

A. Background of the Study

We are living in an age of digitalisation, in which, thanks to the Internet, it is possible to find online all forms and types of content, access it, share it with others and disseminate it further. In that respect, borders of states have become superfluous and, due to the advancing technological developments, language barriers are also disappearing more and more. The market for digital content is therefore global, open to development and constantly changing and growing. This not only opens up economic opportunities for companies that can interact with participants on this market, but it also offers society a large amount of benefits, for example in terms of freedom of expression and information, intercultural exchange or the variety of choices for consumption of (media) content. At the same time there are significant risks and challenges that come with this globalised exchange. Intermediaries and other platforms that enable or provide access to content, collect and categorise content and provide forums for exchange and content creation by users are regularly the gatekeepers to these benefits.

This digital environment could not have been imagined 20 years ago, not least because of the state of development of the Internet in those early days of increasing use of the Internet by the general population. In terms of stability (i.e. transmission rates), distribution, price and versatility, access to and use of Internet services were still real hurdles. Search engines were in their infancy; multimedia platforms with personalization possibilities were considered a possibility in the future but did not actually exist yet due to the described limitations.¹ This observation is even more obvious considering social networks or video sharing platforms² in their current form and popularity, which were unthinkable under the given circumstances at the turn of the millennium. The big players at that time were access providers and the few electronic commerce platforms that already existed.

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- 1 For an insight into the status and environmental conditions at that time see for example *Joint Research Centre*, Multimedia information society.
 - 2 The first video hosting service was founded 1997 with “ShareYourWorld.com”, enabling users to upload small videoclips. Cf., e.g., *Haarkötter*, *Journalismus.online: Das Handbuch zum Online-Journalismus*, p. 288.

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However, it was precisely in light of this environment that the E-Commerce Directive (ECD)³ was established with the aim “of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services”⁴ (ISS). The liability privileges, information obligations, cooperation mechanisms and other provisions created in that EU legislative act on the basis of the pursuit of this objective still apply today without the ECD having been reformed since then. Instead of reforming the ECD itself, in recent years a threefold strategy had been pursued at EU level to nevertheless adapt the regulatory environment to the more advanced, modern internet age:

- adapting sector-specific legislation that responds to certain problems identified;
- providing (more) guidance on the interpretation of less clear provisions of the ECD, in particular regarding notice-and-takedown measures and the reliance on voluntary preventive actions;
- promoting coordinated EU-wide self- (and partly co-) regulation concerning illegal materials which are particularly harmful.⁵

As a result, the regulation of the multi-sided market of dissemination of online content is as diverse as the actors and types of content – whether video, audio, image-based or text-based – involved. The horizontal regulatory approach of the ECD still contains the relevant provisions for ISS, divided by the categories of access, hosting and caching providers, while other secondary legislation that addresses these providers in addition has been created or developed, thereby acknowledging the significantly changed role of ISS. The rise of Web 2.0 interactivity led to most intermediaries moving away from being simple hosts and becoming interactive content management platforms where the exploitation of user data and network effects are at the centre of the business model. Users are no longer passive recipients of content only but rather content creators that promote themselves with very diverse offers on different platforms in text, image, video or sound. The “dark side” of the great opportunities offered by the Internet, technology and digitalisation has also become very apparent over the

3 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17.7.2000, p. 1–16.

4 Cf. Recital 3 ECD.

5 Cf. on this de *Streel/Husovec*, *The e-commerce Directive as the cornerstone of the Internal Market*, p. 32 et seq.

years. Phenomena such as easy access to (and continued dissemination of) illegal content, content inciting to hatred and terrorist propaganda, but also disinformation, are only examples of the problematic aspect that comes with the possibility for users to create and disseminate content via intermediaries without direct editorial control whereby the intermediaries can regularly invoke the liability privileges of the ECD when it comes to the question of responsibility for illegal or harmful content.

The complex situation, with horizontal liability privileges on the part of intermediaries which can be characterised as gatekeepers on the one side and growing threats caused by regularly anonymous users on the other, has led to difficulties in the regulatory practice. Particularly combatting the cross-border spread of illegal online content in an effective manner has turned out to be very difficult for authorities enforcing the law. Against this background and the – at the time not yet officially announced – plans of the European Commission to review the rules of the ECD and propose an amended regulatory framework in the coming years, the State Media Authority of North Rhine-Westphalia commissioned a study conducted by the Institute of European Media Law (EMR) in 2019. That study on “Cross-border Dissemination of Online Content”⁶ examined in detail the applicable legal framework and enforcement issues with regard to the cross-border dissemination of online content, taking into account EU primary law, in particular fundamental rights and freedoms, as well as relevant secondary law.

A special focus was given to the liability privileges of the ECD resulting in the conclusion that the cross-sectoral regulatory approach of the year 2000 no longer takes sufficient account of the structural change of the actors on the Internet: despite the emerging case law of the Court of Justice of the European Union (CJEU) the rapid change of these service providers from formerly neutral information intermediaries to today’s active and multilaterally acting as well as content selecting and curating intermediaries and platforms called for a need to update the rules. Those rules do not (any longer) interconnect in harmony with other existing legislative approaches which were, or are being, pursued both concerning content directly or other sectorial approaches that are also content-related. Such rules – as for audiovisual media services, copyright or the fight against online

6 *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content. Open access at <https://www.nomos-elibrary.de/10.5771/9783748906438/cross-border-dissemination-of-online-content>.

“hate speech”, disinformation and terrorist propaganda – are making intermediaries and platform providers more accountable.

In order to avoid further fragmentation of the rules applicable to different types of online service providers and to avoid the need to continuously introduce new categories of service providers depending on the further development of the online sector, the study therefore proposed either to replace at EU level the existing cross-sectoral approach with a new horizontally applicable legal instrument, which takes into account the different roles of different intermediaries and platforms, or to amend the existing rules in order to clarify the conditions under which previous exemptions from liability do not apply and the types of providers to be included in the scope of this instrument. The main challenges identified in this context are both substantive and procedural implications against the background of the country-of-origin (COO) principle as the hitherto fundamental principle in the regulatory treatment of the cross-border dissemination of online content, but there are also questions of a possible institutional structure that would be both sufficient to meet the risks and preserve competence allocation between the EU and Member States.

Based on the findings of that study, its presentation in several stakeholder meetings and conferences and in light of more concrete announcements for legislative plans of the European Commission, the State Media Authority of North Rhine-Westphalia tasked the Institute of European Media Law (EMR) with a follow-up study focussing on the most pressing areas for reform of the regulatory framework for the online sector as far as content dissemination is concerned. That study, which is the basis for this published version, was conducted during summer and autumn 2020, and its conclusions were presented by the scientific lead of the project at the conference “Safeguarding Freedom – Stabilising Democracy” on 27 October 2020.⁷ At that time, the European Commission had already announced the

7 Cf. Mark D. Cole, *Updating the Legal Framework and Enforcement Concerning Cross-Border Dissemination of Online Content* (presentation available at <https://emr-sb.de/wp-content/uploads/2021/02/Updating-the-Legal-Framework-and-Enforcement-Concerning-Cross-Border-Dissemination-of-Online-Content.pdf>). The conference was organised by the German Media Authorities in cooperation with the Media Authority of North Rhine-Westphalia, the EMR and the Representation of the State of North Rhine-Westphalia to the European Union; see for more details <https://www.medienanstalt-nrw.de/termine/safeguarding-freedom-stabilising-democracy.html>.

“Digital Services Act” as a legislative measure in its work programme 2020⁸ by highlighting that the legislative package would aim to modernise the current regulatory framework for digital services through two main pillars: firstly, to propose clear rules that define the responsibilities of digital services in order to address the risks faced by their users and protect their rights; secondly, to propose competition-based ex-ante rules for large on-line platforms that can act as “gatekeepers”, thereby setting the “rules of the game” for their users and competitors.

After the Commission presented the Digital Services Act package with two draft proposals for a Digital Services Act (DSA Proposal)⁹ and a Digital Markets Act (DMA Proposal)¹⁰ to the European Parliament and the Council on 15 December 2020,¹¹ the study was updated in order to integrate the concrete provisions in the existing analysis and to highlight suggested areas for potential improvement of the proposals in the further legislative procedure.¹² The study continues to focus on those elements that are relevant in the context of media and content dissemination online. From the perspective of the media sector, the proposed reform is an opportunity to take account of existing problems with regard to the legal framework for, and enforcement of, the law in the online environment as far as the cross-border distribution of media content is concerned. In substantive

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- 8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Adjusted Commission Work Programme 2020, COM(2020) 37 final, https://eur-lex.europa.eu/resource.html?uri=cellar%3A7ae642ea-4340-11ea-b81b-01aa75ed71a1.0002.02/DOC_1&format=PDF, p. 4.
 - 9 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:825:FIN>.
 - 10 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>.
 - 11 Cf. in addition the press releases and Q&A overviews, available for the DSA at https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en, and for the DMA at https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.
 - 12 For a first overview of both acts *Ukrow*, Die Vorschläge der EU-Kommission für einen Digital Services Act und einen Digital Markets Act; *Woods*, Overview of Digital Services Act; *Woods*, The proposed Digital Markets Act: overview and analysis.

terms, this relates in particular to the review of the existing liability privileges of intermediaries and platform providers, the protection and safety of users on the Internet, especially with regard to disinformation, hate, violence and other illegal or harmful content, and the treatment of the dominant providers as gatekeepers. From a procedural and organisational point of view, it concerns above all the effective monitoring and enforcement of substantive rules, including an organisational structure that is adapted to situations of danger and at the same time takes sufficient account of restrictions of EU competences.¹³

The present study is structured as follows: it briefly recalls the applicable regulatory framework of the European Union and its Member States for the cross-border dissemination of online content, including the interplay between EU legislative acts and Member States' law and the implementation of it. The study then highlights the problems identified in connection with this framework. After that, the Commission Proposals for a DSA and a DMA are presented in a nutshell. The study then gives a general overview of regulatory options at EU level in the process of adapting this framework. Subsequently five core issues for reform are identified that concern the specific area of media and, more general, content dissemination, without discussing in detail the other elements which are also contained in the Commission Proposals. For each of the five issues the study presents different possible solutions and gives an overview of discussed options as well as the provisions proposed by the European Commission and assessment of the way forward: the country-of-origin principle and its exceptions, the scope of application of the framework for ISS, the liability privilege regime, new obligations and duties for service providers, including the respect for user rights, and, finally, specific issues about the institutional set-up for monitoring of compliance and enforcement.

13 On the latter aspect a further detailed analysis in light of the forthcoming reform of the platform rules of the EU was made by *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector.