. However, the possibility of derogation under the ECD only focuses on measures that enable access in the national territory to be prevented, such as geo-blocking. On the other hand, there are no explicit provisions concerning measures to enforce the law against (foreign) service providers themselves (for example, supervisory measures in the form of the imposition of fines for breaches of the law³⁷).

³⁶ These are service providers that either enable users to access the Internet ("access providers") or enable them to use the content of the Internet by making storage space available ("host providers"). See die Medienanstalten/Institut für Europäisches Medienrecht, *Europäische Medien- und Netzpolitik*, 2nd ed. 2016, p. 61.

³⁷ Examples of the few measures initiated at the national level against foreign content by having recourse to the content "carriers" are a number of administrative decisions taken in 2003 by the Düsseldorf District Government, which is responsible for the supervision of the Internet – see Christoph Engel, "Die Internet-

2.5. Enforcement from the point of view of international law

As international law is characterised by a territorial conception of the state, jurisdiction is in principle (only) exercised over a state's own territory. A state is always prohibited from enforcing its own laws in the territory of another state. This distinction is also important when distinguishing between jurisdiction to prescribe and jurisdiction to enforce. While the material scope of a state's regulations (on which jurisdiction to prescribe focuses) can also be extended to areas outside that state, the spatial scope of those regulations (which is the focus of jurisdiction to enforce) is usually limited to the territory of a state. Jurisdiction to enforce outside the territory of that state would only be possible if it were provided for under domestic law and this domestic regulation were also backed by an international treaty.

In international law, law enforcement can expressly be the subject of the provisions of a treaty. An international treaty can, for example, contain special rules for settling disputes and/or provisions to the effect that disputes must be referred to the International Court of Justice or another international court.

If we proceed upon the assumption that the elementary human rights that must be safeguarded today include the protection of human dignity and the protection of minors, then (as pointed out by the International Court of Justice in its case law) both these areas must also be classified as a concern of all states in the case of at-risk situations in the media field because of the importance of this protection for the international community.

International law is based on the safeguarding of formal principles, such as the prohibition of force and of intervention, and this approach (which is based on a set of values) opens up to a process of balancing these principles against conflicting values. In particular, this interpretational approach, which is characterised not least by its focus on human rights, removes the basis for the absolute dominance of every single state's interest in maintaining its own integrity – including its sole exercise of jurisdiction over its citizens living in its national territory.

However, neither (for example) the United Nations Convention on the Rights of the Child (UNCRC) nor the Council of Europe's Cybercrime Convention (or the additional protocol thereto) contain provisions comparable to the regulatory provisions enacted on the basis of the transposition of the AVMSD into the EU member states' legal systems. While the UNCRC only provides for the commitment of the States Parties to promote the establishment of suitable guidelines for protecting children against information and material that could harm their wellbeing, both the Cybercrime Convention and its additional protocol – as well as the optional protocol to the UNCRC on the sale of children, child prostitution and child pornography – only contain commitments by states to institute criminal proceedings. None of these international treaties establishes an obligation on the part of the executive to take action to protect human dignity and to protect minors from harmful media content. However, the fact that the aforementioned optional protocol to the UNCRC requires the contracting states to impose criminal

Service-Provider als Geiseln deutscher Ordnungsbehörden", *MMR Beilage 4/2003*, 1 (10 ff.). See also Christoph Schnabel, "Porn not found" – Die Arcor-Sperre, *K & R 2008*, 26 ff.

penalties for activities by foreign providers shows that cross-border action against these providers under media legislation to protect minors cannot in itself be classified as breaching international law.

2.5.1. Obligation regarding/possibility of the international-law-friendly interpretation of national law

International human rights are always associated with states (as they are parties to the relevant treaties), and it cannot be inferred from these treaties that private individuals or companies are directly bound to observe these rights. It is therefore not possible, for example, to conclude from existing international law that private individuals and entities operating across borders are directly bound by human rights enshrined in international law and focusing on human dignity and the protection of minors.³⁸ However, modern human rights doctrine now also proceeds upon the assumption that human rights do not exclusively operate within the state/citizen relationship but also in the relationship of private individuals and entities to one another: if the conduct of private individuals and entities can result in putting human rights at risk, then, according to this view of international law, the state is duty-bound to take regulatory action, which may include legislative and administrative measures.

The three-dimensional concept of “protect, respect and remedy” has become a central reference point in the discussion on the cross-border dimensions of human rights protection.³⁹ The first element of this concept is the state’s duty to protect human rights, which means (among other things) the duty to enforce and review state regulations that require private individuals and companies to respect human rights. The second element is corporate responsibility to respect human rights, which means that companies must neither be involved in nor contribute to human rights abuses and that they must prevent such abuses in their business environment and if necessary put an end to them. The third element is access to remedies. Such remedial action against the negative effects of the activities of transnational companies may consist of the use of both legal and non-legal instruments.

However, this concept has probably not yet become firmly established in customary international law. In particular, neither international treaty law nor customary

³⁸ See Norman Weiss, “Transnationale Unternehmen: weltweite Standards?“, *MRM* 2002, 82 (84).

³⁹ See on the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”, 21 March 2011, A/HRC/17/31.; idem., “Human rights and transnational corporations and other business enterprises”, 15 June 2011, A/HRC/17/L.17/Rev.1.

international law currently specifies a universal legal obligation to regulate the external actions of domestic companies.⁴⁰

When answering the question of whether states have, by signing international treaties, only undertaken to protect individuals against infringements of their rights by the state or whether they also have a duty to protect them against the behaviour of private third parties, the focus should, according to the view now firmly established in international law,⁴¹ not be explicitly obliged only to provide protection. Rather, in those fields in which such obligations are not expressly laid down in international law they can nevertheless be inferred from a teleological interpretation of the relevant provision.

In respect of the UN Covenant on Civil and Political Rights the United Nations Human Rights Committee has established, in a General Comment, the following:⁴²

“The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the *positive obligations* on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also *against acts committed by private persons or entities* that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.” [Author's emphasis]

2.5.2. Territorial sovereignty of third states

“Sovereignty” under international law means a state’s unrestricted legal ability to act domestically and internationally. This ability is derived from or dependent on no one and is restricted only in certain fields by barriers established by basic international law (the requirement to ensure a minimum level of human rights protection, a ban on slavery, etc). In particular, sovereignty includes: the right and legal authority to choose freely and to organise the state’s political, economic and social order; free choice in respect of – and the implementation of (and responsibility for) – its own solutions to all issues arising for the political community; and free choice and the exercise of – or if necessary the imposition of restrictions on – contacts with other states and international and supranational organisations.⁴³

An important component of sovereignty is territorial sovereignty, which is understood to mean control over all state power exercised within a territory. Without a state territory, there is no state: international law still defines the state today as a model

⁴⁰ See also Andreas von Arnould, “Freiheit und Regulierung in der Cyberwelt: Transnationaler Schutz der Privatsphäre aus Sicht des Völkerrechts”, in *Berichte der Deutschen Gesellschaft für Internationales Recht*, vol. 47, 2016, 1 (29).

⁴¹ See for example Katarina Weilert, “Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards”, *ZaöRV* 69 (2009), 883 (888).

⁴² Human Rights Committee (HRC), General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 März 2004, UN Doc. CCPR/C/21/ Rev.1/Add.13 (2004), para. 8.

⁴³ On the concept of sovereignty in international law, see, for example, Andreas von Arnould, *Völkerrecht*, third edition, 2016, paragraphs. 89 ff., 312 ff.

of a necessarily territorial system, and the phenomena of Europeanisation and globalisation do not change this. Territory is still quite literally the fundamental element of a state. The world and its legal order are divided up on a territorial basis under international law. A state's territory-related powers are expressed in its jurisdiction (i.e. its regulatory authority over the state territory) and in its territorial sovereignty (i.e. the right to exercise ownership over that territory). In practice, they may diverge when sovereignty is exercised in the territory of a foreign state.⁴⁴

The territorial sovereignty of third states limits the possibilities of responding to actions undertaken by such states (especially responding to diplomatic intervention and, if lodged, inter-state complaints). If, by virtue of the enforcement measures that it undertakes, a state arrogates jurisdiction to itself within the territory of a foreign state, then that foreign state will be entitled to take countermeasures.⁴⁵ Further possible means of exerting influence will be opened up by concluding international treaties, but no treaty hitherto devoted to safeguarding human dignity or the protection of minors or consumers provides for such possibilities.

However, territorial sovereignty is also accompanied by a responsibility recognised in customary international law, which prohibits a state from allowing its territory to be used to cause harm in the territory of another state.⁴⁶ In the view of a number of international law experts, this means that human rights can be respected and protected extra-territorially.⁴⁷

A changing concept of sovereignty that is not limited to a negative defence aspect but understands sovereignty as a responsibility is thus emerging. Understood in this way, sovereignty calls for the assumption of obligations to safeguard also key community assets in areas involving the prevention of violations of legally protected interests by private individuals and entities.⁴⁸

2.5.3. Ban on intervention

The ban on states interfering in the internal affairs of other states is one of the principles of customary international law that make up the international legal framework. The precise determination of the nature of this ban is made difficult by the fact that there is neither a universal definition of the concept of interference (or intervention) in

⁴⁴ See Gilbert H.Gornig and Hans-Detlef Horn (eds.), *Territoriale Souveränität und Gebietshoheit*, Berlin 2016, pp. 21 ff., 35 ff.

⁴⁵ See Andreas von Arnould, "Freiheit und Regulierung in der Cyberwelt: Transnationaler Schutz der Privatsphäre aus Sicht des Völkerrechts", in *Berichte der Deutschen Gesellschaft für Internationales Recht*, vol. 47, 2016, 1 (28).

⁴⁶ See the *Trail Smelter* case (US. v. Canada), 3 R.I.A.A. 1905 (1941).

⁴⁷ See Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, and Ian Seiderman, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights", *Human Rights Quarterly*, 34 (2012), 1084-1169 (1095 f.).

⁴⁸ See Anja Seibert-Fohr, "Die völkerrechtliche Verantwortung des Staats für das Handeln von Privaten: Bedarf nach Neuorientierung?", *ZaöRV* 73 (2013), 37 (59 f.).

international (treaty) law nor a definition of internal affairs.⁴⁹ However, the comprehensive ban on the exercise of force enshrined in Article 2(4) of the UN Charter renders it necessary to provide an expanded concept of interference/intervention. Limiting the definition of an offence to situations in which military force is threatened and used will no longer take proper account of this ban.

Against this background, the UN General Assembly's so-called "Friendly Relations Declaration" deserves particular attention: "No State and no group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. ... No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. ... Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State."

Although this declaration is not binding in international law, the frequent reference to it in subsequent cases involving international law is an indication that the passages quoted above on the ban on intervention should be regarded as a description of applicable customary international law.⁵⁰

The aim of the ban on intervention is to protect the internal affairs of a state; this includes all matters not removed from the state's sole jurisdiction through agreements under international law. It can generally be assumed that a state's constitutional order and political, economic, social and cultural system can be counted among its internal affairs. However, these also include the administrative exercise of jurisdictional power over its own nationals and those of a third state.

However, the range of internal affairs is shrinking more and more because increasing internationalisation has resulted in many issues becoming subject to international law. This applies in particular to the field of human rights, which has at least partially become an international matter as far as the protection of human dignity and the protection of minors from harmful media content are concerned.⁵¹

⁴⁹ Against this background, the historical point of departure for understanding the ban on intervention is of continuing importance. In particular, it is worth noting the recognisable attempt by the USA in the 19th century (via the 1823 Monroe Doctrine) and by Latin American states (via the 1868 Calvo Doctrine and the 1902 Drago Doctrine) to limit the use of military force in international relations. On the basis of these doctrines and practice reflecting a legal conviction, instances of interference by states in internal affairs involving the threat or use of military force were regarded as violating international law at least until the beginning of foreign interventions at the end of the First World War.

⁵⁰ This view is also supported by the ICJ judgment of 27 June 1986 in the dispute between Nicaragua and the USA, in which the court states: "A prohibited intervention must ... be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful, when it uses methods of coercion in regard to such choices, which must remain free ones. The element is coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State."

⁵¹ See sections 2.2. and 2.3.

The ban on intervention, however, not only limits any action by the legislative and executive branches of a state against foreign providers but can at the same time be activated to protect citizens from foreign influences through Internet services.

This obligation to refrain from harmful action was expressed particularly strikingly in the 2011 declaration of the Council of Europe Committee of Ministers on Internet governance principles.⁵² According to the 3rd principle, “(i)n the exercise of their sovereignty rights, states should [...] refrain from any action that would directly or indirectly harm persons or entities outside of their territorial jurisdiction”.

2.5.4. The genuine link question

In the practice of international law, isolated and legally non-binding calls are made for a state to take action across its own borders to protect the legal positions of individuals guaranteed under international law; however, under the latter a state has no obligation to institute proceedings against violations of legally protected interests (such as human dignity or the protection of minors) originating abroad. Another question is that of to what extent a state is allowed to assert jurisdictional rights beyond its own territory. In this regard, the following principles may be established:

A state may in principle only exercise jurisdictional rights beyond its own territory when there is a “genuine link” recognised under international law. Without such a link, jurisdictional measures that have an effect beyond its territory would usually constitute a breach of the sovereignty of the third state⁵³ and therefore have to be classified as a violation of the ban on intervention.

- The “genuine link” principle in international law – which is not least derived from the sovereign equality of states, the ban on intervention and the principle prohibiting the abuse of rights⁵⁴ – requires national powers or their use to be limited. Accordingly, under international law a state is only given responsibility for dealing with situations to which it has a sufficiently close link and after undertaking a balancing of interests with the sovereignty interests of other states.⁵⁵ This is not least an illustration of the principle prohibiting arbitrary action: a state may only deal with situations with a foreign connection if it does not do so arbitrarily.⁵⁶
- On the basis of the principle of territorial jurisdiction, the territoriality principle and the effects principle associated with it are first of all recognised as connecting factors. Reference is also made to the nationality of the individual or company

⁵² Council of Europe, Declaration by the Committee of Ministers on Internet governance principles, adopted at the 1121st meeting of the Ministers’ Deputies on 21 September 2011.

⁵³ See also for example Joachim Bertele, *Souveränität und Verfahrensrecht*, 1998, pp. 19 ff.

⁵⁴ See also for example Hans-Jörg Ziegenhain, *Exterritoriale Rechtsanwendung und die Bedeutung des Genuine-link-Erfordernisses*, 1992, p. 47 with further references.

⁵⁵ See Hans-Jörg Ziegenhain, *op. cit.*, p. 47 f.

⁵⁶ See Nadine Dombrowski, *Extraterritoriale Strafrechtsanwendung im Internet*, 2014, p. 53.

concerned (the active personality principle)⁵⁷ and to the protection of certain state interests (the passive personality principle and the protective principle).⁵⁸

- An exception may be made to the “genuine link” requirement when it is possible to apply the so-called universal jurisdiction principle, according to which every state is entitled to prosecute certain crimes in order to defend particularly important legally protected rights, but this principle is of no use in the case of measures based on media regulatory law.

However, when action is taken against foreign providers it would constitute not only a politically problematic but also legally questionable response to the issues arising under international law if providers’ transnational operations were to contribute to an asymmetric at-risk situation without there being a possibility to initiate a transnational and regulatory response. For decades, the opening-up of media markets, both in Europe and globally, has been pursued – for example through the international law approach to ensure the free flow of information and the European approach leading to the establishment of an internal broadcasting market. Thus, it would in the long run constitute a considerable risk for the legitimation in public policy terms of a regulatory philosophy aimed at the transnational opening of the market when legally protected interests thus far safeguarded at the national level were to fall victim to the arbitrary conduct of third states in the context of bringing about a comparable level of protection. This also highlights the need for a dynamic understanding of the “genuine link” concept.

Owing to the transnational character of the Internet, the mere possibility of taking action against web content in a state other than the one to whose jurisdiction the provider is subject cannot be sufficient to establish a “genuine link” between the website concerned and the state that initiates enforcement measures.

The production of the content in the language of a third state can, however, at least be classified as being directed at that state if there are no additional elements that support the view that the only purpose of the service is to appeal to an audience in another third state in which that language is spoken.

Furthermore, there is in particular an effect on a specific third state when a programme mainly or exclusively deals with the current or past political, economic, social or cultural situation in that state.

⁵⁷ See ICJ, *Nottebohm* judgment of 6 April 1955, ICJ Reports 1955, 4 (23); *Barcelona Traction, Light and Power Company Limited, Second Phase* 1970, judgment of 5 February 1970, ICJ Reports 1970, 3 (42, para. 70); Report of John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, to the UN Human Rights Council, “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts”, UN Doc. A/HRC/4/035 of 9 February 2007, para. 15; Werner Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht*, Berlin (etc.) 1994, p. 325, 473; Kirsten Schmalenbach, “Multinationale Unternehmen und Menschenrechte”, *Archiv des Völkerrechts* 39 (2001), 57 (73).

⁵⁸ See Gabriele Burmester, *Grundlagen internationaler Regelungskumulation und -kollision unter besonderer Berücksichtigung des Steuerrechts*, 1993, pp. 98 ff.; Martin Kment, *Grenzüberschreitendes Verwaltungshandeln*, 2010, pp. 114 ff.; Torsten Stein, Christian Buttlar and Markus Kotzur, *Völkerrecht*, 2017, paragraphs 617 ff.

A foreign provider who places its own offering on a platform of a provider that itself has its registered office in a third state aims to make that offering available in this third country, which is a sufficient ground for determining the existence of a genuine link.

The same applies to a foreign provider that exerts influence on the process of drawing attention to content through aggregation, selection and presentation (particularly in the case of search engines) – especially by working to ensure, for example, that its offering is given priority when search queries are run in a third state.

If a foreign provider's offering is advertised either generally or by means of individual targeting in a third state by persons residing there, then this indicates, irrespective of the language of the content, that the content advertised is at least consciously and deliberately intended to have an impact in that state too. Commercial advertising for a foreign offering either in or directed at a third state thus establishes a genuine link to that offering.



3. Reports on practical experiences from selected countries

Although all media regulation systems must respect the principles set out in part 1 of this publication, the way in which they are implemented at national level varies hugely – even within the EU. The following national reports from selected countries describe the practical impact of these variations (in particular, how the regulatory framework is managed in practice) and the problems and solutions that arise from the structure of the legislative framework and of the associated law enforcement mechanisms.

3.1. AT – Austria

Dr. Susanne Lackner, Kommunikationsbehörde Austria (KommAustria)

3.1.1. Introduction and overview

The legal bases for the regulation of the media-service providers established in Austria were comprehensively amended in Austria in 2010 in connection with the transposition of the Audiovisual Media Services Directive⁵⁹ and as a result of the ORF state-aid procedure.⁶⁰ At the same time, the previously monocratic authority KommAustria became an independent collegial body responsible for regulating the electronic media in Austria.⁶¹

The rules on public service broadcasting,⁶² which essentially take account of the state-aid provisos⁶³ (and which also apply to other public service broadcasters subject to a state-aid procedure) naturally pose only minor cross-border challenges for media authorities within the context under discussion. On the other hand, such challenges do arise in particular from the legal rules for commercial media-service providers governed

⁵⁹ Directive 2010/13/EU of the European Parliament and of the Council.

⁶⁰ Commission procedure “State aid E 2/2008 (ex CP 163/2004 and CP 227/2005) – financing of ORF”.

⁶¹ Federal Act on the establishment of *Kommunikationsbehörde Austria* (KommAustria), BGBl. (Federal Gazette) I No. 50/2010.

⁶² Federal Act on the Austrian Broadcasting Corporation (*Österreichischer Rundfunk – ORF*), BGBl. No. 50/2010.

⁶³ See the 2009 Broadcasting Communication, the Amsterdam Test (in respect of new services), the net-cost-financing principle, the establishment of an external supervisory body, etc.

by the Audiovisual Media Services Act (*Audiovisuelle Mediendienste-Gesetz – AMD-G⁶⁴*), which essentially adopts the principles laid down in the legal areas covered by the AVMSD. This Act also establishes the bases for terrestrial television – i.e. the question of tendering for and operating multiplexes, as well as ancillary services and “must-carry” rules.

However, of primary interest in the case of this publication are the legal basis and practice in the area of online services – especially on-demand services, the cross-border character of which is particularly pronounced. It should, however, be pointed out that in the area of terrestrial television, too, the introduction of DVB-T2 and the resulting increased capacities has led to the greater relevance of cross-border issues because more foreign (predominantly German) media services are being provided in this way.

First of all, however, a brief outline of the regulatory tasks in the area of audiovisual media services needs to be set out.

Those subject to the Audiovisual Media Services Act either need a licence to operate a service or must give notice of their intention to do so.

A licence is required by satellite channel operators and providers of terrestrial channels; it is also required when such channels are carried by other platforms or broadcast via another transponder. The technical, financial and organisational conditions, distribution agreement(s) and details of the respective branch establishment must be credibly provided, and compliance with the legal obligations has to be demonstrated (especially with regard to advertising and the protection of minors). It is also necessary to describe the ownership structure in order to demonstrate compliance with statutory media concentration provisions, particularly in the case of terrestrial television. As far as content is concerned, details must be provided of the channel genre and scheduling and the broadcaster’s own productions, as well as details of whether a window programme is planned. Editorial regulations also have to be submitted. The regulator must grant a ten-year licence if these prerequisites are met but can if necessary impose conditions.

These relatively stricter preconditions for the provision of satellite or terrestrial television compared with cable distribution can be mainly attributed to the assumption that there will be a shortage of frequencies (as in the case of analogue transmission) and to the resulting need for selection procedures.

For cable television operators and providers of (live) streaming and on-demand services, the preconditions they have to meet are less stringent compared with terrestrial or satellite transmission as they only have to give notice of their intentions at least two weeks before the service is rolled out. Here too they must provide ownership details. Moreover, in the case of a linear channel, details must be provided regarding its genre, scheduling, and the proportion of content taken up by the broadcaster’s own productions; further details regarding the type of programming (general entertainment, special-interest, window programme, etc) must also be provided. In the case of on-demand media services, details have to be provided regarding the programme catalogue – especially the

⁶⁴ Audiovisual Media Services Act, BGBl. No. 50/2010.

scope and categories of programmes. The technical means of distribution must also be noted. All these details must be updated annually.

The obligation to give notice of intent is not an end in itself. Its purpose is both to ensure regulatory oversight and the funding of regulatory tasks. The systematic identification of online media is a demanding task for the authority. This obligation to give notice on the part of media-service providers to some extent paves the way for the implementation of the new directive,⁶⁵ which lays down the requirement for member states to keep up-to-date records of the providers under their jurisdiction and empowers the Commission to make a central database available (new Article 2(5a)).

As pointed out in the introduction, KommAustria is the regulatory authority responsible for the statutory supervision of commercial and public media-service providers. It is also responsible for regulating radio services. In the area of commercial media services, it takes all necessary action of its own motion in response to a complaint or application. Possible sanctions available to it are the establishment of breaches of the law and the imposition of administrative penalties. The maximum financial penalty is EUR 40 000 for breaches of the obligation to obtain a licence or infringements of the ban on the provision of services for which prior notice has to be given and EUR 8 000 in the field of advertising. Providers can lodge appeals against all decisions with the Federal Administrative Court,⁶⁶ which began its work in early 2014.

A particularly important statutory requirement with regard to regulatory oversight is the monitoring of audiovisual media services' compliance with advertising rules. At any rate, commercial and public service television must be subject at least once a month to statistically representative random checks, and so too must online and radio broadcasters. After a decision has been taken on the checks to be carried out, providers' records are requested (these must be maintained and preserved for a period of ten weeks) and examined to determine possible breaches of the law. The authority must institute proceedings within four weeks if it determines that the law has been broken.

The authority naturally also carries out random checks on compliance with other obligations, such as the protection of minors and respect for human dignity, but most proceedings in this connection are necessarily complaint-driven.

So what, in broad terms, are the challenges faced by online services subject in particular to the regulatory provisions of the AVMSD (and the Audiovisual Media Services Act)?

⁶⁵ The most recent publicly available text of the new directive is the letter of 13 June 2018 from the Council of Europe to the European Parliament containing a proposal for a "Directive of the European Parliament and the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities".

⁶⁶ See the Federal Act on the organisation of the Federal Administrative Court (Bundesverwaltungsgerichtsgesetz – BVwGG), BGB. I Nr. 10/2013.

3.1.2. Defining the scope

As far as on-demand services are concerned, the regulatory authority may face some difficult questions of definition. This applies to the much-discussed “TV-likeness” criterion established by the AVMSD, which KommAustria sees as constituting a key factor for defining the scope of the law and the directive with regard to other audiovisual content. The definition difficulties arise first and foremost in the case of YouTube offerings by young users, who often deliberately choose stylistic devices and staging techniques that differ from those typically employed by television. However, these developments are in constant flux and subject to strong dynamic forces, which must be duly understood by the regulatory authority. At the same time, it must be made clear and transparently communicated to the user why a particular decision has been taken. Recital 24 of the AVMSD states with regard to “TV-likeness” that “the concept of ‘programme’ should be interpreted in a dynamic way”. This may cause problems as the trend towards making linear channels catering for niche audiences is resulting in there being virtually no format that has not previously been employed somewhere on television. On the other hand, YouTube formats can be found more and more in new television offerings. This is, of course, a consequence of a convergent development, and the solution in terms of regulation may be that the format to be assessed in the case of an on-demand service must “typically” (but not exclusively) be employed in the case of television. As far as the aforementioned transparency of decision-making criteria beyond the assessment of an individual case is concerned, KommAustria has begun to describe certain genres that it classifies as “TV-like” and has published a set of voluntary guidelines.⁶⁷

On-demand services registered with KommAustria⁶⁸ can be broadly classified as follows: “catch-up-TV” and media libraries, newspapers’ video services,⁶⁹ specific channels on video-sharing platforms (when the AVMSD criteria apply, as well as in the case of other social networks), sports services, and services provided by public agencies or other organisations that are not run by the government or for charitable purposes but on a for-profit basis and are thus to be classed as “services” within the meaning of Article 57 TFEU.

