F. The proposed Digital Services Act

Jörg Ukrow

I. Starting point of the discussion and plans

Commission President *von der Leyen* had already announced the introduction of a "Digital Services Act" in her "agenda for Europe" published on the occasion of her 2019 appointment procedure under the title "A Union that strives for more". On this Act, the "Political Guidelines for the next European Commission 2019–2024" presented by the Commission President-designate stated:[906]

> *"A new Digital Services Act will upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market."*

With this approach, von der Leyen was able to build on preliminary work done by DG Connect. This had, as the core of a "Digital Services Act" – not least in view of the fundamental change in the digital economy and its products since the ECD came into force in 2000 –, already envisaged the closing of regulatory gaps, the harmonization of various areas of law, regulations on hate speech and political disinformation at EU level, greater scope for innovative digital business models, and an "update" of the liability of platforms, specifically in order to be able to regulate Internet giants such as Google, YouTube or Amazon in a more targeted and comprehensive manner.

The Commision, in its communication "Shaping Europe's digital future" of 19 February 2020, announced as "key actions" for the goal of a fair and competitive economy i.a.:[907]

> *"The Commission will further explore, in the context of the Digital Services Act package, ex ante rules to ensure that markets characterised by large platforms with significant network effects acting as gate-keepers, remain fair and*

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906 *Von der Leyen*, A Union that strives for more. My agenda for Europe, 2019, p. 13 (available at https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en.pdf).

907 COM(2020) 67 final, p. 10.

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> *contestable for innovators, businesses, and new market entrants. (Q4 2020).”*

In view of the goal of an open, democratic and sustainable society, the Commission announced in the communication as “key actions”, among others:[908]

> *“New and revised rules to deepen the Internal Market for Digital Services, by increasing and harmonising the responsibilities of online platforms and information service providers and reinforce the oversight over platforms’ content policies in the EU. (Q4 2020, as part of the Digital Services Act package).*
> *[…]*
> *Media and audiovisual Action Plan to support digital transformation and competitiveness of the audiovisual and media sector, to stimulate access to quality content and media pluralism (Q4 2020)*
> *European Democracy Action Plan to improve the resilience of our democratic systems, support media pluralism and address the threats of external intervention in European elections (Q4 2020)”.*

In a combined evaluation roadmap and impact assessment, the Commission first presented three ex-post regulatory options related to the ECD “update”:[909]

- In option 1, a limited legal instrument would regulate online platforms’ procedural obligations and essentially make binding the horizontal provisions of the 2018 Commission Recommendation on measures to effectively tackle illegal content online[910] (legally non-binding under Art. 288(5) TFEU). Regulation would build on the scope of the ECD, focusing on services established in the EU. In this context, the responsibilities of online platforms with regard to sales of illegal products and services and dissemination of illegal content and other illegal activities of their users would be laid out. Under this option, proportionate obligations such as effective notice-and-action mechanisms to report illegal content or goods, as well as effective redress obligations such as counter notice procedures and transparency obligations, would be put

908 COM(2020) 67 final, p. 12.
909 European Commission, Combined evaluation roadmap/inception impact assessment – Ares(2020)2877686, p. 4 et seq., available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services.
910 C(2018) 1177 final of 1.3.2018.

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in place. However, the liability rules of the ECD for platforms or other online intermediaries would neither be clarified nor updated.

- Option 2 as established by the Commission provides for a more comprehensive legal intervention, updating and modernising the rules of the ECD, while preserving its main principles. This option would clarify and upgrade the liability and safety rules for digital services and remove disincentives for their voluntary actions to address illegal content, goods or services they intermediate, in particular in what concerns online platform services. Definitions of what is illegal online would be based on other legal acts at EU and national level. In this option, the Commission envisages harmonizing a set of specific, binding and proportionate obligations and defining the different responsibilities in particular for online platform services.[911] In addition to a basic set of generally applicable obligations, the Commission believes that further asymmetric obligations may be needed depending on the type, size, and/or risk a digital service presents.

  Obligations could include:

  - o harmonised obligations to maintain "notice-and-action" systems covering all types of illegal goods, content, and services, as well as "know your customer" schemes for commercial users of marketplaces;
  - o rules ensuring effective cooperation of digital service providers with the relevant authorities and "trusted flaggers" (e.g. the INHOPE hotlines for a swifter removal of child sexual abuse material) and reporting, as appropriate;
  - o risk assessments could be required from online platforms for issues related to exploitation of their services to disseminate some categories of harmful, but not illegal, content, such as disinformation;
  - o more effective redress and protection against unjustified removal for legitimate content and goods online;
  - o a set of transparency and reporting obligations related to these processes.

    This option would also explore transparency, reporting and independent audit obligations to ensure accountability with regards to algorithmic systems for (automated) content moderation and rec-

911 Particular attention is drawn to ensuring consistency with the new rules of the AVMSD, in particular with regard to VSP. Cf. European Commission,Combined evaluation roadmap/inception impact assessment – Ares(2020)2877686, p. 5, fn. 8.

