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LEGAL FRAMEWORK AND ENFORCEMENT CONCERNING CROSS-BORDER DISSEMINATION OF ONLINE CONTENT

STUDY ON THE CURRENT AND POSSIBLE FUTURE
REGULATION OF ONLINE CONTENT AND ONLINE SERVICE
PROVIDERS IN CONSIDERATION OF THE EU E-COMMERCE
DIRECTIVE

Executive Summary

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LEGAL FRAMEWORK AND ENFORCEMENT CONCERNING CROSS-BORDER DISSEMINATION OF ONLINE CONTENT

BACKGROUND OF THE STUDY

The dissemination of online content across borders is challenging the national and European Union (EU) legal frameworks for monitoring service providers and enforcing the law. Not only the vast amount of and increasingly easy access to illegal or harmful content via online service providers question how efficient enforcement can be organized. It is also due to the uncertainty of who is responsible for the content and which party in the process of disseminating content from its production to the reception by the enduser has an active role and could be held liable, that there is a strong call for reconsidering the applicable rules.

Phenomena such as easy access to illegal content, content inciting to hatred, terrorist propaganda but also disinformation are only examples for a problematic aspect of the possibility for users to produce and disseminate content via intermediaries. While there is a strong foundation of both the EU and its Member States on a set of commonly accepted values to which most prominently the fundamental rights belong, the protection of these values have functioned much better in the “offline world” and during the first phase of wide use of the Internet. With the evergrowing availability of usergenerated audiovisual content which is disseminated outside of more traditional channels that necessitated a provider with editorial responsibility, categories of online services in existing legal provisions are questioned.

In order to respond to the changing role of online service providers, namely “platforms” which are addressed in different ways in more recent EU legislation, it is not surprising that the EU has passed several corresponding legislative acts and supporting policy documents as part of the Digital Single Market strategy in the last couple of years. While major changes were introduced for platforms that host audiovisual content both by revising the Audiovisual Media Services Directive as well as creating the Directive on copyright in the Digital Single Market (DSM), the core piece of legislation for online service providers, the E-Commerce Directive (ECD), remains untouched until now, although it dates back to the year 2000. The future Commission has signalled that it will take up this challenge and there are signs that it will propose some form of revision or replacing legislative Act (potentially named Digital Services Act).

AIM OF THE STUDY

Against this background, the present study gives a detailed overview of the overall legal framework which is or can be relevant for dealing with the dissemination of online content. It presents the relevant EU legislative acts including those new texts that include potential role models for a revision of the ECD. A special focus is laid on the question of liability for online content in light of the need to clarify what supervisory authorities can do in order to tackle illegal or harmful content and thereby safeguard fundamental values and principles also in the online context. The interpretation of the relevant sections of the ECD by the Court of Justice of the EU (CJEU) is included as well as discussions about whether liability exemptions for different types of information society services (ISS) have to be reconsidered as a result of duty of care-standards. Finally, the study identifies areas that need to be resolved either by legislative action or forms of increased cooperation between Member States and competent authorities if an improved enforcement of legal standards in the online context shall be achieved.

FUNDAMENTAL RIGHTS, FREEDOMS AND VALUES

The basis and framework for any solution are fundamental rights as laid down in the Charter of Fundamental Rights of the EU (CFR), the European Convention on Human Rights of the Council of Europe and national constitutional provisions. These rights feature prominently human dignity which according to the CFR is “inviolable”, i.e. needs to be considered as an overarching goal to be protected. They include also the protection of minors on their own behalf. On the other hand freedom of expression (of service users that create content as well as recipients of this content) and rights of the service providers that might be confronted with increased legal obligations are to be considered.

Fundamental freedoms are the building stones for the functioning of the single market in the EU. One aspect concerns the right of companies to choose where to establish themselves and thereby fall under the jurisdiction of a specific State. In principle, activities of such entities cannot be stopped by Member States when they cross their borders. This is laid down for goods and services in the Treaties. However, Member States can impose limitations on the free movements when the measures are justified. If there is specific secondary law applicable, especially in form of harmonization or coordination of Member State rules, then this question needs to be answered based on the specific legislative act's provisions.