To summarise, and put in highly simplified terms, it can be said that the core issues when assessing on-demand services are their status as services and their “TV-like” nature. The latter criterion will naturally no longer apply when the new directive comes into force, but from the point of view of implementation it currently unquestionably constitutes a justifiable criterion for limiting the scope of the AVMSD, despite all the delimitation difficulties in this regard.

⁶⁷ <https://www.rtr.at/de/m/InfoMDA>.

⁶⁸ <https://www.rtr.at/de/m/Abrufdienste>.

⁶⁹ Immediately after the entry into force of the AVMSD, KommAustria classified newspapers’ video services as on-demand services requiring notification within the meaning of the law and the directive and instituted a number of proceedings, including proceedings concerning the video service of *Tiroler Tageszeitung Online*, which led to the CJEU’s decision in the *New Media Online* case (C-347/14 of 21 October 2015).

3.1.3. Supranational and international cooperation

In view of the subject matter of this publication, the call for regulatory authorities to routinely engage in more intensive cross-border cooperation needs to be reiterated here – and not only for the sake of completeness. The establishment of jurisdiction alone can impose investigative demands on an authority within the online context that differ from those that arise in the case of conventional linear services, not least because the delivery of such services is much easier both technically and in terms of content compared with linear channels. For this reason, and given the technical possibilities available on the Internet, it is becoming easier to engage in forum shopping, so the associated question of the circumvention of national legal rules, at any rate from the quantitative point of view, is now more acute than in the past.

In other words, the establishment of the criteria laid down in Article 3 of the AVMSD in the case of such services can cause considerable problems, even though previous challenges in the analogue environment should not be downplayed. The difficulties begin in practice because the frequent absence of the provider's details in the case of YouTube services means that establishing contact by means of the email address given does not necessarily lead to the desired success, especially if the message sender is an authority. Moreover, the content and language of these services do not necessarily indicate the origin of the offering.

This could lead in future to more questions of jurisdiction among regulatory authorities and thus to an increased need for informal and flexible cooperation. It will also be essential, as is already the case, to intensify discussions, especially on how the terms used in the AVMSD are to be understood.

Austria needs to cooperate with the German regional media authorities, and the fact that they have a common language means that this works extremely well, although it is necessary to repeat what has already been said with regard to the elimination of language and other barriers and therefore the importance of multilateral cooperation. At bilateral meetings, in which representatives of the Swiss Federal Communication Office participate, issues are discussed that have cross-border significance and require proper regulation in view of the linguistic origin of the content.

3.1.4. Enforcement of the law on the Internet

KommAustria's experience in the area of online regulation, especially with the increasing relevance of services not operated by medium-sized or large companies with legal expertise, shows that it is necessary from a regulator's point of view to adapt its self-image and perhaps also its working methods to these new challenges. The conventional implementation instruments must be employed in any case, but it is inherent in the system that they will be insufficient to ensure that the regulatory objectives with regard to media oversight are achieved in an effective way. In this connection, mention needs to be made primarily (but not exclusively, in the light of the ongoing discussions) of respect

for human dignity and condemnation of hatred on the Internet, as well as the protection of consumers, especially with regard to commercial communication.

More than in the past, the focus of the authorities' activities will have to be on providing instructions to enable media-service providers to abide by the rules, in order to ensure the implementation of the regulatory objectives (apart from instruments of co- and self-regulation, which can only be prescribed by lawmakers).

To this end, KommAustria has, like other regulators, chosen a strategy that it carries out parallel to the aforementioned regulatory approach. In addition to fostering self-regulation in the broadest sense, it relies on the provision of extensive information, on actively reaching out to stakeholders and on cooperation with other institutions and authorities. However, given the inherent shortage of resources it is clear that some additional thinking is required in order to further develop this self-image. As the means of choice, a suitable forum for this has proved to be international and supranational cooperation within ERGA and EPRA, with particular focus on the sharing of best practices that takes place at these levels.

3.1.5. Interdisciplinary cooperation

Lastly, it needs to be pointed out that the ever faster developing digital environment requires considerable technical expertise. Understanding this is a precondition for determining an instrument for efficient regulation. On the other hand, the implementation of the regulatory objectives in the media field also increasingly requires a knowledge of related areas of the law, such as data protection legislation. (The new directive also contains relevant provisions in this regard). This presumably also means in the long run that the regulatory authorities' material resources will have to be adapted to this requirement. On an interdisciplinary level, however, it also means an exchange of views and information with those authorities that overlap or complement one other as far as their responsibility for online services is concerned.

To summarise (in general terms) it needs to be pointed out that online offerings covered by the AVMSD require a structurally different regulatory approach. This means in particular the fostering of providers' media expertise and, consequently, a preventive approach. It must, however, be pointed out that none of the approaches mentioned reduce the importance of providing for penalties.

The aim and purpose of the above remarks is to make it clear that many changes will need to be made.

3.2. BE – Belgium

*Olivier Hermans, Conseil supérieur de l'audiovisuel (CSA)*⁷⁰

3.2.1. Regulatory framework

The regulatory framework comprises, firstly, federal norms (in particular constitutional, civil and general criminal-law provisions) and, secondly, rules issued by the federated entities (audiovisual law).

In principle, audiovisual matters fall under the jurisdiction of the federated entities, known as “communities”. There are three such entities, which are language-based (Flemish-, French- and German-speaking). Each is responsible for a defined region of Belgian national territory – in principle, to the exclusion of the others. Their jurisdiction covers both content-related and technical aspects of audiovisual and audio-based media services.⁷¹ Since the platform used to distribute such services is irrelevant, it includes the open Internet.

In the bilingual Brussels-Capital region, however, the Flemish- and French-speaking Communities both hold territorial jurisdiction, although each only controls audiovisual media-service providers established in the region that, on account of their activities, must be considered as belonging exclusively to one or the other. Meanwhile, other providers (those established in the region but which, on account of their activities, cannot be considered as belonging exclusively to either the Flemish- or the French-speaking Community) fall under the jurisdiction of the federal authority.⁷² In practical terms, a provider of audiovisual media services in a language other than Dutch or French is therefore subject to federal authority if it is established in the bilingual Brussels-Capital region.

Other online content falls under the residual jurisdiction of the federal state.⁷³

⁷⁰ The views expressed are those of the author and not the CSA.

⁷¹ Article 4(6) of the Special Institutional Reforms Act on of 8 August 1980, *Moniteur belge* (official gazette), 15 August 1980, p. 9434.

⁷² Article 4 of the Act of 5 May 2017 on audiovisual media services in the bilingual Brussels-Capital region, *Moniteur belge*, 23 May 2017, p. 58970.

⁷³ See the Code of Economic Law and the Electronic Communications Act of 13 June 2005 (*Moniteur belge*, 20 June 2005, p. 28070).

3.2.1.1. Federal norms

3.2.1.1.1. Constitutional norms

Firstly, Article 19 of the Constitution⁷⁴ guarantees, in particular, freedom of expression, which includes freedom of opinion and communication. However, this freedom may be restricted under criminal law.

It should also be noted that Article 25 of the Constitution⁷⁵ protects the freedom of the press. This should be read in conjunction with Article 150, under which the *cour d'assises* (assize court) deals with press offences, with the exception of those motivated by racism or xenophobia, which fall under the jurisdiction of the ordinary criminal courts. The Belgian constitution therefore aims to ensure that press offences receive greater publicity and are therefore subject to broader democratic control. According to the interpretation of the Belgian *Cour de Cassation* (Court of Cassation), the jurisdiction of the assize courts is limited to press offences defined as “the punishable expression of an opinion in a text reproduced by printing or a similar process, such as digital distribution.”⁷⁶ An opinion expressed only audiovisually or orally cannot therefore constitute a press offence in the constitutional sense. However, its distribution may constitute a criminal offence that, just like offences motivated racism or xenophobia, falls under the jurisdiction of the ordinary courts.

Article 25 of the Constitution also establishes the “cascading liability” principle, according to which a publisher, printer or distributor of written matter cannot be held criminally responsible unless its author is not known or resident in Belgium. The extension of this principle to the Internet is a controversial question, as both legal opinion and case law demonstrate.⁷⁷ The Court of Cassation has not yet explicitly ruled on this. However, it should be noted that, if neither the author of nor the person with editorial responsibility for written matter distributed by digital means is known, the “cascading liability” principle suggests that the technical intermediary should be held liable. Directive 2000/31/EC⁷⁸ establishes certain exemptions from liability, in particular for providers of hosting services.⁷⁹ In such cases, which are seemingly not uncommon, the “cascading liability” principle would not apply.

⁷⁴ “Freedom of worship and of its public practice, and freedom to express opinions on all matters are guaranteed, but offences committed when this freedom is used may be punished.”

⁷⁵ “The press is free; censorship can never be introduced; no security can be demanded from authors, publishers or printers. When the author is known and resident in Belgium, neither the publisher, the printer nor the distributor can be prosecuted.”

⁷⁶ Court of Cassation (2nd chamber), 6 March 2012, *Auteurs et Médias 2012/2-3*, p. 253.

⁷⁷ Jongen, François and Strowel, Alain, *Droit des médias et de la communication, Presse, audiovisuel et Internet, Droit européen et belge*, Brussels, Larcier, 2017, para. 951-953.

⁷⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), OJ L 178 of 17 July 2000, p. 1. This directive was transposed into Belgian law by Articles XII.1 to XII.23 of the Code of Economic Law.

⁷⁹ Article XII.19 of the Code of Economic Law.

3.2.1.1.2. Criminal law provisions

Freedom of expression is limited under various criminal laws enacted by the federal authority in relation to the protection of public order and morality, the protection of minors, the ban on hate speech and discriminatory language, and the prevention of offences against honour and reputation.

Legal provisions designed to protect public order cover both national institutions – e.g. attacks on the government by ministers of religion (Article 268 of the Criminal Code) or attacks on members of the legislative chambers or ministers (Article 275) – and the safety of the State (Articles 101 *et seq.*), which includes the external and internal safety of the State (knowingly serving the policy or designs of the enemy, Article 118bis).⁸⁰

Provisions on the protection of morality are designed to punish affronts to public decency (Articles 383 to 386 of the Criminal Code), as well as the publicising of debauchery and prostitution (Article 380). They also protect minors from child pornography (Article 383bis) and the publicising of sexual services aimed at minors (Article 383ter, para. 1).

Belgian criminal law is also designed to prevent attacks on the honour and reputation of individuals (particularly defamation and libel, Article 443 *et seq.* of the Criminal Code) and to punish harassment (Article 442bis).

Finally, mention should be made of restrictions on the freedom of expression in relation to hate speech and discriminatory language. For example, the Act of 30 July 1981 on the punishment of certain acts inspired by racism or xenophobia and the Act of 10 May 2007 aimed at combating certain forms of discrimination are designed to punish incitement to discrimination, segregation, hatred and violence.⁸¹

3.2.1.1.3. Civil law provisions

Federal civil law protects the right to privacy (as guaranteed by Article 8 of the European Convention on Human Rights) on the basis of civil liability (Article 1382 of the Civil Code). Anyone wishing to pursue a claim under this provision must therefore provide evidence of the fault of the perpetrator, the damage they have suffered, and of the causal link between the alleged fault and damage.

Image rights, which also apply to video images, are also protected.⁸²

Consumer rights are protected under other federal provisions, such as general rules on advertising (contained in Book VI of the Code of Economic Law on market practices and consumer protection) and gambling regulations.⁸³

⁸⁰ Jongen/Strowel, *op. cit.*, para. 547-549.

⁸¹ See Hoebeke, Stéphane and Mouffe, Bernard, *Le droit de la presse – Presse écrite, presse audiovisuelle, presse électronique*, third edition, 2012, Limal, Anthemis, pp. 425-426, no. 636.

⁸² See, in particular, Article XI.174 of the Code of Economic Law. See also Jongen/Strowel, *op. cit.*, para. 607.

3.2.1.2. Community provisions

Each of the Communities has introduced (generally similar) legislation to regulate the audiovisual sector.

Most important within the context of this report are the “may-carry”⁸⁴ provisions on the audiovisual media services that distributors are allowed to distribute. For example, in the French-speaking Community, as well as linear and non-linear services provided by service providers under the jurisdiction of the French-speaking Community, cable and IPTV distributors are permitted to distribute:

3. *the services of any service provider established in a European Union member state;*
4. *the services of any service provider established outside a European Union member state that uses a satellite up-link situated in a European Union member state or satellite capacity granted by a European Union member state;*
5. *the services of any service provider established in a state party to the European Convention on Transfrontier Television.*⁸⁵

They are also allowed to distribute non-European television services “at the time of broadcast and in their entirety” as long as their providers have “concluded an agreement with the government” and been approved by the latter.⁸⁶

Obligations imposed on service providers mainly concern the professional standards of information disseminated,⁸⁷ the protection of minors⁸⁸ and advertising.⁸⁹

Service providers under the jurisdiction of the French-speaking Community are prohibited from broadcasting:

1. *programmes that are contrary to laws or the general interest, that fail to respect human dignity or equality between women and men, or that contain incitement to discrimination, hatred or violence, in particular on grounds of race, ethnic origin, gender, nationality, religion or philosophical outlook, disability, age or sexual orientation, or that deny, play down, justify or condone the genocide committed by the Nazi regime during the Second World War, or any other form of genocide;*
2. *programmes that are likely to seriously harm the physical, mental or moral development of minors, in particular programmes depicting pornography or gratuitous violence. ...*⁹⁰

⁸³ See, in particular, the Royal Decree of 21 June 2011 fixing the conditions that must be met by games offered on television programmes using series of numbers from the Belgian numbering plan and that form a standalone game programme, *Moniteur belge* of 8 July 2011, p. 40609.

⁸⁴ See, in particular, Articles 84 and 88 of the Audiovisual Media Services Decree of the French-speaking Community of 26 March 2009 (AMS decree).

⁸⁵ Article 84(1) of the AMS decree.

⁸⁶ Article 84(2) of the AMS decree.

⁸⁷ For the French-speaking Community, see Articles 36(1) and (3) and 67(1) and (8) of the AMS decree, and, regarding public service broadcasting, Article 7(2) of the decree of 14 July 1997 on the status of the Belgian radio and television service for the French-speaking Community (RTBF), *Moniteur belge*, 28 August 1997, p. 22018.

⁸⁸ Article 9 of the AMS decree.

⁸⁹ Article 10 *et seq.* of the AMS decree.

These rules, which conform with Article 3 of the Audiovisual Media Services Directive (AVMSD), also cover linear services broadcast abroad to the extent provided for in Article 159(3) of the AMS decree. In other words, the *Conseil supérieur de l'audiovisuel* (Higher Audiovisual Council – CSA) of the French-speaking Community can temporarily suspend a service that manifestly and seriously breaches these rules twice over a 12-month period. The CSA must try to resolve the problem amicably and notify the European Commission of the alleged infringements and of the measures it intends to take, as well as of its decision to impose a temporary suspension.

The CSA can also suspend non-linear services that seriously and gravely infringe the following objectives:

1. public order, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons;
2. the protection of public health;
3. public security, including the safeguarding of national security and defence;
4. the protection of consumers, including investors.

It can only do so if it has “previously asked the competent authority of the member state under whose jurisdiction the media-service provider falls to take appropriate measures to prevent further infringements [of the said] objectives and if the latter did not take such measures, or they were inappropriate.” Here also, the CSA must notify, *inter alia*, the European Commission and the competent authority of the member state under whose jurisdiction the media-service provider falls (Article 159(4) of the AMS decree).

However, as regards “European” linear or non-linear television services “entirely or principally aimed at audiences in the French-speaking Community”, the CSA must send a request (with justificatory grounds) “to the competent authority of the member state in which the media-service provider is established ... inviting it to order the media-service provider concerned to comply” with a certain number of important provisions of the AMS decree concerning programmes and its contribution to audiovisual production (Article 159(5) and (6) of the AMS decree).

The Communities have also taken legislative measures to combat discrimination, including the French-speaking Community’s decree of 12 December 2008 on the fight against certain forms of discrimination.⁹¹

⁹⁰ Article 9 of the AMS decree.

⁹¹ *Moniteur belge*, 13 January 2009, p. 970.

3.2.2. Sanctioning options

The regulatory authorities for the audiovisual sector can take various steps in response to legislative infringements, although they are not permitted to take preventive measures.

In the French-speaking Community, the CSA can, in principle, impose the following sanctions for infringements of audiovisual laws:

1. a warning;
2. the publication – subject to conditions, which it lays down, [imposed on] the offending service or in any other periodical publication, or both, at the offender’s expense – of a notice indicating that the authorisation and control board has found an infringement and describing the infringement;
3. the suspension of the offending channel;
4. the withdrawal of the offending channel;
5. the suspension of [the relevant] licence for a maximum of six months;
6. the suspension of distribution of the offending service;
7. a fine of between EUR 250 and 3% of annual turnover, excluding taxes;
In cases of recidivism within a five-year period, this figure is increased to 5% of annual turnover, excluding taxes.
A fine may be imposed in addition to any of the other sanctions mentioned in this paragraph;
8. the withdrawal of [the relevant] licence.⁹²

The CSA can also “suspend the distribution of a serv “suspend the distribution of a service for up to 15 days” without prejudice to the suspension of service providers established in other European Union member states “if there is a threat of serious damage that would be difficult to repair” (Article 159(2) of the AMS decree).

Since the CSA has no material jurisdiction regarding infringements of other legislative provisions, it must refer them to other authorities or report them to the judicial authorities. A mechanism is in place for questions relating to the professional ethics of journalists, which are dealt with by another body, the *Conseil de déontologie journalistique* (Council of Journalistic Ethics – CDJ). Similarly, there is a separate self-regulatory body for advertising, the *Jury d’éthique publicitaire* (Advertising Standards Board – JEP).

A number of different avenues of recourse are available to individual victims of criminal or audiovisual violations or rights infringements. Depending on the case, the perpetrator’s criminal liability or extra-contractual civil liability may be engaged. Victims also have the right of reply, which they may use “in order to rectify one or more inaccurate facts concerning themselves or respond to one or more facts or statements likely to violate their honour”.⁹³ Depending on the circumstances of the case, they may also complain to the CSA, CDJ or JEP.

⁹² Article 159(1) of the AMS decree.

⁹³ Article 7 of the Act of 23 June 1961 on the right of reply, *Moniteur belge*, 8 July 1961, p. 5573.

3.2.3. Law enforcement against (online) audiovisual media – Practical examples/experience

3.2.3.1. General presentation

Most audiovisual media services distributed via cable networks in the French-speaking Community are provided by companies established in Belgium, another European Union member state, a member state of the European Economic Area or a state party to the European Convention on Transfrontier Television.⁹⁴ A few are based elsewhere (the CSA website mentions Israel, the United Arab Emirates, Morocco, Egypt, Tunisia, Russia, Canada and Kuwait). However, if they “use a satellite up-link situated in a European Union member state or satellite capacity granted by a European Union member state” they fall under the jurisdiction of a European Union member state under the terms of Article 2 of the AVMSD. Only a tiny minority of linear television services currently distributed via cable in Belgium are entirely non-European.

As we have seen above, cable and IPTV distributors are entitled to distribute European services and, as long as their providers have concluded an agreement with and have been approved by the government of the French-speaking Community, non-European services. Such an agreement should enable the government to ensure “that the distribution of these services is subject to respect for provisions concerning the development and promotion of European audiovisual production, in particular that of the French-speaking Community.”⁹⁵ *A priori*, this agreement-based system is therefore designed mainly to ensure a certain level of investment in local production. However, the conclusion of such an agreement could certainly provide an opportunity to lay down rules in order to protect other interests.

3.2.3.2. Practical examples and experience

Infringements of audiovisual laws come to light when a complaint is filed or when the regulatory body acts on its own initiative.⁹⁶ Most investigations conducted by the CSA of the French-speaking Community are instigated after a complaint from viewers or listeners. A body known as the *secrétariat d’instruction* (investigative secretariat) is responsible for opening investigations “whenever a complaint or a suspected infringement or violation ... is brought to the CSA’s attention”.⁹⁷ The investigative secretariat must then decide whether the case is admissible and can either drop it or submit it for investigation. In the latter scenario, it draws up an investigative report,

⁹⁴ European Convention on Transfrontier Television, ETS No. 132.

⁹⁵ Commentary on Article 83 of the decree of 27 February 2003, which became Article 84 of the AMS decree, *Documents du Parlement de la Communauté française* (documents of the parliament of the French-speaking Community), no. 357-1 (2002-2003), p. 36.

⁹⁶ For television services offered by providers under the jurisdiction of the French-speaking Community, infringements may also be discovered during the annual checks carried out by the CSA.

⁹⁷ Article 161(1)(1) of the AMS decree.

which is considered by another body, the *Collège d'autorisation et de contrôle du CSA* (the CSA's authorisation and oversight board), which takes the final decision after informing the infringer of the alleged offence and giving it the opportunity to respond.

In practice, the CSA has never issued any sanctions against non-European audiovisual media services. Nevertheless, it should be noted that non-European linear services are mainly provided via cable in the Brussels-Capital region. They are likely to fall under the territorial jurisdiction of the *Institut belge des services postaux et des télécommunications* (the Belgian Institute of Postal and Telecommunications Services – IBPT), in accordance with the distribution of powers concerning audiovisual matters in Belgium.

In any case, some examples of CSA decisions taken in recent years are described below.

Where European services are concerned, the procedures established under the AVMSD and transposed by Article 159 of the AMS decree are applied.

In 2015, the CSA investigative secretariat received a complaint from a television viewer concerning the volume level of National Geographic programmes (broadcast by a provider based in the Netherlands). The CSA forwarded the complaint to its Dutch counterpart, the CVDM.

A complaint was received in 2016 in relation to a documentary programme broadcast on Arte, the Strasbourg-based European culture television channel, which does not fall under the jurisdiction of either France or Germany.

Controversy surrounds the case of television services provided by RTL Belgium, which fall under the jurisdiction of the Grand Duchy of Luxembourg in so far as their provider is established in that country. However, this interpretation is disputed by the CSA. In July 2017, the CSA announced its intention to stop forwarding complaints concerning its television services to the Luxembourg authority, the ALIA. This symbolic case illustrates, in the CSA's opinion, the difficulty of applying the provisions of Article 4 of the AVMSD. The CSA and others have called for the clarification of the connecting factors provided in the directive.⁹⁸

In 2017, the CSA received and dealt with three complaints concerning Netflix (relating to incitement to hatred and discrimination, and commercial communication). Since Netflix falls under the jurisdiction of the Netherlands, the CSA decided that the complaints fell outside its area of competence on territorial grounds. This case illustrates the fact that there is no real difference between the handling of complaints concerning services distributed via traditional platforms such as cable or satellite on the one hand, and online services on the other. Such complaints are dealt with under a similar procedure. Nevertheless, it can be more difficult, in some cases, to determine which regulatory authority has jurisdiction.

⁹⁸ See <http://www.csa.be/pages/266>, consulted on 10 September 2018.

3.2.3.3. Conclusions

The CSA has dealt with a small number of problems concerning non-European television services.

As regards European television services, questions mainly concern the connecting factors of the AVMSD, the clarification of which, as part of the revision of the directive, is welcomed by the CSA.

3.3. DE - Germany

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3.3.1. Introduction

The regulation of broadcasting in Germany finds its constitutional basis in sentence 2 of Article 5(1) of the Basic Law (GG), which states that “Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed”. Adopting a dynamic interpretation of this constitutional concept of broadcasting, the *Bundesverfassungsgericht* (Federal Constitutional Court) demands the positive regulation of the broadcasting sector, with the long-term sustainability of media diversity a key priority.

The legislative provisions created in order to fulfil this constitutional regulatory remit in relation to German-based private media-service providers classified under German broadcasting law as broadcasters⁹⁹ (i.e. radio and television providers) or telemedia providers¹⁰⁰ are found in the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement – RStV)¹⁰¹ and the *Jugendmedienschutzstaatsvertrag* (Inter-State Agreement on the Protection of Minors in the Media – JMStV).¹⁰² Both of these instruments, adopted by the *Länder* (which are responsible for broadcasting regulation in Germany) also serve to transpose the provisions of the Audiovisual Media Services Directive into German law.

⁹⁹ Broadcasting is defined in sentence 1 of Article 2(1) of the RStV as “a linear information and communication service; it is the organisation and distribution of moving images or sound intended for simultaneous reception by the general public, according to a transmission schedule, using electromagnetic oscillations.”

¹⁰⁰ Under sentence 3 of Article 2(1) of the RStV, telemedia are deemed to be all electronic information and communication services that are not telecommunications services under Article 3 No. 24 of the *Telekommunikationsgesetz* (Telecommunications Act) and which consist entirely of the conveyance of signals across telecommunications networks or telecommunications-supported services under Article 3 No. 25 of the Telecommunications Act, or broadcasting.

¹⁰¹ Available at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Rundfunkstaatsvertrag_RStV.pdf.