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ommender systems, as well as online advertising and commercial communications, including political advertising and micro-targeting aspects, beyond personal data protection rights and obligations. Such measures would, in the Commission's view, enable effective oversight of online platforms and would support the efforts to tackle online disinformation.

This option would also explore extending coverage of such measures to all services directed towards the European single market, including when established outside the Union, with a view to identifying the most effective means of enforcement.

The regulatory instrument envisaged under this option would also establish dissuasive and proportionate sanctions for systematic failure to comply with the harmonised responsibilities or the respect of fundamental rights.

- The Commission's option 3, which complements options 1 and 2, would aim to reinforce the updated set of rules as per options 1 or 2, creating an effective system of regulatory oversight, enforcement and cooperation across Member States, supported at EU level. Based on the country-of-origin principle, it would allow Member States' authorities to deal with illegal content, goods or services online, including swift and effective cooperation procedures for cross-border issues in the regulation and oversight over digital services. Public authorities' capabilities for supervising digital services would be strengthened including through appropriate powers for effective and dissuasive sanctions for systemic failure of services established in their jurisdiction to comply with the relevant obligations, potentially supported at EU level. Options for effective judicial redress would also be explored.

For all the options, coherence with sector-specific regulation – e.g. DSM Directive, the revised AVMSD, the TERREG proposal – as well as the EU's international obligations will be ensured.[912]

At the same time, the Commission presented ideas for an ex ante regulatory instrument of very large online platforms with significant network effects acting as gatekeepers in the EU's internal market, as the second pillar

912 European Commission, Combined evaluation roadmap/inception impact assessment – Ares(2020)2877686, p. 6.

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of the planned regulation.[913] These considerations include (at a minimum) the following options[914]:

- (1) revision of the horizontal framework set in the P2B Regulation[915]. In this context, further horizontal rules could be established for all online intermediation services that are currently falling within the scope of this regulation. This could cover prescriptive rules on different specific practices that are currently addressed by transparency obligations in the P2B Regulation as well as on new, emerging practices (e.g. certain forms of "self-preferencing", data access policies and unfair contractual provisions). A revised P2B Regulation could also reinforce the existing oversight, enforcement and transparency requirements. This revision would build on new or emerging issues identified in ongoing fact-findings, as well as on the information, to the extent already available, gathered from the transparency provisions introduced by the P2B Regulation (e.g. on data access transparency; on the effectiveness of the dispute resolution mechanisms). This revision of the P2B Regulation would not seek to review the current provisions of the Regulation, but relate to certain targeted horizontally applicable additional provisions in view of the specific issues identified;
- (2) adoption of a horizontal framework empowering regulators to collect information from large online platforms acting as gatekeepers. Under this option further horizontal rules could be envisaged with a purpose to enable collection of information from large online platforms acting as gatekeepers by a dedicated regulatory body at the EU level to gain, e.g., further insights into their business practices and their impact on these platforms' users and consumers. These rules would not only envisage further transparency (option 1), but would in view of the Commission enable targeted collection of information by a dedicated regulatory body at EU level. While these horizontal rules would enable information gathering, they would not imply any power to impose substantive behavioural and/or structural remedies on the large online

913 European Commission, inception impact assessment, Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market, Ref. Ares(2020)2877647.

914 European Commission, inception impact assessment, Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market, Ref. Ares(2020)2877647, p. 3 et seq.

915 Cf. on this chapter D.II.6.

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platforms that would fall within the scope of such rules. According to the Commission, this would not exclude, however, enforcement powers in order to address the risk of refusal to provide the requested data by the large online platforms acting as gatekeepers;

- (3) adoption of a new and flexible ex ante regulatory framework for large online platforms acting as gatekeepers. This option would provide a new ex ante regulatory framework, which would apply to large online platforms that benefit from significant network effects and act as gatekeepers supervised and enforced through an enabled regulatory function at EU level. The new framework would complement the horizontally applicable provisions of P2B Regulation, which would continue to apply to all online intermediation services. The more limited subset of large online platforms subject to the additional ex ante framework would be identified on the basis of a set of clear criteria, such as significant network effects, the size of the user base and/or an ability to leverage data across markets. This option would include two sub-options:
  - o prohibition or restriction of certain unfair trading practices by large online platforms acting as gatekeepers ("blacklisted" practices). Such a set of clearly defined and predetermined obligations and prohibited practices would aim at ensuring open and fair trading online, especially when these practices are potentially market-distorting or entrenching economic power of the large online platforms. This option explores both principles-based prohibitions that apply regardless of the sector in which the online platforms concerned intermediate (e.g. a horizontal prohibition of intra-platform "self-preferencing"), as well as more issue-specific substantive rules on emerging problems associated only with certain actors, e.g. relating to operating systems, algorithmic transparency, or issues relating to online advertising services;
  - o adoption of tailor-made remedies on a case-by-case basis where necessary and justified. Examples of such remedies that would be adopted and enforced by a competent regulatory body (which, in view of the Commission, would in principle act at the EU level) could include platform-specific non-personal data access obligations, specific requirements regarding personal data portability, or interoperability requirements. The Commission believes that in this regard, the experience gained from targeted regulation of telecommunications services (despite existing differences) could serve as an inspiration, given the similarities deriving from network control and network effects. This second pillar of an ex ante

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regulatory framework would address the diversity and fast evolution of specific phenomena in the online platform economy.