Relevant also in the context of discussing the adequate response to regulating online content dissemination are the fundamental values and goals of the EU. These values do not only have theoretical relevance, but actually there is a specific procedure inserted in the Treaties to ensure that the Member States respect them. Where the EU has competence and the States are barred from applying their own rules, the values and goals necessitate that the EU itself acts in order to enable the States when applying these rules to achieve the values and goals. Consequently, the EU has passed numerous legislative acts that foster the functioning of the single market by harmonizing Member States' laws and creating rules that establishing a level approach in the States. This holds true also for the media and online sector, whilst regulation in these fields needs to consider that impacting the fundamental right of free speech or the shape of the media market needs to be cautious in respecting the Member States' reserved competences especially in light of their cultures and identities.

RELEVANT EU LEGISLATIVE ACTS FOR ONLINE SERVICES

The ECD is a horizontally applicable ruleset for ISS. It established a minimum harmonization approach that focused on a closely circumscribed field of coordinated activities and a relatively strictly applied country of origin principle. The focus at the time was on providing predictable and simple rules for the emerging internet economy and guarantee the application of single market principles. Where derogation existed they were closely defined and aligned with the exemptions provided by the EU Treaties. Other than the ECD from 2000, for the online sector recent revisions to existing laws or creation of new ones have brought significant changes, such as the the AVMSD.

The AVMSD is the cornerstone for the distribution of (linear and nonlinear) audiovisual content since its predecessor was created in 1989. It creates a single market legal framework allowing for the dissemination of audiovisual content across the EU. The foundational country of origin principle ensures that there is in principle only one control of the provider by the Member State under whose jurisdiction it operates and consequently the content flows freely. The agreement of minimum conditions applying to all audiovisual media service providers in the Directive is aimed at assuring that only content legal in that sense is available. The possibility of derogating from the country of origin principle and the prohibition of circumvention enable the receiving Member States to react to content from non domestic providers. The basic principles of the AVMSD have been maintained throughout, but it has been revised once every decade and adapted to new social and technological developments, particularly in the digital environment. The 2018 reform has strengthened the rules on hate speech, protection of minors and advertising regulation and responded to changes in the audiovisual media landscape by including video-sharing platform services in its scope.

The legal framework of data protection law is relevant in connection with the crossborder dissemination of online content not only because data processing is omnipresent in online services, but also because the EU rules for this field include

technical aspects in the rules and, in some cases, take a transnational approach. The General Data Protection Regulation (GDPR) establishes the marketplace principle by linking its scope to the legitimate interests of the data subjects and thereby giving domestic authorities the possibility to address even non-EU providers in certain cases. The detailed rules on structure, competencies and powers of the supervisory authorities in the GDPR can also be used for consideration and evaluation of a new, more harmonizing regulatory approach at EU level in a digital environment.

For intellectual property rights the first relevant Directives impacted the role of ISS e.g. by introducing certain injunction possibilities against them, but left the ECD liability rules untouched at least in the wording of the Directive. The CJEU had to deal with defining the limits of what obligations could be imposed on providers in order to safeguard author's rights. Essentially, this led to an expansion of the obligations that the providers might be asked to comply with. The new DSM Directive of 2019 is noteworthy not only for the creation of a specific definition of "online content-sharing service provider" which refers to different criteria than existing comparable provisions in other EU legislative acts, but mainly for introducing a completely new category of obligations for such providers.

The Platform-to-Business Regulation has a wide scope of application, even though not in the relation to consumers. It is relevant, because certain information obligations – creating increased transparency – are imposed on these platforms. In doing so, the question of passiveness of such platforms regarding the content disseminated may have to be answered in a new way. The Proposal for a Regulation on tackling terrorist content online – although the outcome of the legislative procedure is not yet clear – is specifically aimed at hosting service providers and introduces the obligation for certain proactive (or: specific) measures which clarify what an expeditious removal of content is, but also relying explicitly on a duty of care standard. Even though the Parliament position essentially lowered the strictness of measures that the Commission has proposed, the responsibility of these platforms for user generated content (of this specific type) will change with the Regulation if it is adopted.

The "hard" EU legal instruments as displayed above are supplemented by "soft" EU coordination, support and supplementary measures, which nevertheless are highly important and can represent (potentially) a first step towards new rules. With increased relevance in the area of online content, the EU has addressed above all the areas of the protection of minors, human dignity, hate speech and disinformation online. By issuing recommendations, setting up High Level Groups and developing and publishing codes of conduct and best practices, a framework is created here – with the active participation of stakeholders – which is regularly legally nonbinding but promotes the effectiveness of achieving the objectives pursued and promotes the establishment of minimum standards. Furthermore, the principles and best practices found in this framework, which often also involve non-EU, in particular US-American stakeholders, make it possible to identify necessary and possible legislative measures.

SIGNIFICANCE OF THE E-COMMERCE DIRECTIVE AND CHALLENGES IN ITS APPLICATION

The ECD has no explicit extraterritorial scope. Member States are free to regulate activities of ISS providers established outside the EU as the country of origin principle only relates to providers established in the EU. Although the definition of ISS providers has been clarified and refined by the CJEU, the emergence of new online platform business models, namely in the so-called sharing economy challenge the boundaries of the application of the ECD. This is especially the case concerning the protections for intermediary service providers, defined in Articles 12–15. The premise of wide reaching protections for passive hosts as long as they do not have any actual knowledge of illegal content or activity has been consistently questioned and reinterpreted by courts. This is a reflection of the dramatic change in the online intermediary ecosystem over the last 15 years. The rise of Web 2.0 interactivity has meant that most intermediaries have moved away from being simple hosts. They are now interactive content management platforms where the exploitation of user data and network effects are at the centre of the business model. The increasing diversity of business models questions the rather simplistic categorisation of today's platforms as "hosting providers". The unabated occurrence and rise of illegal content and activity promulgated through these platforms have thrown doubts on whether liability protections that were conceived in a different technological and socio-economic context still can be valid today. The problem of the current liability framework for intermediaries lies first with the condition

of neutrality. Secondly, determining actual knowledge has remained problematic, especially in the absence of any more formalised notice requirements and unclarity of the protection for “Good Samaritan” efforts by intermediaries. Thirdly, case law has also exposed the technological tension between Articles 14 and 15 ECD which on the one hand allow for specific infringement prevention injunctions but prohibit general monitoring obligations on the other.

New solutions to these problems see a move away from liability immunities to formulating explicit responsibilities for these new online platforms. In its case law the CJEU has tried to come up with some concepts such as that of the diligent economic operator. One answer would see the creation of duties of care being imposed on online platforms in the fight against illegal content. Duties of care could take account of the increasingly active role of platforms in the management and dissemination of third party content. Specific preventive duties, following a risk-based approach, would be tied to clearly defined reactive obligations of notice-and-take-down and transparency reporting.

Liability and more generally provisions creating responsibility obligations for providers are laid down in new legislative acts of the EU for new actors. In the revised AVMSD video-sharing platform providers are now within the scope of application, but the obligations imposed on them are subject to leaving untouched the liability exemptions of the ECD. However, the obligations imposed on these service providers actually necessitate appending a much more active role as the platform has to help ensuring that its users comply with applicable rules. Having to undertake ex ante risk assessments and depending on the outcome concerning the potential for harm, the provider has to implement preventive measures without which the platform is assumed to fall short of its obligations.

Although limited to the context of intellectual property rights, the DSM Directive departs from the mere referral to the liability provisions of the ECD and introduces a significant obligation for online content-sharing service provider, which seems to be a consequence of the CJEU jurisprudence on the right of communication to the public. It creates an exception to the safe harbor-exemptions for host service providers under the ECD and requires an active role of the platform providers to obtain authorization for the dissemination of copyrighted content or – in the absence of such – the prevention of availability of the content. Irrespective of clauses limiting the liability for certain platforms and making it conditional, this is a clear change in approach to the role of platforms in EU legislation. It could also lead to different types of liability of one provider for the same content if it violates not only copyright but also other rights. Beyond the copyright context there are a number of other legislative acts of the EU that impact the liability rules of the ECD by creating increased duty of care expectations or other obligations vis-à-vis certain online service providers, namely certain types of platforms. These are expected to comply with professional due diligence requirements if consumer protection requires this. Even though the platforms concerned are not mainly dealing with dissemination of online content, it is a strong indicator of how generally the liability exemptions of the ECD are being limited by other sectoral legislation. This holds especially true for the currently debated Proposal for a Regulation on tackling terrorist content online: as it appears now, at least certain types of increased obligations to monitor will be introduced if a platform has been repeatedly used for dissemination of such illegal content.

CONCLUSIONS

1. Based on these findings some conclusions on the way forward can be drawn. The difficulties in applying a ruleset designed two decades ago for a completely different internet environment have become obvious. The actors have changed and the role of platforms in dissemination of online content has become dominant. First legislative steps reflecting this new setup have been enacted, whereas there are clear differences in the way they relate to the liability exemptions under the ECD. Not only have new categories of ISS been introduced, for some of them specific obligations are now expected. Partly these new rules rely on co-regulatory approaches and involve the reliance on technical solutions to prove compliance. Other legislative solutions even in form of Regulations strike a balance between harmonizing standards and more importantly institutional cooperation between competent Member States' bodies, while allowing to respect differing traditions in the States when applying the rules.
2. In order to avoid a further fragmentation of the rules applicable to different types of online service providers and having to introduce new categories of service providers depending on the further development of the online sector, the EU should strive to either replace the existing cross-sectorial approach in form of the ECD by a new horizontally applicable act concerning all types of “information society services”. In that case it will not only be necessary to iden-

tify whether content disseminators need to be treated in a specific manner as they have – due to their contribution to using the freedom of expression of users, but also because of the potential for serious and permanent harm in case of illegal content due to its fast and wide spreading – a different role in the online environment than a platform for selling goods, but also to agree on new criteria to define providers. A different avenue could be to amend the existing ECD in a way that it clarifies the conditions under which liability exemptions do not apply as well as what type of providers are included in the scope.

3. Should no legislative clarification be achieved in the near future, competent authorities will have to apply existing rules also to cross-border dissemination of content in a more proactive manner even if it may not seem clear from the outset whether, for example, a targeted provider may be able to claim a liability exemption. In light of the need for an efficient protection of fundamental rights and values also in the online context, inactivity is no option. Based on the obligation to protect fundamental rights, typically provided for in national constitutional provisions, and public interest goals – which are also the underlying values of the EU –, even difficulties in achieving an effective enforcement of rules do not justify refraining from attempting at it. This holds especially true if – as is the case for online content dissemination – there is a policy conclusion that action is necessary.
4. In light of the difficulties of enforcement not least due to uncertainties about the role of service providers and the cross-border dimension, regulation should attempt at including the concerned industry in the enforcement process as much as possible. Increasingly, EU legislative instruments introduce themselves or suggest Member States to rely on co-regulation approaches in order to first address the parties concerned by obligations in the regulation to be active themselves, secondly to be able to rely on the development of industry standards and thirdly to allow a regulatory approach that has a less infringing nature on fundamental rights. Typically, such co-regulatory approaches involve the creation of Codes of Conduct. Here, and more generally speaking, it is necessary to point out that co-regulation necessitates the possibility of action by regulatory authorities if compliance is not achieved via the industry approach as well as an involvement in the process of creating such “rules”.
5. Two main challenges remain to be resolved, a substantive and a procedural question concerning which body is in charge of enforcing rules. The ECD, as well as the AVMSD, rely on the country of origin principle that assigns monitoring and supervision duties to the State that has jurisdiction over the provider, normally via an establishment. However, this principle does not apply unlimited: both rulesets foresee exceptional derogations from the principle in case of potential damage to overriding public interest goals due to a lack of enforcement in the origin state. In that case, the marketplace of the service can be trigger for a regulatory action. The conditions for such subsidiary competence as well as the procedures introduced in both Directives are very strict and entail lengthy timelines, as it was regarded necessary to shield the country of origin principle. The nature of online content typically being available until removed calls for solutions with which more speedily access to illegal and harmful content can be stopped. It is conceivable to maintain the country of origin principle but allowing for a marketplace intervention where necessary by either simplifying the procedures or explicitly defining the cases in which other than the home country regulatory bodies can take action.
6. The second challenge concerns the institutional setup. There need to be clear assignments of competencies to bodies in charge of monitoring and supervising online service providers. Beyond law enforcement agencies that are in charge of investigating and prosecuting criminal charges, regulatory authorities need to be able to assume the role of dealing with illegal content. Because of the danger of damaging freedom of expression if there is a direct state influence in this process, independent regulators are best placed to take over this role. Accordingly, in most Member States of the EU regulators that traditionally dealt with audiovisual content in the linear dissemination of content also have been given competence for the online dissemination. Regulatory bodies should have clearly assigned tasks that include their role in co-regulation as well as being sufficiently equipped, e.g. with sanctioning powers. Moreover, in order to make cross-border monitoring efficient there needs to some form of cooperation between national regulatory authorities in the EU. Within such cooperation “community standards” could be developed concerning an agreement on what is to be regarded as illegal and harmful and what type of action should regularly be taken by the national competent authority. The cooperation mechanisms should allow for rapid response in case they are triggered.

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