¹⁰² Available at https://www.kjm-online.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/JMStV_Genese/Jugendmedienschutz-Staatsvertrag_JMStV_in_der_Fassung_des_19_RA_StV.pdf.

They also apply to the public service broadcasters (i.e. ZDF, Deutschlandradio and the nine state media authorities that form the ARD, but are supplemented by inter-state agreements and laws on the establishment of the said authorities.

Under sentence 1 of Article 1(3) of the RStV, private television broadcasters are subject to the RStV, JMStV and state law provisions if they are established in the Federal Republic of Germany. Under sentence 2 of Article 1(3) of the RStV, a television broadcaster is deemed to be established in the Federal Republic of Germany if it fulfils the criteria laid down in Articles 2, 3 and 4 of the AVMSD; these particularly concern (i) the location of its head office, (ii) the place where editorial decisions are taken, and (iii) the location where a significant part of the workforce involved in the provision of the service operates.

In addition to the RStV, private channels that are only broadcast at a state, regional or local level are subject to state media or state broadcasting laws, depending on whether these laws contain provisions concerning the press.

Under the proposal to replace the RStV with a *Medienstaatsvertrag* (Inter-State Media Agreement),¹⁰³ media platforms and intermediaries will also fall within its scope. Both of these groups of stakeholders (the first of which includes cable network operators and providers of smart TV user interfaces and the second of which includes search engine operators) have a role to play in law enforcement on the Internet as part of the process of service bundling and the aggregation, selection and communication to the public of third-party content.

Additional state regulations for broadcasters whose channels are only distributed at state, regional or local level can be disregarded hereafter. Public service broadcasting, with its internal control mechanism, has also – so far, at least – proved to be robust in overcoming possible cross-border difficulties faced by its supervisory authorities.¹⁰⁴ The following analysis is therefore limited to the private sector of the German media landscape.

Whereas telemedia providers (which, under Article 58(3) RStV, include providers of audiovisual on-demand services) do not have to register or apply for a licence under the terms of sentence 1 of Article 54(1) of the RStV, private broadcasters are, in principle, required by sentence 1 of Article 20(1) of the RStV to obtain a licence to broadcast nationally, in accordance with Article 20a *et seq.* of the RStV. Only radio broadcasters that distribute their programmes exclusively via the Internet do not need a licence under Article 20b of the RStV; however, they are required to notify the relevant state media authority of the service.

For the purposes of this report, our primary interest lies in the legal foundations and supervision of telemedia – particularly audiovisual on-demand services, in relation to which cross-border issues are highly relevant.

¹⁰³ The current draft Inter-State Media Agreement is available at https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Medienstaatsvertrag_Online_JulAug2018.pdf.

¹⁰⁴ The gradual blurring of boundaries for Deutsche Welle (Germany's foreign public broadcasting service, whose content is increasingly available in Germany) as well as state authorities' growing involvement in the field of new media information channels do not give rise to cross-border conflicts.

Nevertheless, the television and radio sectors are themselves not totally immune to cross-border issues from either a content-related or a technical point of view. It is true that the distribution of broadcasting via digital terrestrial and cable networks is geographically limited to German territory: from an infrastructure point of view, the lack of cross-border spectrum planning or network configuration has, to date at least, hampered the creation, maintenance and further development of transnational communication spaces in border regions. On the other hand, the digitisation of terrestrial and cable services has made it easier to include foreign services on the corresponding technical platforms. They tend to be included as standard on satellite platforms and in IP radio and television services. In content terms, one particular problem with cross-border transmission is the inclusion of advertising windows aimed at a third country – especially on the channels of the major private broadcasting groups RTL and ProSiebenSat.1.

The public service broadcasters are supervised by bodies within the relevant state media authority, which include representatives from relevant groups in society; state and political party influence is limited under a Federal Constitutional Court ruling.

Private broadcasters that operate at the national level are supervised by (a) the *Kommission für Zulassung und Aufsicht* (Commission on Licensing and Supervision – ZAK) regarding the implementation of general legal principles (Articles 3, 10 and 41 of the RStV) and advertising, sponsorship and teleshopping rules (Articles 7, 8 and 44-45a of the RStV) under the terms of Article 36(2)(6) of the RStV, and (b) the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media – KJM) regarding the protection of human dignity and minors (Articles 4-10 of the JMStV) under the terms of Articles 14 and 16 of the JMStV (without prejudice to the powers of recognised voluntary self-monitoring bodies). The KJM is responsible for monitoring compliance with the JMStV and enforcing the relevant laws, including with regard to other private broadcasting services covering more than one German state and all telemedia services.

In terms of their law-enforcement activities, the ZAK and the KJM act, under sentence 2 of Article 35(2) of the RStV, as organs of the competent state media authority. Under sentence 2 of Article 36(1) of the RStV, in respect of cases dealt with by the ZAK, the competent state media authority is the one that issued the licence to the provider concerned. The same applies to cases dealt with by the KJM as part of its supervision of broadcasting under sentence 1 of Article 20(6) of the JMStV. Under the same provision, in relation to the KJM's supervision of telemedia, the relevant state media authority is the one from the state in which the telemedia provider has its head office or domicile or, in the absence of both of these, its permanent residence. If no jurisdiction can be established under this rule (as is the case with the KJM's supervision of foreign broadcasters and telemedia providers), Article 20(6) sentence 2 JMStV states that the competent authority is the one in whose area of competence the reason for the official action arose.

Under sentence 1 of Article 17(1) of the JMStV, the KJM acts *ex officio*; if a state media authority or a supreme state youth authority forwards to it a case for examination, it must commence an examination procedure. The ZAK, on the other hand, only acts once a supervisory procedure has been instigated by the competent state media authority; however, under sentence 1 of Article 38(1) of the RStV, any state media authority can

notify the competent state media authority that the provision of a national service is in violation of the RStV. The competent state media authority is then obliged to deal with the notification through the ZAK, pursuant to sentence 2 of Article 38(1) of the RStV.¹⁰⁵

The supervision of state, regional and local broadcasters and of telemedia services outside the JMStV's enforcement remit is carried out by the organ of the state media authority stipulated in the relevant state law. For broadcasters, this is often its *Medienrat* (Media Council), which is made up of representatives of relevant social groups, while the authority's executive body tends to fulfil this role in respect of telemedia providers.

The state media authorities are regularly notified of infringements through complaints from third parties, which are submitted in particular via the complaints portal www.programmbeschwerde.de; they are also regularly subject to random service checks (including as part of annual, nationally agreed assessment procedures). In the field of the protection of minors and human dignity on the Internet, the state media authorities are supported in their supervisory role, under Article 18 of the JMStV, by the joint organisation of all German states for the protection of minors ("jugendschutz.net"), established by the supreme state youth authorities and organisationally linked to the KJM.

3.3.2. The distinction between broadcasting and telemedia within the context of law enforcement on the Internet

At the request of their respective providers, the media authorities have already awarded broadcasting licences to numerous Internet television streaming services. In 2017, however, two cases attracted particular public attention in Germany after objections were lodged on the grounds of lack of authorisation:

- In January 2017, the ZAK objected to the DKB's streaming of the Handball World Championship because it thought this should have been classified as broadcasting and had not received the appropriate licence.
- In March 2017, the ZAK complained that the PietSmietTV Internet service should be classified as broadcasting and should therefore apply for a licence. This was a streaming channel that showed mainly so-called "Let's Plays" (videos of people playing computer games) 24 hours a day, seven days a week.

In connection with these objections, the ZAK stressed that not every live streaming service required a broadcasting licence. In particular, it said that the filming of live events

¹⁰⁵ However, under Article 7(1)(2) of the *Satzung über die Zugangsfreiheit zu digitalen Diensten und zur Plattformregulierung gemäß § 53 Rundfunkstaatsvertrag* (Ordinance on free access to digital services and platform regulation, adopted under the terms of Article 53 of the Inter-State Broadcasting Agreement), available at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/Zugangs-und_Plattformsatzung.pdf,

the ZAK can examine *ex officio* whether a platform operator has infringed the RStV's rules on platforms.

without any editorial input did not constitute broadcasting. Live streams that were sporadic, irregular and/or event-related were also not considered as broadcasting.

The concept of broadcasting is technology-neutral – i.e. the transmission method used for the broadcast is irrelevant. It can therefore include online audiovisual services. However, the ZAK only considers audiovisual moving images to be broadcasting if they:

- are linear (i.e. distributed live);
- can be watched by more than 500 viewers/users at a time;
- are editorially designed; and
- are distributed “according to a transmission schedule” on a regular and repeated basis.

A provider can always design an audiovisual media service in such a way that it does not cross the broadcasting threshold. This removes the requirement for a licence and is true of most YouTube channels, where content is only available on demand (i.e. it is not linear).

There is no “transmission schedule” if a live stream is only occasional, sporadic, irregular and/or event-related.¹⁰⁶

3.3.3. Law enforcement instruments – possible sanctions

If the competent state media authority finds, through the ZAK or the KJM, that a private broadcaster has violated the provisions of the RStV or the JMStV, it must take the measures required under sentence 1 of Article 38(2) of the RStV and Article 20(1) of the JMStV. Sentence 2 of Article 38(2) of the RStV states that possible measures include, in particular, the issuance of a warning, prohibition, withdrawal and the revocation of the relevant licence. Under Article 38(4)(1)(b) of the RStV, a broadcaster’s licence may be revoked if it has repeatedly and seriously violated its obligations under the RStV or the JMStV and has not complied with the instructions of the competent state media authority within the period specified by it.

Sentence 2 of Article 59(3) of the RStV (in connection with Article 20(4) of the JMStV) states that the competent state media authority can, in particular, prohibit services and order that they be blocked if a private telemedia provider infringes certain rules applicable to telemedia – in particular its imprint obligations under Article 55(1) of the RStV, the data protection provisions of Article 57(1) of the RStV, the advertising and sponsorship rules contained in Article 58 of the RStV and the provisions of the JMStV. Under sentence 3 of Article 59(3) of the RStV, services must not be prohibited if such a measure would be disproportionate to the relevance of the service to the provider and to

¹⁰⁶ See ZAK, *Rundfunk oder nicht? Erläuterungen zur PietSmiet TV-Entscheidung der ZAK* (Broadcasting or not? An explanation of the ZAK’s PietSmiet TV decision), 2017, available at <https://www.die-medienanstalten.de/atrium/rundfunk-oder-nicht-erlaeuterungen-zur-pietsmiet-tv-entscheidung-der-zak/>.

the general public. Sentence 4 of Article 59(3) of the RStV states that services may only be prohibited if the objective cannot be achieved by any other means. In so far as the objective can be achieved in this manner, the prohibition must be restricted to specific types and parts of services or must be limited in duration (sentence 5 of Article 59(3) of the RStV). Under sentence 6 of Article 59(3) of the RStV, journalistic edited services that reproduce completely or partially the texts or visual content of periodical print media may be blocked only pursuant to the provisions of sentence 2 of Article 97(5) and Article 98 of the *Strafprozessordnung* (Code of Criminal Procedure) – i.e. such blocking must be ordered by a court.

Furthermore, regarding measures taken against telemedia providers, the rules on limiting the liability of providers (in particular access and hosting providers) must be respected, pursuant to Articles 7 to 10 of the *Telemediengesetz* (Telemedia Act), which transpose the EU e-Commerce Directive.¹⁰⁷

Under the terms of Article 49 of the RStV and Article 24 of the JMStV, the competent state media authority can open administrative-offence proceedings against private broadcasters or telemedia providers that infringe the RStV or the JMStV. Such offences may be penalised by a fine of up to EUR 500,000.

In the case of administrative-law infringements and legal enforcement using instruments of administrative-offences law, the measures taken by a state media authority can be subject to judicial control – in the former case by the competent administrative courts and, where a fine is imposed, by the ordinary courts. In order to ensure legal unity throughout Germany within the context of law enforcement by the federal group of supervisory authorities, Article 48 of the RStV and Article 22 of the JMStV state that in judicial proceedings an appeal to the Federal Administrative Court may also be lodged on the grounds that the judgment being challenged is based on a violation of the provisions of the inter-state agreement.

Other law enforcement tools include criminal law instruments (not least in relation to the denial of Nazi crimes)¹⁰⁸ and, in the sense of decentralised control, civil-law instruments (in particular with regard to the safeguarding of the general personality rights of a person who is the subject of a media article) or fair competition.

3.3.4. Barriers to law enforcement against foreign providers

German authorities such as the state media authorities cannot simply ask for administrative or legal assistance abroad whenever they like. They always need legal grounds for doing so. Most *Bundesländer* have no explicit regulations on law-enforcement assistance; in these *Länder*, administrative procedure laws and Article 35(1) GG serve as

¹⁰⁷ See section 2.4.2.

¹⁰⁸ See recent Federal Constitutional Court decisions of 22 June 2018, 1 BvR 2083/15 (http://www.bverfg.de/e/rk20180622_1bvr208315.html) and 1 BvR 673/18 (http://www.bverfg.de/e/rk20180622_1bvr067318.html).

the legal basis for such assistance. If there are no regulations contained in international agreements – as is the case with the subject-matter of the JMStV – then administrative-assistance obligations and rights follow the principles of international courtesy. However, no clear standard has yet emerged. A foreign country that is asked for assistance can certainly provide administrative, legal and law-enforcement assistance if it wants to – even if legal assistance is not required under international agreements or customary rules. Whether it provides such help on a voluntary basis is entirely at its own discretion.

The Federal Republic of Germany only provides administrative assistance under the principle of international courtesy if a reciprocal arrangement is guaranteed. All other countries in the world follow the same approach, although there is so far no evidence of mutual enforcement being actively practised in relation to matters of public law.

As for whether the state media authorities, from a constitutional point of view, are entitled to enforce the JMStV against foreign providers as part of the federal government's foreign affairs activities or the regulatory competence of the *Länder* in relation to media regulation, the special legal status of the state media authorities (as partial holders of fundamental rights) should be taken into account. In this connection, it is also significant that, in the modern era of digitisation and globalisation, the constitutional separation of state and broadcasting supervision applies not only internally in the Federal Republic of Germany, but also in matters with a foreign dimension.

Even if enforcement of the JMStV against foreign providers is not covered by foreign relations in the sense of Article 32(1) of the GG, a corresponding enforcement measure can still, in individual cases, conflict with the foreign policy interests of the country as a whole. In such cases, it is conceivable that the power, which exists in principle (or possibly – in the light of the duty to meet protection obligations the obligation) to undertake cross-border enforcement measures is limited by the principle of federal allegiance. When undertaking enforcement measures against foreign providers on the basis of the JMStV, the state media authorities must therefore take into account whether they are likely to have a significant impact on foreign policy; federal allegiance therefore acts as a barrier to whether and how enforcement powers are exercised.

3.3.5. Enforcing the law against online media

3.3.5.1. The Network Enforcement Act

In order to enable social network providers to deal more quickly and more comprehensively with complaints (especially from users) about hate crime and other illegal content, the 2017 Network Enforcement Act (*Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken – NetzDG*)¹⁰⁹ introduced compliance rules for

¹⁰⁹ https://www.bmfv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl_NetzDG.pdf?__blob=publicationFile&v=2. The compatibility of the NetzDG with the system of competence and fundamental rights set out in the Basic Law is currently the subject of several Constitutional Court procedures.

social networks that entered into force on 1 January 2018. Under sentence 1 of Article 1(1) of the NetzDG, social network operators are telemedia-service providers that, for profit-making purposes, operate Internet platforms that are designed to enable users to share any content with other users or to make such content available to the public. Examples of the latter include Google, Facebook, YouTube and Twitter.

Social network providers are required to produce half-yearly reports on the handling of hate crime and other unlawful content, and to manage complaints effectively. However, they are exempt from the obligations stipulated in Articles 2 and 3 of the NetzDG if their social network has fewer than two million registered users in the Federal Republic of Germany.

Article 5 of the NetzDG requires providers of social networks to appoint a representative *ad litem* in Germany, unless they are platforms (in the sense of sentences 2 and 3 of Article 1(1) of the NetzDG) offering journalistic or editorial content, responsibility for which lies with the service provider itself, or platforms designed to enable the individual communication or the dissemination of specific content.

Under Article 4 of the NetzDG, violations of these provisions may be sanctioned by fines against the company and against those with supervisory responsibilities. Victims of personality-right infringements on the Internet can, through a court order, obtain the offender's subscriber data from the service provider.

Initial reports on deleted content in respect of the period from 1 January until 30 June 2018 are now available.¹¹⁰ They show a very clear disparity between the number of complaints received by different networks (which may be a result of varying degrees of user-friendliness in terms of the accessibility and structure of the respective complaint forms):

Social network	Reported content	Deleted content	Deletion quota
Facebook	1,704	362	21.24%
Google	2,769	1,277	46.12%
Twitter	264,818	28,645	10.82%
YouTube	214,827	58,297	27.14%

¹¹⁰ See

- in respect of Facebook:

https://fbnewsroomus.files.wordpress.com/2018/07/facebook_netzdg_juli_2018_deutsch-1.pdf

- in respect of Google: <https://transparencyreport.google.com/netzdg/googleplus>

- in respect of Twitter: <https://cdn.cms-twdigitalassets.com/content/dam/transparency-twitter/data/download-netzdg-report/netzdg-jan-jun-2018.pdf>

- in respect of YouTube: <https://transparencyreport.google.com/netzdg/youtube>.

3.3.5.2. Other activities at Bundesland level – a selection

The system of deleting or hiding infringing content on online platforms – commonly used by many platform operators and media companies – has one significant drawback: perpetrators are unlikely to face judicial consequences for posting such content, since current law is not enforced online as consistently as it should be.

A coordinated plan to combat hate speech on the Internet in order to counter the increasing brutalisation of network communication was the objective of the *Verfolgen statt nur Löschen – Rechtsdurchsetzung im Internet* (“Prosecute instead of just deleting – law enforcement on the Internet”) initiative that was launched in North Rhine-Westphalia at the start of 2017 by a working group comprising criminal prosecution authorities, media companies and media regulators.¹¹¹ The initiative follows a general preventive approach: by ensuring not only that illegal comments are deleted but that those responsible are consistently held accountable (even online) it is designed to be educational and to heighten users’ sense of wrongdoing.¹¹²

In Saarland, an amendment to the *Saarländische Mediengesetz* (Saarland Media Act – SMG)¹¹³ designed to foster effective law enforcement extended the obligation to appoint a representative *ad litem* in Germany: providers of social networks aimed at users in Saarland and with at least 50,000 registered users in Saarland must appoint a representative *ad litem* in Germany and publish the relevant details in an easily recognisable and directly accessible manner. Documents can be served on this representative in procedures stipulated by the SMG, RStV or JMStV relating to the dissemination of illegal content.

¹¹¹ The *Verfolgen statt nur Löschen – Rechtsdurchsetzung im Internet* (Prosecute instead of just deleting – law enforcement on the Internet) initiative is led by the *Landesmedienanstalt in Nordrhein-Westfalen* (North Rhine-Westphalia state media authority – LfM), the *Zentral- und Ansprechstelle Cybercrime der Justiz NRW* (North Rhine-Westphalia cybercrime office – ZAC NRW), the *Landeskriminalamt* (North Rhine-Westphalia criminal investigation department – LKA NRW), the *Polizeipräsidium Köln* (Cologne police headquarters) and the media companies *Rheinische Post* and *Mediengruppe RTL Deutschland*. The participants place an emphasis on real points of contact, short lines of communication and training in order to guarantee effective criminal prosecution, including on the Internet.

¹¹² Since 1 February 2018, media companies and the North Rhine-Westphalia state media authority have reported more than 130 hate posts to the ZAC NRW. The majority of these cases concern online comments suspected of constituting the offence of incitement of the people. The ZAC NRW has launched investigations in these cases. See <https://www.medienanstalt-nrw.de/service/pressemitteilungen/pressemitteilungen-2018/2018/april/verfolgen-statt-nur-loeschen-zieht-erste-bilanz.html>.

¹¹³ Available at http://sl.juris.de/cgi-bin/landesrecht.py?d=http://sl.juris.de/sl/gesamt/MedienG_SL.htm#MedienG_SL_rahmen.

3.4. HU - Hungary

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The Hungarian media market can be seen as a “loser” when judged by the “country of origin” principle. Only eight of the more than 100 Hungarian-language television channels are established in Hungary; the others are broadcasted from other European States¹¹⁴ The legal environment has motivated the emigration of many broadcasters since 2004, when Hungary joined the EU.¹¹⁵ New media laws enacted in 2010 could not reverse this tendency. The two national commercial television stations have each launched channels abroad focusing on entertainment content over the past eight years.¹¹⁶

3.4.1. Regulatory framework

The legal conditions for publishing media content and operating media service providers were established by two media laws enacted in 2010. Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content (Smtv)¹¹⁷ contains all the fundamental regulations regarding media content and provisions regulating the legal status of journalists. Act CLXXXV of 2010 on Media Services and on the Mass Media (Mttv)¹¹⁸ includes a regulation governing the formation of the media system’s structure. This legal framework has been strongly criticised by several international organisations.¹¹⁹ The latest critical evaluation of the laws was published by the Venice Commission in 2015,¹²⁰ which also covered enforcement issues.

¹¹⁴ The list of the national television channels under Hungarian jurisdiction see http://nmhh.hu/dokumentum/163974/bejelentes_alapjan_mukodo_orzagos_linearis_audiovizualis_mediaszolgalaltatasok.pdf.

¹¹⁵ Gábor Polyák, László Gergely Szőke: The Country of Origin Principle and Regulatory Régimes for Media Competition in East Central Europe, *Central European Journal of Communication* (2009), 83-99.

¹¹⁶ The cable channels of RTL are settled in Luxembourg, the ones of TV2 in Romania.

¹¹⁷ Available (English) at http://nmhh.hu/dokumentum/162262/smtv_110803_en_final.pdf.

¹¹⁸ Available (English) at http://hunmedialaw.org/dokumentum/153/Mttv_110803_EN_final.pdf.

¹¹⁹ For a summary of such criticism see Mertek Media Monitor, Forced Maneuver: Proposals and Expectations toward the Amendment of the Media Act (2012) <http://mertek.eu/en/article/forced-maneuver-proposals-and-expectations-toward-the-amendment-of-the-media-act>. The most comprehensive analysis is the expert opinion of the European Council, which essentially recommends a revision of the media laws across the board. See: Eve Salomon/ Joan Barata, Expertise by Council of Europe. Experts on Hungarian Media Legislation: Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content and Act CLXXXV of 2010 on Media Services and Mass Media (2012) available at http://www.mediajogfigyelo.hu/uploads/files/0_Council_of_Europe_Hungary_Media_Acts_Analysis_-_Final_14-05-2012.pdf. See further Karol Jakubowicz, Analysis and assessment of a package of Hungarian legislation and draft legislation on media and telecommunications, commissioned by the Office of the OSCE Representative on Freedom of Media, Warsaw, 2010, available at <http://www.osce.org/fom/71218?download=true>.

¹²⁰ European Commission for Democracy Through Law (2015): Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, Strasbourg.

It is not only on-demand broadcasting (audiovisual and radio) media services that are the subjects of the 2010 media laws, but also the print and online press. Under the Mttv, press products are defined as individual issues of newspapers and other periodicals, as well as online journals and news portals, which are provided as an economic service under the editorial responsibility of a natural or legal person, and whose main purpose is to provide content containing text and/or images (in order to inform, entertain or educate) to the general public in printed format or via electronic communications networks.¹²¹ However, the law does not define the notion of periodicals, online newspapers or news portals. Online broadcasting services are not defined separately; rather, they fall within the definition of audiovisual media services – that is to say, they feature programmes containing moving images and still images (with or without sound). Media services are economic services aimed at informing, educating or entertaining the general public which are operated by electronic networks either (i) commercially or (ii) on a regular basis under economic exposure with a view to making a profit, and which are under the editorial responsibility of a media service provider whose main purpose is the provision of programmes.¹²²

By defining in this way the scope of the Mttv, the powers and supervisory responsibilities of the Hungarian regulatory body (the Media Council of the National Media and Infocommunications Authority, or NMHH) (hereinafter referred to as the “Media Council”) were also extended to encompass print and online press products. Consequently, the sanctions provided by the Mttv are also applicable to online services, even if they do not encompass any audiovisual content. Though the Media Council is part of the NMHH, it enjoys its own authority to render decisions and has an apparatus that is in certain ways distinct from that of the NMHH. The NMHH is a “integrated/convergent authority”, which handles oversight of the telecommunications and media markets within a single body. The Mttv also authorises the Office (the administrative apparatus) of the NMHH (“the Office”) to make its own decisions in some cases that concern the media service providers.

The supervision of the media-law regulation¹²³ of both printed and online media by one media authority is not, in general, considered to be unconstitutional by the Constitutional Court, which was asked in the course of a procedure to review the 2010 media laws. The Constitutional Court did not “categorically exclude the possibility of a regulation which is content-based or might prompt State action in the case of printed press media”, and it stated that “retrospective, systematic and *ex-officio* control and the possibility of sanctioning constitute, without doubt, restrictions on the freedom of the press, but the mere possibility of sanctioning – [provided that] efficient and substantive judiciary oversight is guaranteed – cannot be considered unconstitutional”.¹²⁴ As a consequence of the Constitutional Court’s decision, the provisions ensuring respect for constitutional order, the prohibition on presenting vulnerable groups in a deleterious

¹²¹ Act CLXXXV of 2010 on Media Services and on the Mass Media Section 203 Point 60.

¹²² Act CLXXXV of 2010 on Media Services and on the Mass Media Section 203 Points 1a and 40.

¹²³ Besides Mttv, there are important rules regarding the media content in the Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content.