In the Commission's view, the various policy options are not mutually exclusive, so that they could be considered as regulatory options not only as alternatives but also cumulatively.[916]

II. Consideration of the results of the study in the design of the new legislative act

1. Transparency

As the FCC emphasized in its *Rundfunkbeitrag* ruling, the digitization of the media and "in particular the focus on Internet networks and platforms, including social media", fosters concentration and monopolization tendencies among "content providers, disseminators and intermediaries".[917] In this way, the FCC itself significantly expands the range of media actors relevant to a positive broadcasting system beyond the traditional addressees, the broadcasters. This extension does not have any direct significance under EU law. However, in view of a level playing field at the interface of fundamental freedom and competition law regulation on the part of the EU, ongoing Member State prerogatives and ultimate responsibility for respecting the principle of pluralism in media systems, this inventory is also not irrelevant in terms of EU law. In view of the dual nature of media content as both a cultural and an economic good, this also applies to the FCC's reference in this decision to "the danger that content can be deliberately tailored to users' interests and preferences, also by means of algorithms, which leads to the reinforcement of the same range of opinions".[918] Such services did not aim to reflect diverse opinions; rather, they were tailored to one-sided interests or the rationale of a business model that aims to maximise the time users spend on a website, thus increasing

916 In the meanwhile, the European Commission has presented its legislative proposals on 15 December 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0825&qid=1614597643982, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN. For a first discussion see *Ukrow*, Die Vorschläge der EU-Kommission für einen Digital Services Act und einen Digital Markets Act, and in detail *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination.

917 FCC, Judgment of the First Senate of 18 July 2018, 1 BvR 1675/16, para. 79.

918 FCC, Judgment of the First Senate of 18 July 2018, 1 BvR 1675/16, para. 79.

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the advertising value of the platform for its clients. In that respect, results shown by search engines were also pre-filtered, they were in part financed through advertising, and in part depended on the number of clicks. In this respect, algorithmic processes are also recognizably important in the media industry ecosystem.

To make the framework conditions of such algorithm-based aggregation, selection and recommendation processes transparent is a legislative reaction that is at least reasonable in the line of this expansion of the scope to the economic dimension of media-related business models, if not imperative in the interest of the coherence of fundamental freedom restrictions associated with transparency obligations.[919]

Disclosure requirements imposed by EU law from an economic perspective with regard to algorithm-based aggregation, selection and recommendation processes can make a significant contribution to counteracting new uncertainties regarding the credibility of sources and evaluations. They relieve the individual user in processing and assessing the information provided by the mass media that, in the FCC's view[920], they must take on now that conventional filters of professional selection have lost importance due to the digitization of the media.[921]

Already the current EU media law provides links that can be activated in view of threats posed by insufficient transparency of the actions of new players relevant to (constitutional) media law, such as providers of media platforms, user interfaces, media intermediaries and voice assistants. This is because the State Broadcasting Treaty already lays down transparency obligations, at least also for private media players. In this respect, attention should be paid in particular to information requirements for the identification of media players and regulations on the law of commercial communication. However, in their current formulation, the obligations in question are not suitable for triggering supervisory measures vis-à-vis the aforementioned new media players directly aimed at creating transparency in their actions: a general transparency requirement for all participants in the media value chain, including new players, cannot be inferred from the current body of media law, already with regard to the limits imposed on an expanding interpretation of secondary EU law by the principle of conferral. Such a feasible transparency obligation cannot be derived from consti-

919 Cf. on the importance of transparency also *O'Neil*, Angriff der Algorithmen, p. 288 et seq.; *Schallbruch*, Schwacher Staat im Netz, p. 22; *Ukrow*, Algorithmen, APIs und Aufsicht, p. 8 et seq.

920 FCC, Judgment of the First Senate of 18 July 2018, 1 BvR 1675/16, para. 80.

921 Cf. *Ukrow*, Algorithmen, APIs und Aufsicht, p. 9.

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tutional considerations[922] either: EU constitutional law, too, at most imposes a duty of transparency, but does not specify its details. However, an analogous extension of the corresponding facts would be possible in view of the same regulatory objective.[923]

When a digital service receives a notice from a user requesting the removal or blocking of access to illegal online content (e.g., illegal incitement to violence, hatred, or discrimination on any protected grounds such as race, ethnicity, gender, or sexual orientation; child sexual abuse material; terrorist propaganda; defamation; content that infringes intellectual property rights; infringements of consumer law), it is consistent with the concept of transparency that the user be informed of any measures taken as a result of that notice.

