

**Preliminary considerations on National Regulatory
Authorities responsible for the digital Information
and Communications Services Sector**

*Seltsam im Nebel zu wandern! Einsam ist jeder Busch und Stein, kein Baum kennt den
anderen, jeder ist allein! – How strange it is to walk in the mist! Every bush and stone is
lonely, no tree knows the other, everyone is alone!*

Hermann Hesse

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1. Context – On Rules and Regulators

“It is necessary to separate the regulation of electronic communications networks and services from the regulation of content. Therefore, this Directive does not cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, [...]. The separation between the regulation of electronic communications and the regulation of content does not affect the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection..” (Rec. 7, EEC)

Information services: content services nowadays often provided via ECN that deliver **information** to the **general public**, with or without editorial responsibility of the provider (linear & non-linear audiovisual & auditive media services, online platforms being VSP or providing other media content, press publications, like newspapers, magazines...

- Directive 2010/13 AVMSD
- Regulation 2024/1083 EMFA
- Regulation 2024/900 TTPA
- Regulation 2022/2065 DSA

e.g. Must carry (114 EECC), open and non-discriminatory internet access (3 OIr), restrictions in relation to the transmission of illegal content (DSA) and of harmful content (Annex I (C) (4) EECC,

Provisions with regard to API's and EPG's (61(2)(d) EECC

Electronic communications networks and services = services provided via ECN which encompass notably services consisting wholly or mainly in the conveyance of signals such as transmission services used for broadcasting

- EECC 2018/1972
- Regulation on the "open internet" 2015/2120
- GIA regulation 2024/1309

Provision of information services

- **“Information Services” NRA (art. 30 AVMSD) (+ art. 7(1) EMFA, 22(4) TTPA refer “an NRA designated by a MS pursuant to art. 30”**
- **Digital Services (online platforms - VSP) Coordinator and evt. other (art. 49 DSA)**



Provision of electronic communications networks and services

Electronic Communications competent authorities (NRA and other) (5 Code)
(+ art. 5 OIR 2015/2120, art. 3 + 11 GIA 2024/1309)

2. The concept of « Regulation » in a strict sense

« The term ‘regulation’, obviously itself ambiguous, is used here in its narrow sense, namely the taking of specific (individual) decisions by an administrative authority with broad discretionary powers, as opposed to “reglementation” [adoption of general rules], which in domestic legal terminology traditionally covers only general and abstract norms.»

Council of State, opinion n° 33.255/4, Che 50-1937/1, p. 64, fn. 1.

- **General definition: the application of the rules foreseen by a founding act (EECC, AVMSD, EMFA, DSA, TTPA) by an administrative authority through individual measures taken on a case by case basis**
- « Each Member State shall designate one or more national regulatory authorities, bodies, or both. Member States shall ensure that they are legally distinct from the government and functionally independent of their respective governments” (art. 30. AVMSD)
- Also: **intermediate decisions** (Larouche) : 1 direct addressee, consequences for all users: eg SMP Price setting)
- A very few examples of **generic rule setting** (numbering plan is set by electronic communications NRA, art. 93 EECC; the establishment of the necessary mechanisms to assess the appropriateness of the measures adopted by a VSP-provider in order to protect minors and the general public from certain contents (e.g. incitement to violence and hatred), art. 28b (5) Art says “MS” but in the context of transposition this has been entrusted upon the NRA).

- N.B. Cases of “**regulation by delegation**”:

The enforcement of some provisions can be entrusted upon “trusted flaggers” who ensure in this way “tasks of sovereignty” (“Hoheitsaufgaben”)(art. 22(1) DSA): “Providers of online platforms shall take the necessary technical and organizational measures to ensure that notices submitted by trusted flaggers, [regarding illegal content], are given priority and are processed and decided upon without undue delay.” (art. 22(1) DSA)

They must however be certified by the national DSC (art. 22(2) DSA)

- **N.B. Assisted regulation:** the NRA must take the utmost account of guideline from the Commission, BEREC or the EMBS:
 - Art. 288 TFUE: « Recommendations and opinions shall have no binding force”.
 - However the CJ found that “Nevertheless, [...] even if recommendations are not intended to produce binding effects, the national courts are bound to take them into consideration for the purpose of deciding disputes submitted to them, in particular where the recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions [...]. Therefore, in the context of its review of a decision of the NRA adopted on the basis of Articles 8 and 13 of the Access Directive, a national court may depart from Recommendation 2009/396 only where [...], it considers that this is required on grounds related to the facts of the individual case, in particular the specific characteristics of the market of the Member State in question.”
 - But recently the CJ’s the AG found « the guidelines adopted by the Body of European Regulators for Electronic Communications (BEREC) lack binding legal effects ...” (C-514/24, Magyar Telekom, AG Sanchez-Bordona, pt. 67
- => To follow

3. Tasks and activities of the « Regulators » in charge with the digital information and communication services

The activities of national regulatory authorities or bodies established under Directive 2010/13/EU should ensure respect for the objectives of media pluralism, cultural diversity, consumer protection, the proper functioning of the internal market and the promotion of fair competition (rec. 53,

“ The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore” (art. 167(1) TFUE)

- **Main subject of regulation**

- « Information services are both cultural and economic services

- « Electronic communications services are basically economic services, sometimes having public utility character (universal service)

- **Guiding principle**

- « Promote AND require »

- **Supervision and enforcement** of the rules, i.e. controlling and ensuring respect of rules (e.g. hate speech, e-commerce), including evt. dispute settlement in telecoms AND

Proactive organisation of market entry (notably management of resources) esp. regarding transmission regulation (e.g. art.48(4)&(6) EECC)

5. Rules regarding status and organization of national regulatory authorities in charge with digital information and communications services: the specific case of independence

“The independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions” (rec. 13 BRD 2009/140 and 37 EECC).

“Independent NRAs are key to the proper application of media law across the Union” (rec. 36 EMFA).

- **Two dimensions of independence for both, « Information Services » and electronic communications NRA**
 - **Market independence (separation of regulatory and operational functions) (6(1) EECC, 30 (1) AVMSD)**
 - + **No interference by providers in regulation and by regulators in « provision »: « Member States shall respect the effective editorial freedom and independence of media service providers in the exercise of their professional activities. Member States, including their national regulatory authorities and bodies, shall not interfere in or try to influence the editorial policies and editorial decisions of media service providers» (art. 4(2) EMFA)**
 - **Political independence (not seek or take instructions from any other body in relation to the tasks assigned to them)**

- **Institutional safeguards**

- **Guarantees regarding appointment and dismissal of members of NRA**
- **Budgetary autonomy**
- **Sufficient resources, including qualified staff: »have adequate technical, financial and human resources to carry out the task assigned to them » (art. 6(2) EECC)**

6. Cooperation at national level

*« However, in this case, the competences of the federal state and the communities in the field of electronic communications infrastructure have become so intertwined as a result of technological developments, that they can no longer be exercised except in **cooperation**. It follows that by unilaterally regulating the powers of the telecommunications regulator, the legislature has violated the principle of **proportionality** that applies to all exercises of powers.»*

(Const. Court, 132/2004, 14 July 2004,

6.2.B.)

“The DSC shall in any event be responsible for ensuring coordination at national level in respect of those matters [including online platforms – VSP] and for contributing to the effective and consistent supervision and enforcement of this Regulation throughout the Union.” (49(2) DSA)

- **Rationale:**

- **Multiple competences : by topics / services – by geographic => efficiency and avoid overlaps – contradictions**

- **Models**

- **Ad hoc** cooperation (with a non-sector specific regulator): e.g. Competition Authority (art. 22 EMFA)
 - **The “Digital Services Coordinator” model:** a specifically designated competent authority ensures coordination for contributing to the effective and consistent supervision and enforcement of the rules = dispatch

• Models, ctd

- The “**Federated Regulator**”: composed of representatives of the different regulators concerned

= the “Conférence des Régulateurs pour le secteur des Communications électroniques - **CRC**» Conference of Regulators for the Electronic Communications Sector (transmission of broadcasting – (other) telecommunications – decisions regarding market analysis’)

= **DLM** (Die Landesmedienanstalten): coordination of the different Mediaregulators of the German federated States – however, it has no decisional power.

• Models, ctd

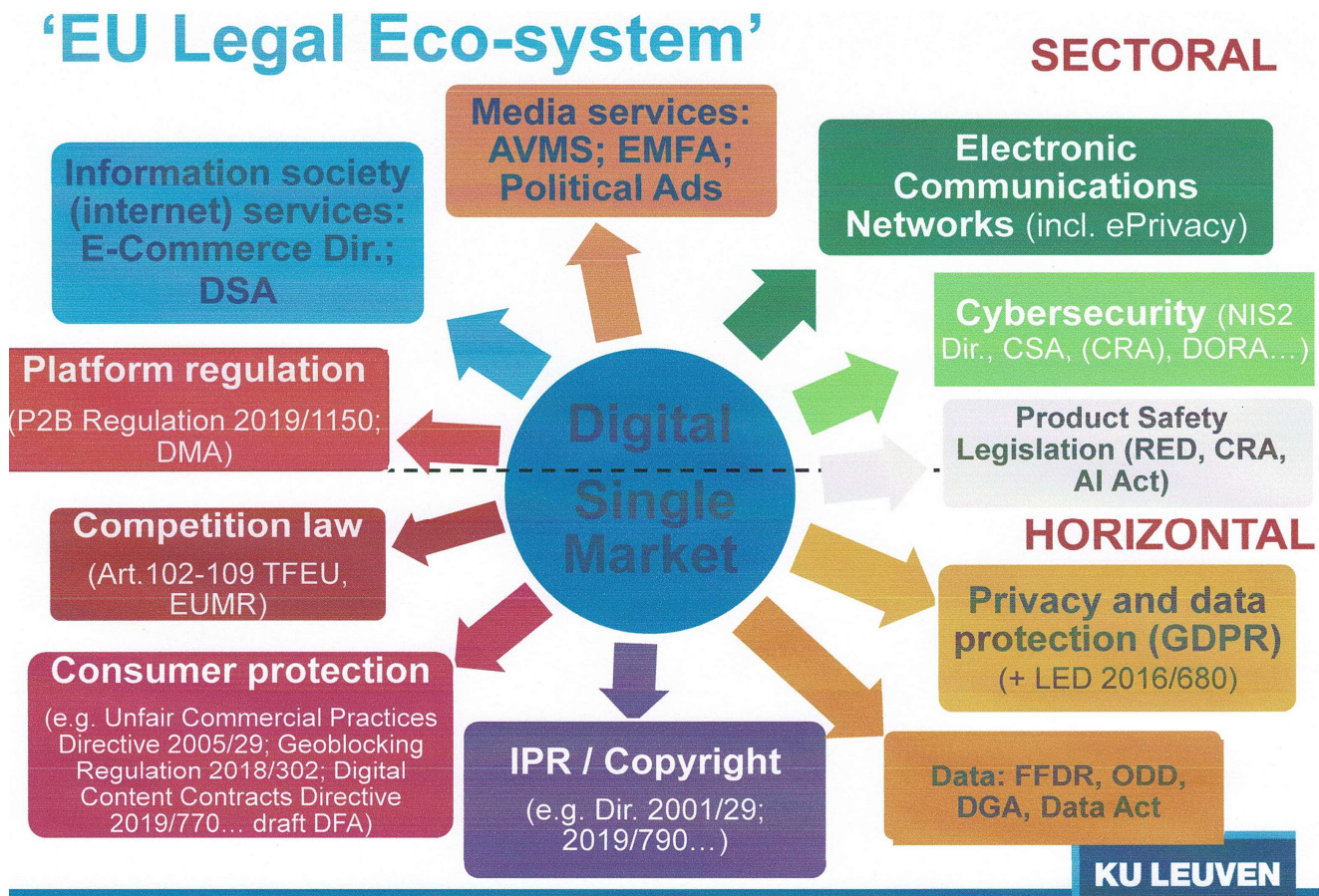
- The **“Integrated Regulator”**: a single regulator with decisional power integrating different sectors or different levels of competencies for which there no longer exist a specific regulator
 - A new **“inter-federal regulator for electronic communications and broadcasting (transmission)”**, discussed in 2013 but not achieved, would have been an example of an integrated regulator encompassing different levels of competencies. This regulator would have been made up of representatives from the various levels of government and would unify and replace the current regulators in the sector, namely the Belgian Institute for Postal Services and Telecommunications (IBPT), the Vlaamse Regulator voor de Media (VRM), the Conseil supérieur de l'audiovisuel (CSA) and the Medienrat.

• Models, ctd

- The **“Integrated Regulator”**: a single regulator with decisional power integrating different sectors or different levels of competencies for which there does no longer exist a specific regulator
 - **In case of the combination of different sectors** including other sectors than media and electronic communications, the different forms of independences of the information services (media services in a broad sense) and communications services must be respected for the entire body (“organic approach” or “organizational approach”)

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7. Challenges (today and tomorrow)



- **Cope with a multitude of rules and concepts.**
- **Master the full board of increasingly intertwined regulatory logics (fordern UND fördern / promote AND require, “mere” supervision and enforcement AND proactively shape the sector**
- **Keep pace with rapid technological developments and the constant emergence of new types of (integrated) media services (e.g. social media integrating text, audio and video).**
- **Face new business models for the provision of content: provision of user interfaces, integration of transmission and content (e.g. 3 C networks “Connected Collaborative Computing”).**

- **Face new tasks and thus needs for additional resources (manpower, knowledge, tools like AI,...).**
- **Cooperate in order to guarantee efficiency in regulation: not being overwhelmed by the sheer amount of (specialized) new tasks be it by gathering different specialized competences and resources e.g. AI-Tools) and avoid overlaps and contradictions.**
- **Within a context becoming increasingly [national], European, global, maintain and promote geographic cultural specificities - collaborate with the Regulators of other MS and within the EBMS while safeguarding national cultural specificities.**

- **Herzlichen Dank für Ihre Aufmerksamkeit !**
- **Hartelijk dank voor uw aandacht !**
- **Un tout grand merci pour votre attention !**
- **Thank you very much for your attention !**

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