¹²⁴ Constitutional Court Resolution No. 165/2011. (XII. 20.) AB,
<https://net.jogtar.hu/jogszabaly?docid=A11H0165.AB&txtreferer=A1000185.TV>.

manner and the ban on incitement to hatred continues to be applicable to all types of media products and services.

As regards the geographical scope of the media laws, the AVMSD's "country of origin" principle naturally also applies in Hungary. There is a separate chapter in the Mttv on the Media Council's proceedings that could be initiated against media content providers established in other EU member states. Another chapter regulates proceedings in respect of cases involving the circumvention of the national framework of rules by abusively using the country-of-origin principle.

However, one of the objections of the European Commission against the 2010 media laws¹²⁵ concerned the lack of harmonisation of the country-of-origin principle: The Commission found that the fact that the Mttv reserved the right to fine foreign media providers was not compatible with EU principles. The original text of the Mttv provided for the possibility of a provisional derogation from the obligation to ensure freedom of reception and not to restrict the retransmission of AVMS from other member states in the event that the Media Council considered that they infringed the rules on the protection of minors and incitement to hatred, and provided that the measures taken were assessed by the Commission and ruled compatible with EU law (in particular the principle of proportionality). With regard to this rule, the Commission pointed out: "Taking into account the fact that such measures constitute a derogation to the country-of-origin principle and that they would apply to cases where the media service provider would have been considered by the relevant authorities of the Member State where they are established as not infringing the rules on protection of minors and incitement to hatred, the Commission services have doubts as to whether the imposition of fines, which seems to be envisaged by Articles 176 and 177 [Mttv.], in any circumstances, can be considered as a proportionate measure".¹²⁶

The Hungarian Government did not dispute this observation and amended the wording of the Mttv. This was the first time that the Commission had had to interpret the AVMS Directive concerning the country-of-origin principle, and it also demonstrated that the text of the AVMS Directive does not clearly specify what kind of "measures" can be applied within the framework of Article 3(2) in respect of a provisional derogation from the principle.

3.4.2. Sanctioning options

As mentioned above, the scope of Hungarian media regulation and the supervisory power of the Media Council extends to online media services. Oversight and sanctioning powers are shared between the the Media Council and the Office of the National Media and

¹²⁵ The letter, written by EU Commissioner Neelie Kroes, was published here: http://mediajogfigyelo.hu/uploads/files/1037_Neelie_Kroesmagyarul.pdf. In English see here: <http://nol.hu/media/file/attach/61/10/00/000001061-1855.pdf>.

¹²⁶ Letter written by EU Commissioner Neelie Kroes, page 2.

Infocommunications Authority.¹²⁷ The Mttv assigns responsibility for certain types of less serious infringements to the Office, while in other cases the Media Council is entitled to proceed against the provider in question. If the Office rules against a client, then the provider has the right to appeal against that decision to the Media Council.

The sanctioning system is complex and differentiated according to the type of media service concerned and the seriousness of the breaches in question. The possible sanctions applicable by the Media Council are as follows:¹²⁸

- establishing that an infringement has taken place and issuing a warning, ordering the infringer to discontinue the unlawful conduct and to refrain from any further infringement in the future (in cases when the infringement is considered insignificant and no recurrence has occurred or is to be expected);
- excluding the infringer from participating in tender procedures related to providing support for media providers' activity or the production of programmes for a fixed period of time;
- imposing a fine on the infringer, subject to limits, which vary according to the kind of media service concerned (for example, in an infringement involving online press products, a fine is provided of up to twenty-five million forints (HUF);
- ordering the provider concerned to publish a notice or the whole ruling of the Media Council on its website, in a press product or during a designated programme in the manner and for the period of time specified in the ruling;
- suspending for a specified period of time the exercise of the right (held on the basis of possession of the relevant licence) to provide broadcast-media services;
- removing the broadcaster from the (retransmission) register of cable and satellite broadcasters (a media service struck from the register may not be made accessible to the public once it has been deleted)
- Terminating the infringer's public contract for the provision of terrestrial broadcasting services (in the event of repeated grave infringements).

Publishers of print and online press products may be subject to the imposition of fines and the publishing of an announcement about the infringement and decision in question. Other sanctions are applicable only to linear and on-demand audiovisual media services.

The Mttv defines when an infringement must be deemed to constitute a repeat instance. An infringement is deemed to have been repeated when the infringer engages in unlawful conduct on the same legal basis repeatedly within a period of 365 days (not including insignificant offences).¹²⁹ It lists some principles that are to be considered when applying sanctions. For example, the Media Council and the Office must act in line with the principles of equal treatment, graduality and proportionality, and the legal consequences of an imposed sanction must be proportionate to the gravity and rate of reoccurrence of the infringement.

¹²⁷ Act CLXXXV of 2010 on Media Services and on the Mass Media (Mttv.) Sections 184.

¹²⁸ Act CLXXXV of 2010 on Media Services and on the Mass Media Sections 186-187.

¹²⁹ In cases of the infringement the rules regarding the European and Hungarian works, the infringement is repeated when it was committed repeatedly within a period of three years.

The Mttv also gives the Media Council the power to take sanctioning options against the executive officer of a media company as well as against intermediaries. The executive officer can be sanctioned in the case of a repeated infringement – namely by imposing a fine of up to HUF two million. Furthermore, the Media Council is entitled to order so-called “intermediary service providers” to suspend or terminate the distribution of online press products or the broadcasting of media services.¹³⁰ The types of intermediary service providers covered by the law are the same as those addressed by the e-Commerce Directive.¹³¹ Such providers offer only conduit and network access, and caching and hosting services (including – under Hungary’s Act on the implementation of the e-Commerce Directive¹³² – search engines). All kinds of intermediaries can be obliged to suspend the distribution of online press products, but only in the event that the publisher fails to fulfil the terms of the final and executable resolution of the Media Council. Until now, no resolution has been found in the online database¹³³ of the NMHH that addresses the application of these rules.

The Media Council and the Office are also equipped with broad powers to ascertain the relevant facts of each case.¹³⁴ For example, they are entitled to inspect, examine and make copies and extracts of any and all media containing data, documents and written files – even if they contain business secrets – relating to media services. Such powers encompass the authority to order not only the provider and the other parties of the procedure but any third person to make a statement and to supply data and information. However, nobody has to reveal information about communications between a legal representative and his client, or information that would expose the identity of any person from whom journalists have received information relating to the media content in question.

The Mttv has established a specific co-regulation system as an alternative to official oversight. Stipulating an exception for television and radio media services, the law made it possible for media operators to implement rules concerning media content through self-regulatory bodies that hold exclusive legal power.¹³⁵ Under the Mttv, the Media Council can conclude an “administrative agreement” with these self-regulatory bodies. The administrative agreement must contain a professional code of conduct devised by the self-regulatory body. On the basis of the administrative agreement, the self-regulatory body deals on its own with cases that subject to the code of conduct. In doing so, its involvement takes priority over the activities of the Media Council under its own authority. However, the Media Council is obliged to review all decisions taken by the self-regulatory body, and the Media Council also acts as a forum for legal remedies if providers are not in agreement with measures taken by the self-regulatory body. Since 2011, four organisations have become part of this co-regulation system: as the Hungarian

¹³⁰ Act CLXXXV of 2010 on Media Services and on the Mass Media Sections 188.

¹³¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

¹³² Act CVIII of 2001 on Electronic Commerce and on Information Society Services.

¹³³ http://nmhh.hu/tart/kereses?HNDTYPE=SEARCH&name=doc&fld_compound=&fld_compound_target=allfields.

¹³⁴ Act CLXXXV of 2010 on Media Services and on the Mass Media Sections 155.

¹³⁵ Act CLXXXV of 2010 on Media Services and on the Mass Media Sections 190-202/A.

Publisher's Association, the Association of Hungarian Content Providers, the Association of Hungarian Electronic Broadcasters and the Advertising Self-Regulatory Board.¹³⁶

When assessing both Hungarian media laws, the Venice Commission voiced serious criticism of the sanctioning system and the institutional framework of law enforcement: "There is no doubt that the maximum amounts of fines provided by the Media Act are extremely high, even taking into account the size and the economic condition of the potential offender. And the 'chilling effect' is greater in a situation where all members of the Media Council, irrespective of their qualifications or otherwise, have been appointed to this body at a time when the ruling coalition had a super-majority in the Parliament and are therefore perceived, rightly or wrongly, as too close for comfort with the current Government".¹³⁷ According to the Venice Commission, the sanctioning and investigating powers (as well as the structural weaknesses) of the Media Council establish a legal environment that can be easily abused.

3.4.3. Law enforcement against online media

Neither the practice of the Media Council nor the co-regulation system focuses on online services. The Media Council has adopted two resolutions concerning articles published in a newspaper and made available online. In both cases, Media Council examined print and online texts that had committed incitement to hatred in respect of certain social groups.¹³⁸ The Media Council fined the publisher in both cases, pointing out in the wording of its decision that the fine covered both the print and online versions of the offending articles. Nevertheless, the greater part of each fine was imposed in respect of the online content (as opposed to the print content). In particular, the Media Council noted the continuity of the infringement committed by the online content. However, one of the sanctioned articles continues to be available online, without any reference to their unlawful nature.¹³⁹

There have been no other resolutions regarding online content issued by the Media Council so far. According to the website¹⁴⁰ of the relevant co-regulatory body, no procedure has been initiated against online content within the framework of the co-regulation regime.

The Media Council is cooperating with Central European media authorities. The Central European Regulatory Forum (CERF) is an organisation of media regulatory bodies from the Czech Republic (Council for Radio and Television Broadcasting), Hungary (Media Council of the National Media and Infocommunications Authority), Poland (National Broadcasting Council), Romania (National Audiovisual Council), Serbia (Republic

¹³⁶ See all codes: <http://mediajogfigyelo.hu/index.php?do=a&id=1575>. Further see <http://tarsszabalyozas.hu/>.

¹³⁷ European Commission for Democracy Through Law (2015): Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, Strasburg, 11.

¹³⁸ See Resolution Nr. 802/2013. (V. 8.) and Nr. 551/2016. (V. 17.) of the Media Council.

¹³⁹ See <http://magyarhirlap.hu/cikk/40438/9066>.

¹⁴⁰ <http://tarsszabalyozas.hu/category/beszamolo/>.

Broadcasting Agency) and Slovakia (Council for Retransmission of the Slovak Republic). It aims to enhance cooperation between the regulatory authorities of Central Europe, including in respect of law-enforcement action taken against media providers established in countries that are not represented in the CERF. Furthermore, the Media Council also cooperates with other European regulatory bodies. An important partner is the supervisory authority of Luxembourg (*Autorité Luxembourgeoise Indépendante de l'Audiovisuel*), because the Hungarian cable channels of Germany's RTL Group are based in Luxembourg.

To sum up, the legal framework of law enforcement is complex and has been criticised because of its chilling effect. However, the application of these rules is understated. The real power of the Hungarian supervisory authority is strictly limited by the fact that the overwhelming majority of Hungarian-language media services are operated in other EU member states.

3.5. IT - Italy

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3.5.1. Regulatory Framework

The Italian regulatory framework, in terms of on-demand and online media services, is obviously shaped by the AVMSD provisions. Nonetheless, minimum harmonisation has afforded scope for the development of some peculiar characteristics.

In this contribution, we will look at the “classic” implementation of the Directive into national law, including two particularly relevant regulatory initiatives instigated by the *Autorità per le Garanzie nelle Comunicazioni* (AGCOM – the Italian national regulatory authority) on the basis of the existing legal and regulatory tools. Those two initiatives are (i) the Regulation on copyright protection online and (ii) the creation of the Technical Roundtable on Pluralism on Online Platforms.

The AVMSD was implemented into the Italian legal framework by Legislative Decree no. 44/2010, which amended and updated the previous Legislative Decree no. 177/2005 (the so-called “AVMS Code”). The Decree, as far as the definitions of the relevant legal terms are concerned, is mainly a literal transposition of the AVMSD provisions; on the other hand, during the transposition process of the AVMSD into Italian law, an Article 32(a) was inserted, which stipulates that AVMS providers must respect copyright and associated rights and which gives a mandate to AGCOM to adopt a regulation in this regard.

¹⁴¹ The opinions expressed in this article are the author's own and do not necessarily represent the position of the *Autorità per le garanzie nelle comunicazioni*.

However, paragraph 1(a) of Article 21 and Article 22(a) give a mandate to AGCOM to adopt two regulations: one concerning the provision of non-linear services (deliberation no. 607/10/CONS¹⁴²) and the second one on the provision of linear AVMS conveyed through electronic communications networks other than coaxial cable, satellite and terrestrial platforms¹⁴³ (deliberation no. 606/10/CONS¹⁴⁴).

The latter regulation's scope is limited to linear services intended for the general public (such as IPTV and web-TV); it prescribes a weekly schedule of at least 24 hours and does not encompass cable television services in limited areas, such as CCTV or audiovisual emissions in railway stations, metros, airports, or business premises.

The Regulation on on-demand services is limited to catalogues accessible to the general public, excluding "catch-up TV" or storage services regarding content already broadcast on a linear basis, AGCOM considers to be ancillary to linear services. No rules are laid down with reference to on-demand radio.

Both regulations are divided into three parts, which respectively set out (i) the rules regarding authorisations (for VOD) and licensing (for IPTV, web-TV and such), (ii) the rules governing respect for fundamental rights and (iii) the principles of the AVMS system (together with transitory provisions).

Focusing on the second part (which is more relevant for the purposes of this contribution) a licensed/authorised subject must – under the regulations – respect the obligation to keep the recording of distributed content on the respective catalogue (if non-linear) or schedule (if linear) for three months following the date on which they were made available. The registration must enable the unequivocal identification of information concerning the date and the time of the distribution of the content in question. The providers must respect copyright, the rules on commercial communications and the need to protect minors and to promote European works (where applicable).

¹⁴² AGCOM Deliberation deliberation no. 607/10/CONS.

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_2fsZcpGr12AO&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_2fsZcpGr12AO_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_2fsZcpGr12AO_assetEntryId=854396&_101_INSTANCE_2fsZcpGr12AO_type=document

¹⁴³ Which are regulated by separate regulations, on which no impact was expected as a result of the implementation of the AVMSD.

¹⁴⁴ AGCOM Deliberation no. 606/10/CONS,

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_2fsZcpGr12AO&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_2fsZcpGr12AO_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_2fsZcpGr12AO_assetEntryId=686964&_101_INSTANCE_2fsZcpGr12AO_type=document

3.5.1.1. The Regulation on Copyright protection online

On 12 December 2013 AGCOM gave final approval, under deliberation no. 680/13/CONS,¹⁴⁵ to a Regulation concerning the protection of copyright on electronic communication networks, pursuant to the AVMS Code and the e-Commerce Directive.

AGCOM's authority is based on provisions contained in the Copyright Law, which gives AGCOM monitoring responsibility in respect of copyright within the area of its competence (electronic communication networks), the aforementioned Article 32(a) of the AVMS Code, which assigns to AGCOM regulating tasks, and the Decree implementing the e-Commerce Directive, under which the administrative authority with monitoring functions may request Internet Service Providers (ISPs) to terminate or prevent an infringement. AGCOM is the administrative authority with monitoring functions within the copyright sector.

The approval of this Regulation ended a process which began in 2010 and which encompassed three public consultation processes (in 2010, 2011 and 2013) and a workshop in May 2013 aimed at comparing the different models employed around the world in order to ensure the protection of online content. AGCOM's approach to the matter of copyright protection is based equally on two different approaches: on the one side, it recognises the need to support the offer of legal audiovisual content and to educate and inform the public; on the other side, it prescribes enforcement proceedings in the event of violations. In line with Directive 2015/1535,¹⁴⁶ which lays down the procedure for the provision of information in the field of technical standards and regulations, the draft regulation has been notified to the European Commission. Within the "standstill period" (90 days), the EU Commission delivered to AGCOM its observations, which were taken in the utmost consideration in the formulation of the final regulation.

The Regulation is composed of five chapters. The first lists the definitions of the relevant legal terms and outlines the aim and the scope of the regulation (which does not apply to peer-to-peer programmes aimed at the direct sharing of files between users nor to the end-users). The second part is centred on the measures proposed by AGCOM to boost the development and protection of the legal offer of digital works: AGCOM promotes the education of users (especially youngsters) and encourages the online consumption of legal content and the development of innovative and competitive commercial offers of audiovisual content. With this aim, the Regulation has established a committee to promote and oversee the legal offer of digital works; the committee's members are chosen from bodies representing the interests of all involved stakeholders – consumers, authors, artists, producers, AVMS providers and ISPs, as well as representatives of Italian institutions in charge of matters relating to copyright protection.

¹⁴⁵ AGCOM Deliberation no. 680/13/CONS, https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_2fsZcpGr12AO&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_2fsZcpGr12AO_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_2fsZcpGr12AO_assetEntryId=771920&_101_INSTANCE_2fsZcpGr12AO_type=document.

¹⁴⁶ Directive 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2015_241_R_0001.

The third and the fourth chapters of the Regulation describe the enforcement proceedings that are to be followed in the event of violations of copyright were (i) conducted online or via audiovisual media services (or radio services) and (ii) only based on a complaint lodged by rightsholders. In the event that an actual infringement of the copyright law is alleged, then following proceedings in which all interested parties (e.g. service providers, uploaders of digital works in question, and the owners of the website or webpage concerned) can participate and present documentation, AGCOM can adopt different measures, depending on the location of the server hosting the content. In the event that the server is located in Italy, AGCOM may order the hosting provider to remove the digital works from its website, schedule or catalogue, or, in the case of massive violations, ask for the disabling of access to the digital works concerned. If the server is located abroad, AGCOM may order only the conduit providers to disable access to the website. In the event of non-compliance with such orders, AGCOM can impose a fine of between EUR 10,000 and EUR 250,000, pursuant to Article no 1, para 31, of Law no. 249/1997¹⁴⁷ (under which the Authority was created).

The proceedings last for up to 35 days from the date on which the rightsholders lodged their complaint; provision is made for “fast-track” proceedings of up to 12 days in the case of massive or particularly serious violations. All decisions are made publicly available online.¹⁴⁸

The Regulation prescribes a quick and balanced intervention, which must always be conducted in accordance with the need for a gradual response that is proportionate and adequate to the infringement. For instance, in cases of the unauthorised presence of a single digital work on a website hosted abroad, AGCOM’s intervention is necessarily and technically limited to its requiring Italian conduit providers to disable access to that website; given the minor nature of the violations, it would be disproportionate to block access to the site entirely for the presence of a single infringement. Hence, AGCOM decided not to proceed but rather to inform the postal police and the judicial authority of the violation.

In December 2017, the so-called “European Law”¹⁴⁹ (an annual law adopted by the Italian Parliament to ensure the full implementation of European law) amended the national framework for the protection of copyright online, enhancing AGCOM’s powers in respect of such matters. Specifically, the Law intervenes in respect of two main aspects: firstly, it empowers AGCOM to adopt protective precautionary measures against websites that are evidently infringing copyright (provided that there is an imminent threat of irreparable harm to the rightsholders); and secondly, it entrusts AGCOM with responsibility for adopting measures to prevent the recurrence of violations already identified by a previous AGCOM decision. Under both provisions, AGCOM is required to implement those rules in its own Regulation. Consequently, AGCOM in January 2018 proposed amendments to the Regulation in respect of the protection of copyright online; it then notified the European Commission of its proposals, pursuant to Directive

¹⁴⁷ <http://www.camera.it/parlam/leggi/97249L.htm>.

¹⁴⁸ All of AGCOM decisions are stored on the website www.ddaonline.it.

¹⁴⁹ Law no. 167/2017, available at <http://www.gazzettaufficiale.it/eli/id/2017/11/27/17G00180/sg>.

2015/1535, and initiated a public consultation process aimed at further discussion. The regulation was adopted on 16 October 2018.¹⁵⁰

The main new aspects of the revised Regulation consist in the possibility of adopting, as a matter of urgency and where the said conditions of an imminent threat of irreparable harm are met,¹⁵¹ precautionary measures within three days from receiving the complaint. In the case of a counterclaim against the measures issued by AGCOM, the AGCOM Board decides definitively in the following 7 days. The provision balances the need for a necessarily timely intervention against the violations of copyright committed online with that of guaranteeing participation in the proceedings of all the interested parties.

AGCOM can also require the providers to adopt the most appropriate measures, depending on the role they play,¹⁵² to avoid the recurrence of already established violations and to oppose the initiatives aimed at avoiding the application of their own measures. With this in mind, in line with the most recent guidelines of national jurisprudence and of the Court of Justice of the European Union, AGCOM updates, within three days from the request, the list of sites subject to disabilitation of the access from Italy that are regenerated by modifying the domain name. Specifications and further measures may also consist of c.d. notice and stay down and thus preventing the re-uploading of already removed content.

3.5.1.2. Old tools for new issues: tackling online disinformation

On November 2017 AGCOM began undertaking its own measures (based on the already existing regulatory tools) aimed at tackling “fake news” and the spread of disinformation online.

On the basis of an analysis carried out over the last few months of the online information system (which highlighted the impact on the debate of the evolution of the Internet, the growing use of social networks in electoral and referendum campaigns, and the spread of disinformation strategies through digital platforms) AGCOM adopted

¹⁵⁰ AGCOM deliberation no. 490/18/CONS, <https://www.agcom.it/documents/10179/12343059/Delibera+490-18-CONS/875626ba-5956-400f-baf4-86fd6ffbe073?version=1.1>.

¹⁵¹ We might consider the case (actually happened to AGCOM) of a movie not yet distributed in theatres but made illegally available on a pirate website.

¹⁵² The plethora of potential recipients of the orders is wide and composed of extremely diversified categories of operators, such as sharing platforms, cyberlockers, cloud services and storage services, differing in the services offered, in the possibility of intervention on the content and in the technical tools that can be adopted. This entails a different degree of intervention that these subjects can put in place in respect of illicitly diffused digital works, also taking into account the constant technological evolution and the different functionalities and technical tools available to the subjects. AGCOM therefore considers that it would be counterproductive to categorically decline the measures that service providers are called to put in place to stop the violations and prevent their recurrence: the risk, in addition to that of unduly imposing interference in the freedom of business, would also be to make the regulation less flexible and suitable for future needs. The measures will be declined, case by case, so as to adapt to the actual situation and involving the representatives of the ISPs in the previous identification of the suitable measures for the different categories.

Deliberation no. 423/17/CONS,¹⁵³ which establishes a technical roundtable on disinformation online (“Technical Roundtable for the Guaranteeing of Pluralism and the Correctness of Information on Digital Platforms”).

The Roundtable started its work on 1 December 2017 and aims to identify and combat the phenomenon of online disinformation that is a product of targeted strategies. AGCOM plays the role of a “facilitator”, providing impetus and coordination to the various stakeholders operating in the information sector online, in order to promote self-regulation on a voluntary basis as a way of countering the disinformation phenomenon in general and, specifically, ensuring the fairness, impartiality and plurality of information.

The Roundtable has short-term goals (e.g. in view of the Italian parliamentary elections of March 2018 AGCOM adopted a set of guidelines in agreement with Google and Facebook), mid-term goals (such as creating methodologies for the classification and detection of disinformation online, devising prevention strategies (including tools for reporting and possibly tackling online content, studies of economic flows, also in association with online advertising) and long-term goals (creating consolidated best-practices and self-regulatory tools such as guidelines and codes of conduct in order to ensure the fairness, plurality and impartiality of online information).

3.5.2. Law enforcement against (online) audiovisual media – Practical Examples/Experience

As already mentioned in connection with the regulator’s enforcement activities in respect of the online environment, two cases have been particularly notable: the first concerned the proceedings initiated against two pirate IPTVs; the second was a target of the short-term strategy of the Technical Roundtable on disinformation online.

3.5.2.1. The case of the “pirate” IPTVs

On 19 October 2017, AGCOM ordered ISPs operating under Italian jurisdiction, pursuant to its Regulation on copyright protection online, to disable access to two IPTV servers after those IPTVs had engaged in massive copyright infringements. The decisions were taken following two sets of proceedings arising from complaints lodged on 10 October 2017 by Mediaset Premium S.p.A., whose entire pay-TV offering had been systematically made available via content delivery network (CDN) selectors. Unauthorised access to the pirated service was offered for a fee that was significantly lower than the legal subscription fee. In technical terms, once users had paid the fee for access to the pirated content and their

¹⁵³ AGCOM deliberation no. 423/17/CONS, “Establishment of a Technical Roundtable for the Guaranteeing of Pluralism and the Correctness of Information on Digital Platforms” available at https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_2fsZcpGr12AO&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_2fsZcpGr12AO_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_2fsZcpGr12AO_assetEntryId=8971542&_101_INSTANCE_2fsZcpGr12AO_type=document.

authentication had been verified through credentials directly embedded in each one of the URLs in question, they were provided with a list of URLs that allowed access to the livestreaming of programmes through HTTP protocol; subsequently, users were redirected to the so-called “streaming server” of the requested content. In this way it was possible for users to view a vast quantity of pay-TV material on all major devices (e.g. PCs, smart-TVs, smartphones, tablets).

Moreover, AGCOM determined during the proceedings that the websites used for the promotion of these illegal offers were exploiting (without any authority) the images and logos of the pirated audiovisual media service providers. Furthermore, the programmes made available on the pirate IPTVs were often among the first results in search-engine results for the programmes in question, even as sponsored content. These elements, as well as the high quality of the images, were considered to have possibly led some users to believe that this was a legitimate offering. The findings of the proceedings led AGCOM to conclude that massive and serious violations had occurred; consequently – in compliance with the principles of graduality, proportionality and adequacy – the preconditions existed for the issuance of an order for access to the websites to be disabled by means of DNS blocking, to be implemented by the Italian ISPs within two days of their being notified of the findings of the proceedings.

3.5.2.2. A short-term strategy: Guidelines for ensuring equal access to online platforms during the 2018 parliamentary election campaign

The Guidelines for ensuring equal access to online platforms during the March 2018 parliamentary elections¹⁵⁴ campaign were a self-regulatory initiative promoted by AGCOM within the remit of its Technical Roundtable on pluralism and the correctness of information on digital platforms (established under Deliberation no. 423/17/CONS). In particular, on the basis of the initiatives discussed by the Technical Roundtable – and taking into account the institutional tasks with which AGCOM is by law entrusted in respect of ensuring equal access to the media during electoral campaigns – general principles regarding this matter were identified; these principles are considered to be applicable to all information media, including digital platforms. Accordingly, some particularly relevant observations can be made when noting the principles laid down by Law n. 28¹⁵⁵ of 22 February 2000, which can be reinterpreted to fit well into the digital environment.

(i) Equal access: As already prescribed by Law n. 28/2000 in respect of the “offline” information media, it is necessary to guarantee to all political actors, with impartiality and fairness, and under uniform conditions, access to political information and communication tools provided by digital platforms (particularly Google and Facebook). Law n. 28/2000 contains specific provisions regarding access to radio and television in order to guarantee

¹⁵⁴ <https://www.agcom.it/documents/10179/9478149/Documento+generico+01-02-2018/45429524-3f31-4195-bf46-4f2863af0ff6?version=1.0>.

¹⁵⁵ Law 22 February 2000, n. 28 – Provisions for equity of access to information media during the electoral and referenda campaigns and for political communication.

equal access to all political actors. The scope of the law cannot be extended to platforms, but these nonetheless should, where possible, comply with the principles of the law. With this in mind, in order to determine who or what may be deemed to constitute political actors, AGCOM has made reference to Article 2 of Law n. 28/2000, which defines “political subjects” in the first phase of an electoral campaign as those forces that already have representatives in those bodies to which the election pertains and, in the second phase, the lists and coalitions of lists of those standing for election, provided that the elections concern at least a quarter of electors nationwide.

It is necessary that political subjects be duly informed of the tools with which online platforms can provide them in order to help their political communication online; it is of course up to those political subjects to decide whether take advantage of those possibilities.

In accordance with the principle of proportionality, platforms have wide autonomy in choosing the technological, legal and market instruments composing their offer of content.

(ii). Transparency in electoral advertising messages: With regard to those advertising messages that are commissioned by political subjects, it has to be stressed that it is necessary, wherever possible, that the nature of an electoral message (and the political subject for whom that message is intended) be clearly indicated, as is already required for political-electoral messages in the press by Law 28/2000.

These indications can either be inserted directly into the political advertising messages in question or on a website to which the message makes reference.

(iii). Illegal content and content whose dissemination is banned by law (such as opinion polls): Particularly urgent is the need – in accordance with legislative decree no. 70/2003, (which implements the e-Commerce Directive) – to determine by means of a shared approach those procedures that are to be followed when intervening in cases of a violation of the law. Such interventions must be prompt in the case of messages or videos that infringe the law – for example, messages whose content is illegal, that besmirch the honour or reputations of other candidates, that distort statements made by a subject or attribute to him/her false statements or positions that do not respond to the truth, or that are defamatory.

Similarly, it will be necessary to identify procedures allowing AGCOM to send a notice to online platforms in cases of content disseminating the results of opinion polls during the 15 days prior to a vote; this is explicitly banned by Article 8 of Law no. 28/2000.

(iv). Institutional Communication: A principle enshrined in law and easily adaptable to the digital environment is that laid down by Article 9 of Law no. 28/2000, which bans institutional communication. The ban can be extended to the use of social media accounts belonging to public institutions. The Italian Presidency of the Council of Ministers has already recommended to all administrations that they use their Internet communications tools in such a way as to respect the principles established by law as regards elections.

(v). Electoral silence: “On the day before the vote and on voting days it is forbidden also for private broadcasters to spread electoral material”. So says law no. 28/2000, which bans not only any form of electioneering on television but also the making of any public election speeches during this period. It is recommended for political subjects, on online platforms, to avoid any form of electioneering in order not to unduly influence the electorate.

(vi). Fact-checking: AGCOM in its Guidelines also recommends a strengthening of the fact-checking initiatives already proposed by Google and Facebook during the Technical Roundtable meetings.

3.5.3. Conclusions

The new approach adopted by AGCOM shows how – even in the absence of a legal framework – the existing regulatory tools, along with a willingness to cooperate on the part of providers and online platforms, may nonetheless lead to the establishment of a harmonised set of rules.

However, initiatives for tackling illegal content online are in most cases left to the goodwill and cooperative attitude of social media, leading to a risk (as is proving to be the case) of only limited interventions being undertaken or the adoption of different approaches based on what is more convenient for providers. It is called “self-regulation”, but in practice these efforts should be seen rather as “*à-la-carte*” initiatives that lack a common industry-wide approach. For instance, one social network could decide to filter or remove content containing disinformation, while another could decide to simply rank it down, with different levels of responses for the same users.

Such an approach, easily adaptable to areas other than that of online disinformation, might offer an answer to the most-debated question that regulators are asking themselves these days: should and could a harmonised approach be reached here? Should regulators at least facilitate such initiatives by promoting them or by setting a minimum standard?

3.6. LV - Latvia

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3.6.1. Regulatory Framework

The media in Latvia are covered by two media-specific laws – namely the Law on the Press and other Mass Media (“the Press Law”)¹⁵⁷ and the Electronic Mass Media Law (“EMML”).¹⁵⁸ Other legislation can also apply to the media, where appropriate. This includes the Law on Information Society Services, the Advertising Law, the Copyright Law, the Law on the Protection of Children’s Rights, the Law on the Processing of Physical Persons’ Data, the Law on Pornography Restrictions, and the Law on Gambling and Lotteries.

3.6.1.1. Law on the Press and other Mass Media

The Press Law dates back to 1991 and, despite numerous amendments, it is still outdated in many respects. For example, the definition of the “means of mass information” is unclear and lacks legal certainty:

“[T]he press and other mass media are newspapers, magazines, newsletters and other periodical publications (published not less frequently than once every three months, with a one-time print run exceeding 100 copies), as well as electronic mass media, newsreels, information agency announcements, and audiovisual recordings intended for public dissemination. An Internet site can be registered as a mass medium.”

According to this definition, both publishers (in the broad sense of the term) and their publications constitute “mass media”. The apparent contradictions in this definition are resolved upon reading the wording of Article 30, which deals with international treaties and agreements:

“International cooperation of mass media shall be regulated by treaties and agreements entered into by the highest State authorities and administrative bodies of the Republic, mass media, [and] professional organisations of journalists or other creative unions in accordance with the laws of the Republic of Latvia and the norms of international law.”

It may be assumed that the legislature did not intend to provide for “cooperation” between, for example, newsreels and audiovisual recordings and that the definition only refers to publishers (and not their publications).

¹⁵⁶ Any opinions expressed are those of the author and not necessarily those of the Ministry of Culture.

¹⁵⁷ *Latvijas Republikas likums Par presi un citiem masu informācijas līdzekļiem*, available (in Latvian) at <https://likumi.lv/ta/id/64879-par-presi-un-citiem-masu-informacijas-lidzekliem>.

¹⁵⁸ *Elektronisko plašsaziņas līdzekļu likums*, available (in Latvian) at <https://likumi.lv/doc.php?id=214039>.

The reference to websites, added in an amendment to the law in 2011, could be problematic for the National Electronic Mass Media Council (NEMMC) when complaints are received because it is not always clear which institution is responsible for dealing with these complaints. (For example, should it be the NEMMC, the police, the Data State Inspectorate or the Consumer Rights Protection Centre?) The voluntary nature of registering websites as “electronic mass media” even when they claim to be merely “electronic media” means that those choosing not to register should not normally be subject to the specific rules prescribed by the Electronic Mass Media Law on, for example, the protection of minors or the insertion (and amount) of advertising, sponsorship and product placement. Similarly, one might have assumed that unregistered portals would not be subject to the Press Law. However, in 2012 Latvia’s Supreme Court took a different view in an interesting ruling on a libel case against Latvia’s incumbent telecoms operator, Lattelecom, concerning an article that appeared on its portal Apollo.lv. (The case began in 2007, before the amendment to the Press Law encompassing websites.) The court dismissed the defendant’s argument that the Press Law did not apply to Internet portals, holding: “Although the Internet media are not mentioned in article 2 of this law, ... the norm mentioned should be interpreted by its meaning, rather than the letter. Taking into account the commonly known rapid development of Internet and electronic technologies in the past decade, the list of mass media set out in Article 2 of the law on the Press and other Mass Media does not appear to be exhaustive. This rule, in accordance with the objectives of the law, is applicable to all media, including those operating in the Internet environment ...¹⁵⁹ In any case, they are, however, subject to the Law on Information Society Services,¹⁶⁰ which transposes the EU directive on electronic commerce.

The publication of certain types of content is prohibited by the Press Law, including official secrets; incitement to sedition, violence or the commission of crimes, war propaganda or hate speech; defamatory material; and content that infringes provisions on the protection of minors. Although not explicitly stated, the Press Law only applies to media registered in Latvia;¹⁶¹ the content of audiovisual media services of other jurisdictions retransmitted in Latvia is not covered.

3.6.1.2. Electronic Mass Media Law

The EMMML was adopted in 2010 and transposes the provisions of: the Audiovisual Media Services Directive (2010/13/EC) and the relevant parts of the Universal Services Directive (2002/22/EC) and its amending Directive (2009/136/EC); Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector; the Regulation on cooperation between national authorities

¹⁵⁹ *Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2012. gada 17. oktobra spriedums Lietā Nr. SKC-637/2012 [4.4]* (Judgement of the Supreme Court of the Republic of Latvia Senate Department of Civil Cases of 17 October 2012 in Case No. SKC-637/2012 [4.4]) available at: <http://www.at.gov.lv/downloadlawfile/3096> (Latvian).

¹⁶⁰ *Informācijas sabiedrības pakalpojumu likums*, (Law on the Press and other Mass Media) available (in Latvian) at <https://likumi.lv/doc.php?id=96619>.

¹⁶¹ Article 9 of the Press Law requires mass media to be registered in the Register of Enterprises of the Republic of Latvia.

responsible for the enforcement of consumer protection laws (2006/2004); and the Directive on the manufacture, presentation and sale of tobacco and related products (2014/40/EU). The scope of the law encompasses radio and television broadcasting on all platforms, on-demand services, and the retransmission of local and foreign media services (as well as Internet-based services if they have been registered as electronic media or if they provide a service that requires a broadcasting or retransmission service).

The Audiovisual Media Services Directive (AVMSD) requires freedom of transmission; any derogation from the country-of-origin principle by imposing restrictions on the retransmission of services from other EU member states is only permitted in exceptional circumstances where there have been “manifest, serious and grave” infringements of the rules on the protection of minors (Article 27.1 or 27.2) and the prohibition on hate speech (Art.6).¹⁶² In transposing the Directive, Latvia has taken advantage of Art. 4 of the AVMSD that permits member States to “require media service providers under their jurisdiction to comply with more detailed or stricter rules”. Thus, in addition to the prohibition on hate speech, Article 6 of the EMLL also prohibits:

- content that gives undue prominence to violence;
- pornography;
- incitement to war or the initiation of military conflict;
- sedition or incitement to change the State political system by violence, to destroy the territorial integrity of the State, or to commit any other crime; or
- content that discredits the statehood and national symbols of Latvia.

Until 2016, the EMLL did not set out the procedure to be followed whereby Latvia could derogate from the country-of-origin principle. If a situation arose where restrictions on the transmission of services from other member States were being considered, the Electronic Mass Media Council had to refer to the text of the AVMSD. The law was amended in 2016 and now has a comprehensive and highly detailed new section dealing with the imposition of restrictions on the transmission of electronic media services from other countries. There are separate articles dealing with linear and non-linear services, services originating in EU and EEA member States, and services originating in States that are party to the European Convention on Transfrontier Television.

The EMLL contains a very important provision concerning responsibility for the content of retransmitted services. Media service providers with a permit to retransmit channels whose initial distribution does not originate under the jurisdiction of EU member States or States that are party to the European Convention on Transfrontier Television are responsible for the compliance of the content of these channels with the requirements of the EMLL (Art. 19.4). This means that Latvian cable and satellite operators – as well as those retransmitting services over the Internet – are responsible for the legality of the content of, for example, channels such as CNN and Al Jazeera; most

¹⁶² In the case of on-demand services member states may derogate from the country-of-origin principle on additional grounds in the interests of public policy, including national security and defence (Art. 3.4.a.i). This disparity between the rules for linear and non-linear services originates in the borrowing of the rules for on-demand services from the e-Commerce Directive. The situation will be corrected in the revised AVMSD.

significantly for Latvia, this also applies to channels that originate in Russia but are licensed or registered in EU jurisdictions, notably the UK and Sweden.¹⁶³

Amendments to the EMMML adopted in June 2018 are of particular interest because they include measures aimed at reinforcing the means employed to tackle two problems in the cross-border context. The first (a particular concern to the industry) is the problem of piracy – in this case the unlicensed and therefore illegal provision of audiovisual media services. A study commissioned by the non-governmental organisation For Legal Content¹⁶⁴ found that in 2017, 80 000 households (of a total of 707 000 households) with television access opted for illegal television connections (such as card-sharing services, illegal sales of third-country satellite packages and associated equipment, and the illegal streaming of television series and films, music and sports broadcasting).¹⁶⁵ According to the study, the annual loss of revenue in taxes is estimated to be at least EUR 9.6 million. The aforementioned 2016 amendments already prohibit the retransmission of audiovisual media services without a permit and require the provider to either cease retransmission or obtain a retransmission permit within 15 days. If neither option is exercised the regulator assumes the functions of a supervisory body, as defined by the Law on Information Society Services, and takes further action as appropriate. Although not explicitly stated, the reference to the Law on Information Society Services implies that the illegal retransmission is taking place in the online environment. This is confirmed by the 2018 amendments, which will give the Electronic Mass Media Council the right to restrict access to those websites available in Latvia that are retransmitting audiovisual programmes without a retransmission permit by prohibiting the use of the domain name concerned for a period of up to six months.

The second problem is the retransmission of illegal content – namely hate speech and war propaganda – on television channels under the jurisdiction of other EU member States. As mentioned earlier, the EMMML now has clearly defined procedures for derogation from the country-of-origin principle. The 2018 amendments oblige the regulator to take action if an EU or EEA member State has prohibited the transmission of an audiovisual media service for breaching the rules on hate speech and the protection of minors. If the prohibition is still in force, the regulator should collaborate with the relevant body of that State to determine whether the same infringements can be found in the content of programmes retransmitted in Latvia. If so, the regulator can take a decision to prohibit the retransmission of that programme in accordance with the prescribed procedure – i.e. the one transposed from the AVMSD. Although this amendment does not give the regulator any new powers, it does promote cooperation with regulators in other member States and makes easier the task of establishing whether there has been transmission of illegal content.

¹⁶³ Russian television channels NTV Mir and REN TV are licensed by Ofcom in the UK, and Rossiya RTR is retransmitted from Sweden.

¹⁶⁴ <http://www.parlegalusaturu.lv/en/>.

¹⁶⁵ Arnis Sauka, *Nelegālās maksas TV apraides apjoms Latvijā 2015* (The Volume of Illegal pay TV Broadcasting in Latvia 2015), 2016, Stockholm School of Economics, Riga/BASE. Available at: http://www.parlegalusaturu.lv/media/TV_un_Internets_zinojums_FINAL.pdf.

3.6.1.3. Law on Information Society Services

This law¹⁶⁶ primarily transposes the EU Directive on electronic commerce (2000/31/EC) and covers Internet-based audiovisual media services. As is to be expected, intermediaries acting as “mere conduits” are not liable for illegal content if they have not initiated its transmission, selected its recipients nor selected or modified the content concerned. Similarly, hosting service providers bear no responsibility for the content they store if they have no knowledge of its illegal nature and have taken effective measures to destroy or prevent access to the illegal content as soon as they have become aware of it.

Supervisory bodies have the right to restrict services that present or could present a serious risk to:

- public policy – in particular the prevention, investigation, detection and prosecution of criminal offences (including the protection of minors), the prevention of discrimination on grounds of race, sex, religion or ethnic origin, and the prevention of defamation,
- public security – including the safeguarding of national security and defence,
- the protection of public health,
- consumer protection.

It is interesting to note that, unlike the Directive, the law does not explicitly mention incitement to hatred as grounds for imposing restrictions; even so, it would be reasonable to consider hate speech to be a form of discrimination.¹⁶⁷

Under this law, the supervisory bodies are the “Consumer Rights Protection Centre, the Data State Inspectorate and other supervisory and overseeing institutions”. The National Electronic Mass Media Council is not named as a supervisory body in this law; however, this status was also assigned to the Council by amendments to the Electronic Mass Media Law in 2016.

3.6.1.4. Further specific Laws

The Law on Pornography Restrictions¹⁶⁸ prohibits the dissemination of material of a pornographic nature or information regarding accessibility to such material in the electronic environment to an indeterminate range of recipients or in cases when the consent of the addressee has not been received.

¹⁶⁶ *Informācijas sabiedrības pakalpojumu likums* (Law on Information Society Services), available at: <https://likumi.lv/ta/en/en/id/96619-law-on-information-society-services>.

¹⁶⁷ Article 20.2 of the International Covenant on Civil and Political Rights states: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

¹⁶⁸ *Pornogrāfijas ierobežošanas likums* (Law on Pornography Restrictions), available at: <https://likumi.lv/ta/en/en/id/157638-law-on-pornography-restrictions>.

Section 13 of the Pre-election Campaign Law¹⁶⁹ requires providers of electronic media retransmitting foreign channels in Latvia to include a provision in the contract with the relevant foreign electronic mass medium to the effect that during the period of the pre-election campaign, programmes to be retransmitted in Latvia may not include campaign material regarding a political party, its associations and voters' associations.

Section 41 of the law on Gambling and Lotteries¹⁷⁰ prohibits the advertising of gambling outside licensed premises. Online gambling is permitted, but the service must be licensed by the Lotteries and Gambling Supervision Inspection. Cabinet regulations¹⁷¹ envisage the blocking of unlicensed gambling websites.

3.6.2. Sanctioning Options

Sanctions for infringements of the laws governing the audiovisual media range from warnings and fines to the suspension of transmission or retransmission and, as a last resort, the revocation of broadcasting and retransmission permits.

3.6.2.1. Electronic Mass Media Law

In the cross-border context the regulator has the power to restrict the retransmission of foreign channels on the territory of Latvia but has to follow the procedures prescribed by the AVMSD in the case of television channels in the jurisdictions of other EU or EEA member States and the rules prescribed by the European Convention on Transfrontier Television in the case of those Convention parties that are not EU member States. The two main pieces of legislation that provide fines and sanctions other than the suspension of transmission and the revocation of permits are the Code of Administrative Violations and the Criminal Law.¹⁷²

¹⁶⁹ *Priekšvēlēšanu aģitācijas likums* (Pre-election Campaign Law), available at: <https://likumi.lv/ta/en/en/id/253543-pre-election-campaign-law>.

¹⁷⁰ *Azartspēļu un izložu likums* (Law on Gambling and Lotteries), available at: <https://likumi.lv/ta/en/en/id/122941-on-gambling-and-lotteries>.

¹⁷¹ *Ministru kabineta noteikumi Nr.291 (2014) Kārtība, kādā Izložu un azartspēļu uzraudzības inspekcija sagatavo un nosūta lēmumu par piekļuves ierobežošanu Latvijā nelicencētu interaktīvo azartspēļu organizētāju interneta mājaslapām* (Cabinet Regulations No.291 (2014) on the procedure whereby the Lotteries and Gambling Supervision Inspection prepares and sends a decision on the restriction of access to the internet websites of the organisers of interactive gambling unlicensed in Latvia), available at: <https://likumi.lv/ta/id/266884-kartiba-kada-izlozu-un-azartspelu-uzraudzibas-inspekcijsagatavo-un-nosutalemumu-par-piekluves-ierobezosanu-latvija-nelicence> (Latvian).

¹⁷² *Krimināllikums* (The Criminal Law) available at: <https://likumi.lv/ta/en/en/id/88966-the-criminal-law>.

3.6.2.2. Code of Administrative Violations

The Code¹⁷³ sets out which violations fall within the authority of the Council, together with the available sanctions (which range from warnings to a fine of up to EUR 14 000). In the cross-border context, these include violations of the rules on:

- The dissemination and advertising of pornographic material (a maximum fine of EUR 3 600);
- Mass-media operations. (e.g. broadcasting or retransmission without the appropriate permit can result in a fine of up to EUR 14 000);
- Pre-election campaigning (a maximum fine of EUR 1 400).

3.6.2.3. Criminal Law

Below are the main provisions of the Criminal Law that may be infringed by foreign media services targeting Latvia.

Public incitement to genocide is punishable by deprivation of liberty for a period of up to eight years (Section 71¹).

The following may be punished by imprisonment for a period of up to five years or temporary deprivation of liberty, or community service, or a fine (Section 74¹): public glorification of genocide, crimes against humanity, crimes against peace or war crimes; glorification of war; and the denial, or gross trivialisation of acts of genocide, crimes against humanity, crimes against peace or war crimes (including genocide), crimes against humanity, crimes against peace or war crimes committed by the U.S.S.R. or Nazi Germany against the Republic of Latvia and its inhabitants.

Public incitement to a war of aggression or triggering an armed conflict is punishable by deprivation of liberty for a period of up to eight years (Section 77).

Incitement to national, ethnic, racial or religious hatred or enmity is punishable by deprivation of liberty for a period of up to three years or temporary deprivation of liberty, or community service, or a fine. If such incitement has been undertaken by a group of persons or a public official, or a responsible employee of an undertaking (company) or organisation, or by using an automated data processing system, the punishment is deprivation of liberty for a period of up to five years or temporary deprivation of liberty, or community service, or a fine. If the incitement is related to violence or threats of violence or has been committed by an organised group the punishment is deprivation of liberty for a period of up to ten years; such a sentence may be followed by probationary supervision for a period of up to three years (Section 78).

Public glorification or justification of (or public incitement to commit) acts of terrorist acts or the distribution of materials with this type of content is punishable by imprisonment up to five years, temporary deprivation of liberty, community service or a fine, followed by probationary supervision for a period of up to three years (Section 79⁶).

¹⁷³ *Latvijas Administratīvo pārkāpumu kodekss* (Latvian Administrative Violations Code), available at: <https://likumi.lv/ta/id/89648-latvijas-administrativo-parkapumu-kodekss> (Latvian).

Public incitement to take action against the national independence, sovereignty, territorial integrity, State power or administrative order of the Republic of Latvia in a manner that is not provided for in the Constitution (or the distribution of material inciting such action), may be punished by deprivation of liberty for a period of up to five years or temporary deprivation of liberty, or community service, or a fine, followed by probationary supervision for a period of up to three years (Section 81).

Defamation in the mass media is punishable by temporary deprivation of liberty or community service, or a fine (Section 157).

3.6.3. Law enforcement against (online) audiovisual media – Practical Examples/Experience

Latvia's experience in enforcement against cross-border audiovisual media services is limited to temporary suspensions imposed in 2014 and 2016 on the television channel Rossiya RTR (rebroadcast from Sweden) for having broadcasted incitement to hatred and war propaganda.

In 2014, the regulator suspended the retransmission of the channel for a period of three months. In its decision the National Electronic Mass Media Council listed ten occasions (stating the precise dates and times) on which broadcasts had “not only presented one-sided information, but [had] also manipulatively served as resources assisting military aggression, thus positioning themselves as instruments of war”.¹⁷⁴ “Defenders of Ukrainian democracy and the legitimate government in Ukraine were consistently compared to those who defend the ideology of Nazi Germany. The broadcasts drew parallels with Nazi crimes during World War II, thus sending the message that if those forces were to take power, then they would repeat Nazi crimes.” The Council concluded that, “after evaluating the stories in context, as well as individual statements, it is clear that there have been calls for war or military conflict, as well as for the fomenting of hatred for reasons of ethnicity and nationality”. Of course, this has to be seen in the context of Russia's illegal annexation of Crimea and the so-called “Maidan” events. It has to be said that on this occasion Latvia did not follow the procedure prescribed by the AVMSD, justifying its action by arguing that a democracy had the right to defend itself. Considerable references were made to judgements of the European Court of Human Rights and various overarching legal instruments, including the European Convention on Human Rights and the International Covenant on Civil and Political Rights. We should also remember, as stated earlier, that at the time, the Electronic Mass Media Law did not set out the specific procedure to be followed (as prescribed in the AVMSD), relying instead on the Latvian Constitution, norms of international law, and the case law of the European

¹⁷⁴ *Lēmums Nr.95 (03.04.2014) Par programmas "Rossija RTR" retranslācijas ierobežošanu Latvijas teritorijā* (Decision No.95 (03.04.2018) on restricting the rebroadcasting of Rossiya RTR in Latvia). Available at: <https://neplpadome.lv/en/assets/documents/anglu/NEMC%20Decision%20Nr%20%2095.doc>.

See also Ieva Andersone, The National Electronic Mass Media Council explores legal options to limit certain retransmissions, IRIS 2014-5:1/25, <http://merlin.obs.coe.int/iris/2014/5/article25.en.html>.

Court of Human Rights. Although the Commission did not commence an infringement procedure, the issue was discussed as a case study at the AVMSD Contact Committee meeting in November 2014. The discussion paper presented by the Commission found that “[the] Latvian regulator did not contact the Commission services” and that Latvia “did not follow the ‘circumvention’ procedure under Article 4. The regulator did not first contact Sweden with a view to achieving a mutually satisfactory solution”.¹⁷⁵

In 2016 the Council again suspended the retransmission of Rossiya RTR, this time for a period of six months.¹⁷⁶ The grounds for suspension were very similar – incitement to hatred and calls for military intervention in Ukraine and for the bombing of Turkey and the annihilation of its armed forces. The channel had described Ukraine as a “fascist and degenerate State” that was perpetrating genocide against Russians and other inhabitants had called for it to be destroyed militarily, given that it was the “aggressor”, with whom negotiations were impossible.

On this occasion the regulator followed the procedure prescribed by the AVMSD by:

- establishing three serious infringements of the rules prohibiting hate speech (Art. 6);
- having already previously informed the European Commission of two infringements and the Council’s intention to restrict the transmission of the channel should there be another violation;
- informing the Swedish Broadcasting Authority of the violations and the possibility to find a mutually acceptable solution as well as of the Council’s intentions should there be another violation;
- informing the media service provider in question (NCP “RUSSMEDIACOM”) of the violations and offering it the right of reply.

The Council did not consider as acceptable the service provider’s argument that the infringing material had been broadcast in a discussion programme, because the provider of a programme is responsible for its content. (Indeed, the producers of the show must have been fully aware of what to expect in the light of one of the participant’s previous statements on the subject matter of the show.) It should be noted that Swedish law

¹⁷⁵ Discussion Paper on the Application of Articles 3 and 4 AVMSD. Case study: Suspension of some Russian-language channels in Latvia and Lithuania, https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/40_discussion_paper_4_rev_en.pdf.

¹⁷⁶ *Lēmums Nr.77 (07.04.2016) Par programmas "Rossija RTR" retranslācijas ierobežošanu Latvijas teritorijā* (Decision No.77 (07.04.2016) on the restriction of the retransmission of the programme Rossiya RTR in the territory of Latvia. Available at:

[https://neplpadome.lv/lv/assets/documents/Lemumi/Lemums%20Par%20Izplatisanas%20Ierobezosanu_final_pdf%20\(1\).pdf](https://neplpadome.lv/lv/assets/documents/Lemumi/Lemums%20Par%20Izplatisanas%20Ierobezosanu_final_pdf%20(1).pdf) (Latvian).

See also Ieva Andersone, Regulator suspends the retransmission of a Russian TV channel, IRIS 2016-6:1/19, <http://merlin.obs.coe.int/iris/2016/6/article19.en.html>. See also the item on the Council’s website: *NEPLP restricts rebroadcasting and distribution of Rossiya RTR in Latvia for six months*, <https://neplpadome.lv/en/home/news/news/neplp-restricts-rebroadcasting-and-distribution-of-rossiya-rtr-in-latvia-for-six-months.html>.

prevents the regulator from taking action against audiovisual media services that are retransmitted to other States and are not intended for audiences in Sweden.¹⁷⁷

In its reasoning on this occasion, the Council also referred to the case-law of both the Court of Justice of the European Union and the European Court of Human Rights, as well as to the relevant international legal instruments. In both cases the suspensions proceeded without any serious problems but have not resulted in changes in the channel's editorial policy.

Concerning, for example, the Russian television channels NTV Mir and REN TV, which are licensed by Ofcom in the UK and which target Latvia, in 2011 Ofcom received complaints about advertisements urging viewers to sign a petition for a referendum on making Russian an official language of the Republic of Latvia. The 20-second spots featured the logo of the Latvian Electoral Commission, thus giving the impression that the spots had either been sponsored or at least approved by the Commission. In two separate decisions, published 10 months and 13 months after the broadcasts, Ofcom found numerous breaches of the rules in its Broadcasting Code,¹⁷⁸ namely:

- misleading portrayals of factual matters in programmes (2.2);
- non-exclusion of all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy (5.4);
- non-observance of due impartiality on matters of major political or industrial controversy and major matters relating to current public policy (5.11 and 5.12);
- unfair treatment (7.1);
- advertising indistinguishable from other parts of the programme service (9.2).¹⁷⁹

Although not immediately obvious, difficult legal issues may arise in the cross-border audiovisual media services field once the UK leaves the European Union. It should be noted here that over 500 television channels and almost 100 on-demand services under UK jurisdiction target audiences in other member States, Latvia included.¹⁸⁰ Currently all EU member States are bound by the provisions of the AVMSD and disputes between member States (for example, jurisdiction issues and disputes regarding cases of alleged circumvention) can be settled by turning to the European Commission and the Court of Justice. After Brexit this will not be possible in the event that the UK is a party to a dispute. Twenty-one member States, including the UK and Latvia, have ratified the European Convention on Transfrontier Television and one might think that in a post-Brexit situation those 21 member States could turn to the Convention's Standing

¹⁷⁷ Chapter 16 Section 2 of the Radio and Television Act states "Broadcasts that are provided under a retransmission licence according to Chapter 4 section 7 should not be reviewed by the Broadcasting Commission." Available at:

<http://www.mprt.se/documents/styrdokument/radio%20and%20television%20act.pdf>.

¹⁷⁸ <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code>.

¹⁷⁹ Ofcom Broadcast Bulletins No. 214 (24.09.2012),

https://www.ofcom.org.uk/_data/assets/pdf_file/0030/47928/obb214.pdf and No. 220 (17.12.2012),

https://www.ofcom.org.uk/_data/assets/pdf_file/0017/45611/obb220.pdf.

¹⁸⁰ European Audiovisual Observatory *Brexit in context: The UK in the EU28 audiovisual market*, May 2018,

<https://rm.coe.int/brexit-in-context/16808b868c>.

Committee to arbitrate in a dispute. However, the Convention is seriously outdated compared to the revised AVMSD (on-demand services are not within its scope, let alone video-sharing platforms and, in certain cases social media), and work on the revision of the Convention was discontinued in 2010. Moreover, the Council of Europe has no budgetary provision for the work of the Standing Committee. At this stage of development, in practical terms this means that there will no longer be a dispute-resolution mechanism (recourse to the European Court of Human Rights could be a very lengthy affair). Bearing in mind that there are UK-registered television channels specifically targeting Latvia, this could be problematic in the future if a dispute-resolution mechanism for the audiovisual media services sector cannot be agreed upon between the UK and the EU.¹⁸¹

3.7. Sweden

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3.7.1. Regulatory Framework

3.7.1.1. Fundamental Regulation

The Swedish Fundamental Law on Freedom of Expression (hereafter the Fundamental Law¹⁸²) guarantees every Swedish citizen¹⁸³ the right, vis-à-vis the public institutions, to publicly express his or her thoughts, opinions and sentiments, and in general to communicate information on any subject on television and certain similar media. No restriction of this freedom shall be permitted other than those that follow from the Fundamental Law.¹⁸⁴

The Fundamental Law applies to transmissions of radio programmes¹⁸⁵ that are directed to the general public and are intended for reception via the use of technical aids. The provision of live broadcasts and recorded programmes that are specifically requested

¹⁸¹ The question arises of how disputes will be resolved between the UK and those EU Members States that are not party to the Convention, namely Belgium, Denmark, Greece, Ireland, Luxembourg, Netherlands and Sweden?

¹⁸² Available at : http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/ytrandefrihetsgrundlag-19911469_sfs-1991-1469 (English version from 2015 available at: <https://www.riksdagen.se/globalassets/07.-dokument--lagar/the-fundamental-law-on-freedom-of-expression-2015.pdf>).

¹⁸³ According to Chapter 11 Article 1 of the Fundamental Law foreign nationals are equated with Swedish citizens in respect of freedom of expression unless otherwise provided for in law.

¹⁸⁴ The Fundamental Law, Chapter 1 Article 1.

¹⁸⁵ The term “radio programmes” comprises television programmes.

fall under the Fundamental Law, provided that the starting time and the content cannot be influenced by the receiver. In the case of radio programmes emanating from Sweden that are transmitted by satellite, the provisions of the Fundamental Law concerning radio programmes in general apply. As for radio programmes intended primarily for reception abroad, exceptions to the Fundamental Law may be laid down in law.¹⁸⁶

As for simultaneous and unmodified onward transmissions in Sweden of radio programmes emanating from abroad or transmitted to Sweden by satellite but not emanating from Sweden, only certain provisions in the Fundamental Law apply, for example the rules prohibiting prior scrutiny.¹⁸⁷

The Fundamental Law also provides the right to transmit radio programmes by landline. This freedom, called “the freedom of establishment”, may only be limited if allowed so under the Fundamental Law.¹⁸⁸ The right to transmit radio programmes other than by landline may be regulated in an act of law containing provisions on licensing and conditions of transmission.¹⁸⁹

The Swedish Radio and Television Act (RTA)¹⁹⁰, which partially implements the AVMS Directive, applies to television broadcasts (that is to say linear services) and on-demand television (non-linear services)¹⁹¹ that can be received in any EEA State, provided that the media service provider is established in Sweden or if certain other criteria¹⁹² apply.¹⁹³

On-demand television is defined in the RTA as a service whereby a media service provider provides television programmes to the public for purposes of information, entertainment or education, using electronic communications networks upon request by the user, at a time chosen by the user and from a catalogue of programmes chosen by the provider.¹⁹⁴

A licence is only required for broadcasting on terrestrial frequencies.¹⁹⁵ Broadcasters with jurisdiction in another EEA State, pursuant to the AVMS Directive, also require a licence. Such licences may, however, only stipulate and regulate technical conditions.¹⁹⁶ A media service provider that either conducts a broadcasting operation that

¹⁸⁶ The Fundamental Law, Chapter 1 Article 6.

¹⁸⁷ The Fundamental Law, Chapter 1 Article 7.

¹⁸⁸ The Fundamental Law, Chapter 3 art. 1.

¹⁸⁹ The Fundamental Law, Chapter 3 art. 2.

¹⁹⁰ Available in Swedish at :

http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/radio--och-tv-lag-2010696_sfs-2010-696.

¹⁹¹ The RTA also contains provisions regarding Teletext and radio broadcasts; RTA, Chapter 1 section 1.

¹⁹² For example the RTA also applies when the media service provider is not established in Sweden, or is established in any other EEA State, but utilises a satellite up link situated in Sweden or utilises satellite capacity appertaining to Sweden.

¹⁹³ RTA, Chapter 1 section 2 and 3.

¹⁹⁴ RTA, Chapter 3 section 1.

¹⁹⁵ RTA, Chapter 4 section 2.

¹⁹⁶ RTA, Chapter 1 section 3 and Chapter 4 section 9.

does not require a licence or provides an on-demand television service must register with the Swedish Press and Broadcasting Authority (the SPBA).¹⁹⁷

Although content rules set out in the RTA do not apply to foreign broadcasters, the SPBA is required to monitor the content of foreign radio and television broadcasts directed towards Sweden.¹⁹⁸

The Swedish Broadcasting Commission (SBC) is an independent decision-making body within the SPBA. The SBC monitors, through post-broadcast reviews, whether programmes under Swedish jurisdiction broadcast on television or provided through on-demand services adhere to the applicable content regulations set out by the RTA or the content-related conditions noted in a licence.¹⁹⁹ Below follows an overview of the content related regulations included in the SBC's review.

3.7.1.2. Content-related regulation

Some provisions regarding content, such as those regarding impartiality, accuracy, the medium's impact²⁰⁰ and the right to privacy, can only become applicable on a media service through inclusion in a broadcasting licence. In programmes subject to conditions of impartiality there may be no messages broadcast at the request of a third party which are aimed at gaining support for political or religious opinions or opinions regarding labour market issues.²⁰¹ Since a license is only required for broadcasting terrestrial television this regulation does not apply to broadcasts via satellite or landline²⁰² or to on-demand services.

The content rules in the RTA include a general requirement that a television service provider²⁰³ shall ensure that the media service as a whole reflects the fundamental concepts of a democratic constitution, the principle that all persons are of equal value, and the freedom and dignity of the individual.²⁰⁴ This provision, however, refers to a media service as a whole and is not directly applied on individual programmes. The provision allows a broadcaster to reject, or respond to, discriminatory or racist statements without conflicting with the requirement of impartiality. The provision is also considered to entail an obligation to dissociate oneself from, or to respond to, anti-democratic statements.

¹⁹⁷ RTA, Chapter 2 section 2.

¹⁹⁸ Ordinance (2010:1062) Containing Terms of Reference for the SPBA, Section 3.

¹⁹⁹ RTA, Chapter 16 section 2.

²⁰⁰ Terrestrial broadcasting services shall take into account the impact of the medium in terms of format, topics and broadcasting hour. This provision is applied to the evaluation of programmes that contain or deal with subject matters such as violence, sex and drugs, and means that the broadcasting companies should exercise caution. Programmes that could be construed as incitement to crime are not allowed. Features that are clearly offensive to either gender are also prohibited, as well as programmes offensive to people of a certain skin colour, nationality, religion or sexual orientation. The application of the provision is affected, for example, by whether the programme or feature is satirical or humorous in nature.

²⁰¹ RTA, Chapter 5 section 6.

²⁰² The term landline includes traditional cable but also Internet.

²⁰³ More particularly a provider of television broadcasts, on-demand television or teletext and broadcasters of radio programmes licensed by the Government.

²⁰⁴ RTA, Chapter 5 section 1 and Chapter 14, section 1.

The RTA also includes a rule according to which information disseminated in a television programme, which is not commercial advertising, must be corrected when this is justified. This rule applies to both television broadcasts transmitted by cable and broadcasts transmitted by means other than cable.²⁰⁵

In some cases, content-related requirements differ slightly depending on if the service is linear or non-linear. One example is programmes containing portrayals of violence of a realistic nature or pornographic images. In respect of television broadcasts, such programmes may not be broadcast at times and in a manner that would create a considerable risk of children viewing them, unless the broadcast is nevertheless defensible on special grounds. In regards to on-demand television, such programmes may not be provided in such a manner that creates a considerable risk of children viewing them, unless this is nevertheless defensible on special grounds. In the case of television broadcasts such programmes shall either be preceded by a verbal warning or contain a warning text continuously displayed on the screen throughout the broadcast.²⁰⁶ In the case of on-demand services examples of such measures could be the use of PIN-codes or filtering systems.

The RTA implements the AVMS Directive's rules of product placement, sponsorship, and commercial advertising and other advertising. As mentioned above, the regulations may slightly differ, depending on whether a service is linear or non-linear.²⁰⁷

There is also a section in the RTA that states that television programmes that are not commercial advertising may not improperly promote commercial interests. This means that programmes may not promote purchases or rental of goods or services, or contain sales-promotional features, or promote a product or service in an improper manner.²⁰⁸

When it comes to advertising aimed at children and the advertising of alcoholic products Sweden has stricter rules than the AVMS Directive. Commercial advertising in broadcasts or on-demand services may not aim to attract the attention of children under the age of twelve.²⁰⁹ There is a general ban on the commercial advertising of alcohol in television and on-demand service.²¹⁰

3.7.1.3. Obligation to submit information

Some parties are obliged, under the provisions of the RTA, to submit certain information at the request of the SPBA. Any person who undertakes operations that require a licence under the RTA must provide the authorities with the information and documents necessary to verify that operations are being conducted in accordance with the RTA, as well with as the conditions and provisions issued pursuant to it. A licence holder must

²⁰⁵ RTA, Chapter 5 section 4.

²⁰⁶ RTA, Chapter 5 section 2 and 3.

²⁰⁷ RTA, Chapters 5, 6, 7 and 8.

²⁰⁸ RTA, Chapter 5 section 5.

²⁰⁹ RTA, Chapter 8 section 7.

²¹⁰ The Swedish Alcohol Act (2010:1622), Chapter 7 section 3.

also provide the SPBA with the information required to enable the SBC to determine the amount of the special fee (see below section 3.7.2.).²¹¹

A person transmitting television programmes via satellite must provide information regarding the owner of the company and the way such operations are financed.²¹² A satellite operator must provide information regarding its client, the client's address, the name of the programme service and the manner in which satellite transmissions are carried out.²¹³

3.7.1.4. Obligation to provide recorded programmes

A broadcaster of television programmes or a provider of on-demand television is obliged to record all programmes. A recording shall be kept for at least six months from the date on which the programme in question was broadcast or from the date on which the information in question ceased to be provided. The recorded programme must be submitted to the SPBA upon simple request and with no charge.²¹⁴

3.7.2. Sanctioning Options

A licence to broadcast terrestrial television may be revoked. Such a decision may only be issued if, in giving due consideration to the reason for the measure, it does not appear to be overly severe.²¹⁵ In the case of broadcasts or on-demand services that do not require a licence there is no regulation set out by the RTA that allows for a decision to order a media service provider to terminate its activities.

If the SBC finds that a programme contains portrayals of violence or pornographic images, the SBC must notify the Chancellor of Justice. The Chancellor of Justice may then order the party concerned not to broadcast such programmes again at times and in a manner that constitutes a significant risk that children may see the programmes. The same applies to a party who repeatedly and unjustifiably supplies on-demand television in a manner that creates a considerable risk of children viewing the programmes. The order may be issued subject to a conditional fine.²¹⁶

If the SBC finds that a party has failed to observe programme-related licence conditions (such as the above mentioned conditions regarding impartiality, accuracy, the medium's impact and the right to privacy), or the provision regarding rectification, the SBC may order the broadcaster to publicly announce the SBC's decision in an appropriate manner. Such a decision, however, may not prescribe that such an announcement must be

²¹¹ RTA, Chapter 16 section 10.

²¹² RTA, Chapter 16 section 7.

²¹³ RTA, Chapter 16 section 8.

²¹⁴ RTA, Chapter 16 section 11.

²¹⁵ RTA, Chapter 18 section 2.

²¹⁶ RTA, Chapter 17 section 13.

made during one of the broadcaster's programmes. The decision may include an order subject to a fine.²¹⁷

A party who disregards some of the provisions and conditions pertaining to commercial advertising, sponsorship and product placement, undue prominence etc. may, after an application lodged by the SBC, be ordered by an administrative court to pay a special fee. When considering the question of the imposition of such a fee, the court shall in particular consider the nature, duration and scope of the offence.²¹⁸ The special fee will be no less than five thousand Swedish kronor (SEK) and no more than SEK 5 million (approximately EUR 500 and EUR 500.000, respectively). However, the fee should not exceed 10% of the broadcaster's annual turnover during the preceding financial year. In determining the amount of the fee, special consideration must be given to the general circumstances of the offence, which constituted the basis for determining whether a fee should be imposed or not, and the estimated revenues that the broadcaster accrued as a result of the offence.²¹⁹

If a party fails to comply with, for example, the obligation to submit information and provide recorded programmes upon the request of the SPBA the authority may order that such information or programmes be seized. Such an order may be subject to a fine.²²⁰

3.7.3. Law enforcement against (online) audiovisual media – Practical Examples/Experience

Regarding issues of law enforcement in an online environment it is in particular worth mentioning the special challenges that the SBC has met regarding reviews of online on-demand television initiated by the SPBA and assessing of whether a service is an on-demand service or not.

In recent years, the SBC has dealt with several cases concerning video services available on the websites of various Swedish newspapers. These cases have concerned rules regarding the undue prominence of commercial interests, product placement, sponsorship and advertising.

Firstly, the SBC had to decide if the provision of programmes on newspaper websites constituted a special or independent service in relation to other materials, such as articles, on the website. The decisive factor in these cases was whether the programmes were provided as a minor part of wider content or not. The question that needed to be answered was if the programmes were accessible and it was possible to watch them regardless of other content on the website in question. In making that assessment, the SBC considered whether the programmes were provided on a particular

²¹⁷ RTA, Chapter 17 section 10.

²¹⁸ RTA, Chapter 17 section 5.

²¹⁹ RTA, Chapter 17 section 6.

²²⁰ RTA, Chapter 17, section 11.

subdomain or if they were available under tabs named, for example, “Video” or “TV”, under which the programmes were stored. The SBC also took into consideration whether the programmes could be viewed separately from articles – i.e. whether the programmes appeared to be independent of the journalistic text material accompanying them. In most cases the SBC concluded that the video sections on the newspapers’ websites were on-demand services that fell within the scope of the RTA. In doing so the SBC has referred to a judgment delivered by the European Court of Justice (ECJ) in 2015.²²¹

The SBC has also dealt with several cases concerning more traditional movie and television services, focusing on the measures taken by the media service provider in question to protect children from, for example, violent content.

One case²²² involving an online movie service that was regarded as an on-demand audiovisual media service by the SBC concerned a movie trailer for the movie “Playing with Dolls” and “The Hateful Eight”. The SBC found that both the trailer and the movie contained detailed depictions of realistic violence. To view full length movies on the site, a user first had to create an account with a password, then log in to his or her account and thereafter pay for each separate movie with a credit card, invoice or text message. The SBC considered this to constitute sufficient measures to prevent children from viewing the violent movie. The trailer, however, was available on the site free of charge, and a user could watch it without having to log in. This meant, according to the SBC, that the service provider had not taken sufficient measures to prevent children from viewing the violent trailer.

The SBC has also dealt with cases concerning on-demand services operated by one of the Swedish public service companies. One case concerned two episodes of a drama series called “Gomorra”. The SBC found that the episodes of “Gomorra” had contained detailed depictions of realistic violence.²²³ No user account or log in had been necessary to view the programmes, which had been provided free of charge. The programmes had been marked as unsuitable for children and there had been the possibility to activate “child protection” in the form of a four-digit PIN-code before starting the programme. After activating the child protection measure, programmes marked unsuitable for children could not be viewed without the code. However, since it had been possible to start the programme immediately by pushing “play” if the user had not activated the child protection, the SBC decided that the measures taken had been insufficient in this case. The SBC notified the Chancellor of Justice about the breaches.²²⁴

Regarding cross-border issues (although not in an online environment) it might be worth noting a Swedish alcohol advertising case²²⁵ that concerned channels provided by

²²¹ C-347/14 (ECLI:EU:C:2015:709).

²²² The SPBAs case number 16/01711.

²²³ The SPBAs case number 16/02905.

²²⁴ The Chancellor of Justice may order the party concerned not to broadcast such programmes again at times and in a manner that constitutes a significant risk that children may see the programmes. The order may be issued subject to a conditional fine.

²²⁵ SPBA case number 11/00567; Cf. Erik Ullberg and Michael Plogell, Swedish Authorities Want to Stop Alcohol Advertising and Sponsorship in UK Broadcasts, IRIS 2015-2:1/31, <http://merlin.obs.coe.int/iris/2015/2/article31.en.html>.

broadcasters established in the UK. The broadcasters have a licence to broadcast on the Swedish terrestrial network, their television programmes target Swedish territory, the programmes are broadcast in Swedish or have Swedish subtitles and contain advertising aimed at Swedish markets.

The case was the first of its kind and resulted in the European Commission deciding²²⁶ to apply Article 4 of the AVMS Directive for the first time. Article 4 allows member states that have adopted more detailed or stricter rules in the public interest to take appropriate measures against broadcasters under the jurisdiction of another member State where certain conditions are fulfilled. In brief, the marketing of alcoholic beverages in commercial television advertising is prohibited in Sweden but not in the UK. In January 2018, the Commission decided that Sweden had failed to prove that the broadcasters had established themselves in the UK in order to circumvent the stricter rules.

Other cases involving cross-border issues handled by the SBC have involved a Russian satellite channel. The provider, established in Russia, uses a satellite up-link situated in Sweden, and the channel targets the Baltic countries. Media authorities in Latvia and Lithuania have lodged complaints alleging that the channel disseminates, *inter alia*, hate speech, in breach of the AVMS Directive and in material breach of the rules requiring impartiality and accuracy under the relevant respective domestic laws. Since the provider uses a satellite up-link in Sweden the channel falls under Swedish jurisdiction, and the two Baltic media authorities sought the SBC's guidance, in accordance with Article 3 in the AVMS Directive, to be able to restrict the retransmission of the broadcasts.²²⁷ The SBC concluded that the broadcasts in question had not breached any of the rules applicable to the broadcasts since there are no rules regarding impartiality and accuracy in respect of satellite channels contained in the RTA. Issues regarding, for example, freedom-of-expression offences are not assessed by the SBC. Instead, such questions are handled by the Chancellor of Justice, who is the sole prosecutor in cases concerning offences against freedom of expression.

The Chancellor of Justice has, however, concluded that the broadcasts do not constitute offences under the Fundamental Law since the programmes are neither broadcast from Sweden nor intended to be received in Sweden.²²⁸ If an alleged offence does not fall under the Fundamental Law or the remit of the Chancellor of Justice it may be handled by the police and a public prosecutor. The Swedish Police have, however, in turn concluded that there are no indications that a crime has been committed that could be prosecuted under Swedish law.

It can also be mentioned that the SBC and the SPBA cooperate with the British broadcasting authority, Ofcom, regarding complaints about television channels broadcast

²²⁶ European Commission, decision of 31.1.2018 on the incompatibility of the measures notified by the Kingdom of Sweden pursuant to Article 4(5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, COM (2018) 532 final, available at <https://ec.europa.eu/digital-single-market/en/news/commission-decides-swedish-ban-alcohol-advertising-not-compatible-eu-rules>.

²²⁷ RTA, Chapter 1 section 3, and AVMS Directive Article 2(1) and 2(3)(a).

²²⁸ The Fundamental law, Chapter 1 art. 6 and 7.

to Sweden from the UK. Several television channels broadcast in Sweden fall under British jurisdiction since the broadcasters are established in the UK and broadcast from the UK to Sweden. When the SPBA receives complaints regarding content broadcast on such television channels, the complaints are forwarded to Ofcom for consideration, in accordance with an agreement between the SPBA and Ofcom. The SPBA informs the plaintiffs about forwarding the complaints and Ofcom informs the SPBA on the results of the proceeding. Ofcom publishes the decisions in the Ofcom's Broadcast and On Demand Bulletin.

3.8. Turkey

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3.8.1. Regulatory Framework

This report discusses the regulatory framework for Audiovisual Media Services (as well as the way in which it is applied in Turkey) by providing recent examples. In order to properly understand the situation in Turkey, it is particularly important to consider Turkey's process of candidacy for EU membership and the efforts made to this end, and also the recent shift to the presidential system.

Turkey first officially applied to join the EU in 1959. Although a "road map" setting out the path towards Turkey's full EU membership was drawn up under the 1963 Ankara Agreement, various issues several times caused this path to be disrupted. The 1995 Customs Union Agreement heralded a new era in terms of Turkey's progress towards EU membership; under the Agreement, Turkey was expected to go overhaul its regulatory framework through a comprehensive legislative process. Finally, in 2004, Turkey's candidacy for full EU membership was recognized; negotiations between EU and Turkey commenced in 2005. After starting negotiations with the EU, Turkey had to undertake certain progressive actions in order to modernise its public institutions and make its legislation compatible with the EU's legal framework. As a result, Turkey started the reform of its legislation with an extensive law-drafting process aimed both at the transposition of existing EU legislation into Turkish law and improving the accountability and functionality of its public institutions.

In addition to the above efforts to harmonise Turkey's legislation with that of the EU, Turkey initiated another major transformation (following the general elections held in June 2018) designed to usher the country into a new presidential system. In accordance with the result of a referendum held in 2017, constitutional amendments were adopted. Following the elections of June 2018 most new legislative initiatives can be considered to constitute structural and organisational changes for the purposes of implementing the recently amended governmental structure (e.g. the establishment of new governmental authorities and institutions, such as administrative bodies and affiliated institutions, as well as the extension of the roles and duties of certain ministries). Therefore, while it

would be accurate to state that a large portion of recent legislative activity in Turkey stems from Turkey's harmonisation efforts within the framework of its negotiations with the EU, in recent months Turkey has also been focusing on its transition to the presidential system.

The negotiation process for the transposition of the AVMSD was led by the Radio and Television Supreme Council ("RTUK"), the relevant authority with regards to media-related services. The RTUK was founded in 1994 as an administratively and financially autonomous and impartial public/legal authority for the regulation and supervision of radio, television (and now also on-demand media) services. Following the elections in June 2018 and during the structural transformation process for the transition to a presidential system, the RTUK was attached to the Ministry of Culture and Tourism, losing its autonomous position.

RTUK personnel attended various meetings with representatives of the EU and Turkey even before the start of the official accession negotiation process, such as the EU Council Enlargement Group meeting in Brussels in 2008. Member state representatives evaluated Turkey's action plan on "Information Society and Media", which was prepared by the RTUK, and determined that the commitments stated in the action plan were satisfactory for the "Information Society and Media" area. Accordingly, in line with the closing remarks of the 2008 meeting, the RTUK is responsible for the transposition of the following measures:

- Turkey should adopt legislation in the audiovisual field – particularly the Audiovisual Media Services Directive, which includes measures that ensure the harmonisation of the legal framework such as the freedom to receive and retransmit television broadcasts.
- Turkey should organise a consultation forum with the relevant parties to discuss the impact of those measures that are adopted in order to ensure the independence of the regulatory body and the transparency of the audiovisual process.

Given the above-mentioned framework, and in order to meet the above-noted expectations, the AVMSD was transposed into Turkish legislation within the scope of the harmonisation process by Law No. 6112 on the Establishment of Radio and Television Enterprises ("the RT Law"), which entered into force in March 2011.²²⁹

²²⁹ The RT Law, which was published in the Official Gazette dated 3 March 2011 and numbered 27863, is available at <https://kms.kayis.gov.tr/Home/Goster/34819>. The English version of the RT Law, which does not reflect the latest amendments (Art. 29/A; see the following footnote) is available at <https://www.rtuk.gov.tr/en/audio-visual-media-law/5350/5139/the-law-no6112-on-the-establishment-of-radio-and-television-enterprises-and-their-media-services-march-3-2011.html>.

According to Article 1 of the RT Law, the purpose of the law is to regulate and supervise radio and television broadcasting services and on-demand media services in order to ensure freedom of expression and information, determine procedures and principles as regards the administrative, financial and technical structures, set the obligations of media-service providers, and establish and organise the duties, powers and responsibilities of the RTUK.

Further to a recent development, on 21 March 2018, the RT Law was amended with the addition of Article 29/A²³⁰ in order to regulate media and broadcasting services provided on the Internet. According to the amended article of the RT Law, media-service providers that provide television, radio and on-demand broadcasting services via the

²³⁰ Article 29/A of the RT Law:

(1) Media services providers that obtain a temporary right to broadcast and/or a broadcasting licence from the Supreme Board, may also provide their rights, licences and broadcasting services via the Internet, in accordance with this Law and Law No. 5651 on Regulating Broadcasting on the Internet and Fighting Against Crimes Committed through Internet Broadcasting, dated 4/5/2007. Media services providers that request authorisation to provide radio, television and on-demand broadcasting services only via the Internet shall be required to obtain a broadcasting licence from the Supreme Board, and platform operators that request authorisation to transmit these broadcasts via the Internet shall also obtain such authorisation from the Supreme Board.

(2) In the event that the Supreme Board determines that broadcasting services provided by real and legal persons that do not have temporary broadcasting rights and/or licences from the Supreme Board or whose rights and/or licences have been cancelled are transmitted via the Internet environment, it may be decided that the content of the broadcasting in question shall be removed and/or be blocked by a justice of the peace upon the request of the Supreme Board. Such a decision shall be sent to the Information and Communication Technologies Agency for implementation. The justice of the peace shall render its order with respect to the blocking/removal request of the Supreme Board within twenty-four hours and without any hearing. Appeals against such orders can be lodged in accordance with the provisions of the Criminal Procedure Law No. 5271 dated 4/12/2004. Paragraphs 3 and 5 of Article 8/A of the Law Numbered 5651 shall be applicable in respect of such removal or blocking decisions.

(3) The provisions of the second paragraph will apply in respect of the Supreme Board's duties in the case of the existence of international treaties to which the Republic of Turkey is a party, even if (i) the content originates from abroad or the hosting provider in question is located abroad, or (ii) the transmission of the broadcasting services of the media service providers or platform operators that have violated the provisions of this Law are under the jurisdiction of another country (this shall be determined by the Supreme Board), or (iii) broadcasting institutions which broadcast to Turkey in the Turkish language via the Internet environment or which broadcast commercial communications aimed at Turkey despite the broadcasting language not being Turkish. In order for these organisations to continue broadcasting on the Internet, it shall be mandatory to obtain a broadcasting licence and to obtain the relevant broadcast-transmission authorisation certificate for platform operators from the Supreme Board, as is the case for any other institution under the Republic of Turkey's jurisdiction.

(4) By reserving the rights of the Information and Communication Technologies Agency, individual communications shall not be evaluated within the scope of this article, and radio, television and platforms providing on-demand broadcasting services which are not dedicated to transmit on-demand broadcasting services over the Internet, and natural and legal persons who only provide hosting for radio, television and on-demand broadcasting services shall not be deemed as platform operator for implementation of this article.

(5) Procedures and principles regarding the broadcasting of radio, television and on-demand broadcasting services on the Internet, the transmission of such services, assigning a broadcasting licence to media-service providers and assigning broadcasting transmission authorisation to platform operators, the oversight of such broadcasting, and the implementation of this Article shall be determined by a regulation to be jointly issued by the Supreme Board and the Information Technologies and Communications Authority within six months of this Article coming into effect.

Internet must obtain a broadcast licence or (in the case of disseminating platforms) a broadcast-transmission licence from the RTUK. Access to platforms providing these services without obtaining a licence shall be blocked. It should also be noted that this Article concerns not only the resident media-service providers and platform operators, but also those that are not seated in Turkey (without any geographical limitation).

The procedures and principles in respect of obtaining a broadcasting licence and broadcast-transmission authorisation for platform operators, auditing such broadcasting and the implementation of the amended Article shall be further explained by a regulation to be jointly issued by the RTUK and the Information Technologies and Communications Authority (“ICTA”)²³¹ within six months of the date of the amendment of the RT Law. In line with the provision set forth under Article 29/A, on 27 September 2018, the RTUK published a Draft Regulation on Radio, Television and On-Demand Broadcasting Provided through an Internet Platform (“Draft Regulation”),²³² which introduces many obligations – starting with the obligation of media-service providers and platform operators to obtain a licence – and which aims to regulate broadcasting services provided through the Internet. The RTUK published the Draft Regulation on its own website in order to gauge public opinion on it. The Draft Regulation was found to be quite controversial, especially from the perspective of international companies; thus, it is still not clear whether, before it is finally enacted, the Draft Regulation will be revised to reflect the reactions that it has received.

In addition to the RT Law, the Law on the Regulation of Broadcasts via the Internet and the Prevention of Crimes Committed Through Such Broadcasts No. 5651 (“Law No. 5651”)²³³ sets forth the obligations and liabilities of content providers – i.e. hosting providers, access providers and the Internet Service Providers Union (see below) – as well as the principles and procedures relating to the prevention of certain crimes committed on the Internet environment through content, hosting and access providers.

3.8.2. Sanctioning Options

Law No. 5651 regulates various conditions and reasons for blocking access to either a piece of content or an entire platform. Although Law No. 5651 mainly aims to block access only to certain content (in the interests of being proportionate), access to an entire platform/website could still be blocked easily in the light of the lack of clarity of certain

²³¹ Pursuant to Article 10 of Law No. 5651, the ICTA is tasked with, *inter alia*, (i) conducting studies aimed at the prevention of activities and broadcasts of an illegal content by means of facilitating coordination through the public authorities, institutions, NGOs, law enforcement officers and the relevant content, hosting and access providers, (ii) monitoring the broadcasts available in the Internet environment and taking measures to block access to those broadcasts whose content constitutes a crime under the law, and (iii) determining the timing, level and form of the monitoring broadcasts available in the Internet environment.

²³² The Draft Regulation, which is published on the RTUK’s website, is available at: <https://www.rtuk.gov.tr/assets/Galeri/Haberler/radyo-televizyon-ve-istege-bagli-yayinlarin-internet-ortamindan-sunumu-hakkinda-yonetmelik-taslagi.pdf>.

²³³ Law No. 5651, which is published in the issue of the Official Gazette dated 23 May 2007 (numbered 26530), is available at <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5651.pdf>.

provisions in the RT Law and a lack of technical equipment on the part of the regulatory authority.

Article 8 of Law No. 5651 lists a number of crimes and states that access-blocking measures can be taken by the ICTA (for details of the procedure, see below) in the event that there is a sufficient strong suspicion that a platform/website has engaged in such crimes. Accordingly, broadcasts made via the Internet whose content can reasonably be believed to constitute one or more of the crimes listed and prohibited by the Turkish Criminal Code²³⁴ (causing a person to commit suicide; depicting the sexual abuse of children; facilitating the use of drugs or other stimulants or the supply of a substance hazardous to health; disseminating obscenity; facilitating prostitution; and providing the means and facilities for gambling) or by the Law on Crimes committed to the detriment of Kemal Atatürk, the first President of Turkey (such as hate speech against Atatürk) will be blocked.

Moreover, under Article 8/A of the Law No. 5651 blocking access and/or content removal decisions can also be taken for the purposes of protecting the right to live and the safety of life and property, protecting national security and public order, and preventing criminal activity. Gambling supervisory authorities may also obtain an access-blocking decision if they determine that crimes that fall within their authority are committed on the Internet. Therefore, although content that can be reasonably linked to certain crimes will trigger an access-blocking or content removal decision (as listed above), the law also gives discretion to the authorities to determine whether certain content constitutes a threat to the right to life, national security, etc.

In addition to Law No. 5651, the RT Law also obliges media-service providers to provide their media services in a manner that is in line with the principle of showing an understanding of public responsibility, as further detailed in Article 8 of the RT Law; accordingly, certain sections of Article 8 stipulate that media services must not, for example: violate the existence and independence of the state of the Republic of Turkey; incite society to hatred and hostility by discriminating on the basis of race, language, sex, class, region, religion or sect; foment hatred within society; be contrary to human dignity and the principle of the right to privacy in one's personal life; include humiliating, derogatory and defamatory expressions in respect of persons and entities/organisations (apart from reasonable criticism); praise or encourage terrorism; contain and encourage broadcasts that discriminate on the basis of race, colour, language, religion, nationality, sex, disability, political and philosophical views, or sectarian or similar reasons; contain and encourage broadcasts that humiliate persons; be contrary to the national and moral values of the society; praise the committing of a crime or criminals or criminal organisations; teach criminal techniques; depict the abuse of children or powerless and disabled people or incite violence against them; encourage gambling or the use of addictive substances such as alcohol, tobacco or narcotics; or encourage or normalise violence. As can be well understood from the above examples, the RT Law's scope is quite wide and open to broad interpretation.

²³⁴ Turkish Criminal Code is available at: <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf>.

Under Article 8/2) any radio or television programmes that could impair the physical, mental, or moral development of young people and children may not be broadcast at times when this group of viewers are likely to be watching, whether or not such a programme carries a cautionary/protective symbol. Similarly, Article 8/3 of the Law stipulates that on-demand media-service providers shall ensure that media services that could adversely impact the physical, mental or moral development of young people and children are provided in such a manner that they will not hear or see such services under normal circumstances.

Under the RT Law, it is also forbidden to offer prizes and bonuses or to market, sell or present a product by using value-added electronic telephone numbers, local numbers with special content services such as call numbers, and other fixed-line or mobile numbers which are subject to special call rates, which are dedicated to a certain competition, sweepstake, lottery or similar exercise, and which give rise to unjustified profit and are misleading to listeners and audiences.

The RTUK may impose administrative fines and issue warnings, in accordance with the RT Law. Accordingly, media-service providers broadcasting in violation of some of the above-mentioned subparagraphs of Article 8/1²³⁵ will be issued an administrative fine amounting to between 2% and 5% of the gross commercial communication revenues realised within the month preceding the month during which the violation took place. The RTUK may impose such administrative fines,²³⁶ in consideration of the seriousness of the violation and the broadcast's medium and reach. On the other hand, media-service providers that conduct broadcasts in violation of the principles, obligations or prohibitions established by the other sub-paragraphs of Article 8/1 and other provisions of the RT Law will receive a warning. If the violation is repeated after the warning is delivered, the media service provider may be issued an administrative fine of between 1% and 3% of the gross commercial communication revenues realised within the month preceding the month during which the violation took place. In determining the broadcast's medium and reach in order to determine the amount of the administrative fine, the RTUK will consider whether the service is provided on a regional or national scale. A "national" broadcast shall mean that the broadcast reaches more than 70% of the population. The level of the administrative fine may not be less than TRY 10 000 (approximately EUR 1 700) for on-demand media-service providers.

As regards the sub-paragraphs of Article 8/1 concerning the compatibility of media content with the national and moral values of society (sub-paragraph (f)) and the depiction of addictive substances such as alcohol, tobacco and narcotics or gambling

²³⁵ (a), (b), (d), (f), (g), (ğ), (h), (n), (ö), (s), (ş) and (t).

²³⁶ According to the RTUK's decision 2017/49, a scene of a couple kissing in the television series "Çukur" lasted too long, using close-up filming techniques that went beyond the scene's purpose and which could have negatively affected children and teenagers; accordingly, the scene violated Article 8 of the Law. The RTUK imposed an administrative fine of TRY 260 000 (approximately EUR 35 000) on the broadcasting company. The decision is available at <https://www.rtuk.gov.tr/ust-kurul-kararlari/6112-sayili-kanunun-8inci-maddesinin-ikinci-fikrasinin-ihlali-nedeniyle-idari-para-cezasi-show-tv-aks-televizyon-reklamcilik-ve-filmcilik-san-ve-tic-a-s/24385?Aciklama=%C3%B6p%C3%BC%C5%9Fme>.

(sub-paragraph (h)) – it should be noted that these are the issues encountered the most, and they are interpreted by the RTUK quite broadly.

The RTUK is furthermore entitled to impose a fine pursuant to other specific laws. For example, Article 3/6 of Law no. 4207 on the Prevention of Harm and the Supervision of Tobacco Products²³⁷ – which prohibits the use of tobacco products on programmes, movies, shows, music videos, commercials and introductory films broadcast on television – provides an administrative fine of no less than TRY 10 000 (approximately EUR 1 700) and between 1% and 3% of gross revenues. For example, according to decision no. 2017/16,²³⁸ a cartoon broadcast on the television channel Disney Channel-Disney Televizyon Yayıncılık A.Ş. contained a character that was constantly smoking, and the images of the character smoking were not blurred by the broadcasting company. Accordingly, the RTUK judged that the broadcasting company had violated Article 3/6 of Law no. 4207 and imposed an administrative fine of TRY 12 070 (approximately EUR 2050)

Moreover, Articles 6/1 and 7 of Law no. 4250 on the Spirits and Alcoholic Beverages Monopoly²³⁹ prohibits the same kind of depiction in respect of alcoholic beverages and provides an administrative fine of between TRY 5 000 and TRY 200 000 (approximately EUR 850 and EUR 34 000). According to RTUK decision no. 2016/10,²⁴⁰ a movie was held to have presented the consumption of alcoholic beverages as a social norm (by means of statements such as “This is your birthday; of course we will drink”) and as a means of relaxation. Furthermore, a character in the movie talks rudely to other characters as a result of having consumed alcohol. Therefore, the RTUK ruled that the movie in question had violated Law No. 4250 by encouraging the use of alcoholic beverages and imposed an administrative fine of TRY 5 000 (approximately EUR 850) on the broadcasting company.

3.8.2.1. Law enforcement against (online) audiovisual media – Practical Examples/Experience

As explained above, Law no. 5651 regulates various conditions and reasons for blocking access to either a piece of content or an entire platform/website, and sets forth the principles that media services shall comply with. Violations thereof may incur administrative fines.

²³⁷ The Law on the Prevention of Harm and the Supervision of Tobacco Products, no. 4207, which is published in the edition of the Official Gazette dated 7 November 1996, no. 22829, is available at: <https://www.tobaccocontrollaws.org/files/live/Turkey/Turkey%20-%20Law%20No.%204207.pdf>.

²³⁸ Available at: <https://www.rtuk.gov.tr/ust-kurul-kararlari/4207-sayili-kanunun-3uncu-maddesinin-altincifikrasinin-ihlali-nedeniyle-idari-para-cezasi-disney-channel-disney-televizyon-yayincilik-a-s/23617?Aciklama=t%C3%BCt%C3%BCn>.

²³⁹ The Law on the Spirits and Alcoholic Beverages Monopoly, which is published in the edition of the Official Gazette dated 12 June 1942, no. 5130 is available at: http://www.tapdk.gov.tr/mevzuat/kanunlar/kanun_4250.pdf.

²⁴⁰ Available at: <https://www.rtuk.gov.tr/ust-kurul-kararlari/4250-sayili-kanunun-6-nci-maddesinin-birincifikrasinda-yer-alan-televizyonlarda-yayinlanan-dizi-fi/6360?Aciklama=alkol>.

In practice, although Law no. 5651 mainly aims to block access to individual pieces of content because of the proportionality requirement (as explained above), access to a complete platform can easily be blocked given the poor wording of the relevant provisions, which fail to explicitly specify the distinction between cases where specific content should be removed and where an entire website containing problematic content should be blocked under Law no. 5651. Moreover, the lack of technical equipment on the part of the regulatory authority necessary to selectively block access to particular content in violation will most inevitably result in the blocking access of the entire website in question, as explained below. Law no 5651 is also explained below within this context, and specific articles thereof and their implementation are examined.

3.8.2.2. Catalogue Crimes – Article 8 of the Law No. 5651

Blocking orders in respect of crimes listed in Article 8 of Law No. 5651 (also known as “catalogue crimes”) must be decided by a judge or, in cases where the decision cannot be delayed, by a public prosecutor, provided that a justice of the peace confirms the order in question within 24 hours. Blocking orders based on Article 8 of Law no. 5651 must be forwarded to the ICTA for implementation, and the ICTA shall implement the order within a maximum of four hours. Moreover that the wording of this Article does not specifically require courts to deliver blocking decisions in respect of specific content. Owing to the resultant lack of clarity, in practice, the implementation of Article 8 usually results in the blocking of the entire platform in question. On the other hand, if a platform fails to implement a blocking order under Article 8 of the Law No. 5651, it may be sanctioned by a judicial fine in the amount of a daily rate of between TRY 500 and 3 000. Moreover, it has also been the case that platforms that have not implemented specific blocking orders have been forced to shut down, pursuant to paragraph 3 of Article 8/A.

For instance, access to YouTube was blocked in Turkey from January 2008 until March 2010 owing to the fact that a video on the platform constituted defamation against Kemal Atatürk (one of the catalogue crimes listed in Article 8 of Law No. 5651).²⁴¹ The access ban on the platform was lifted after a German-based licensing company purchased the copyright of the video in question from the video owner and removed the video from the platform shortly thereafter. Once the content constituting defamation against Atatürk was removed, the ICTA reinstated access to YouTube again.

On the other hand, in the light of the media criticism Turkey has been receiving in this respect in the last years, courts have started to deliver decisions based on specific pieces of content, unless the entire platform in question commits one of the catalogue crimes. For example, websites entirely devoted to enabling or promoting prostitution are blocked under Article 8 of Law No. 5651. However, if there are only some pieces of content promoting prostitution on a platform not specifically aimed at offering such content, courts now deliver decisions that target the problematic content, instead of the entire platform.

²⁴¹ Cf. Selcuk Akkas, Court Imposes a Ban on YouTube, IRIS 2007-5:19/33, <http://merlin.obs.coe.int/iris/2007/5/article33.en.html>.

3.8.2.3. Article 8/A of the Law. No 5651

Article 8/A of the Law No. 5651 constitutes the Article that offers the widest scope for broad blocking measures, given that it enables platform-blocking orders based for an extensive variety of reasons. Under this Article, in cases where a decision cannot be delayed, access to either a piece of content or a platform as a whole may be blocked in defence of the right to life, to protect the security of life and property, in defence of national security and public order, to prevent the commission of crimes or to protect public health. Under Turkish law, “public order” and “public safety” are not specifically defined, as they can change, depending on the specific case or situation. Furthermore, the Turkish Criminal Code regulates various crimes in such a manner that the “prevention of the commission of crimes” under Article 8/A of the Law No. 5651 could concern any of the above-listed crimes. Therefore, in practice, any incident (such as the defamation of the President or footage of a bomb attack) could be subject to measures stipulated by Article 8/A.

Blocking orders under Article 8/A of the Law No. 5651 are made either by a judge (justice of the peace) or the ICTA upon the request of Prime Ministry or related ministries. If such an order is given by the ICTA, it must submit its order to a justice of the peace for confirmation within 24 hours. However, regardless of the authority that issues the blocking order, such orders shall be implemented within four hours at most.

Article 8/A mentions as the first measure to be taken the blocking of access to a piece of content that endangers the right to life, threatens the security of life, property, national security, public order or public health, or facilitates the commission of crimes. However, if access to a piece of content cannot be blocked for technical reasons or if the violation cannot be prevented by only blocking access to a particular a piece of content, then access to the platform as a whole shall be blocked, in accordance with Article 8/A (3) of Law No. 5651.

Moreover, as the ICTA does not have the technical infrastructure to block access to a particular content that is provided via an https service, if a specific link is accessible via such secure/https-services, then the ICTA shall require the platform in questions to implement the order itself. Otherwise the platform will be blocked and subject to an administrative fine of between TRY 50 000 and TRY 500 000 (approximately EUR 8 500 to 85 000). For example, Twitter has been blocked in Turkey a few times after it failed to implement within four hours blocking orders based on Article 8/A. Moreover, Twitter has also been sanctioned with a fine of TRY 150 000 by the ICTA on the grounds that it had not complied with such an order.

3.8.2.4. Protection of Personal Rights – Article 9 of the Law No. 5651

Under Article 9 of Law no. 5651, the Internet Service Providers Union (ISPU)²⁴² is the only authority that can enforce access-blocking decisions handed down by the justices of the peace in the event of a violation of personal rights. Such decisions shall be delivered to

²⁴² Relevant website is available at: <https://www.esb.org.tr/>.

the ISPU and then implemented by it within a maximum of four hours. However, as the ISPU cannot implement certain orders (such as those blocking access to content provided via https-services) – due to the kind of technical deficiencies suffered by the ICTA – such orders that are not directly implemented by the ISPU are sent for implementation to the concerned platforms on which the problematic content is to be found.

Under normal circumstances, Article 9 of Law No. 5651 requires the blocking of access to a specific piece of content. However, if the violation is not prevented by blocking access to that particular piece of content, then under Article 9, access to the entire platform might be blocked. For instance, Twitter was blocked²⁴³ in 2014 for the first time in Turkey on the grounds that hundreds of court orders had been issued on the basis of Article 9 of Law No. 5651, and Twitter had failed to comply with any of them. After the blocking, Twitter reviewed all the orders and complied with most of them. The platform again became accessible two weeks after having been blocked.

Article 9 is the most common article cited in blocking orders. In other words, because obtaining a blocking order owing to a violation of personal rights is quite easy (courts do not require a fee for such applications to be lodged, and blocking requests must be responded to by courts within 24 hours), there have been a high number of blocking orders imposed on the basis of Article 9 of the Law compared to those imposed on the basis of Article 8, Article 8A and Article 9A of the Law.

3.8.2.5. Protection of the Right to Privacy in One's Personal Life – Article 9/A of the Law No. 5651

Article 9/A of Law No. 5651 provides for the blocking of access to content in order to ensure the right to privacy in one's personal life. Accordingly, those who claim that their rights to privacy in their personal life has been violated by the content of a broadcast on the Internet may directly apply to the ICTA and request the blocking of access to the content in question. The President of the ICTA shall immediately deliver such a request to the ISPU for implementation of the request; access to such content shall be blocked within a maximum of four hours. However, in the event of any delay, the ICTA could also implement the order itself without forwarding it to the ISPU. In any event, the ICTA shall lodge an application with a court within 24 hours of such a blocking action in order for the court to confirm its blocking order.

Again, under normal circumstances, Article 9/A of the Law requires the blocking of access only in respect of specific pieces of content. Given the fact that it is easier to receive a blocking order due to a violation of personal rights under Article 9 than a violation of right to privacy in one's personal life, in practice Article 9/A is rarely invoked. In other words, since any violation regarding privacy could also be deemed to constitute a violation of personal rights, citizens invoke Article 9 of Law No. 5651 (violation of personal rights) more often than they do Article 9/A.

²⁴³ Access to Twitter was blocked in 2014 by the Decision of the Office of Chief Public Prosecutor of Istanbul, dated 20/03/2014.

4. Comparative analysis

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The national reports paint a picture of law enforcement against domestic and foreign media-service providers in the European audiovisual sector that, despite a common international (and, in some cases, European) legal framework, contains numerous national variations. While many of the challenges mentioned with regard to the regulation of (online) media content are the same or similar from one country to the next, there are also national differences, some of which can be traced back to specific geographical and linguistic characteristics or to cultural peculiarities of the relevant regulatory environment. In order to obtain an overview of the different forms of law enforcement within the European audiovisual market – which, regardless of the common regulatory framework of the European Union and the Digital Single Market, is a single market from the perspective of recipients, media providers and creative professionals – we need to compare both the national regulatory environment in terms of statutory requirements and the sanctions available to regulators and the national challenges and solutions mentioned in the individual country reports.

It has already been stated in the first part of this publication that there is a common international framework for audiovisual media and their regulation, which legislatures, authorities and media-service providers must follow. It is also clear that extensive harmonisation has taken place in terms of the European legislative framework. While this legislative alignment at the EU level is largely driven by the AVMSD and the e-Commerce Directive, for EU non-member states it is also a result of the European Convention on Transfrontier Television and national efforts to gain access to the European market. The report from Turkey, for example, highlights the country's attempts to implement the provisions of the AVMSD within the context of its EU membership aspirations.²⁴⁴

The development of pan-European media law that facilitates law enforcement in Europe mainly concerns content-related harmonisation and takes the form, for example, of regulations governing advertising rules and the depiction of violence and hate speech – in particular in the field of product placement, sponsorship and restrictions on the advertising of tobacco and alcohol within the context of the protection of minors in the media.

²⁴⁴ This has not changed following the considerable tensions that recently arose between the EU and Turkey after the failed military coup in Turkey and the subsequent repression and changes to the constitutional order in the country.

Even so, there is a certain degree of divergence between national regulatory frameworks which, at EU level, is a consequence of the flexibility given to member states by the AVMSD. In particular, Article 4(1) states that “Member States shall remain free to require media-service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law.” In Sweden, for example, there are stricter rules concerning advertising aimed at children and the advertising of alcoholic products in audiovisual media.

Media services are also, in some cases, subject to special provisions resulting from cultural traditions, which can be political in nature, or from state security interests, which vary in terms of intensity and form. Media services in Turkey, for example, “must not oppose the existence and independence of the state of the Republic of Turkey, the indivisible integrity of the state [and] its territory and people, or Atatürk’s principles and reforms”.²⁴⁵

However, national differences are found not only in special laws governing audiovisual media, but also in criminal-law provisions that apply to audiovisual media content. Harmonisation in the sense of a “Europeanisation” of criminal law²⁴⁶ has yet to materialise outside the EU’s jurisdiction in the field of particularly serious crime with a cross-border dimension under the Lisbon Treaty and the implementation of police and judicial cooperation under the TFEU. Despite potential similarities, some of which have historical roots, criminal legislation is therefore not coordinated at national level. Aimed at protecting public order and national integrity, it is often partly characterised by vague legal concepts that are open to interpretation and leave a margin of discretion for those in charge of applying the law. The provisions of the Belgian Criminal Code (Article 383 *et seq.*), for example, aim to prevent public breaches of morality.²⁴⁷ However, what constitutes a breach of public order or morality differs (and, in particular, is treated with varying degrees of stringency) from one country to another.²⁴⁸ Specific rules enshrined in national laws, such as the punishable nature of the use of the symbols of unconstitutional organisations under Article 86a of the German Criminal Code, are also relevant. Even though differences within the EU may only be subtle, this varied regulatory landscape and the different conditions it creates for media-service providers can mean that certain countries, like so-called tax havens, are more attractive than others when it comes to locating a company head office.

Also relevant to law enforcement in the European context is the country-of-origin principle, which can offer an escape route from regulation and law enforcement in a particular country. The Hungarian report, for example, describes Hungary as a “loser” when judged by the country-of-origin principle, because only eight of 100 Hungarian-

²⁴⁵ Article 8(1)(a) RT Law.

²⁴⁶ Concerning this notion, see Bernd Hecker, *Europäisches Strafrecht*, third edition. Springer, Berlin 2010, para. 5 *et seq.*

²⁴⁷ *La protection des bonnes mœurs*; see chapter 3.1.2.

²⁴⁸ Although not directly relevant to criminal law, examples concerning the protection of minors described in the national reports from Turkey and Sweden demonstrate considerable national differences: whereas even a lengthy close-up of a kissing scene was judged to be harmful to minors in Turkey, appropriate youth protection mechanisms in Sweden were only discussed in relation to the realistic portrayal of violence in trailers for films such as “The Hateful Eight”.

language television broadcasters are based in the country – an example that demonstrates the reality of “forum shopping”. If we add to these numerous variables the fact that national media laws are aimed at different categories of service provider – for example, Turkish law no. 6112 treats video-on-demand services in the same way as other broadcast content, while in Hungary, (online) press and audiovisual media are regulated by the same law, and in Germany, telemedia and broadcasting remain subject to different regulations within the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement), as do linear and non-linear programmes in Sweden – it soon becomes clear that, although there is a degree of regulatory harmonisation, the devil is in the detail, as they say.

As regards the different ways in which legal infringements in (audiovisual) media are punished, it should be noted firstly that the police and judicial authorities are able to work together, including with their counterparts in different countries, to take action against providers of content that infringes criminal law. However, effective cooperation is limited by continuing restrictions on the ability of criminal law-enforcement agencies to combat cybercrime and concerns about transnational criminal law enforcement on grounds of national sovereignty.

The national reports focus on the law-enforcement options available to regulators, although in some cases and in some legal systems the regulators may need to involve a court in order to fulfil their basic law-enforcement remit.²⁴⁹ The regulators surveyed – KommAustria (Austria), the CSA (Belgium), the *Landesmedienanstalten* (German state media authorities), AGCOM (Italy), the NEMMC (Latvia), the SPBA (Sweden), RTUK (Turkey) and NMHH (Hungary) – all have similar possibilities open to them to take action against providers and their content.

It should be noted, first of all, that broadcasters in the countries concerned must generally either obtain a licence or official authorisation²⁵⁰ – which some regulators will only grant if certain content-related, technical and organisational conditions are met – or at least register or file a notification of their service. However, apart from broadcasters, the types of media service (i.e. on-demand and online services) that need to be licensed or registered vary from country to country. In Austria, for example, as in Germany, operators of satellite and terrestrial channels require a licence, whereas cable television companies and (live) streaming service providers only need to notify the authorities. In Italy, the rules on authorisation (for VOD) and licensing (for IPTV, web TV and similar services) are contained in decrees issued by the regulator itself. On-demand television services in Sweden must register with the SPBA.

If a licence or authorisation is necessary, the regulator also has the opportunity to suspend or revoke it under certain conditions, making the further transmission or distribution of the service illegal. Some regulators (in Germany, but not Sweden, for example) are also able to ban telemedia services, for which a licence is not required. At national level, such measures are usually undertaken as a last resort (as in Germany and

²⁴⁹ This is the case with infringements of advertising rules in Sweden, for example, and the offences listed in Article 8 of Turkish law no. 5651.

²⁵⁰ In Hungary, agreements are signed between terrestrial broadcasters and the national regulator.

Belgium, for example), and sometimes only after prior warnings have been issued,²⁵¹ but ultimately subject to the interpretation of the regulator concerned. The seriousness of the infringement and the method of transmission – e.g. analogue or digital²⁵² – can affect the type and extent of the sanction. Here also, reference is made in some circumstances to culturally based differences linked to the particular characteristics of the legal system concerned. While such national differences often become apparent when comparing the type of sanction chosen in individual cases, they generally become quite clear when comparing the maximum fines that can be imposed under the law. While in Latvia, for example, the NEMMC can impose fines of no more than EUR 14 000 for content-related infringements, the maximum fine in Germany and Sweden is EUR 500 000. For foreign providers in particular, this can represent an inadequate framework that further encourages forum shopping. Whether or not this is the case also depends on who can be sanctioned by the regulator (providers or distributors?), which is only partially harmonised at EU level.

In view of the aforementioned national disparities and differences based on transmission methods, the resulting (cross-border) challenges in terms of the application and enforcement of the law, which are emphasised in the national reports, are obvious. One key challenge, which is particularly highlighted in the reports from Latvia and Belgium, for example, concerns the handling of regulations governing how to deal with foreign services under the procedure described in Article 4(1) and (2) of the AVMSD, in conjunction with its different expressions in national law as an amendment to the country-of-origin principle. In practice, the interpretation of this provision in terms of its applicability to “a broadcaster under the jurisdiction of another Member State” and the practical implementation of cooperation with another country’s regulatory body in order to achieve a “mutually satisfactory solution” throws up particular difficulties if and to the extent that there are no more detailed (national) provisions to refer to. Particular reference should be made here to the detailed explanations contained in the Latvian report. A similar problem arises in relation to Article 3(1) of the AVMSD, the wording of which has also posed challenges concerning the temporary blocking of television channels (see the chapter on Hungary).

Another problem of interpretation that regulators face concerns the definition and categorisation of services (especially Internet-based services), where such categorisation determines the legal framework under which a service falls and, therefore, the possible sanctions that may be applicable to it. For example, should video services on newspaper websites be classified as video-on-demand services (Sweden) and should (live) streaming services on Twitch and YouTube be treated as broadcasting, since they are similar to television (Austria and Germany)?

While these questions are legal in nature, regulators also face a number of practical and technical challenges. The former undoubtedly include the idiosyncrasies of the digital age that result from the cross-border nature and anonymity of the Internet and

²⁵¹ In Turkey and Belgium, for example.

²⁵² The Hungarian report, for example, suggests that the regulator sometimes applies a higher level of sanction to Internet-based digital content than to printed content on account of its longevity and permanence.

the steady disappearance of language barriers.²⁵³ Online business models are easier and less expensive to establish, and often do not require technical infrastructure to transmit content in the way that broadcasting does, which means that even “amateurs” are able to reach huge audiences. As the Austrian report points out, the importance of communication with this new kind of provider is increasing, especially in view of, for example, the growing prominence and presence of individual “influencers” on YouTube. Various questions also arise where technological and legal aspects come together, such as how to identify who is responsible for a service when information is lacking (Austria) or how to impose sanctions against (secure) websites (Turkey).

As is repeatedly emphasised in the national reports, the regulators therefore need to find sustainable solutions for effective law enforcement, which are increasingly dependent on legal, technical and other specialist skills forming part of a multidisciplinary approach. The aforementioned possibilities offered by digitisation provide opportunities not only for media providers, but for also regulators, since they too can benefit from the disappearance of language barriers and international boundaries, especially in relation to cooperation.

Practical solutions are presented in the national reports both at regulatory level, where self- and co-regulation models are described, and in the field of cooperation and the promotion of media skills and media literacy.

Problems relating to the procedure for taking action against foreign providers (Article 4(2) of the AVMSD) are already being tackled as part of the AVMSD reforms – i.e. at regulatory level – which represents a step in the right direction that is welcomed in the national reports (Belgium). In addition, national regulations (Latvia) can help to simplify the procedure in terms of international cooperation. However, actual legislation on administrative and enforcement assistance, which is lacking in the media sector in particular, will not be able to replace this (Germany). Only cases involving content relevant to criminal law can be referred at a European level for police and judicial cooperation, over which the regulators have no influence (even though this precisely constitutes their area of expertise). Models such as the system described in the Italian report, in which the regulator is more closely involved and has greater powers – in this case, in relation to online copyright enforcement – show that new strategies involving all relevant stakeholders are being tested nationally, and could set an example to be followed at European and international level. The involvement of independent institutions with their own areas of responsibility – supplementing, or in some cases, overlapping the regulator’s remit in the context of a co-regulatory system – offers opportunities on the one hand, but also poses risks on the other (see the description of the Hungarian Media Council).

Regulators that have developed their own guidelines with reference to best practices²⁵⁴ – sometimes with the involvement of relevant interest groups such as ERGA

²⁵³ Examples include translation tools, automatic subtitles and the expanding role of English as the global language.

²⁵⁴ See, for example, the guidelines of KommAustria and the ZAK on content classification criteria.

and EPRA,²⁵⁵ whose participation in the debate (including at European and international level) is supported – face problems with the interpretation of national, European and international law. The joint development and publication of such guidelines is also accompanied by greater transparency and acceptance of providers.

Although available sanctions have already been used by the regulators, their impact is limited, especially in the online sector. In Turkey, for example, owing to the lack of technical means of blocking individual content, access to entire platforms is blocked for Turkish users.²⁵⁶ Apart from the considerable dangers this poses for freedom of expression, information and the media, the effectiveness of such an approach can be fundamentally questioned, since although it increases the pressure on the providers concerned, the infringing content does not completely disappear, but is simply no longer accessible for certain sections of the population of the European judicial area. As regards transnational problems, the effectiveness of a second regulatory approach (as adopted in Germany, for example) involving the deletion of content is under scrutiny. Developments around the NetzDG have shown that although the quantity of illegal content on the Internet can be reduced with the help of responsible providers at any given moment, the basic problem caused by the constant influx of new illegal content remains. Offenders often have no real consequences to fear.

The national reports therefore consistently focus on cooperation at various levels, in terms of both preventive measures and the enforcement of practical measures. As well as participation in forums such as ERGA and EPRA, one form of cooperation simply involves the forwarding of complaints about media services.²⁵⁷ However, bi- and multilateral cooperation at sub-EU level, which is often influenced by external circumstances such as a common language across the media landscape (Germany and Austria) or the programme orientation of foreign providers (United Kingdom and Sweden), is also taking place. KommAustria, for example, mentions bilateral meetings involving Switzerland and the German state media authorities. However, the importance of cooperation in a specific case is demonstrated by the situation described in the Latvian report, in which the Russian television broadcaster RTR, licensed in Sweden, was ultimately blocked by the Latvian regulator.

Lastly, the national reports stress the importance of both the inclusion of and transparency towards stakeholders and of the promotion of media literacy, which can take the form of the broad provision of information (Austria) or longer-term initiatives involving the relevant stakeholders (Germany). Such cooperation can take place at a thematic level on the basis of specific dangers, with the regulators playing an advisory role (see the Italian initiative on online disinformation) or in the form of general discussion forums.

In conclusion, however, despite all these efforts to find solutions, it appears that a general solution for all the problems surrounding (national and foreign) law enforcement

²⁵⁵ See also Italy or Germany.

²⁵⁶ See the description of the blocking of YouTube between 2008 and 2010.

²⁵⁷ See, for example, the forwarding of Netflix complaints by the CSA to the Dutch authorities or the complaints submitted to OFCOM by the SPBA.

against (online) media providers has yet to be found, and that the search for such a solution is primarily being conducted at the national level. Nevertheless, in order to counter threats to the protection of minors, intellectual property, democracy (especially in the context of fake news) and the freedom of expression and information as a whole, solutions for the digital environment will need to be found (especially at international level) in the near future. However, the steps that have already been taken at national level will be able to support this process.



5. Conclusion

Dr. Jörg Ukrow and Christina Etteldorf

In the age of digitisation, physical borders are becoming less and less important, and the boundaries of technical progress are being pushed further and further back. Whether with regard to the many different means of transmission, content differentiation, the variety of platforms available, developments in consumer behaviour or ways of providing information, the digital world must also be a place in which the media have their own established position in the formation of individual and public opinion and the democratic and social decision-making processes. This is accompanied both by opportunities for and risks to the interests and rights of everyone involved in the media's provision of information, education content, advice and entertainment – from users and intermediaries to media companies and, lastly, individual creatives/journalists. The aim here is to transfer (and where necessary adapt and extend to the new digital environment) the degree of protection – especially that of human dignity as well as of consumers and minors – which, in the case of analogue media, has been developed over a period of decades. This is particularly relevant because the cross-border acquisition and distribution of content via online services has considerably increased in importance or become the norm. Protection appropriate to the digital environment is achieved through the interaction of ways available under civil, criminal and administrative law to respond to current violations and potential risk situations. Details of this interaction are not least also dependent on legal and cultural traditions in individual states. In view of obligations under international law, such as those imposed by the Cybercrime Convention, there must be no areas on the Internet that are not subject to the criminal law. However, even below the level of relevance to the criminal law there should be no place in the media for calls for hatred and violence or their positive portrayal, especially when it comes to protecting human dignity and safeguarding minors from harmful media content. It is also necessary to protect the interests of consumers, which may, for example, involve legal provisions regarding commercial communication and unfair business practices. Creative people should be appropriately remunerated and at any rate be protected from breaches of their (copy)right. Lastly, media companies must also be allowed scope for development in the light of their professional and entrepreneurial freedom, which not only means the entry of new companies into the market but also new (and not so new) business models that have become established for some years as an integral part of the media world – in some cases perhaps going unnoticed to legislators. All this is primarily the task of existing or new (media) law and of those familiar with its further development, application, implementation and, ultimately, enforcement.

It has been demonstrated in this publication that existing rules of international and European law and examples of national law – including fundamental and human

rights guaranteed at these legislative levels (both online and offline and in analogue and digital contexts) are valid. In the media field, however, and especially the audiovisual sector, there are no or no comprehensive rules, or rules that do not exist everywhere, that enable media content and media providers to be dealt with in a satisfactory way in the light of the aforementioned partially conflicting interests. In particular, when the law is applied and enforced in the case of different types of media in the digital environment there are differences compared with the “analogue period” owing to technical and user-generated structural variables. Both international treaties and customary international law provide a basis and impose an obligation to adhere to general principles, but they contain no specific provisions for dealing with modern challenges in a cross-border risk situation.

When answering the question of whether states, by signing international treaties, have only undertaken to protect individuals against infringements of their rights by the state or whether they also have a duty to protect them against the behaviour of private third parties operating across national borders, the focus should, according to the view now firmly established in international law, be on explicit obligations to provide protection on the basis of a teleological interpretation of the relevant provision of international law. Territorial sovereignty and the ban on intervention by legislative and executive bodies in the case of cross-border issues impose barriers under international law. In the absence of applicable customary international law on this situation, an exception in this regard needs to be regulated under international treaty law. There will be no objections to this if it is implemented in compliance with fundamental and human rights and there is a “genuine link”, such as the provider’s nationality or the fact that the service specifically targets other countries.

In a situation in which the opening up of media markets, both in Europe and globally, has been pursued for decades, it would be a legally questionable response to the issues arising under international law if providers’ transnational operations were to contribute to an asymmetric risk situation without it being possible to initiate a transnational and regulatory response. A foreign provider against whom action is taken by a contracting party of the Council of Europe for a breach of that third state’s substantive law because of an offering made available there can invoke rights enshrined in the ECHR when appealing against the legislative acts concerned. However, if the situation involves the state in which the provider has its registered office carrying out enforcement measures on the basis of agreements under international law between that state and the third state, then invoking the EU’s Charter of Fundamental Rights and/or the ECHR before the courts of the former can at least be ruled out if that state is not itself a member of the EU and/or a State Party to the ECHR.

States in whose territory a service from a third EU member state is ultimately used are only authorised in exceptional cases to carry out a check on that service and institute measures against it. This is the case when there is a reason justifying the restriction on the free movement of services and the action taken has been proportionate. If secondary law clarifying the fundamental rights exists, then an examination of these harmonising provisions must be given priority.

The country-of-origin principle is expressly laid down in the area of the application of the AVMSD, which currently covers linear television and on-demand video services and will in future also include video-sharing platforms. If a provider falls within

the jurisdiction of an EU member state, that state must monitor compliance with its regulatory framework. In exchange for the check on its country of origin, the media-service provider is entitled to have its content transmitted in other EU states without any restriction being imposed by the receiving state. AVMSD not only sets out details of the nuanced procedural regime to be applied in the event of a temporary derogation from the retransmission requirement in the case of linear and non-linear services; it also refers in the reasons that it sets out for the reception of the CJEU's case law on circumvention to criteria that can also be brought to bear in connection with the "genuine link" debate. The country-of-origin principle is also laid down in the area of the application of the e-Commerce Directive, but in order to safeguard certain legally protected interests in the case of an "information society service" (such as human rights or the protection of minors), an EU member state can derogate from its obligation not to restrict the retransmission of such a service by instituting either a more time-consuming standard procedure or, as the case may be, a procedure in an urgent case if those interests have been or are in danger of being harmed. However, under both procedures it is permissible to employ only one measure to block access in the national territory (for example, in the case of an infrastructure manager such a measure would probably be that of geo-blocking). On the other hand, there is no explicit mention of whether this is to be extended to the (foreign) providers of the services themselves (for example, supervisory measures in the form of the imposition of fines for breaches of the law).

As the country reports have shown, however, regulators certainly face similar challenges as far as these different starting points in the application of legislation (including different legislation) are concerned. The classification of services (especially those available on the Internet) for the purpose of establishing the legal framework to be applied, the technical means required for handling online services, the need to deal with foreign providers and the creation of media literacy with respect to new players and business models are all questions that are exercising regulators throughout Europe, albeit independently of one another. However, the country reports have shown with their descriptions of national legal frameworks and the penalties available that the environment for media providers and users and regulators' scope for action differ from one state to another. A specific law creates only limited means for its international enforcement against foreign providers, especially with regard to its compatibility with international and European obligations – for example those arising from the AVMS Directive, the thrust of which has not yet been finally and uniformly clarified. Although this problem of the inadequate enforceability of the existing regulation has at least been tackled in the process of reforming the AVMS Directive, domestic legislators and regulators have mainly sought new national structures that could enable regulators to carry out their tasks properly, meaningfully and effectively, including in the case of new types of service that do not necessarily fall within the Directive's scope. As the country reports indicate, the options selected mainly focus on various forms of cooperation with both providers and stakeholders (as well as foreign regulators), but these approaches have so far not been merged at the supranational level and are generally limited to a particular geographical area owing to the particular structure of the media service. Approaches involving co-regulation and self-regulation are also implemented at this level. However, in the context of the reinforcement of police and judicial cooperation in the European treaties – as well as the extension of the scope of the Directive and the strengthening of

ERGA provided for by the latter – the increasing cross-border dimension of the distribution of video and audio content is also expected to lead to the recognition of the need for more intensive co-operation between national supervisory and law-enforcement authorities in the fields of both criminal law and media law, and a gradual response to this need in the form of greater transnational cooperation. This is because only the consistent and coherent pan-European application and enforcement of the relevant rules – especially with regard to safeguarding human dignity and the interests of minors – can give lasting protection to the fundamental values on which media regulation (both in the EU and at the Council of Europe) is based.

In conclusion, it can accordingly be established that the enforcement of legislation against (online) media providers is not only an interesting subject in terms of legal theory and jurisprudence but is gaining in practical importance. Whereas the debate about the Internet as a legal problem has been mainly dominated for many years by how its development potential is determined by a regulatory framework that limits the players' responsibility at the various levels of the network infrastructure, more attention has recently been paid to such undesirable developments as the compatibility of such phenomena as "fake news", disinformation, or unlawful web content. Strengthening the enforcement of law governing the Internet is proving in practice to be a lengthy and laborious process. Breaches of existing media law on websites and in profiles on social networks have become widespread, irrespective of whether provisions are involved that relate to the protection of minors, to obligations and to prohibitions in the field of audiovisual commercial communication or to principles for ensuring a media-based public dialogue that is compatible with democracy and social ethics. One thing is certain: the enforcement of the law on the Internet is posing new quantitative and qualitative challenges for media regulators in European states and is becoming a subject that is testing the ability to carry out supervision under the conditions of digitisation and globalisation. The better the exchange of information is between supervisory authorities in compliance with general data protection provisions, the better the supervision provided can succeed in a digital and global environment. This study provides further stimulus to this debate.

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