4. Towards a Future Regulatory Framework for Online Content

In this section the findings of the study above are reflected in view of a possible future re-orientation of the EU regulatory framework applicable to providers disseminating online content. The problems and new approaches displayed above will be summarised in order to understand which avenues could be explored taking into consideration some framework conditions.

4.1. Lessons Learnt

4.1.1. Difficulties in the Application of the ECD

The unabated occurrence and rise of illegal content and activity promulgated through platforms which are ISS and therefore fall under the scope of the ECD have thrown doubts on whether liability protections that were conceived in a different technological and socio-economic context still can be valid today. In particular, the study highlighted three key issues in this regard. The principal idea for setting up a liability framework granting privileges to intermediaries was based on the idea that they fulfil the condition of neutrality. The study has shown that this starting point cannot be upheld as a rule any longer and poses problems in that it contradicts the approach of having more active platforms when it comes to monitoring for illegal content. A further problematic area has been to determine the exact meaning of the notion "actual knowledge" which is a requirement for the liability privilege being lost by a service provider in connection with illegal content. This is especially true as there is until today an absence of any more formalised notice requirements from which actual knowledge could "automatically" be derived, as well as an unclarity of the protection for "Good Samaritan" efforts by intermediaries. A final problem that has surfaced clearly in the case law concerning the interpretation of the ECD is the technological tension between Art. 14 and 15 ECD, which, on the one hand, allow for specific infringement prevention injunctions against service providers but prohibit, on the other hand, general monitoring obligations by these.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

The application of the ECD and the national transpositions of it over the last nearly two decades have brought to the fore further problems. The Directive was based on the country-of-origin principle and thereby the approach that there would be one Member State that uses its jurisdiction power where necessary vis-à-vis established providers on their territory. From the outset the ECD was framed in a way that exceptional derogations from the country-of-origin principle were possible, as there was an assumption that there should be a backstop in case of problems concerning certain overarching goals and enforcement measures. However, the procedure, which resembles exceptional derogation procedures of the AVMSD, turned out to be complex, burdensome and lengthy and has therefore been rarely used irrespective of the fact that Member States or their competent authorities have in the past been pointing out enforcement shortcomings. Therefore, this procedure alone has not proven to be a sufficient approach to reconcile legitimate protection interests with the fundamental principle of country-of-origin.

A final issue that has been creating difficulties in the application of the ECD is that beyond its limited number of substantial provisions already the categorisation of specific information society services to which the liability regime applies in different levels has turned out to be no longer reflective of the reality of intermediaries fulfilling these and combined functions today. The definitions or categories of service provider functions have also not been so clear that there would not have been disputes about the application to certain specific types of providers, which is obvious from even very recent case law.

4.1.2. New Actors, New Approaches and New Regulatory Models

One of the results of the difficulty in applying merely the definition of information society services which dates back to 1998 and only having a limited amount of specific subcategories established in the ECD is a differentiation of definitions to different types of (sometimes new) actors in different legislative acts. This is especially clear in several of the legislative acts of the Digital Single Market strategy of the Juncker Commission. Not only did the AVMSD introduce the notion of video-sharing platform providers, the DSM Directive addresses for an important part of the Directive online content-sharing service providers, the P2B Regulation establishes rules for certain online intermediary services and the proposed TERREG concerns hosting service providers but addresses these in a new manner. These are

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

illustrative examples showing that there is no clarity any longer about the categories of providers active in the online environment; thus it has obviously been difficult to formulate even some horizontally designed provisions in a way that they target all online providers. An important challenge lies therefore in the consistency of regulatory approaches in the online environment, already in defining the scope of application also with a view to other existing legislative acts or attempting at finding a new horizontally applicable categorisation.

New solutions to the problems mentioned above 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 takedown and transparency reporting. Beyond the case law of the court, some new legislative acts of the EU have explicitly taken a new approach to liability of online actors even if the corresponding act explains that the ECD privileges shall remain untouched. In the revised AVMSD, for example, video-sharing platform providers are now within the scope of application, but the obligations imposed on them are subject to leaving in place the liability exemptions of the ECD. However, the obligations imposed on these service providers actually necessitate that the platforms take a much more active role in that they have to help in achieving the goal that its users comply with applicable rules concerning content dissemination. Having to undertake ex ante risk assessments and depending on the outcome concerning the potential for harm, the provider then has to implement also preventive measures. Failure to do so will result in an assumption that the platform is not complying with its obligations.

For some legislative acts there is even an explicit departure from the ECD liability regime, even though in those cases only for specific contexts in which already the CJEU jurisprudence indicated that a primary liability by the platform provider is conceivable. This is the case concerning intellectual property rights, and the DSM Directive introduces a significant obligation for online content-sharing service providers and thereby does not any longer just refer to the liability provisions of the ECD but instead acknowledges that these platforms are taking an active role in the communication to the public of certain content and therefore can be addressed

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

also as being primarily liable. The DSM Directive creates an exception to the safe-harbour exemptions for host service providers under the ECD and requires an active role of the platform providers to obtain authorisation for the dissemination of copyrighted content. If they cannot achieve that, they have to take measures to prevent the availability of the concerned 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. As has been shown, this new approach can also lead to different types of liability of one provider for the same content if the content violates not only copyright but also other rights.

It is not only the DSM Directive that has an impact on the liability rules of the ECD; there are a number of other EU legislative acts that create 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 in light of achieving a sufficient consumer protection level. 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 again by other sectorial legislation. In some cases the new approach even entails an explicit expectation that the measures to be taken by platforms are also preventive in nature: for certain types of content there will be the need to prevent upload of content if the platform has been repeatedly used for dissemination of such illegal content.

The new legislative and policy approaches also concern a new or reinforced role of still relatively new regulatory models. In light of the difficulties of enforcement not least due to uncertainties about the role of service providers and the cross-border dimension, regulatory approaches try to include the industry and other sector players in the "regulation" of the services that are provided. The instrument with which this shall be pursued is typically a co-regulatory framework which is suggested in several legislative acts towards the Member States as a way to move forward in the implementation of that act. Most notably, the revised AVMSD refers to such models in a separate provision. The goal is to first encourage the addressees of regulatory measures to be active and to push secondly for the development of industry standards. If such self-regulatory approaches bring promising results, they have the advantage of being more direct and having a less infringing nature on fundamental rights. However, experiences so far hint more towards co-regulatory approaches which give some external monitoring body also a role when self-regulatory codes of conduct are

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

created. In addition, the possibility of action by regulatory authorities in case of non-compliance with self-set rules is necessary (cf. also below).

In this context it is also noteworthy that recent regulatory instruments rely on the use of certain technical solutions or standards by the providers in order for them to show compliance with the obligations. Even though the national transposition phase of the DSM Directive is still ongoing, it seems clear that the obligations of Art. 17 DSM Directive will only be reachable if technical solutions are implemented.

4.1.3. Margin for Member States in Implementation: the Example of GDPR

The GDPR is an interesting example to illustrate the margin that Member States retain when implementing EU law. Although it is a Regulation and shows a strong degree of harmonisation in its detailed regulatory provisions, which typically leaves Member States little margin in implementation, it will be shown that for specific elements of the Regulation this is not the case. Compared to this, the AVMSD, for example, shows a lower degree of harmonisation which, although it increased over time (cf. on this Chapter 2.4.2.1), continues to focus on the definition of minimum standards. In particular, it allows Member States (generally) to subject media service providers under their jurisdiction to stricter rules. Such a provision in a general formulation would not work in a Regulation seeking the degree of legal harmonisation as in the case of the GDPR.

The principles relating to the processing of personal data laid down in Art. 5 GDPR do not provide for derogations or room for interpretation for Member States. This means that the principles of lawfulness, fairness, transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity, confidentially and accountability apply in all Member States. National implementation must not contradict these principles. According to Art. 23 para. 1 GDPR, Member States can deviate from these principles, the information obligations laid down in the GDPR for processors and the rights of data subjects, but only if the derogation respects the essence of the fundamental rights and freedoms and if this is a necessary and proportionate measure in a democratic society to safeguard several public interests mentioned in this Article specifically (e.g. national security or the enforcement of civil law claims). Art. 23 para. 2 GDPR defines the minimum content to which such rules must correspond (e.g. the national provisions shall contain specific provisions at least as to the purposes of the

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

processing, the scope of the restrictions introduced, the safeguards to prevent abuse or unlawful access or transfer, etc.). It thus provides a national margin in implementation within certain limits. The lawfulness of processing standard is also largely harmonised. It contains however limited possibilities for Member States to be more specific: in particular, and this is relevant in the context of this study, in the area of data processing for journalistic purposes, but also with regard to data processing for the fulfilment of contracts or a public task (Art. 6 para. 1 lit. b) and e) GDPR) and, furthermore, as far as genetic data, biometric data or data concerning health is concerned.

In this context, the structure of supervision is also interesting, particularly with regard to the independence of the national supervisory authorities.[641] Although the setting up of supervisory authorities is in principle under the responsibility of Member States, in particular to preserve national specificities in relation to existing supervisory structures (including in the case of federal states with multiple layers of authorities in charge) and the competence of supervision, the GDPR contains specific provisions to ensure the independence of these regulators. This is mainly due to the fact that the independence of supervision is based on fundamental rights[642], the protection of which the GDPR aims to guarantee. Therefore, Member States should in particular provide that the members of national supervisory authorities are appointed by means of a transparent procedure and that they act with integrity, refrain from any action that is incompatible with their duties. Moreover, the supervisory authority should have its own staff and be provided with the financial and human resources, premises and the infrastructure necessary for the effective performance of its tasks. It should also have a separate, public annual budget.[643] This considerably limits the institutional autonomy of the Member States in assigning a competent authority for the application of the GDP rules.[644] The CJEU has already clarified with regard to the predecessor Directive that independence of supervisory authorities is an essential element of data protection law because of the fundamental rights dimension. A broad interpretation of this term is also compatible with the competences of the EU and does not violate the

641 Cf. on this in detail already Chapter 2.4.3.4.

642 CJEU, judgement of 9.3.2010, C-518/07, *European Commission v Federal Republic of Germany*, para. 21 et seq.

643 Cf. Recitals 120 and 121.

644 On the general question, whether and to what extent (secondary) Union law may contain requirements for the organisation of the Member States' authorities, cf. *Stöger*, in: ZöR 65(2), 2010, p. 247, 247 et seq.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

principles of conferral of powers, subsidiarity and proportionality.[645] The legal restriction of the Member States' margin in implementation is therefore justified for the case of GDPR.

However, there is one area of substantive rules in the GDPR for which the details are not harmonised. This concerns specific processing situations listed in Chapter 9 GDPR. Such situations include in particular data processing for journalistic purposes (as already described in detail in Chapter 2.4.3.1.), but also for the purposes of academic, artistic or literary expression (Art. 85 GDPR), in the context of employment (Art. 88 GDPR) or relating to processing for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes (Art. 89 GDPR). These provisions highlight legal areas that are not subject to a blanket and unconditional application of the principles and competencies on which the GDPR relies but rather give Member States the possibility to apply their framework in achieving the obligatory goal.

Above all, the latter underlines that the degree of harmonisation depends on the balancing between the goals pursued by harmonisation and the interference in Member States' competences. The higher the weight to be given to an objective at Union level (e.g. fundamental rights guarantees or the independence of supervisory authorities), the stronger the argument for harmonisation. By contrast, the more a regulation interferes in Member States' competences (e.g. in media regulation as detailed in Art. 85 GDPR), the more restraint is required with regards to harmonisation. The more an objective is shaped by national interests (e.g. Art. 23 para. 1 GDPR), the stronger the need is for a national margin in implementation.

4.1.4. Institutional Dimension of Enforcement on National and EU level: the Example of the GDPR

As described in detail above (Chapter 2.4.3.5), the GDPR has established differentiated cooperation and consistency mechanisms for cross-border cooperation between competent national data protection authorities. At the "top" of this structure sits the EDPB, which has the powers both to give directions in the application of GDPR rules and to make final decisions. The EDPB can make binding decisions on disputes between competent data protection authorities from different Member States in a dispute resolution procedure in accordance with Art. 65 GDPR and, under certain

645 CJEU, *European Commission v Germany*, supra (fn. 642), para. 46 et seq.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

circumstances, also in disregard of the assessment of the lead supervisory authority in the respective case. Although the EDPB has no means of enforcing its rights or sanctions, the binding nature of the decision can nevertheless significantly interfere with the powers of the lead supervisory authority.

4.1.4.1. The European Data Protection Board Compared to Other Sectors

Compared to other cooperation institutions established at EU level that are set up to improve the uniform and efficient application of EU rules by cross-border cooperation, these powers are considerable. For example, in the audiovisual sector, ERGA is also composed of representatives of the competent national regulatory bodies. It also has the task of providing technical expertise to the Commission, facilitating exchange and cooperation between regulators and delivering opinions at the request of the Commission, which has now been detailed in the revised AVMSD in Art. 30b. While the task of ensuring a coherent national implementation of the European requirements is the responsibility of the Commission within the framework of the AVMSD (Art. 30b para. 3 lit. a AVMSD), and ERGA only advises it in this respect (Art. 2 lit. a Commission Decision on establishing the ERGA[646]), that task is expressly assigned to the EDPB within the framework of GDPR (Art. 70 para. 1 GDPR). Accordingly, ERGA has no powers to make binding decisions vis-à-vis its members or the Member States. However, the Commission does have such binding regulatory powers: according to Art. 2 para. 5c, Art. 3 para. 2 and 3 AVMSD, the Commission can make binding decisions about the competence of a regulatory body and on the compatibility of measures taken in deviation from the country-of-origin principle with EU law. ERGA itself, by contrast, is limited to taking a position as part of this procedure. Such decision-making powers of the Commission are, in turn, unknown in the GDPR (besides the decision-making powers within the framework of adequacy decisions for the transfer of data to third countries).

Similar to ERGA, the Body of European Regulators for Electronic Communications (BEREC) is also essentially responsible for providing support,

646 Commission Decision of 3.2.2014 on establishing the European Regulators Group for Audiovisual Media Services, C(2014) 462 final, available at https://ec.europa.eu/digital-single-market/en/news/commission-decision-establishing-european-regulators-group-audiovisual-media-services.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

advice and opinions.[647] The nature of involvement of this group of regulators, which comprises a Board of Regulators (composed of one member from each Member State) and working groups, depends on the type of procedure. Regarding the resolution of cross-border disputes arising under the European Electronic Communications Code (EECC)[648] between undertakings in different Member States, Art. 27 para. 2 and 3 EECC, for example, provide for an involvement of BEREC. Where the dispute affects trade between Member States, the competent national regulatory authority or authorities shall notify the dispute to BEREC in order to bring about a consistent resolution of the dispute, in accordance with the objectives set out in Art. 3 EECC. In this scenario, BEREC shall issue an opinion inviting the national regulatory authority or authorities concerned to take specific action in order to resolve the dispute or to refrain from action.

However, any obligations imposed on an undertaking by the national regulatory authority as part of the resolution of the dispute shall (inter alia) only take the *utmost* account of the opinion adopted by BEREC (Art. 27 para. 5 EECC). This does not imply any power of last resort. In the context of the procedure for consolidating the internal market for electronic communications (Art. 32 EECC), the EECC provides on the other hand for another distribution of tasks than, for example, the abovementioned EECC rules on the resolution of cross-border conflicts or the rules laid down by the AVMSD or the GDPR. Art. 32 para. 1 EECC states that "[n]ational regulatory authorities shall contribute to the development of the internal market by working with each other and with the Commission and BEREC, in a transparent manner, in order to ensure the consistent application, in all Member States, of this Directive". The Directive therefore considers that ensuring a coherent application of the Directive is a common task for the parties concerned. However, and without going into detail regarding the respective rules of the EECC, in order to enhance consistent regulatory practice across the Union, the Commission may require the national regulatory authority to withdraw certain of its draft measures, where BEREC shares the Commission's serious doubts as to the

647 Cf. Art. 4 of Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, OJ L 321, 17.12.2018, pp. 1–35.

648 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), OJ L 321, 17.12.2018, pp. 36–214.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

compatibility of the draft measure with EU law and in particular with the regulatory objectives of this Directive.[649] Therefore, although the involvement of BEREC is essential for making a decision, the power to take the actual decision lies with the Commission.

4.1.4.2. Essential Factors for Institutional Organisation

These differences in the distribution of competences and tasks to regulatory authorities on cooperation structures can be attributed to the diversity of the regulatory subject matters and to their relation to the levels of harmonisation, legislative competence, the marketplace principle and the limits that result from the regulatory area concerned. These factors make the institutional arrangement of the GDPR meaningful and, to a certain degree, even necessary. However, as will be shown, these factors find their limits in the media privilege principle. Therefore, this aspect needs to be considered when thinking about whether such structures of the GDPR could be transferred to other areas in the domain of online content dissemination.

As already described in Chapter 4.1.3, the GDPR achieves a high level of harmonisation if compared to other EU provisions in the online context such as the AVMSD, both with regard to the applicable law itself and its enforcement. Against this background, it seems consistent that the EDPB is granted final decision-making powers where the law of the Member States has been harmonised and where a cross-border situation is concerned. The extensive harmonisation of data processing principles, (partially) harmonised legal bases for processing and the largely uniform granting of rights for data subjects are factors that enable the EDPB to base its (binding) opinions and decisions on a set of rules that are already compulsory in all Member States. It therefore does not need to consider the national implementations in the 28 Member States. This makes it also easier to decide on cross-border issues. On the other hand, the AVMSD, for example, limits itself to granting the ERGA powers to deliver opinions. This ensures that national interests and particularities with regard to media law are taken into account and that the Commission's decisions are limited to the examination of compatibility with EU law. It would therefore be difficult to conceive a cooperation structure like ERGA in this context in a way that it would resemble the EDPB, not only considering that the Member

649 Cf. on this also Recitals 154 and 201 EEC.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

States are even given deviation possibilities from the country-of-origin principle but also because of the differing task as far as cross-border issues are concerned.[650]

The powers of the EDPB end where the harmonisation remit of the GDPR ends: according to Art. 70 para. 1 GDPR, "[t]he EDPB shall ensure the consistent application of this Regulation". Regarding the dispute resolution by the EDPB, the GDPR stipulates in Art. 65 para. 1 that, "[i]n order to ensure the correct and consistent application of this Regulation in individual cases, the Board shall adopt a binding decision […]". The GDPR recognises therefore in principle that there are areas in data protection law which do not necessitate a "consistent application". The advantages of the simplified decision-making through the powers conferred to the EDPB for areas falling under a standardised legal basis do not work for these specific scenarios. That applies in particular to the media privilege in Art. 85 GDPR, where the implementation is left to the Member States, allowing, in particular, to provide for deviations from the cooperation and consistency mechanisms determined in Chapter 7 GDPR.

This, in turn, is consistent insofar as the question of the scope of the powers of a supranational "body of the Union with own legal personality" (Art. 68 para. 1 GDPR) also involves questions of competencies between Member States and the EU. For the area of data protection, a legal basis establishing competence of the EU is laid down in Art. 16 TFEU. It states that the EU shall create the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law. Compliance with these rules shall be subject to the control of independent authorities. Regarding the rules relating to the free movement of data, Art. 16 para. 2 TFEU in that sense is a *lex specialis* rule compared to the general internal market provision of Art. 114 TFEU. This allows for the economic integration of data protection into the EU legal framework.[651] However, the administrative and economic focus of this provision does not allow the adaption of rules in other areas per se. This addresses in particular the regulatory areas that are excluded from the GDPR framework by Art. 85 et seq. As the EU has no explicit and comprehensive competence for regulating the media

650 This explicitly does not concern the question whether the ERGA could possibly be granted powers in relation to individual areas of AVMSD regulation or in relation to other regulatory matters.

651 *Kingreen*, in: Calliess/Ruffert, Art. 16 TFEU para. 4, 7.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

and its function and influence during the process of public opinion making as such (cf. Chapter 2.3.2.1), GDPR cannot reach out into this areas. Even the allocation of powers to a supranational institution at EU level can therefore only be based on the distribution of competencies. This applies even if, as in the case of the EDPB, the institution is essentially composed of Member State authorities.