Transparency requirements of this kind are a familiar phenomenon in the EU's internal market; there are no overriding objections under EU law to extending the transparency requirements beyond the existing information requirements to include the processing of notifications of illegal online content. On a superficial view, they can indeed hardly be classified as imperative for the realization of the internal market within the meaning of Art. 26(1) TFEU (and thus, e.g., by using the legal basis of Art. 114 TFEU). In any case, the information requirements related to the processing of communications would share this categorization with the information required under Art. 5 of the amended AVMSD. Even more so than in the case of information requirements within the meaning of Art. 5 AVMSD, however, such requirements relating to the handling of illegal online content could be considered to support the system of decentralized control of the application of EU law.

Regarding the information requirements under Art. 5 of the amended AVMSD, the recital 15 of Directive (EU) 2018/1808 considers:

> *"Transparency of media ownership is directly linked to the freedom of expression, a cornerstone of democratic systems. Information concerning the ownership structure of media service providers, where such ownership results in the control of, or the exercise of a significant influence over, the content of the services provided, allows users to make an informed judgement about such content. Member States should be able to determine whether and to what extent information about the ownership structure of a media service provider should be accessible to users, provided that the essence of the funda-*

922 Cf. on this e.g. *Bröhmer*, Transparenz als Verfassungsprinzip.
923 Cf. in detail *Ukrow/Cole*, Zur Transparenz von Mediaagenturen, p. 46 et seq.

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mental rights and freedoms concerned is respected and that such measures are necessary and proportionate."

Information requirements relating to the processing of notifications of illegal online content would of course also have to respect the freedom of the media pursuant to Art. 11(2) CFR and would also have to be proportionate in their formulation.

Moreover, transparency aspects could also be made fruitful in terms of legal harmonization in connection with the functioning of recommendation systems beyond the existing requirements of the P2B Regulation, also in view of other media intermediaries. This is because the discoverable information about how the recommendation systems work on the various platforms is currently very different. In some cases, there are already regulations in this regard, such as § 93 MStV,[924] but in the vast majority of Member States they have not yet been established. In view of the dual nature of broadcasting and comparable telemedia as cultural and economic assets, the possibility of discriminating against offerings has direct relevance to the internal market and competition. In this respect, links for regulation on the part of the EU are essentially recognizable. However, at present it is not foreseeable that discrimination occurs on the basis of criteria that are incompatible with the EU's integration program. A prioritization of discoverability, e.g., by language of the offering, remains a permissible criterion of differentiation, at least by intermediaries of private provenance, notwithstanding efforts to promote a European public sphere.

Incidentally, there are also deficits in transparency, in need of correction, which call into question the *effet utile* of the existing information requirements, not least when it comes to identifying those responsible for illegal online content. In this respect, registrars often refer to actual or perceived limitations that are or appear to be set by the General Data Protection Regulation. In addition, registrars in Germany, among other countries, are not yet required to verify the data provided. Fake names and addresses are the result of this sanctionless misconduct, which can render

924 § 93 MStV stipulates that providers of media intermediaries must keep the following information easily perceptible, immediately accessible and constantly available to ensure diversity of opinion: (1.) The criteria that determine the access of a content to a media intermediary and the whereabouts; (2.) the central criteria of an aggregation, selection and presentation of content and their weighting including information about the functioning of the algorithms used in understandable language. Providers of media intermediaries who have a thematic specialisation are obliged to make this specialisation perceptible by designing their offer.

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empty the protection objectives of the information requirements under the AVMSD and ECD. A readjustment in the design of the regime for information requirements, as a result of which regulators can reliably identify the content provider, could close this gap of an effective supervisory possibility for compliance with EU law by the respective responsible parties.

2. *On the criterion of illegality of the content*

In the effort to adequately protect minors from harmful behavior such as cybergrooming or bullying, or developmentally harmful content within the framework of the Digital Services Act, the distinction between illegal and harmful content, the definition of which differs in part at European and national level, is already proving problematic. Whereas the European Commission apparently understands "illegal content" to mean content related to criminal law, in Germany, e.g., "illegal content" refers to content that contradicts a prohibitory norm – such a norm, however, does not necessarily have to be sanctioned by criminal law, but can also be prosecuted in the form of administrative (offence) proceedings.[925]

The very important area of protection against developmentally harmful offerings thus risks falling into a gray area of lower protection intensity under EU law. This is because often exemption regulations recognized by the EU only cover criminal proceedings and thus not the area of administrative (offence) proceedings necessary for the effective protection of minors from harmful media. This makes enforcement of the regulations considerably more difficult, in particular in the online sector. At least a clarifying adjustment of the understanding of the term "illegal" in the sense of including administrative prohibitions would in this respect be helpful in view of the continuing intended protection perspective with regard to (not least underage) users of information society services in the design of the proposed Digital Services Act.

