

Safeguarding freedom – securing justice

**Answers from Academia
– A Legal Analysis –**

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Institut für Europäisches Medienrecht
Institute of European Media Law
Institut du droit européen des médias

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Setting the Scene

liability?

enforcement?

online piracy?

terrorist propaganda?

pornography?

discrimination?

content provider?

intermediary?

originators?

xtube?

Twitter?

Pinterest?

WhatsApp?

Dailymotion?

TikTok?

Photobucket?

Aparat?

Instagram?

vimeo?

rediff?

Snapchat?

Tumblr?

Google?

Flickr?

user?

violence?

Younow?

PornMD?

Twitch? Sine Weibo?

host provider?

access provider?

public incitement?

platform?

hate speech?

disinformation?

facebook

legal framework?

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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

Prof. Dr. Mark D. Cole
Ass. iur. Christina Etteldorf
Carsten Ullrich, LL.M.

with contributions by
Ass. iur. Jan Henrich

■ Aim

- presenting a detailed overview of the overall legal framework concerning cross-border dissemination of online-content
- putting special focus on the question of liability and the current interpretation of the E-Commerce Directive
- identifying areas that need to be resolved either by legislative action or forms of increased cooperation between Member States and competent authorities
- finding approaches for an improved enforcement of legal standards in the online context

■ Executive Summary and more information

- www.medienanstalt-nrw.de/e-commerce or
- <http://emr-sb.de/e-commerce-study>

Structure of the EMR study



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Legal framework and enforcement concerning cross-border dissemination of online content

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- Background of the study
- Legal framework
 - Fundamental rights and freedoms
 - Other primary law (EU values, principles and competencies)
 - Secondary Law
 - E-Commerce Directive (ECD)
 - Audiovisual Media Services Directive (AVMSD)
 - General Data Protection Regulation and ePrivacy Directive
 - InfoSoc, Enforcement and DSM Copyright Directive
 - Upcoming legal acts: Platform-to-Business-Regulation (application 2020) and Terrorist Content Regulation (?)
 - EU support, coordination and supplementary measures
- ECD in detail
 - scope, intermediary liability, CJEU interpretation
 - “duty of care”-standard
 - comparison with other sectoral liability provisions
- Towards a future regulatory framework for online content
 - Lessons learnt and important considerations
 - Possible avenues and looking ahead

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Legal framework - fundamental rights

Human Dignity

Right to property

**Freedom of speech
and the media**

online
service
providers

**Rights of children /
protection of minors**

EU **C**harter of
Fundamental **R**ights (CFR)
European **C**onvention on
Human **R**ights (ECHR)
National constitutional law

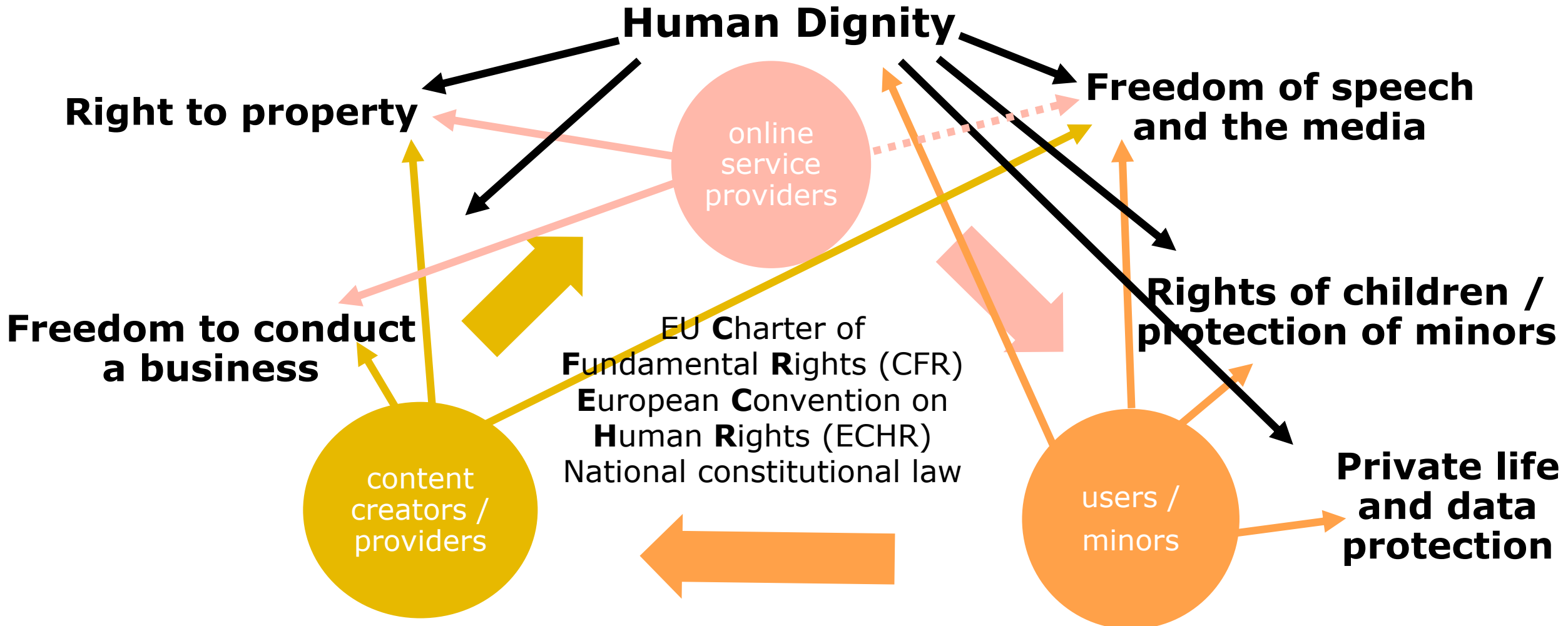
**Private life
and data
protection**

**Freedom to conduct
a business**

content
creators /
providers

users /
minors

Legal framework - fundamental rights



Legal framework - fundamental freedoms

- Fundamental freedoms = building stones for the functioning of the **single market** in the EU
- Guaranteeing freedom of establishment and freedom to provide services
- Connected with country of origin-principle: Companies can choose where to **establish** themselves as well as to **provide cross-border services** in the EU and thereby fall under the **jurisdiction of a specific State**. In principle, activities of such entities **cannot be stopped** by other Member States when they cross their borders.
- But: Member States (MS) can **impose limitations** on the free movements when measures are **justified**
- In case of applicable specific **secondary law** measures restricting the freedoms need to be evaluated based on that legislative act

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Legal framework – other primary law

To be taken into consideration

- EU **values, goals and principles** (Art. 2 et seq. TEU):
 - such as safeguarding human rights and human dignity, pluralism, non-discrimination, tolerance, justice, ...
 - on the one hand, in the accession procedure pursuant to Article 49 TEU, basic values acquire significance as a substantive legal prerequisite
 - on the other hand, non-compliance with the values in the procedure pursuant to Art. 7 TEU may lead to a restriction or suspension of MS rights
- (Reserved) **competencies** of MS, inter alia in the media sector
- **Connection** between values and competencies: Where the EU has competence and the MS are barred from applying their rules, the values and goals necessitate that the **EU itself ensures framework** to enable MS when applying these rules to achieve the values and goals.

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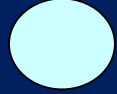
Secondary law: overview

Timeline European/EU secondary law and amendments

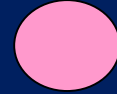
1989



1995



2000



2005



2010



2015

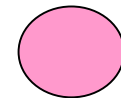


2020



Audiovisual Media Service Directive (EU) 2018/1808 (AVMSD)
(former: Television without Frontiers Directive 89/552/EEC)

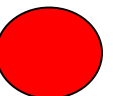
General Data Protection Regulation (EU) 2016/679 (GDPR)
(former: Data Protection Directive 95/46/EC)



E-Commerce Directive 2000/31/EC (ECD)

DSM Copyright Directive (EU) 2019/790 (DSM)
(supplementing: InfoSoc Directive 2001/29/EC)

Upcoming: P2B Regulation (applicability)
TERREG



Secondary law: overview

Timeline European/EU secondary law and amendments



Audiovisual Media Service Directive (EU) 2018/1808 (AVMSD)
(former: Television without Frontiers Directive 89/552/EEC)

General Data Protection Regulation (EU) 2016/679 (GDPR)
(former: Data Protection Directive 95/46/EC)

E-Commerce Directive 2000/31/EC (ECD) ?

Digital Services Act?

DSM Copyright Directive (EU) 2019/790 (DSM)
(supplementing: InfoSoc Directive 2001/29/EC)

Upcoming: P2B Regulation (applicability)
TERREG

Legal framework – secondary law: specifically E-Commerce Directive

- ECD is a **horizontally** applicable ruleset for information society services (ISS; predefined in Directive of 1998) in single market
 - original goal: predictable and simple rules for the emerging internet economy
- ECD contains a set of **liability exemptions/limitations** for intermediaries defined in Art. 12-15 ECD
- ECD establishes a **minimum harmonisation** approach and a relatively strictly applied **country of origin principle** (with no prior authorisation-rule)
- ECD has **no explicit extraterritorial scope**, MS are free to regulate activities of ISS providers established outside the EU.
- ECD allows **derogations** by MS from the country of origin principle in certain fields (cf. Annex) and situations (Art. 3 para. 4 ECD)

Legal framework – other secondary law: AVMSD

- AVMSD is the **cornerstone** for the distribution of (linear and non-linear) audiovisual content online founded on two main principles
 - **country of origin principle** ensures that there is in principle only one control of the provider by the MS under whose jurisdiction it operates and consequently the content flows freely
 - But: for MS **derogation possibilities** and **prohibition of circumvention**
 - Agreement of **minimum conditions** assuring that only content legal in that sense is available. **But**: possibility of deviation and margin for implementation.
- AVMSD has been revised once every decade and **adapted to new social and technological developments**, particularly in the digital environment
- 2018 reform concerned rules on **hate speech**, **protection of minors** and **comm.comm.** and responded to changes in the audiovisual media landscape by including **video-sharing platform services** in its scope

Legal framework – other secondary law: Further relevant legislative acts

- **DSM Directive 2019**
 - creation of a **specific definition** of “online content-sharing service provider” which refers to different criteria than existing comparable provisions
 - introduction of a completely **new category of obligations** for such providers
- **GDPR 2018**
 - important regarding its **technical** and **transnational** approach (marketplace principle) allowing domestic authorities to address non-EU providers
- **P2B-regulation** (applicable July 2020)
 - **wide scope** of application and increased **transparency obligations** questioning passiveness of platforms
- Upcoming **TERREG** (?)
 - obligations for certain **proactive measures** by hosting service providers
- Certain EU coordination, support and supplementary measures
 - inter alia in the fields of **protection of minors**, **hate speech (illegal content)** and **disinformation**

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DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 8 June 2000

- **Definitions and categories of providers** established 20 years ago (although clarified by the CJEU) **do not longer fit** the changing market realities with platforms now regularly being interactive content management platforms
- **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
 - difficulty concerning condition of 'neutrality'
 - difficulty of determining 'actual knowledge'-concept
 - difficulty of resolving tension between obligations under Art. 14 ECD (infringement prevention injunctions) and Art. 15 ECD (no general monitoring)

- New solutions in related legal acts adapted to changed market conditions see a move away from liability immunities to **formulating explicit responsibilities** for these **new online platforms**
- Development of **alternative approaches / notions** in jurisprudence or other sectoral approaches such as
 - 'diligent economic operator'
 - '**duty of care**'-standards including preventive duties following risk-based approach
- But: approach so far and development **question upholding existing ECD liability exemptions** in an untouched way

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Conclusions for the future

AVMSD GDPR TERREG
DSM P2B Regulation

- **Avoiding further fragmentation** of the rules applicable to different types of online service providers
 - 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 (newly defined) “information society services” or
 - amend existing ECD in a way that it clarifies the conditions under which liability exemptions do not apply as well as its scope (which type of providers covered)

Conclusions for the future

- **Inactivity is not an option**
 - in light of EU values and fundamental rights if 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
 - such activity may include testing the limits of existing provisions such as the reach of the liability limitations for providers targeted by a measure
 - for online content dissemination a clear policy conclusion can be observed that action is necessary which can not only include legislative but also executive measures



Conclusions for the future

- **Involving industries** will be important
 - in order to achieve activity by the obliged providers themselves
 - to rely on the development of industry standards
 - to allow regulatory approach of a less infringing nature on fundamental rights

- But: necessary to remind that any form of **co-regulation** necessitates the **possibility of action by regulatory authorities** if compliance is not achieved via the industry approach as well as involvement by regulators in the process of creating “rules” such as **robust and measurable codes of conduct**



Conclusions for the future

- Two main challenges remain to be resolved:
a substantive and a procedural question
concerning which **body is in charge of enforcing rules**
 - maintaining the country of origin principle creates the necessity to establish **marketplace principle aspects**, e.g. regarding simplifying the procedures of intervention by a MS or authority that does not have primarily jurisdiction
 - need for **clear assignment of competencies** to bodies in charge of monitoring and supervising online service providers with a more formalized type of **cooperation** between competent national regulatory authorities **in the EU**



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