A further factor for the institutional arrangement in the framework of GDPR is the market location principle (cf. Chapter 2.4.3.3), which excludes, at least for the harmonised area, the application of the country-of-origin principle by Member States. Due to the far-reaching harmonisation achieved by the GDPR, which requires relatively uniform rules to be observed in the Member States, the application of the market location principle is, on the one hand, less restrictive for data processors in the Member States. Compared to this, the introduction of the market location principle in less harmonised areas, such as in the context of the new AVMSD requirements for VSPs, would be difficult to implement, especially for providers, as Member States are given a wide scope of action, especially with regard to mechanisms of self- and co-regulation. On the other hand, third-country entities can also be addressed by the EU legal framework of the GDPR, whereas, if the country-of-origin principle was to apply at EU level, it would depend on whether individual Member States had enacted regulations at national level that would allow access to such third-country data controllers or processors. Therefore, the EDPB has been given the task of issuing guidelines and issuing binding opinions or making binding decisions in order to avoid such diversity. For example, the question of "jurisdiction" is decisive for the assessment of which supervisory authority is responsible. For the questions of the (substantive) legality of processing it depends alone on the "market location", whereby the EDPB can then refer to the rules of the GDPR in evaluating the case.

4.1.4.3. The Setup between National DPAs and Their Cooperation on EU Level

Finally, the question of the delimitation of the scope of application of a regulatory area also plays a decisive role in institutional design. Economic operators which target their offers to the EU must adhere to the require-

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

ments set on EU level[652], as has been explicitly laid down in GDPR. Thus, for example, service providers must adhere to the information obligations of the GDPR when processing customer data on the basis of a contract and protect the rights of those concerned. They are subject to the supervision of a data protection authority of the respective Member State to which they direct their offer. The process for determining a lead supervisory authority facilitates those cases where a provider has targeted several Member States and would therefore be subject to different competent supervisory authorities. This shifts multiple regulatory engagements from the entrepreneur (the processor) to the area of supranational cooperation between the authorities. The far-reaching powers of the EDPB and the consistency mechanisms fit in well with these closely circumscribed cases. The data protection authorities of which the EDPB is composed can contribute their expertise and thus facilitate an easier and unified application of the law. This, however, reaches its limits where sector-specific data protection law is concerned. The media privilege or its national implementation can serve again as an example for this. Here the limits of binding decision-making powers at EU level can be illustrated particularly well by the – here simplified – example of the highly complex implementation of the media privilege in Germany:

Due to its federal nature, Germany is divided into 16 federal states (*Länder*) with legislative powers. Media law lies within the competence of the federal state legislators, whereby there are typically separate laws for private broadcasters, public broadcasters, the press, online media (so-called *Telemedien*) and, in some cases, other forms of media. The implementation of the "media privilege" has therefore led to more than 50 different individual regulatory arrangements for the media law sector in Germany. In this example, the differences in the supervision of data processing for journalistic purposes shall be highlighted.[653] In many federal states, the supervision of private broadcasting under data protection law has been delegat-

652 An approach which, by the way, is also followed by the Recommendation on Tackling Illegal Content Online (supra, fn. 395) when it defines a hosting service provider "irrespective of its place of establishment, which directs its activities to consumers residing in the Union".

653 For a detailed overview on this and the following, and for references to the respective laws: Institute of European Media Law, synopsis on the planned changes in national legislation to implement the 21st Amending Treaty to the Interstate Broadcasting Treaty and the GDPR, available at https://emr-sb.de/synopse-art-85-dsgvo/; further explanations and analysis by *Ory*, in: UFITA 82(1), 2018, p. 131.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

ed to the Länder regulators appointed to supervise the media in terms of content (related to the national transposition of AVMSD). This was done in view of the fact that these authorities are more closely involved in issues relating to media law (and freedom) and that supervision should be unified.[654] In other federal states, the media authorities are only obliged to monitor the area of journalistic data processing, whereby the general data protection authorities are responsible for the other types of processing. In the remaining other Länder, the general data protection authorities supervise the data processing of private broadcasters as a whole, including the journalistic data processing. The supervision of journalistic data processing in public broadcasting, on the other hand, lies with "broadcasting data protection officers" (*Rundfunkdatenschutzbeauftragte*) within the broadcasters themselves, in order to ensure that public broadcasters are not under the influence of the state by giving state authorities control powers. For the press, in turn, the federal states have predominantly opted to delegate the supervision to the German Press Council (*Deutscher Presserat*), an institution of self-regulation. Thus, in addition to the already existing 16 general state data protection authorities and the Federal Commissioner for Data Protection at the federal level, a large number of supervisory institutions are also being set up. In order to ensure that media law concerns are generally taken into account in the supervision of data protection and vice versa, cooperation mechanisms are regularly introduced into the federal state laws at the national level in order to provide for cooperation between, for example, state media authorities and data protection authorities. At EU level, there is a lack of such cooperation requirements. It is therefore necessary to rely on Member States' national implementations that they provide for cooperation mechanisms between authorities that are specific to the area and therefore closer to the subject matter.

How important media-specific considerations can also be in the context of harmonised data protection law has been shown by the *Google Spain* ruling of the CJEU[655]. It is true that the EDPB would not be authorised within the scope of application of the GDPR to make exclusive press-specific decisions. There are specific cases when in addition to the regular interests to be considered in data protection law – which are economic or public interests on the side of the processors and personal rights on the side of the

654 Cf. for example the Parliament of the Saarland, explanatory memorandum on the amendment of the Saarland Media Act, printed papers 16/277, available at https://www.landtag-saar.de/file.ashx?FileName=Gs16_0277.pdf, p. 30.

655 CJEU, *Google Spain SL v AEPD*, supra (fn. 79).

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

data subjects –also interests of the media are concerned. This is often the case in scenarios where data subjects are content creators on platforms. In such situations it would make sense to have a media regulator or a supervisory authority with that background to shape the decision. However, such an assignment is not guaranteed per se by the GDPR, which is geared to competences of the supervisory authorities in data protection matters including on EU level the EDPB.

4.1.5. Application to the ECD of Interim Findings Relating to the GDPR to the ECD

The analysis of the margin of implementation has resulted in two main conclusions: On the one hand, maximum harmonisation leads to greater legal certainty for both legal users and regulators. This applies in particular to cross-border situations, which benefit from the widest possible harmonisation of the criteria for assessment. Furthermore, this applies in particular to the establishment of standards which address matters in shared competence and where the rules of the Member States were very diverse. Contrary to this, on the other hand, harmonisation reaches its limits where matters are concerned which lie predominantly within the regulatory competence of the Member States.

The ECD contains a number of provisions which would be suitable for a high level of harmonisation, such as the information requirements for ISS. With regard to the liability rules, which are the focus of this study, however, such a generalising conclusion is not easily possible. On the one hand, this study has shown that the current design of these rules poses a great challenge to addressees and regulators against the background of the changing media landscape. The boundaries between pure intermediaries and content providers are blurred, which is why the question needs to be answered in a differentiated manner. In principle, maximum harmonisation should be achieved as far as possible. The ECD already operates in the digital environment, and its scope of application therefore naturally concerns cross-border issues. On the other hand, however, a harmonisation approach that is as broad as possible should not ignore the fact that the blurring of the boundaries between pure intermediaries and content providers has also led to a blurring of the boundaries between pure electronic commerce and media. This may call for a differentiated approach, not least in the light of fundamental rights (cf. Chapter 2.1.3) and the allocation of competences (cf. Chapter 2.3.2). Although the EU legislator is not barred

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

to regulate media content entirely, it must take account of cultural policy concerns on the part of the Member States (cf. Chapter 2.3.1). The framework conditions presented in the context of this study and demanded in the process of evaluation could be implemented by a restrictive harmonisation approach by way of sectorial exceptions. This would in a way resemble the approach chosen by GDPR for the media privilege. If one would pursue this direction too far, however, the identified deficits of the current regulatory framework under ECD would continue due to wide areas being uncovered. Media and cultural policy interests of the Member States should be taken into account by establishing as far-reaching a regulatory approach on EU level as possible while at the same time leaving the assessment of cases relevant to media law to the national regulatory authorities. Due to the proximity and expertise of the regulators already established in the field of media supervision, these would also be a suitable contact point for monitoring and enforcement in the context of ECD.

The latter point is also linked to the question of institutional structure. The analysis in this context first and foremost emphasised that cooperation between both the Member States and the regulators of the different Member States is of essential importance and requires a foundation in EU law. This is all the more true in the context of the ECD, which already in its current approach mainly concerns cross-border cases in the (digital) internal market. The specification in Art. 19 ECD, which is limited to general requirements without the establishment of concrete procedures, does not seem sufficient for these purposes. In addition, the concrete shaping of the institutional component – in addition to the degree of harmonisation and legislative competence already mentioned – depends on factors such as the intended scope of application (in particular the country-of-origin principle or market location principle; for more details see Chapter 4.3.2) and the delimitation of the regulatory area. The more binding competences, in particular enforcement or final decision powers, are granted to the institution(s) outside or above national regulatory authorities, the narrower these factors have to be defined; the more convergent the legal material, the more difficult it is to implement a supranational regulatory structure at EU level such as in the case of GDPR with the EDPB.

In this respect, the ECD in its current form is more similar to the model of the AVMSD, especially with regard to the country-of-origin principle and the cautious harmonisation approach. In particular, it places the assessment of measures taken by a Member State against providers in another Member State with regard to their compatibility with Union law with the Commission (Art. 3 para. 6 ECD). It is therefore not set up like the

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

GDPR, which confers less power to the Commission, but boosts the powers of the regulatory body. It is to be assumed that, as regards the ECD, the position of the Commission will essentially remain unchanged in the future due to its proximity to the subject matter and other competences in the area of the internal market. Beside this, there is another factor which opposes the transfer of the institutional model of the GDPR or comparable models to the regulatory scope of the ECD. The ECD is not as narrowly confined to a specific area as the GDPR but takes a horizontal approach – and in that sense can be regarded as a "convergent legal basis" – that spreads across many other areas, which may each need specific institutional considerations. This is shown not only by the diversity of the addressees but also by the exemptions from the current scope of application. In this context, it would be preferable to have an institutional structure in the sense of enhanced and procedurally regulated cooperation between national regulators (e.g. in existing models such as BEREC or ERGA) in conjunction with more differentiated rules on law enforcement.