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925 Providers transmitting or making accessible content suited to impair the development of children or adolescents into self-responsible and socially competent personalities are required by § 5 JMStV to use technical or temporal instruments to ensure that children or adolescents do not normally see or hear such content. Absence of such an instrument makes the offering illegal according to German understanding, as it contradicts a prohibition norm of the JMStV. Under EU law, by contrast, the offering would merely be harmful, since the infringement is not subject to criminal sanctions.

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3. Media regulation for information society services and new media actors by means of self-, co- and cooperative regulation

According to Art. 4a(1) sentence 1 of the amended AVMSD, "Member States shall 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 this Directive to the extent permitted by their legal systems".

In view of the fact that the fundamental structural principles of the AVMSD and the ECD, which already include the principle of cross-border freedom of provision and the principle of home country control as well as transparency obligations with regard to provider-related information requirements, should be as similar as possible, the regulatory concepts of the two sets of rules should also be parallelized. This would also take into account the principles of subsidiarity and proportionality in terms of regulation.[926] In addition, the considerations in the Commission's Communication "Better regulation for better results – An EU agenda" would be facilitated. In this Communication, the Commission emphasized that it would consider legislative as well as non-legislative options consistent with the principles for better self- and co-regulation when assessing approaches to better regulation. Building on these considerations, it also makes sense, in line with convergence in the media sector, to use the proposed Digital Services Act to aim for the greatest possible convergence of fundamental structural principles not only for information society services, but also for new media players such as media intermediaries.

In view of the system of self-regulation and co-regulation in Art. 4 a of the amended AVMSD, recitals 12 to 14 therein considered:

> *"A number of codes of conduct set up in the fields coordinated by Directive 2010/13/EU have proved to be well designed, in line with the Principles for Better Self- and Co-regulation. The existence of a legislative backstop was considered an important success factor in promoting compliance with a self- or co-regulatory code. It is equally important that such codes establish specific targets and objectives allowing for the regular, transparent and independent monitoring and evaluation of the objectives aimed at by the codes of conduct. The codes of conduct should also provide for effective enforcement. These principles should be followed by the self- and co-regulatory codes adopted in the fields coordinated by Directive 2010/13/EU.*

926 Cf. on the connection between self-regulation and co-regulation on these principles as rules for the exercise of competence Art. 4a(2)(2) AVMSD.

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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.
Self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations and associations to adopt common guidelines amongst themselves and for themselves. They are responsible for developing, monitoring and enforcing compliance with those guidelines. Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislative, judicial and administrative mechanisms in place and its useful contribution to the achievement of the objectives of Directive 2010/13/EU. However, while self-regulation might be a complementary method of implementing certain provisions of Directive 2010/13/EU, it should not constitute a substitute for the obligations of the national legislator. Co-regulation provides, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. In co-regulation, the regulatory role is shared between stakeholders and the government or the national regulatory authorities or bodies. The role of the relevant public authorities includes recognition of the co-regulatory scheme, auditing of its processes and funding of the scheme. Co-regulation should allow for the possibility of state intervention in the event of its objectives not being met. Without prejudice to the formal obligations of the Member States regarding transposition, Directive 2010/13/EU encourages the use of self- and co-regulation. This 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."

These considerations, in particular also in terms of definition as well as on the opportunities of these regulatory instruments for effectively achieving protected interests such as consumer protection and on requirements for the design of the instruments, could also be made fruitful *mutatis mutandis* in an amendment and supplement to the ECD within the framework of the proposed Digital Services Act.[927]

927 With regard to information society services and media intermediaries, the codes would also have to – in line with Art. 4a(1) sentence 2 of the amended AVMSD – "(a) be such that they are broadly accepted by the main stakeholders in the

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Measures to achieve the public interest objectives of the proposed Digital Services Act, in particular in the area of new media players, are also likely to prove more effective if taken with the active support of the providers concerned themselves. However, self-regulation, although it could be a complementary method for implementing certain rules of an amended and supplemented ECD, should not fully replace the obligation of Member States to implement not least also regulation (at least indirectly safeguarding media pluralism) on discoverability issues through this regulation by of the EU. In a system of regulated self-regulation, which is also referred to as a system of co-regulation, it is in line with the above to continue to provide for government intervention in the event that the objectives of regulation via self-regulation alone do not promise to be achieved.

In co-regulation, as also emphasized in the recent amendment to the AVMSD,[928] stakeholders and state authorities or national regulators share the regulatory function. The responsibilities of the relevant public authorities include recognizing and funding the co-regulation program, as well as reviewing its procedures. Co-regulation should continue to provide for government intervention in the event that its objectives are not met.

In addition to the positive experience already gained with the approach of regulated self-regulation in the protection of minors in the media, which is recognized as a constitutionally protected right in the same way as the safeguarding of diversity, the limits that are generally imposed on exclusively traditional sovereign regulation under the conditions of digitization and globalization speak in favor of including this concept in the structure of the proposed Digital Services Act[929]:[930]

- Such a traditional concept of regulation can meet the interests of the objects of control only to a very limited extent (in particular through lobbying during the legislative process) and may therefore promote less a will to cooperate than rather a will to resist by exhausting the possibilities for legal action under the rule of law.

Member States concerned; (b) clearly and unambiguously set out their objectives; (c) provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at; and (d) provide for effective enforcement including effective and proportionate sanctions".

928 Cf. rec. 14 Directive (EU) 2018/1808.

929 Cf. on this in an approach also *Russ-Mohl*, Die informierte Gesellschaft und ihre Feinde: Warum die Digitalisierung unsere Demokratie gefährdet, p. 269 et seq.

930 Cf. on the following in an approach *Schulz/Held*, Regulierte Selbstregulierung als Form modernen Regierens, p. A-8; *Ukrow*, Die Selbstkontrolle im Medienbereich in Europa, p. 10 et seq.

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- There is an increasing knowledge deficit (not only) on the part of the controlling public authority (whether EU or state); even research results are only available to a limited extent as a resource for the development of a prophylactic approach to avert threats to diversity; moreover, such research is particularly dependent on the willingness of researched media actors to cooperate.
- In modern information and communication societies, meta-data on the extraction, processing and personalized preparation of information have developed into an important "scarce resource" under oligopolistic or even monopolistic control; these meta-data are therefore likely to become an increasingly decisive "control resource" over which the EU and its Member States do not have privileged access – even if there is no knowledge deficit in the specific case – as is the case with the resource "power", but where they are confronted with new power holders.
- Globalization no longer merely increases the possibilities of so-called "forum shopping" to avoid national regulations, as was the case at the beginning of the classifications of new regulatory systems under legal dogma; in the meantime, globalization has rather led to the fact that the national legal space of all EU states is dominated as a territorial link of democratic sovereignty in view of the offering of media platforms, user interfaces, voice assistants and media intermediaries by actors whose business policy is determined under corporate law outside the EU.
- Own initiative, innovation and a sense of responsibility cannot be enforced by law.
- Moreover, traditional sovereign-imperative control is typically selective, not process-oriented, as would be appropriate for control of complex regulatory tasks, including not least control of the influence of algorithm-based systems on the formation of individual and public opinion.[931]

In view of any potential elements of the Digital Services Act relating to the democratic process, it is particularly worth noting with regard to approaches to self-regulation that independent fact-checking – beyond the relevance of content under criminal law – could still prove to be an effective way of identifying false reports and inhibiting the impact of disinfor-

931 Cf. *Ukrow*, Algorithmen, APIs und Aufsicht, p. 16 et seq.

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mation campaigns based on them.[932] In addition, the engagement of individual media intermediaries, such as Google and Facebook, should be mentioned, which highlight validated information and make it constantly available in the news feed, e.g. on the topic of COVID-19.

While this proves to be a signal for a strengthening of self-regulation, there are, on the other hand, also contrary experiences: for example, the Self-Assessment Reports (SAR) of the platforms under the European Union's Action Plan against Disinformation include information on the implementation of the Code of Practice against Disinformation commitments.[933] One of the biggest criticisms of the SAR is that the data and information contained refer only to the European level and are not broken down to the individual Member States. Thus, the SAR were insufficient to perform a meaningful and valid analysis of compliance with the commitments.

Moreover, in the sense of a cooperative regulatory approach, projects that rely on deeper cooperation between law enforcement authorities, media regulators and media players – in particular in the reporting of illegal online content in a broad sense – can also help to consistently tackle the dissemination of illegal content online[934], which could become one of the purposes of the Digital Services Act.

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932 Studies conducted to date present mixed results with regard to the concrete effectiveness of fact-checkers (especially in the area of political information). In this context, the factor that recipients in the digital environment can actively select or avoid the information corrected by fact checkers is also and primarily relevant. However, the contribution of fact-checking to tackling disinformation campaigns cannot be dismissed out of hand, at least on the whole. Cf. for an overview of studies and for a classification in particular *Hameleers/van der Meer* in: Communication Research 2019–2, 227, 227 et seq.; as well as *Barrera Rodriguez/Guriev/Henry/Zhuravskaya* in: Journal of Public Economics 2020, 104, 104 et seq.

933 On this in detail already supra, chapter D.IV.3.

934 In this regard, the projects of the Landesmedienzentrum Baden-Württemberg (https://www.lmz-bw.de/landesmedienzentrum/programme/respektbw/), the Bayerischen Landeszentrale für neue Medien (https://www.blm.de/konsequent-gegen-hass.cfm), the Landesanstalt für Medien NRW (https://www.medienanstalt-nrw.de/themen/hass/verfolgen-statt-nur-loeschen-rechtsdurchsetzung-im-netz.html) as well as the Landeszentrale für Medien und Kommunikation Rheinland-Pfalz (https://medienanstalt-rlp.de/medienregulierung/aufsicht/verfolgen-und-loeschen/) can be cited as examples – without chronological order of emergence.

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4. Regulation of EU-foreign media content providers

In the course of their supervisory activities, EU regulators are increasingly identifying illegal content originating in third countries but targeted at the regulator's respective Member State market. This applies not least to the German state media authorities.

In the case of EU-foreign offerings, the media authorities currently apply a procedure similar to that for EU offerings under Art. 3 AVMSD or Art. 3 ECD. Even if such a procedure is not required by law, the first step is to consult the national regulatory authority in the country of origin on the matter.

The competent authorities in the country of origin are informed of the offering and the infringements identified and requested to take measures. This applies to the countries of origin of both content and host providers. If the country of origin declines to intervene, if the response proves to be unreasonably long or inadequate in view of the protected legal interest, the provider's own measures are taken after consultation with the provider.[935]

Against this background, the objective of the proposed Digital Services Act could also be to demand or promote Member State precautions to ensure that undertakings from third countries, by being assigned to the jurisdiction of a Member State, do not benefit too easily from the country of origin principle of the EU internal market and the liability privilege of the ECD, the validity of which in the EU internal market is linked to compliance with certain minimum standards for the protection of public interests. Such minimum standards are lacking in relation to service providers based outside the EU. To avoid uncoordinated regulatory action against undertakings from non-EU countries, it would also appear to be expedient to lay down EU requirements for sustainable and effective agreements on action against undertakings from non-EU countries between the national regulatory authorities within the framework of their respective European groups (above all ERGA and BEREC).

Since there are currently no clear regulations under EU law with regard to content from non-EU countries, Member States' regulatory authorities

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935 In the case of an offering from Israel targeted at the German market, the competent ministry declined to intervene itself and declared its agreement with measures taken by German media regulators. After hearing and issuing a decision, an adjustment of the offering was achieved due to the cooperation of the provider (https://www.medienanstalt-nrw.de/presse/pressemitteilungen/pressemitteilungen-2020/2020/april/coin-master-an-deutschen-jugendschutz-angepasst.html).

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are dependent on the cooperation of the country of origin and the provider in these proceedings. Otherwise, the only option is to access domestic third parties such as telecommunications or payment service providers to mitigate the risk.

The planned new State Treaty on Games of Chance[936] takes account of this shortcoming with regard to the achievement of the protection objectives defined in § 1 GlüStV in supervisory practice by means of a corresponding responsibility regime. § 9 of the State Treaty soon to be signed stipulates:

> *„(1) Gaming supervisory has the task of supervising compliance with the public-law provisions enacted by or pursuant to the present State Treaty, and of preventing illegal gaming and advertising for illegal gaming. The authority responsible for all Federal States or in the respective Federal State can issue the necessary orders in individual cases. It may take the following actions without prejudice to other measures provided for in this State Treaty and other legal provisions, in particular*
> *1.request at any time information and submission of any and all documents, data and evidence needed for the inspections as referred to in sentence 1, and to enter any commercial premises and plots where public gaming is being organised or brokered for purposes of such inspections during normal business and work hours,*
> *2.place requirements on the organisation, performance and brokerage of public games of chance and advertising for public games of chance, as well as on the development and implementation of the social concept,*
> *3.ban the organisation, performance and brokerage of illicit games of chance as well as any associated advertising,*
> *4.prohibit the parties involved in payment transactions, in particular the credit and financial service institutions, upon prior notification of illegal gaming offers, from participating in payments for illegal gaming and in payments from illegal gaming without requiring prior mobilisation of the organiser or broker of public games of chance by the gaming supervisory authority; […] and*
> *5.after prior notification of illegal gaming offers, take measures to block these offers against responsible service providers as per §§ 8 to 10 of the Telemedia Act, in particular connectivity providers and registrars, provided that measures against an organiser or broker of this game of chance cannot be car-*

936 The draft version of the State Treaty notified to the European Commission can be accessed via https://ec.europa.eu/growth/tools-databases/tris/en/index.cfm/search/?trisaction=search.detail&year=2020&num=304&mLang=.

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ried out or are not promising; these measures can also be taken if the illegal gaming offer is inextricably linked to other content. […]"

There are no convincing reasons why not least the regulations on IP and payment blocking should not serve as a model for the further development of the AVMSD and the ECD in the interest of the proposed Digital Services Act's objectives of human dignity, minor and consumer protection, while preserving the substantive and procedural significance of fundamental rights protection under EU law.

5. Reform of liability regulation with regard to service providers

The categorization of provider types made in the ECD no longer reflects the current state of digitization.[937] The categorization of services emerged at a time when their number operating on the market was much more limited and they were clearly delineated. In the meantime, many hybrid forms have emerged, which can be classified differently depending on the business line of their undertaking. Equally, the business models of service providers have become much more complex, which makes it difficult to classify them clearly, even when looking at the main focus.

Practical experience also shows that many service providers act, e.g., as both host and content providers, i.e. they manage third-party content and at the same time make their own content available on their platform. From the media regulators' pespective, however, it is difficult to classify what type of content is involved in a specific case, as the services are either not clearly labeled or are not necessarily clearly classifiable as specific services.

This multiple character of platforms is also reflected in the EU legal acts that have emerged over the last few years: each of these develops its own definitions of services and assigns new responsibilities (e.g. AVMSD – VSP; Copyright Directive – service providers for sharing online content; P2B Regulation – online intermediation services and online search engines; TERREG draft – addresses hosting service providers, but in a new way, as active obligations are imposed on them)[938].

In addition to the definition of service, the service liability regime also appears increasingly deficient – although not in its starting point: in the

937 In detail *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online-Content, p. 91 et seq.

938 Cf. on this in detail supra, chapter D.

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case of illegal online content, the ECD has so far suggested priority action against the provider or editor responsible for the inadmissible or harmful content. This rationale also seems worth preserving in the development of the Digital Services Act for reasons of proportionality. Therefore, obligations for traditional service providers as well as for new media players such as media intermediaries, media platforms and user interfaces should essentially be limited to obligations to cooperate. These actors should fulfill their overall responsibility for a free and legally compliant Internet by enabling independent regulators to take action against content providers when necessary. Specifically, this requires granting media supervisory authorities the right to information.

However, according to the experience gained since the ECD came into force, this alone is often not sufficient to safeguard general interests, which are also protected by the fundamental rights and values of the EU. In view of such undesirable developments, it is obvious to also provide for a binding co-responsibility of the platforms in case of a lack of enforcement possibilities against the editor in charge of a media content.

A future liability regime should allow for recourse against the service provider by the media regulator whenever the former is unwilling or unable to provide information about the identity of the infringing user. This principle is not unknown to the European legal structure; in this respect, the Digital Services Act could tie in with regulatory models in EU law.

In this context, it is worth considering basing the extent of a service provider's liability on the degree of anonymization it allows for its users: the more a service relies on the anonymity of its users, the sooner it seems responsible to make it liable for content that it did not create itself or adopt as its own.

The basis for possible liability could be the last identifiable person or organization. In this case, the service provider only benefits from the liability privilege if it acts purely as a host of content of verified participants. If it allows anonymization on its platform, it cannot invoke the liability privilege and is liable for possible violations of legal rights. Anonymization on platforms would therefore remain possible under the condition that the service provider can be called upon to combat infringements.

6. *Options for organizational structures for improved enforcement of media-related public interests*

The cooperation of regulatory authorities and institutions in the Member States active in the field of and related to media regulation is of fundamen-

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tal significance for sustainable law enforcement on the Net. At least if it is possible to intensify cooperation between the various competent institutions in the area of media, telecommunications, data protection, and competition supervision in their respective European associations of organizations (namely ERGA, BEREC, and EDPD) and to design them in a manner appropriate to their tasks, the establishment of a uniform regulatory authority operating throughout the EU would appear to be problematic under primary law – not least in view of the formative power of the principle of subsidiarity under organizational law. Experience with ERGA and BEREC suggests that a decentralized structure in the media sector or in areas related to the media is best suited to protecting fundamental European values in their respective national manifestations while ensuring adequate safeguards for freedom of expression and information.

In this context, the principle of the independence from the state of media supervision, as laid down in Art. 30 AVMSD, must also be upheld for newer media in the online sector as well as for new media players such as media agencies and media intermediaries, insofar as it is not their economic activities but rather their diversity-related activities that are at issue, and thus freedom of opinion must be protected. Supervision of processes relevant to diversity, which is also the case with the aggregation, selection and presentation of media content in new digital form, by an authority, and be it one of the EU, which does not act in social feedback but in a state or supranational manner, is not compatible with the democratic understanding of a media landscape independent of the state and influences of Union institutions, as is stipulated for the EU by the fact that it is bound by fundamental rights.

Even to the extent that Art. 30 AVMSD requires that regulatory bodies be provided with financial and personnel resources that enable them to pursue a regulatory concept that is as holistic as possible, this organizational concept also serves as a model for the regulation of new media players relevant to diversity. This requires, not least, the involvement of expertise in the areas of the platform economy and artificial intelligence, in particular also with a view to algorithmic aspects of findability regulation.

There is also a need for improved legally binding bases for effective cross-border service and enforcement of notices and decisions by media regulatory authorities. The underlying procedures must be clearer and simpler than those in European and international acts and agreements limited to civil and commercial disputes (e.g. Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters; Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters). Media regula-

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tors also need mutual legal assistance capabilities in order to achieve more efficient law enforcement in certain international circumstances.

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