4.2. Important Considerations

In this section, before discussing possible avenues to pursue in the future, some important elements that should be considered in any reform discussion concerning the regulatory framework for online content dissemination are presented. They are elements that relate to the fundamental rights framework, in which the regulation of content dissemination takes place, and will also allow to consider alternative regulatory approaches.

4.2.1. Value-based Approach Necessitates Effective Enforcement

On the one hand, this study has shown that the dissemination of online content addresses a number of fundamental rights issues worthy of protection, which particularly applies to content harmful to minors and illegal content. The fundamental rights from both the ECHR and the CFR as well as from national constitutional provisions must be respected by the Union and its Member States in their actions, in particular when considering legislative activities. This results not only in rights positions granted to individuals against overstepping into their protected realm by state action but also – especially as far as human dignity is concerned – in positive protection obligations for these rights by the States. Such positive obligations

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

to act concern the EU to a much lesser extent, especially since the CFR explicitly does not establish any new competences for the EU, but they are highly relevant for the Member States. They must ensure that any interferences found which are incompatible with fundamental rights can be dealt with effectively. For the regulatory authorities, this means that they must take all means at their disposal – either directly from the fundamental rights or through other legal provisions which protect these fundamental rights – to remedy and actively counteract any impairment.

The study has further shown that the EU, and thus also its Member States which have committed themselves by being members of the EU, are based on certain values and objectives which must be taken into account in their actions. One of these values is respect for human dignity and human rights, which in turn incorporates the aforementioned fundamental rights considerations into the EU's system of values. These values should not only be understood in the sense of general principles without any specific meaning or significance, but their observance is actually a prerequisite for accession to the EU and their non-compliance can lead to sanctions vis-à-vis the respective Member State in the procedure according to Art. 7 TEU. If there is a situation in the EU where these values are disregarded, then the EU and its Member States are called upon to take action. The EU can still only act within its framework of competence. Concerning illegal or harmful content online that is freely available and very harmful to minors, this observation does not necessarily mean that the EU itself or the Member States have to take specific action against specific content. They do, however, have to work towards establishing appropriate and effective systems that provide the right means for regulators or law enforcement authorities. This is reflective of the fundamental rights obligation of the regulatory authorities to use all means at their disposal to deal with interferences: if these means prove to be ineffective and unsuitable for the protection of fundamental rights after they have been taken, this can in turn result in a duty on the part of the legislature (depending on the distribution of competences) which results from the values and fundamental rights.

This finding is emphasised by the Union's objectives. These are enshrined in the TEU, including inter alia the creation of an internal market, and set out what the EU must achieve in legislative and coordinating terms. They basically lay down an "EU programme", which must also be completed by coordinated policies of the Member States in the context of the exercise of the limited powers by the EU institutions and in the relevant thematic and legal areas. This can also result in standstill obligations for the Member States, which prohibit them from counteracting the inte-

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

gration more closely defined by the EU's goals. It follows from the imperative of loyalty to the EU that the Union, if it has seized a competence and has comprehensively regulated a matter, is also obliged to shape this matter in such a way that the Member States in turn have the actual possibility of fulfilling their obligations under the system of values and fundamental rights. The effect of this can be the need for legislative action: if the national regulatory authorities have taken all means at their disposal to fulfil their obligations under the fundamental rights framework, and if the Member States have also taken all steps possible within their scope of competence to establish an effective system, but this turns out to be not sufficient to counter violations of fundamental rights or values, then the result might be that the EU is obliged to take action.

In the context of the study and taking into consideration that there are difficulties in the application of the ECD, this has another consequence. Should there be no legislative clarification 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 a provider targeted by them may be able to claim a liability exemption. In light of the need for an efficient protection of fundamental rights and values, inactivity is no option. This means that even difficulties in achieving an effective enforcement of rules cannot justify that competent authorities do not at least attempt at reaching a most value-respecting situation. More pragmatically spoken, this will also be a result from the wider acknowledgement in policy and society that there are problems in the context of online content dissemination which need to be addressed by more concrete action.

4.2.2. Involvement of Industry through Self- and Co-regulatory Measures

As has been explained in detail in Chapter 2 and 3 of this study, the question of regulating dissemination of online content is part of a complex regulatory system involving many different legislative acts. This also results from the fact that a large number of different stakeholders are involved in the development, production, distribution, exploitation and marketing of such content. The three main categories are users, content providers/producers and distributors/platforms, which in turn are split into a number of different types of actors – much more diverse in the digital environment than in the analogue environment. While legislation and regulation in relation to traditional content providers such as broadcasters has grown

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

in parallel to the technological progress, it is lagging behind against the rapid and steady development of the Internet and its intermediaries. The regulatory space has increased tremendously due to the borderless nature of the digital world, as has the technical expertise needed to create effective, appropriate and enforceable rules. For these reasons, the involvement of various stakeholders in regulatory approaches has become much more important. Below, the regulatory models of self- and co-regulation will be addressed. These approaches are said to have a number of advantages, which will be examined. Already existing and potential instruments of self- and co-regulation will also be discussed.

4.2.2.1. Defining Self- and Co-regulation

In the EU context, self-regulation has been defined as "the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectorial agreements)".[656] Co-regulation has been defined as a "mechanism whereby an [EU] legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognized in the field (such as economic operators, the social partners, non-governmental organisations, or associations)".[657] The term "regulated self-regulation" can also be found.

However, there is no uniform use of these terms or a universally valid definition at European or international level. Furthermore, the systems of self- and co-regulation differ widely in the Member States, both in terms of their design and their intensity.[658] The status given to self- and co-regulation regularly varies and may in particular depend on the extent to which a national regulatory framework exists in the area affected by self- or co-regulation. In the context of this study, the finding of a definition is not necessary. It shall suffice to clarify in this context that co-regulation depends on the interaction between a regulator and the regulated entity. While industry is still charged with creating a framework of rules and standards to which it is bound, for co-regulation to work there must be certain

656 Interinstitutional Agreement on Better Law-Making, 2003, OJ C 321, para. 22.
657 Ibid., para. 18.
658 *Cappello (ed.)*, Self- and Co-regulation in the new AVMSD, IRIS Special 2019-2.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

review, monitoring[659] and approval mechanisms, which are overseen by regulatory authorities or quasi-regulatory bodies.[660] Breaking the rules or standards by the industry would incur legally enforceable sanctions, specified in law or administrative rules, by these bodies. Self-regulation, on the other hand, regularly takes place without external monitoring mechanisms (by outside institutions set up and operated and staffed by the regulated bodies themselves) and generally does not provide for sanctions.[661]

4.2.2.2. Advantages and Disadvantages of Self- and Co-regulation

The advantages of self-regulation and co-regulation as a more "softer law" approach are illustrated when comparing to some of the disadvantages of so-called "hard law" in the form of legislation as far as it concerns the online sector. Due to partly lengthy legislative mechanisms and procedures, it is not readily accessible to rapid adaptations due to changing market conditions or technical and societal change. If unsuitable principles are first enshrined in law or if suitable principles lose their suitability in the course of time due to external influences, tying to hard legal foundations can hinder innovation and reactive response to these changes.[662] Furthermore, there are hurdles to law enforcement, especially against foreign providers, as described in this study, for example because providers are difficult for the regulatory authorities to grasp or costly procedures have to be followed. In this context, it is worth to consider the risk of "forum shopping", which makes certain States more attractive as host countries due to a perceived lighter regulatory framework, against the background of the country-of-origin principle, which is laid down in hard legislation. Above all, online providers are not dependent on a particular location to make content accessible to any local public.[663]

Rules established through self-regulation and co-regulation may be attractive in this context for several reasons: they are not narrowly dependent on legislative processes and can be regularly adapted by the stakeholders involved. They can also be evaluated at regular intervals, allowing a rela-

659 *Schulz/Held*, Regulated Self-regulation as a Form of Modern Government, p. 63.
660 *Marsden*, European Law, Regulatory Governance and Legitimacy in Cyberspace, pp. 61–63.
661 Ibid., pp. 63, 227
662 Cf. *Finck*, in: LSE Law, Society and Economy Working Papers (15/2017), p. 7.
663 Cf. on this and the complex of self- and co-regulation online at whole: *Cappello (ed.)*, Self- and Co-regulation in the new AVMSD, IRIS Special 2019-2.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

tively timely reaction to latest technologies and emerging problems. The latter is also one of the main arguments frequently put forward for self-regulation by the respective industry stakeholders, in particular platform providers: information asymmetry. In fact, the emergence of self-regulatory systems on the Internet appears to be a logical response to the challenges of traditional regulation with this new medium. For one, it is in the nature of this rapidly evolving area that the legislative bodies do not always have the necessary technical knowledge of the functioning of the systems concerned and of the (side) effects that a particular regulation may cause. This in conjunction with the sheer amount of content and business models has led to a "capability challenge" on the side of regulators with regards to designing effective regulation and enforcing it.[664] Secondly, the expansion of the Internet and the cross-cutting nature of content and business models call for international, cross-sectorial and innovative solutions,[665] which – given the relatively short history of the Internet and its rapid rise – have not yet emerged. Thirdly, cultural and legal traditions in Europe have been conducive to collaborative forms of regulation especially in new, emerging economic sectors and industries.[666]

In this regard, the Commission argued in its 2016 Communication on Online Platforms[667] that traditional top-down legislation reaches its limits in the platform economy and that therefore self- and co-regulatory measures are likely to stay or become even more important for that economy's future governance. In addition, it can be argued in line with Recital 13 AVMSD[668] that the mechanisms of self- and co-regulation may lead to a more effective enforcement of rules because they have been developed with the support of the regulatory subjects. In these scenarios, willingness to comply with regulatory requirements is in principle higher overall. Fi-

664 *Freeman*, in: Italian Antitrust Review 2(1), 2015, p. 75, 80.

665 *Cohen*, in: Theoretical Inquiries in Law, 17(2), 2016, p. 369, 375–387

666 *Marsden*, European Law, Regulatory Governance and Legitimacy in Cyberspace, pp. 67–70; *Senden et al*., Mapping Self- and Co-regulation. Approaches in the EU Context.

667 Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, COM/2016/0288 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0288#footnoteref21.

668 Recital 13 states: "Experience has shown that both self- and co-regulatory instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection. Measures aimed at achieving general public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves".

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

nally, it should also be pointed out that self- and co-regulatory arrangements can be more easily applied to specific and more closely circumscribed regulatory areas than legislative measures. The latter are bound to achieving a certain objective (e.g. combating hate speech or discrimination) and do not necessarily focus on regulating a certain area (e.g. obligations of platforms in the online sector). Co- and self-regulation make it easier to differentiate the targets of regulatory measures: on the one hand, only those categories or types of providers are involved in the regulatory design process that are actually affected by a particular problem or objective. On the other hand, it also facilitates the definition of regulatory addressees or categories that have to comply with certain specifications. This is particularly relevant in the area of intermediaries if one considers the large variety of platforms which each may have a completely different orientation (e.g. search engines and social networks).

In its Opinion on Self-regulation and Co-regulation in the Community legislative framework, the European Economic and Social Committee has summarised the advantages of these forms of regulation as follows: (1) they tend to promulgate comparatively new and innovative norms which announce and reflect eras of change and are often harbingers of legal progression in areas where binding rules are non-existent or insufficiently developed; (2) they are assumed to improve the substantive quality of decisions and policy making by incorporating new information obtained from the different participants; (3) they increase learning processes among the participants and in this way generate new knowledge; (4) they can strengthen the orientation of private action on the common good and on the basic values of society as well as the integration of public values into decisions; (5) they are supposed to resolve, contain or reduce conflict among competing interests and the actors involved; (6) they achieve cost-effectiveness and (7) they increase compliance with regulation via greater commitment to and support for the implementation of decisions.[669]

However, besides the fact that this enumeration shows an ideal model situation but typically is not reflective for all self- and co-regulatory measures, such mechanisms are also linked with risks and challenges related to their implementation and enforcement. For example, in its Resolution of

669 Opinion of the European Economic and Social Committee on Self-regulation and co-regulation in the Community legislative framework (own-initiative opinion) (2015/C 291/05), OJEU C 291/29, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.291.01.0029.01.ENG&toc=OJ:C:2015:291:TOC, para. 1.1

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

9 September 2010 on Better Lawmaking, the European Parliament "warns against abandoning necessary legislation in favour of self-regulation or co-regulation or any other non-legislative measure [and] believes that the consequences of such choices should be subject to careful examination in each case, in accordance with Treaty law and the roles of the individual institutions".[670]

The concerns expressed in this respect focus in particular on the lack of effective monitoring mechanisms and sanctions under self- and co-regulatory regimes, which in practice often prove ineffective in achieving the objectives pursued. This is most relevant in the area of self-regulation. It applies especially to completely unmonitored systems which can be seen[671], for example, in the terms and conditions set by platforms for their users, some of which go beyond the existing legal framework.[672] These self-regulatory provisions typically only stipulate sanctions for the users of the services (e.g. blocking of accounts or deletion of content) but not for the platform itself. In addition, there is often a lack of transparency in the decision-making process that leads to action or sanctions. Therefore there is a need for a counterweight on behalf of public interests.

Systems in which independent bodies are involved in monitoring (and in some cases drawing up of) codes of conduct, for example in the form of self-regulatory bodies, are somewhat more transparent and effective. Whether these bodies are equipped with sanctioning powers (also in the form of, e.g., public disapproval) depends on the respective arrangement. As a rule several industry stakeholders normally create such arrangements for a certain regulatory area, so that violations can be associated with a negative reputational impact, at least within the industry but also in the wider public opinion. It should also be mentioned that guidelines or directives issued by self-regulatory bodies can become indirectly binding by being

670 Resolution (P7_TA(2010)0311), para. 46 and 47, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0311+0+DOC+XML+V0//EN.

671 *Finck*, in: LSE Law, Society and Economy Working Papers (15/2017), p. 8; *Dittrich*, Online Platforms and How to Regulate Them, p. 7; cf. on this as well *Koopman/Mitchell/Thierer*, in: The Journal of Business, Entrepreneurship & the Law 8(2), 2015, p. 529, 542 et seq.

672 Cf., e.g., The Community Standards of Facebook, available at https://de-de.facebook.com/communitystandards/, where several conditions, for example on hate speech or sexual activities, are regulated; furthermore, for example, the Uber Community Guidelines, available at https://www.uber.com/legal/community-guidelines/us-can-en/, regulate a seat-belt obligation for drivers which do not exist in every state at the legal level in which Uber offers its services.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

consulted or referred to by (mainly national) courts within the framework of the interpretation of uncertain legal terms.[673] Such models operate at an interface between self- and co-regulation.

Much more effective in terms of enforcement, implementation and transparency are co-regulatory systems that involve (mainly national) public oversight bodies or authorities. These may be independent regulators or private bodies charged with public powers through regulatory or administrative acts. Accordingly, the Commission has also clarified in its abovementioned Communication on Online platforms that "*principles based* self-regulatory/co-regulatory measures, including industry tools for ensuring application of legal requirements and appropriate monitoring mechanisms, can play a role. *Underpinned by appropriate monitoring mechanisms*, they can strike the right balance between predictability, flexibility, efficiency, and the need to develop future-proof solutions"[674]. Without losing the advantages of self-regulation, public interests can also be incorporated into regulation, thus ensuring a more organised approach to implementing the underlying requirements (as has, for example, been described in Chapter 3.3.8.3 for the New Approach). Such a system would then also be backed up by sanctions to allow for effective enforcement tools. Normally, a co-regulatory system's positive effect also rests on involvement of relevant authorities (e.g. the media regulatory authorities in the area of online distribution of media content), as this can lead to a coordination between regulated and co-regulated areas and more public accountability. In addition, these bodies are already equipped with a professional competence that allows them to assess the facts and circumstances associated with regular media regulation.[675]

---

673 In Germany, for example, the advertising guidelines of the Central Association of the German Advertising Industry (*Zentralverband der deutschen Werbewirtschaft*, ZAW) are taken into account by the German courts when interpreting the Law against Unfair Competition (*Gesetz gegen unlauteren Wettbewerb*, UWG) with regard to the question of the lawfulness of advertising; similarly the press code of the German Press Council (*Deutscher Presserat*) is taken into account by the German courts with regard to the interpretation of the concept of due care in journalistic offers.

674 COM/2016/0288 final, supra (fn. 667), p. 5, highlighted by the author.

675 Against this background, it is not surprising that in most European countries the regulators responsible for the audiovisual media have also been entrusted with the performance of tasks in the field of Internet services; cf. AVMS-RADAR, study prepared for the European Commission by the EMR and the University of Luxembourg.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

4.2.2.3. Existing Forms of Self- and Co-regulation in the Online Environment

On EU level, the first initiatives for self- and co-regulation initially focused on three areas: technical standardisation, professional rules and social dialogue.[676] However, over time they have been extended to protect consumers, especially in the spheres of business, financial services and industry. They have included, for example, agreements on direct selling and disputes arising from this activity, the development of trust labels for e-commerce, the organisation of cross-border mail-order sales, as well as the reporting of good practice and even certification for professional profiles in the information society, in particular for Internet service providers. These provisions are often accompanied not only by a system for monitoring their implementation but also by simplified rules on consumer disputes, increasing their effectiveness.[677]

As far as the relevant area of the dissemination of online content is concerned, in addition to the initiatives on hate speech and tackling online disinformation presented in detail above (cf. Chapter 2.5), which can be broadly assigned to the field of self-regulation, the provisions of the new AVMSD, which are more of a co-regulatory nature, are of particular interest. Stressing that in order to remove barriers to the free circulation of cross-border services within the Union it is necessary to ensure the effectiveness of self- and co-regulatory measures aiming, in particular, at protecting consumers or public health (Recital 31), the new Art. 4a AVMSD pushes Member States to encourage the use of co-regulation and the fostering of self-regulation through codes of conduct adopted at national level in the fields coordinated by the AVMSD to the extent permitted by their legal systems. Those codes shall be clear, unambiguous and broadly accepted by the main stakeholders in the Member States concerned and shall provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at and for effective enforcement including effective and proportionate sanctions. Regarding this, the Commission and the Member States may foster codes of conduct that are developed together with the respective stakeholders. The AVMSD, which regards self-regulation primarily as a means of providing a high level of con-

676 Cf. on this European Economic and Social Committee, European Self- and Co-Regulation, available at https://www.eesc.europa.eu/resources/docs/auto_coregulation_en–2.pdf, pp. 13 et seq.

677 Ibid., p. 15.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

sumer protection and considers its use particularly appropriate in relation to new media[678], refers to this solution at several points, in particular regarding the implementation of the provisions on the protection of minors (Art. 6a para. 4 AVMSD), commercial communication (Art. 9 para. 3 and 4 AVMSD) and on video-sharing platforms (Art. 28b para. 2 AVMSD). With regard to the latter, this will probably pose major challenges for legislators and regulators, for which, as far as can be seen, no solutions are yet available.[679] However, while self-regulation might be a complementary method of implementing certain provisions of the AVMSD, the AVMSD focuses more on co-regulation, which could provide the missing legal link with the national legislator (which self-regulation by definition cannot provide) in accordance with the legal traditions of the Member States.[680]

From a national perspective, self- and co-regulation systems have been developed in nearly all EU Member States in one way or another. This is also connected to the fact that the Commission has so far been locating the competency to establish respective rules for the online sector to the Member States.[681] This applies for the media sector anyway[682], where some of the existing self- and co-regulatory systems in Member States cover all media (e.g. self-regulation concerning advertising in the press, broadcasting, etc.), while others are restricted to individual media or new information and communication services.[683] Many of these rules also cover the online sector – whether they were created specifically for this purpose or whether they also apply to the Internet within the framework of the regulation of a specific subject area (for example codes of conduct for the press that could also be "binding" for bloggers). However, although there are similari-

678 Cf. Recital 13 AVMSD.

679 In the mentioned report on Self- and Co-regulation in the transposition of the revised AVMSD, prepared for the European Audiovisual Observatory (*Cappello (ed.)*, Self- and Co-regulation in the new AVMSD, IRIS Special 2019-2), the EMR asked the country reporters in particular to describe the situation in the field of protection of minors, advertising and VSPs. While all of the selected countries had systems of self- and co-regulation in place regarding the first two areas, there were no rules or systems regarding VSPs.

680 Cf. Recital 14 AVMSD.

681 Cf. already Chapter 2.5.2.

682 *Furnémont/Smokvina*, European co-regulation practices in the media, comparative analysis and recommendations with a focus on the situation in Serbia.

683 Cf. *Cappello (ed.)*, Self- and Co-regulation in the new AVMSD, IRIS Special 2019-2; cf. already Council Conclusions of 27 September 1999 on the role of self-regulation in the light of the development of new media services, OJ L 283, 6.11.1999, p. 3.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

ties[684], there are also significant differences between the ways in which different self-regulation systems are organised and complement or contribute to legislative acts, thus reflecting Europe's democratic, regional and cultural diversity.[685] This is linked not only to the different regulatory traditions of the Member States but also to the conditions in each State, in particular whether there is a differentiated legal framework in certain areas or not. Self- and co-regulatory systems adopted on the basis of Art. 4a AVMSD in the areas mentioned in the Directive may[686], however, converge and at least create similar conditions for the players in the respective Member States.

4.2.2.4. Possible Forms and Conditions of Co-regulation on EU Level

With regard to questions about possible forms of self- and co-regulation in the online sector, it should first be noted that in certain areas, such as the fight against hate speech, there are already instruments at EU level which have shown some first positive, though very limited effects.[687] In this area it may be a question of constantly improving and expanding the existing agreements and, if their effectiveness does not improve, moving the best practices found into a more binding form of co-regulation. Moreover, it is essential that efforts be made to ensure that more and other stakeholders participate in these initiatives. While previous signatories of codes of conduct, such as *Google*, *Facebook* and *Microsoft*, are certainly the key represen-

684 In particular regarding, for example, the field of advertising; cf. *Cappello (ed.)*, Self- and Co-regulation in the new AVMSD, IRIS Special 2019-2.

685 Already: Council Conclusions of 27 September 1999, supra (fn. 683); *Marsden*, European Law, Regulatory Governance and Legitimacy in Cyberspace, pp. 67–70.

686 Art. 4a para. 2 underlines that Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in compliance with this directive and Union law, including where their national independent regulatory authorities or bodies conclude that any code of conduct or parts thereof have proven not to be sufficiently effective. Furthermore, Recital 14 states that encouraging Member States to implement self- and co-regulation measures should neither oblige Member States to set up self- or co-regulation regimes, or both, nor disrupt or jeopardise current co-regulation initiatives which are already in place in Member States and which are functioning effectively.

687 Cf. the initiatives on tackling online disinformation and hate speech portrayed at Chapters 2.5.2 and 2.5.3.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

tatives of that industry in the fight against, e.g., hate speech online, there are a number of other providers that need to be brought into the spotlight. In view of its "negotiating power" as a supranational body with numerous powers even vis-à-vis big players, the Commission could certainly be the right initiator here. Finally, the current self-regulatory measures often lack means that would effectively help to measure, evaluate and audit the actions which the industry stakeholders have committed to. For example, they are at the moment unable to harmonise reporting and takedown mechanisms or shed light on the decision-making processes of both automated algorithmic and human content review systems.[688]

However, beyond minimum standards and mere commitments to the fight against illegal and discriminatory content, i.e. when it comes to concrete obligations that pursue concrete objectives of public interest, self-regulation reaches its limits. Co-regulation, on the other hand, can be an effective instrument if it respects the existing legal framework (in the sense of a useful supplementation, not an alternative or replacement) and leaves the competence for defining public interests at the state level. Furthermore, it needs to meet certain criteria[689]:

- transparency and publicity,
- representativeness of the parties concerned,
- prior consultation of the parties directly concerned,
- added value for the general interest,
- non-applicability when the definition of fundamental rights is at stake or in situations where the rules must be applied uniformly in all the Member States,
- judicial control,
- monitoring of the degree and success of their implementation, using objective criteria and reliable indicators defined in advance and specified according to sectors and objectives,
- checks and follow-up of their implementation by preventive measures or sanctions, in order to ensure their effectiveness,
- provision of a system of fines or other penalties,

688 *Quintel/Ullrich*, Self-Regulation of Fundamental Rights? The EU Code of Conduct on Hate Speech, Related Initiatives and Beyond, pp. 11–13.

689 See on these criteria: Opinion of the European Economic and Social Committee on Self-regulation and co-regulation in the Community legislative framework, supra (fn. 669), para. 1.7.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

– possibility of periodic review in the light of changing situations, legislation and the aspirations of their signatories,
– clear identification of financing sources.

Again, this list is to a certain extent an idealised picture of what a co-regulatory system should look like. Altogether, instruments of self- and co-regulation may be useful, and in particular co-regulation, mainly due to the involvement of industry stakeholders, but there are areas where this reaches its limits. Providers whose business models are based precisely on the distribution of illegal offers (e.g. piracy portals, certain types of pornography and depictions of violence as well as terrorist propaganda), which flourish regularly on the Internet, will normally avoid the regulatory dialogue between legislator and industry that is characteristic of self- and co-regulation. For them, the necessity of a firm legal basis and its effective enforceability remains. Certain co-regulatory solutions may be able to capture these actors if they, e.g., provide for the possibility of sanctions or certification requirements.

4.2.3. The Principle of Proportionality

The general principle of proportionality is one of the fundamental principles of Union law and is reflected both at the level of competences (under Art. 5 para. 4 TEU, the measures taken by the Union may not go beyond what is necessary to achieve the objectives of the Treaties in terms of content or form) and at the level of material law within the framework of the assessment of the justification regarding fundamental rights and freedoms. This applies in particular if possible regulations, such as here, affect the freedom to provide services or the freedom of establishment. The general principle of proportionality is only briefly mentioned here, as it has already been explained in detail in the framework of fundamental rights (cf. above Chapter 2.1).

In addition to respecting specific requirements for restrictions on fundamental rights and freedoms, not only EU acts but also the measures and laws of Member States – even when acting in the exercise of their own exclusive powers – must be appropriate and necessary to achieve an objective of general interest legitimately pursued by the regulation in question. In addition, the burdens imposed must be proportionate to the objectives pursued. If there are several suitable measures to choose from, the least burdensome must be chosen. The principle of proportionality thus generally serves as a guideline for the balancing of conflicting legal interests and

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

therefore calls for the conflicting interests of media service providers in the integration of their content and of users in transparency to be weighed, on the one hand, against the interests of the platforms and other stakeholders in their freedom to conduct their business and, on the other, against that of users in the self-determined use of platforms and devices.

At this point, the interests protected by fundamental rights that are particularly relevant in connection with the dissemination of online content (cf. Chapter 2.1.) are to be emphasised once again. Content that impairs human dignity cannot be balanced against other interests such as freedom of expression, so that particularly strong regulation is possible. The protection of minors is subject to a similarly high interest (but open to balancing with other interests), since it is both a public interest and a state task. Content that violates personal rights or interests protected by copyright may, under certain circumstances, conflict with freedom of expression or freedom of the media, which has led to special restrictions, e.g. in copyright law. In its strategy for a Digital Single Market for Europe, the Commission also stressed the importance of avoiding the deletion of legal content when applying measures to block illegal content.[690] In this regard it is crucial to leave the assessment of whether content is illegal or legal to qualified institutions. The interests of the platforms worthy of protection, which result in particular from the freedom to conduct a business and the right to property, must also be taken into consideration. Regulation may not be so far-reaching that business models protected by fundamental rights can no longer be exercised. In this respect, it may be essential to involve industry in the evaluation of this situation. However, a large part of this sometimes complex evaluation involving a wide range of stakeholders' interests will be based on consultation procedures already carried out and on the work of interest groups involving industry that has already been done.[691]

690 COM(2015) 192 final, supra (fn. 18), para. 3.2.2.

691 Cf. on this the consultation procedures mentioned in Chapters 2.4 and 2.5 regarding in particular the reform of the AVMSD and the DMS Directive as well as the High Level Groups on fighting illegal content, hate speech and disinformation.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

4.3. Possible Avenues

4.3.1. General Considerations

There are different ways forward in order to respond to the issues identified in this study with the regulatory framework for the online dissemination of content. The existing legislative acts on EU level applicable to this context could be reformed during the mandate of the new Von der Leyen Commission. Completely new legislative acts could be proposed which either come on top of the existing or replace some of these. An alternative to these legislative steps is a reinforced application by competent authorities of the existing framework, and be it "only" to further display problems in cross-border constellations. Further, in the direction of what has been done in recent years, the inclusion of the online industry in developing, defining and applying self-regulatory standards could be steeped up.

If the path of revision of existing legislative acts or creations of new ones would be chosen, there are different ways that this could take. On the one hand, for legal certainty the measures could at least codify the jurisprudence of the CJEU as it applies to the sector and was presented in this study. In doing so, identified gaps that have not yet been addressed by the Court, or at least not in a conclusive manner, could be closed. For example, although the definition of ISS providers has been clarified to an extent by the CJEU, the emergence of new online platform business models, namely in the so-called sharing economy, continue to challenge the boundaries of the application of the ECD. The intermediary service providers rely heavily on the liability privileges as defined in Art. 12–15 ECD, although it has been shown that 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 rightly questioned and subjected to new interpretations by courts. The new interactive content management platforms which build heavily on the exploitation of user data and network effects are at the centre of this business model but in no way of a unified shape. This is why the ongoing general categorisation of "hosting providers" needs to be overcome in light of these platforms.

In addition, from a substantive perspective of law, 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. This necessitates a reconsideration of the way they are addressed by the relevant law. In order to avoid a further fragmentation of the rules ap-

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

plicable 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 replace the existing cross-sectorial approach in form of the ECD by a new horizontally applicable act concerning all types of "information society services" (while departing from this definition where necessary). When doing so, it is especially important to see whether within a horizontally applicable framework there might have to be specific subcategories. For example, content disseminators play a different role or have a different significance for society than purely commercially oriented e-commerce platforms and therefore need to be regulated in a way that their role as multiplier of the freedom of expression of their users is taken into consideration as much as the potential for serious and permanent harm in case of illegal content due to its fast and wide spreading.

A more simple approach to "renovating" the legislative framework would be to revise the ECD in a way that at least the clarification of categories of providers is achieved and scope exemptions concerning the liability privileges or procedures for better enforcement in case of actual liability of a platform provider are introduced. Because the value-based and fundamental-rights-driven framework for online content dissemination necessitates the protection of rights of users, foremost of minors, as has been shown by this study, inactivity of regulatory authorities in response to difficulties in enforcement, to an unclear scope of the applicable law or possibly to a lack of formally assigned competence alone is not an option. If it is necessary, one possibility in the reform of the ECD would also be to clarify in which scenarios an exceptional derogation from the country-of-origin principle is really possible and how the cooperation between regulatory authorities of the two or more Member States concerned can be enhanced.

4.3.2. Adjusting Country-of-Origin and Market Location Principle

This study has dealt extensively with the country-of-origin principle as set out in the AVMSD (Chapter 2.4.2.2.2) and the ECD (Chapter 3.2). The principle is also known in other areas of EU law.[692] It states, in general, that a service provider that falls under the jurisdiction of one EU Member

692 For an overview, especially for non-media- or information-society-oriented services, cf. *Sørensen*, in: Nordic & European Company Law, LSN Research Paper Series No. 16-32, pp. 2 et seq. The principle is also known by similar expressions

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

State can rely on complying with the legal framework of (only) that specific state in order to be authorised to deliver its services (i.e. in our context to disseminate content) across all EU Member States. In this regard, the concept follows the idea of the fundamental freedom to provide services as laid down in the TFEU, which obliges Member States not to interfere with the free movement within the single market except in case of justified restrictions. These restrictions have to be based on an overriding public interest and have to be proportionate. They are also possible concerning the freedom to provide services and therefore have also found their way into secondary EU legislation in the context of services and building on this country-of-origin principle. The study has shown that the principle is regulated differently in the EU legal acts, which holds true in particular regarding the possible derogations by the Member States. For example, after its revision in 2018, the AVMSD is no longer based on the ECD in its wording regarding the measures Member States can take against VoD services, although in the previous version the derogation for these types of online services was aligned exactly to the ECD provisions.

The country-of-origin principle was contrasted in the study with the market location principle contained in the GDPR (Chapter 2.4.3.3). This principle follows the approach that service providers must comply with the rules of the state to whose population they direct their offers. Differently than the country-of-origin principle in the AVMSD or ECD, the market location principle in the GDPR also has a kind of extraterritorial reach in that it makes possible under certain circumstances that EU-based supervisory authorities can address providers (in that case controllers or processors) with a seat outside of the EU as long as there is a connecting factor.

There is an obvious advantage of the country-of-origin principle which is why it has been fundamental in contributing to the establishment of cross-border (originally) television and (then) audiovisual media services in the EU: there is legal clarity once the jurisdiction is assigned and there is an economic incentive to then use cross-border dissemination as it comes at no additional "regulatory" cost. Possible disadvantages have always been voiced with the danger that there can be a phenomenon of "forum shopping" or, consequently, a "race to bottom" concerning the regulatory framework for those areas that are not covered by harmonised law or are

such as "principle of home state control", "home country authorisation", "seat state principle", etc. Cf. also *Cole*, The Country of Origin Principle, p. 118.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

transposed in different ways in the Member States.[693] Since the basic condition of the country-of-origin principle is that service providers only have to ensure compliance with the law of the country from which they distribute their services and can then freely offer their services in other EU Member States, they can base their choice of establishment by making an overall assessment of the most preferential framework conditions. Often these may be found where companies are affected by fewer restrictions than in other places. This can also be the case, for example, for economic advantages such as reduced VAT rates, but more importantly in legal terms in case of, e.g., nationally nuanced interpretations of the liability privileges under the ECD.[694] This is an advantage for providers in view of the fact that corporate interests can be safeguarded. The term "forum shopping", however, refers more to the disadvantages associated with it for others, in particular consumers, competitors on the market, Member States and public interests as a whole. Consumers cannot rely on compliance by providers with the same rules as those they know from their home country. Competitors from other Member States may be disadvantaged by having to comply with stricter rules, especially when competing in the same or similar markets on the Internet. Public interests, which may vary from one Member State to another, such as the protection of minors, can also be affected. Finally, Member States may lose their attractiveness as countries of establishment for businesses if they adopt stricter rules than other EU Member States. This, in turn, can lead to the aforementioned race to the bottom, where Member States may be inclined to establish a regulatory environment (within the respective harmonisation framework) that is as free

693 Cf. in detail *Harrison/Woods*, European Broadcasting Law and Policy, pp. 8 et seq.: "Jurisdiction, forum shopping and the 'race to the bottom'"; as well as *Cappello (ed.)*, Media law enforcement without frontiers, IRIS Special 2018-2; *Cole*, AVMSD Jurisdiction Criteria after the 2018 Reform.

694 In the summaries of the replies to the public consultation launched by the Green Paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values" (available at https://ec.europa.eu/digital-single-market/en/news/publication-summaries-green-paper-replies, p. 3), the Commission noted that "[s]ome respondents among Member States authorities and Regulatory Authorities express the view that US companies can better adapt to the fragmented market conditions because they can choose their country of establishment according to the applicable law, e.g. regarding reduced VAT rates, the liability privileges for hosting providers set out in the ECD, the heterogeneous implementation of the AVMSD, in particular concerning the provisions on the promotion of European works."

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

of restrictions as possible, mainly on the basis of economic and structural considerations.

Possible problems with the country-of-origin principle – as well as with derogations from it – can concern the enforcement for the rules. Regulatory authorities cannot easily intervene against EU providers even if they are of the opinion that these do not only not comply with domestic national rules (which is legal and a consequence of the country-of-origin principle) but also not with the rules of the home state or standards deriving from EU law. The authorities charged with the enforcement are in such cases dependent on the intervention or at least the cooperation of the competent supervisory authority in the country of establishment or, in the current design of the country-of-origin principle, must follow complicated procedures if they want to take measures themselves. The prerequisite for a successful country-of-origin principle is therefore that the authorities of the country of establishment have a sufficient interest and ability to enforce the law.[695] This becomes problematic when an offer from one state is obviously and perhaps even exclusively addressed to an audience in another state. In this case, the (generally competent) regulatory authorities of the home state might not have the same interest in effective enforcement than if it is a service addressing the domestic audience, because there might be, e.g., a language discrepancy. In the AVMSD, for example, this problem is addressed by the prohibition of circumvention. But the procedure to apply a "fictious" establishment approach to a foreign provider is still complicated and uncertain in its outcome as it has so far never been used successfully.

The market location principle addresses these disadvantages by linking them to the market and target audience for the respective service. However, this approach has other disadvantages. First of all, a "pure" market location principle is difficult to reconcile with the idea of the free movement of services in the EU, especially in light of the creation of a single market. If suppliers always have to fear being monitored by foreign regulators based on foreign rules and being confronted with measures, this may disincentivise the cross-border offering. The degree of interference for service providers also depends on the degree of harmonisation on EU level, in particular the (minimum) standards set by EU secondary law.[696] In addition, the marketplace principle leads to establishing a competence of several regulators in parallel, which in turn makes it necessary to install procedural

695 *Walk*, Das Herkunftslandprinzip der E-Commerce-Richtlinie, p. 38.
696 Cf. on this already Chapter 4.1.4.2.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

safeguards against certain services ending up without regulatory grasp or being confronted with diverging approaches, by introducing coordination measures.

The respective advantages and disadvantages, however, depend decisively on the specific design of the market location or country-of-origin principle. It is remarkable in this context that also the GDPR is not based on a full market location principle but takes up aspects of the country-of-origin principle. This concerns specifically the provisions on jurisdiction in cross-border cases and the requirement of a connecting factor in a Member State in order to trigger GDPR application for that state or supervisory authority. The service provider will be assigned a lead supervisory authority on the basis of jurisdiction criteria, which will then cooperate at a higher level with supervisory authorities from other Member States. These cooperation and consistency mechanisms in the GDPR are considerably more differentiated, but in a way they can be seen as a more detailed codification of the idea that is already contained in the exceptional deviation procedures (departing from the country-of-origin principle in specific cases) of AVMSD and ECD. Thus, the country-of-origin principle is not a fixed construct that is unchangeable but only (and at the same time fundamentally) the starting point. It can therefore be designed according to the needs of the digital age in particular, provided that this is compatible with the freedom to provide services. In particular, certain aspects of the marketplace principle could be adopted which combine the advantages of both principles in a similar way that the GDPR does it the other way round by mainly being based on the market location principle.

Furthermore, there is also a need for procedural improvements with regard to possible derogations from the country-of-origin principle. This concerns necessary clarifications, which must be made in order to remove the uncertainty of Member States and their national supervisory authorities to make use of the possibility of derogation. It is especially necessary to ensure the effectiveness and simplification of the procedures. Such procedural improvements also concern the institutional design and cooperation of competent authorities which will be dealt within the following section. In both respects, a reference to the nature of the content, as already indicated in the new AVMSD rules[697], could be a reasonable way forward.[698]

---

697 Art. 3 para. 2 and 3 AVMSD differ, for example, regarding infringements of Art. 6a para. 1 and Art. 6 para. 1 lit. b) AVMSD; cf. Chapter 2.4.2.2.2.

698 In this regards cf. also *de Streel/Buiten/Streintz*, Liability of online hosting platforms, pp. 52 et seq., but in the context of liability rules.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

Incitement to terrorism, child sexual abuse or content infringing human dignity requires more effective and faster enforcement mechanisms than other content, which is an outcome of the fundamental-rights- and value-based orientation of the EU, as has been shown above (Chapters 2.1.3 and 2.3.1). A possible avenue could be to create corridors in which deviations from the country-of-origin principle are possible for authorities on a fast track mechanism, e.g. when they concern these fundamental values such as human dignity violations or when they only have a limited impact. In the context of thinking about a revision of these elements, procedural clarifications should also be made as to the dealing with non-EU-originating content.

4.3.3. Institutional Setup and Cooperation in Enforcement

Concerning the institutional setup in enforcement of the rules against providers that disseminate content online, there are two main challenges: one concerns the setup of competent authorities and their "equipment" with adequate supervision and enforcement powers and capabilities, the other, in light of the tension between market location and country-of-origin principle and due to the cross-border nature of online content dissemination, relates to the cooperation structures and mechanisms on EU level between the national regulatory authorities.

For illegal content that qualifies as breaching criminal law prohibitions, there is a competency for national law enforcement agencies – and for certain types of such content also cooperative structures on EU level –, but the supervision of online content dissemination providers necessitates an additional layer because of the limited possibility for law enforcement agencies to take care for the online sector and the sensitivity of dealing with fundamental-rights-relevant content expressions. Therefore, there needs to be a clear assignment of competencies to such regulatory authorities that are in charge of monitoring and supervising online service providers. Independent regulators that have experience with balancing the freedom of expression of content providers and the enforcement of overarching public interests are likely best placed to take over this role. Accordingly, in most EU Member States regulators that traditionally dealt with audiovisual content in the linear dissemination of content have already been given the additional competence for the online dissemination. These bodies should have clearly assigned tasks. This is especially important when it comes to meaningful co-regulation that does not merely rely on

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

self-regulation of the industry. In that case their role, e.g., in the development of common standards as well as the monitoring of compliance with these should be laid down in the law clearly.

Such regulators should also be equipped with sanctioning powers, as this is an important possibility to enhance compliance with rules by providers in order for them to avoid being confronted with the respective measures of the authority. Moreover, in order to make cross-border monitoring efficient there needs to be some form of institutionalised cooperation between national regulatory authorities in the EU. In such a forum, "community standards" of these bodies 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 exact form of this cooperation needs to consider the specifics of the content-related supervision work (as has been shown above in the context of the discussion around the GDPR institutional setup for cooperation) and ensure an increase in efficiency compared to the situation today. The work of ERGA so far, in which national regulators exchange best standards and discuss possible improvements in procedures, seems to make this structure to be the right starting point for such considerations.

4.3.4. Improving Conditions for Enforcement

Regarding the improvement of enforcement and to counter the dissemination of illegal online content, the study has presented several different approaches to how platform providers are pushed into a more responsible position. This applies in particular to the framework of support, coordination and supplementary measures (Chapter 2.5) as well as to the self- and co-regulation level. Especially details from the Communication on Tackling Illegal Content Online[699] and the Recommendation on Tackling Illegal Content Online[700] can be taken into consideration at this point, which are also contained in other existing approaches.[701] The way in which platform providers can be made more accountable for illegal content is divid-

699 Communication from the Commission, Tackling Illegal Content Online, COM/2017/0555 final, supra (fn. 394).

700 Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C/2018/1177, supra (fn. 395).

701 Cf. in detail Chapter 2.5.2.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

ed into four main areas in particular: transparency, proactive measures, reactive measures and cooperation.

Transparency obligations regularly concern the obligation of platform providers to design their guidelines in such a way that it becomes clear and understandable when and which type of content is considered illegal and what happens to content identified in this way. This type of measure also increases awareness in dealing with digital content and the media competence of users. In addition, regulators and other government agencies also get a better overview of the measures taken by the platforms. Furthermore, transparency obligations also concern information from platform providers on how illegal content was actually handled and what measures were taken until now, presented in the form of periodic reporting obligations. Such reports are provided for in the Code of conduct on countering illegal hate speech online[702], where the reports of the addressees are incorporated into an evaluation report of the Commission, which also provides an overview of current trends and problems.

Proactive measures that could potentially conflict with the current liability rules of the ECD mainly concern the establishment of systems to detect illegal content and prevent such content from being disseminated. Such measures have the advantage that illegal content can be stopped before it is even disseminated, which otherwise leads to a rapid spread online. Therefore, preventing initial placing on the Internet can help very effectively avoiding the infringement of third-party rights. These measures are, however, only very cautiously advocated, as they come into tension with the freedom of expression of the concerned users guaranteed by fundamental rights. Therefore, they are regularly accompanied at least by appeal systems and concern clearly identifiable illegal content. Potential risks remain, however, especially when the uploading control of content is left to algorithms, which is the only viable way in large-scale platform usage scenarios. In the field of copyright law, such measures are not directly provided for by the new DSM Directive, but they were originally contained in the Commission's proposal.[703] As a reaction to the controversy around that, the Commission noted in its Recommendation on Tackling Illegal Content Online that proactive measures could involve the use of automated means for the detection of illegal content only where appropriate and proportionate and subject to effective and appropriate safeguards (e.g. hu-

702 Cf. in detail Chapter 2.5.2.
703 Cf. in detail Chapter 2.4.4.2.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

man oversight and verifications).[704] Furthermore, there should be measures to guarantee the safety of such technical systems.

Reactive measures describe measures that platform providers can take in response to the concrete or general presence of illegal content on their platforms. This includes in particular the establishment of effective reporting and complaint systems for illegal content and the associated subsequent handling of the content (deletion, blocking, limitation, etc.). It may also cover reporting obligations to other bodies, such as law enforcement authorities, and own labelling obligations. The latter also addresses the issue of cooperation, which can take place in many different levels (between Member States, regulators, providers, third parties) in the sector of online dissemination of content. However, in the context of improving law enforcement, the main focus is on cooperation between hosting service providers and Member States and on the cooperation between hosting service providers and so-called "trusted flaggers".

Cooperation between hosting service providers and Member States is of particular importance, as the involvement of the industry is key in particular in the digital cross-border environment.[705] There need to be points of contact for matters relating to illegal content online between Member States and platform providers to provide an effective cooperation.[706] This applies not only to the general establishment of contact with the providers but also to the specific individual case if illegal content is found on the platform. In this case, the competent regulatory authorities must be able to take effective and proportionate measures, for the implementation of which they regularly have to rely on the cooperation of the platform providers. In this context, the Commission has argued in favour of fast-track procedures to process notices submitted by competent authorities.

Another approach of cooperation is the cooperation between hosting services providers and trusted flaggers. The Recommendation of the Commission defines these as individuals or entities which are considered by a hosting service provider to have particular expertise and responsibilities for the purposes of tackling illegal content online and states that this form of cooperation should be encouraged, in particular by establishing fast-track procedures to process notices submitted by trusted flaggers.[707] Further-

704 Commission Recommendation (EU) 2018/334, supra (fn. 395), points 18, 20.
705 Cf. in detail Chapter 4.2.2.
706 Commission Recommendation (EU) 2018/334, supra (fn. 395), Recital 5.
707 Commission Recommendation (EU) 2018/334, supra (fn. 395), point 4 lit. g) and point 25.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

more, according to the Recommendation, hosting service providers should be encouraged to publish clear and objective conditions for determining which individuals or entities they consider as trusted flaggers, and those conditions should aim to ensure that the individuals or entities concerned have the necessary expertise and carry out their activities as trusted flaggers in a diligent and objective manner, based on respect for the values on which the EU is founded. The expertise required here to qualify as a trusted flagger takes into account the consideration that reporting or even deleting content can significantly interfere with the content creators' fundamental rights to freedom of expression.

To leave this assessment initially to the platform providers alone, as is the case, for example, in Germany with the Network Enforcement Act[708], seems also problematic considering the fundamental rights setting and the fact that these activities are in principal tasks to be performed by the states. Therefore, trusted flagging should be provided by competent and above all independent institutions which bring the interests of the public and the users into line. These could be self-regulatory bodies staffed by independent experts. However, the disadvantages of self-regulation or regulated self-regulation have already been described (cf. Chapter 4.2.2.2). These findings also apply to the abovementioned stronger inclusion of the regulated industry in the performance of countering illegal content, as their contributions are dependent on factors that are not always open to monitoring and holding accountable. For the flagging process, it should be the regulatory authorities that are mainly responsible for this task, because they have both the necessary independence and the technical and professional competence to achieve the goals.

4.4. Looking Ahead

The study aimed at presenting the current applicability of the EU legislative framework to platforms that are involved in online dissemination of content. Based on the identification of gaps and deficiencies in enforcement of legal standards in this area, the need for a change, or at least shift, of the legislative basis was shown. It needs to be underlined in the concluding look ahead that any amendment to the framework, and any replacement of existing or creation of new legislative acts, should be based on the fundamental rights and values set that characterise the European

708 Network Enforcement Act, supra (fn. 361). Cf. on this already Chapter 2.4.4.2.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

Union – not only because it is an obligation to ensure that these rights are protected efficiently and that the Member States are giving a framework within which their competent authorities can ensure the upholding of applicable standards while respecting freedoms on the single market, but also because content dissemination touches an area which is sensitive in itself from a fundamental rights perspective (most notably freedom of expression) and because of its role in contributing to opinion-forming processes in our democracies.

The European Union has recently set standards with the GDPR that have a reach beyond the borders of its Member States. Finding an adequate balance between not limiting the use of the communication freedoms in the online context in a too restrictive manner and at the same time coming to a necessary and satisfactory answer to the large amount of illegal or harmful content dissemination that takes places all the time is a challenge. If it is successfully achieved, standards could again serve as models that go beyond the EU and in that way at the same time potentially also further ameliorate the situation in the EU if foreign providers are confronted with other responsibility expectations from their home Member States.

Solutions and approaches developed in this reform process as well as certain elements in existing instruments that concern online dissemination might in future turn out to be applicable for other areas of technology regulation. This might be the case for newly established transparency requirements – including enforcement of standards in the context of this transparency – that could be applied when discussing the possible regulation of artificial intelligence and machine learning technology. Another outcome of the present reform discussion should be a clearer identification of the assimilation of the importance of different roles in the online content dissemination between providers with editorial responsibility and those that apply control over the organisation and means of dissemination of that content. The current discussions and the changes to the understanding of information society services already in the past years is reflective of the situation that the role of intermediaries and platforms has changed in a significant way over the past years. When reforming the framework, an inconsistent division of responsibility and liability depending on what type of content is concerned or which legislative act is applicable should ideally be avoided. A clearer and more up-to-date definition of the scope of application of these acts by reconsidering the criteria to apply to the different providers is an important step.

As a final point there should be one other conclusion underlined that was discussed above: even if nothing is changed or only changed after a

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

long period of discussion, which is to be expected due to the legislative procedures at EU level, national regulatory agencies entrusted with the monitoring of content dissemination should also act in reaction to illegal or problematic online dissemination of content even though it has a cross-border dimension.

https://doi.org/10.5771/9783748906438-221, am 11.07.2024, 04:12:16
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb