B. Summarising the Applicable Legal Framework

This chapter gives an overview on the existing framework for the media- and content-related online environment. In doing so, it summarises relevant findings of the preceding study "Cross-border Dissemination of Online Content".[14]

I. On Fundamental Rights, Fundamental Freedoms and EU Values

Considering the legal framework for the cross-border dissemination of online content, the fundamental rights as laid down in the Charter of Fundamental Rights of the EU (CFR)[15], the European Convention on Human Rights of the Council of Europe (ECHR)[16] and the provisions of national constitutional law lay the basis and have to be the foundation for any approach that is chosen.[17] These rights include prominently human dignity, which, according to the CFR, is "inviolable", i.e. needs to be considered as an overarching goal that has to be protected by State efforts. In the area of online content, there are many ways to violate rights of others, including attacking the human dignity of others. This can be true in particular for audiovisual content containing certain forms of pornography or depictions of violence. Concerning non-fictional depictions, this can be assumed when a person is displayed as "an object"[18] against the right to be treated with dignity. For fictional media, some type of content can qualify as such under specific conditions, too.[19]

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14 *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, esp. p. 53–168.

15 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

16 The European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

17 On this and the following in detail and with further references, cf. *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, p. 53 et seq.

18 Examples include execution videos of terrorist organisations or so-called "snuff videos", which are most commonly disseminated via the Internet.

19 In the case of fictional content, under certain circumstances – although there will regularly be consent of the persons depicted – a violation of human dignity can

Fundamental rights also include the protection of minors on their own behalf, thus laying down the principle that in all actions relating to children, whether taken by public authorities or private institutions, whether in the offline context or in the digital media environment, the child's best interests must be a primary consideration. This high priority of the protection of minors is threatened in the online environment both from the recipient's perspective (in terms of the free accessibility of content harmful for the development of children) and from the victim's perspective (in terms of the dissemination of child pornographic or child sexual abuse content or phenomena such as grooming, which have been proliferating in the online environment). These fundamental rights thus suggest that a strict(er) and clear(er) regulation of the online sector is needed, both in terms of obligations for providers and enforcement possibilities for supervisory authorities. On the other hand, the fundamental right of freedom of expression as well as the freedom of the media demand special attention in the regulation of content, concerning both the handling of user-created content and the free consumption of information originating from different parts of the spectrums.

This finding also applies to the commercial interests of the actors involved in the cross-border dissemination of online content. Regulations that impose obligations on platforms, that, for example, may result in liability in the event of non-compliance, can interfere with the freedom to conduct a business, because they may make certain business models unfeasible or subject to major alignment. This, as well as the potentially affected right to property, are enshrined in the CFR, ECHR (or Protocol) and national constitutional law. The legal framework at sub-constitutional level has to be interpreted in the light of these fundamental rights. Its design also needs to be in line with these rights. This is all the more true considering that fundamental rights, such as human dignity or freedom of expression, can also give rise to active duties to protect on the part of states, including competent state bodies that are also bound by fundamental rights.[20]

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be constructed on the side of the recipient (through an unintentional identification with the situation depicted) or also on the side of the persons depicted, who may not have been able to give effective consent – whether due to mental, physical or age-related incapacity to consent.

20 Cf. the jurisdiction of the European Court of Human Rights (ECtHR), in particular for Art. 8 ECHR (judgement of 27.10.1994, no. 18535/91, para. 31; judgement of 12.11.2013, no. 5786/08, para. 78), Art. 10 ECHR (judgement of 22.4.2013, no. 48876/08, para. 134; judgement of 17.9.2009, no. 13936/02, para. 100 et seq.;

The fundamental freedoms laid down in the Treaty on the Functioning of the European Union (TFEU)[21] are a significant element in the realisation of the EU's internal market, which includes the digital sector, aptly named the "Digital Single Market" by the Commission. Above all, the free movement of goods, the freedom of establishment and the freedom to provide services aim at keeping markets open and giving legal certainty to commercial operators in those markets. In principle, businesses should be able to distribute their goods and services freely throughout the EU and establish themselves where-ever they wish to do so without being subject to discrimination or restrictions in the receiving state. In the context of cross-border dissemination of online content, this does not only concern media companies, which can invoke these freedoms, but also the actors involved in the dissemination of content, i.e. in particular the ISS. Derogations from fundamental freedoms, whether at national or EU level, must be justified by an objective of general interest, and the measures taken to reach this objective have to be proportionate. This also applies to the COO which has been included in varying degrees in the legislative framework. Although the COO is not a mandatory consequence of the existence of fundamental freedoms, it is another expression of the idea of ensuring a free and fair internal market enshrined therein.

The justification of interferences with fundamental rights and fundamental freedoms essentially entails the necessary balancing of conflicting interests, those other interests themselves potentially being protected by fundamental rights or freedoms. The greater and more drastic the threat to one legal interest is, the easier it is to justify strong interferences by referring to other legal interests. It is therefore a necessary consequence of a carefully differentiated proportionality assessment that certain market participants are subject to different and stronger obligations than other market participants. In the context of the dissemination of online content, for example, content intermediaries play a different role than other platforms and are subject to higher risks for the fundamental rights addressed above. Because of the relevance of such platforms for the dissemination and availability of media and communication content more generally, it is justified to pay specific attention to them when reforming the horizontally applicable framework for information society services.

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judgement of 29.02.2000, no. 39293/98; judgement of 16.03.2000, no. 23144/93) and Art. 11 ECHR (judgement of 16.3.2000, no. 23144/93, para. 42).

21 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

Finally, the values on which the EU is founded and which the Member States have agreed upon and committed themselves to uphold are also relevant regarding the legal framework for the cross-border dissemination of online content. Art. 2 of the Treaty on European Union (TEU)[22] establishes as foundational values of the Union the respect of human dignity, freedom, democracy, equality, the rule of law and respect of human rights, including the rights of minorities. The close connection with the fundamental-rights-protecting framework is evident. These values are common to all Member States, i.e. in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. These fundamental values are therefore of direct relevance to the current and future legal framework of the EU concerning the online sector. But they are also important for the legal framework of the Member States: on the one hand, through the validity of the principle of loyalty – in this case to the Union (Art. 4 para. 3 subpara. 2 TEU) – and, on the other hand, as a substantive prerequisite in the accession procedure under Art. 49 TEU and the non-compliance procedure under Art. 7 TEU.[23] Thus – and in light of this fact that both the threats and the benefits of access to information and communication opportunities in the online sector, human dignity, democracy, the rule of law and protection against discrimination are key factors – the EU values serve not only as benchmarks for a minimum level of regulation but also as common denominators for the EU and all Member States in light of exercising their competencies.

II. On the Allocation of Competences

Besides the guiding principles for establishing a framework for the online sector, the question of which actor can act in which way in creating the

22 Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390.

23 While the mechanisms of Art. 7 TEU (preventive and sanctions) are to be used only in cases of systemic threats or breaches of EU values, in the context of judicial tools like the infringement procedures (Art. 258–259 TFEU) and preliminary references (Art. 267 TFEU) EU values can play a role as well. Cf. on this and further mechanisms to monitor and prevent breaches of EU values in Member States on EU level, in particular regarding the European Commission's rule of law framework and the set-up of annual dialogues on the rule of law, *Diaz Crego/Manko/van Ballegooij (EPRS study)*, Protecting EU common values within the Member States, p. 19 et seq.

regulation is determined by the allocation of competences to the European Union by the Member States in this multi-level system. Specifically, concerning the dissemination of online content, a variety of factors are decisive that result from the tension between regulating the media sector as an economic market and the significance of the media in democratic societies that goes beyond their role as market participants. Thus we have a dual function of the media as both a cultural asset and an economic asset. However, the various ways in which media and individual media contents or user-generated content, which is relevant to the formation of public opinion in particular, are distributed are just as relevant. In addition, there is the advancing convergence of the media, which is reflected not only in the secondary legal framework – further explained under III. below – but also impacts the use of competences, depending on whether "media" are regarded to be moving closer to regular market players or services that are not actually media are being regarded through the lens of their comparability to media in terms of their function. In the following, this study will only outline the essential framework conditions for the allocation of competences that are relevant to the scope of the study. An extensive analysis of this question can be found in a recent study co-authored by authors of this study.[24]

To begin with, according to the principle of limited conferral of powers (Art. 5 TFEU), all competences not conferred to the Union by the Treaties remain with the Member States. Where powers to act have been allocated to the Union, it acts only within the limits of the powers conferred to it by the Member States in the Treaties to attain the objectives set out therein. The categories of competences are: exclusive (Art. 3 TFEU), shared (Art. 4 TFEU) and the power to support, coordinate or supplement the actions of the Member States (Art. 6 TFEU). The nature of each competence also determines the respective powers to act of both the Union and the Member States.

This applies also regarding legislative measures in the field of dissemination of online content. However, it is not possible to define a specific area of law which would cover all aspects relevant in this context in the sense of one single competence basis. Rather, various matters are involved here. Different objectives can be pursued with legislation, and its addressees and substantive rules are likely not uniform. This is reflected in the variety of legal bases in the TFEU that potentially are connected to this field of regu-

24 Cf. *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector.

lation: namely Art. 28, 30, 34, 35 (free movement of goods), Art. 45–62 (free movement of persons, services and capital), Art. 101–109 (competition policy), Art. 114 (technological harmonisation or the use of similar technological standards, for instance, in products needed to operate the Internet), Art. 165 (education), Art. 166 (vocational training), Art. 167 (culture), Art. 173 (industry) and Art. 207 (common commercial policy). Considering the context of this study, in particular three competence areas of the EU are foremost relevant and will be highlighted in the following: the internal market competence of the EU, the EU competition law regime and the EU's (limited) cultural competences.

Exclusive competences, under which only the EU can take legislative actions, exist in particular for "the establishing of the competition rules necessary for the functioning of the internal market", which is laid down specifically in Art. 101 et seq. TFEU. Competition law focuses on market power and on counteracting or preventing anti-competitive behaviour; therefore market power that has a dimension of inhibiting competition in the EU market overall is addressed by regulation on that level. However, this economic focus does not mean that competition law aspects are not also relevant in the area of content dissemination. On the contrary, market power, even more so when it amounts to market dominance, especially in the online sector, often equates to having power over opinion-forming of the population. One of many examples of this is the market-leading search engine, which is the gatekeeper for the findability and visibility of content – an aspect that the Regulation on promoting fairness and transparency for business users of online intermediation services (Platform-to-Business (P2B) Regulation)[25], for example, takes into account with its economic focus.[26]

Therefore, the competition regime is generally suitable for achieving the goal of a diverse content offer not as a direct but as a side effect in light of, for example, ensuring media pluralism.[27] At the same time, competition

25 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57–79.

26 Cf. on this in particular *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector, p. 142 et seq.; *Cole/Etteldorf*, in: Cappello (ed.), Media pluralism and competition issues, p. 32, 33.

27 Cf. *Cole*, Europarechtliche Rahmenbedingungen für die Pluralismussicherung im Rundfunk, p. 93, 104 et seq.; *Jungheim*, Medienordnung und Wettbewerbsrecht im Zeitalter der Digitalisierung und Globalisierung, p. 249 et seq.

law not being directed at reaching media pluralism as such is not sufficient to substitute for targeted actions that are not based on the competition law competence. On the basis of competences under competition law, undertakings with significant market power in particular can therefore be subjected to special conditions. The exclusive competence of the EU includes the control of a ban on cartels (i.e. the prohibition of concerted practices by colluding in an anti-competitive manner), of the abuse of a dominant market position, of mergers and of State aid.[28] However, the economic focus of this competence basis may equally require – if it is also applied "horizontally" in an area in which cultural or, in particular, media policy aspects play a role – to provide in turn for special rules for indirectly affected areas, as is the case, for example, in the context of state aid law[29] or in the framework of the Merger Regulation[30].

Although the functioning of the internal market as a goal is a prerequisite for any matter that is allocated exclusively to the EU, the shaping of the internal market (Art. 114 TFEU) itself does not fall under the exclusive competence of the EU. According to Art. 4 para. 2 TFEU, it is instead a shared competence where both the Union and the Member States have the possibility of adopting legally binding acts. In such areas Member States can only take action to the extent that the Union has not yet taken action. Pursuant to Art. 114 (1) TFEU, the European Parliament and the Council are empowered to adopt measures for the approximation of the laws and regulations of the Member States which pursue the establishment and functioning of the internal market. This functional definition of the scope of application is very broad and has led in the legislative practice of the EU, especially in recent times, to a large number of legal acts – and further proposals by the Commission – being mainly based on Art. 114.

However, Art. 114 TFEU is by no means a universal competence that can be used for all measures within the internal market or to regulate companies operating within it. Rather, this provision must be interpreted as focussing on the removal or prevention of obstacles to the free movement of goods and services in the internal market or noticeable competition im-

28 Cf. on this *Ukrow*, in: UFITA, 83 (1), 2019, 279, 279 et seq.

29 According to Art. 107 para.3 lit. d TFEU, state aid to promote culture may be considered to be compatible with the internal market.

30 According to Art. 21 para. 4 of the Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22), Member States may provide for special rules in the field of merger control, inter alia, to safeguard media pluralism.

pairments.[31] This means that the EU legislator must follow the purpose of improving the conditions for the establishment and functioning of the internal market, because if a "mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Art. 100a [TEC, now: Art. 114 TFEU] as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory."[32] This strict understanding of the provision also corresponds to the fundamental idea of the principle of conferral of powers, subsidiarity and proportionality, which the EU legislator must observe separately when exercising its competences. In particular, the principle of subsidiarity, enshrined in Art. 5(3) TEU, obliges the EU to carry out a subsidiarity test for all its "acts" and in this way complements the requirements arising from the relevant competence provision in Art. 4, 5 and 6 TFEU.[33] This test includes the assessment that, first, the EU shall act only if and insofar as the objectives of the envisaged action cannot be sufficiently achieved by the Member States and, second, in the sense of an efficiency or added value criterion, that the regulatory objectives can be better achieved at Union level by reason of the scale or effects of the envisaged measures.[34] The subsidiarity principle is of such relevance that in a legislative procedure, already at the outset, the parliaments of the Member States are informed and have a number of possible ways to react in case they are of the opinion that the principle was disregarded.

As regards the competence of the EU in the cultural sector, there are significant limitations set out in the TFEU which have to be taken into account. According to Art. 6 lit. c), only support, coordination and complementary measures can be taken by the EU in the field of culture, which is therefore fundamentally and intrinsically the responsibility of the Member States. Culture in that sense includes a variety of media-related aspects like areas of intellectual and creative human activity, which undisputedly include art, literature and music, but also the audiovisual sector as well as

31 CJEU, C-300/89, *Titandioxyd*, para. 23; C-376/98, *Advertising and sponsorship of tobacco products-I*, para. 110.

32 CJEU, C-376/98, *Germany v. Parliament and Council*, para. 84.

33 Cf. *Bast/von Bogdandy,* in: Grabitz/Hilf/Nettesheim, Art. 5 TEU, para. 50 et seq.; *Weber,* in: Blanke/Mangiameli, Art. 5 TEU, para. 7.

34 In more detail and with further references: *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector, p. 53 et seq.

media-specific aspects of the protection of pluralism.[35] Furthermore, Art. 167 para. 1–3 TFEU enable, but to a very limited extent, an active cultural policy of the EU. Thus, the EU should contribute to the development of the cultures of the Member States and promote cooperation between them, supporting and supplementing activities of the Member States where necessary, amongst others in the field of artistic and literary creation, "including in the audiovisual sector". In principle, the EU is free to choose which instruments it uses for support and coordination, which may also include the enactment of binding legislation in the form of Regulations or Directives. However, it is limited to the extent that the basic power to regulate must remain with the Member States. The EU may not counteract, unify or replace the policies of the Member States. Harmonisation of national legislation is therefore explicitly excluded. Art. 167 para. 4 TFEU serves as a horizontal or "cross-cutting" cultural clause, requesting the Union to take cultural aspects into account whenever acting under other provisions of the Treaties, bearing in mind that such other measures, for example based on its economic competence, can affect matters of culture and that a weighing of interests might therefore become necessary. This does not amount to a rule according to which anything concerning culture would be excluded from EU action. Rather, the EU's basic competence order remains unaffected, and Art. 167 para. 5 TFEU determines the (narrowly allocated) instruments and procedures available to the EU in this field[36], serving as a negative clause preventing the EU from a recourse to the general titles of competence under the approximation of laws, particularly in the area of the internal market (Art. 114 TFEU), while taking action in the cultural sector.

To summarise the competence framework in light of the focus of the present study, it has to be stressed that the EU has a number of different legal bases at its disposal, which empower it to adopt both legally binding acts and non-binding support and coordination measures, for instance combined with self- and co-regulatory mechanisms. For the adoption of

35 Cf. *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector, p. 45; already at a very early stage of the debate about this question cf. *Schwartz*, in: AfP 24 (1) 1993, 409, 417 with further references.

36 Only recommendations adopted by the Council on a proposal from the Commission, as well as support measures adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, but excluding any harmonisation of the laws and regulations of the Member States, can be considered.

rules and in particular for a reform of the ECD by way of a horizontal approach to create a legal framework for a broad range of internet players, the most likely legal base is the creation and better functioning of the internal market (Art. 114 TFEU). When exercising this shared competence, the principles of limited conferral of powers, subsidiarity and proportionality must be observed, which are capable of curtailing EU action. With regard to rules for the cross-border dissemination of online content, the limited competences of the EU in the area of media regulation must also be considered, which result on the one hand from the absence of explicit competences at EU level and, on the other hand, from the cultural clause, which requests consideration of Member States' cultural policies before EU action is taken. In addition, the imposition of special rules on platforms with significant market power may be based on competition aspects.

III. The Network of Sectoral Regulation

The starting point for the network of sectoral rules that apply in the area of online content dissemination is the horizontal framework of ECD. Adopted in the year 2000, the ECD was intended to create for the first time a framework for Internet commerce by eliminating legal uncertainties for cross-border online services and ensuring the free movement of ISS between the EU Member States. In order to do so, the ECD lays down some basic rules for ISS by following a minimum harmonisation approach based on the COO principle. Besides general rules concerning information obligations, the establishment of service providers, commercial communications, electronic contracts, codes of conduct, out-of-court dispute settlements, court actions and (a very basic rule on) cooperation between Member States, the liability (exemption) regime provided by the ECD is (until today) a core element of the Digital Single Market. Art. 12 to 15 set out conditions under which ISS (specifically access, caching and host providers) are not liable for third-party content which is accessed, transmitted or stored on their platforms. In addition, the principle that no general monitoring obligation may be imposed on these providers is established. These rules apply in principle to all providers that qualify as such ISS, unless the ECD itself or sectoral law, by which it is supplemented or superseded in many areas, provides otherwise.

In the two decades since creation of the ECD, the dissemination of online content is actually addressed by a broad and complex network of sectoral rules. These include, on the one hand, media-specific rules such as the

provisions of the Audiovisual Media Services Directive (AVMSD)[37] as the core of European "media regulation". On the other hand, it concerns more general rules which are directed at regulating certain aspects of the online economy, but which are particularly relevant for the dissemination of media content because of their scope, such as the P2B Regulation. In between, there are a number of sectoral rulesets of importance such as the Directive on copyright and related rights in the Digital Single Market (DSM Directive, DSMD)[38], which concerns certain forms of dissemination and is directed at achieving an appropriate financial participation in the exploitation of works from a copyright law perspective, or the proposed Regulation on preventing the dissemination of terrorist content online (TERREG)[39], which concerns certain type of content that is supposed to be suppressed and takes a criminal law and fundamental rights protection perspective.[40]

The AVMSD is an essential part of the relevant legal framework for the dissemination of online content because, despite the approach of minimum harmonization pursued therein, a number of fundamental rules apply to online platforms. It covers audiovisual media services within the meaning of Art. 1 para. 1 lit. a AVMSD (including both services (linear and non-linear) in the meaning of Art. 56 and 57 TFEU when they fulfil the criteria of the AVMS-definition and audiovisual commercial communications) and – since the revision of the reform of the AVMSD in 2018[41] – video-sharing platforms (VSP(s)) within the meaning of Art. 1 para. 1

37 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95, 15.4.2010, p. 1–24.

38 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1, OJ L 130, 17.5.2019, p. 92–125.

39 Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online. A contribution from the European Commission to the Leaders' meeting in Salzburg on 19–20 September 2018, COM/2018/640 final.

40 A detailed analysis of the sectoral regulation relevant in the context of dissemination of online content is provided in the study *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, p. 91 et seq. An overview of the interconnection between these different provisions can also be found in *Dreyer et al.*: The European Communication (Dis)Order, p. 24 et seq.

41 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of cer-

lit. aa AVMSD. Thereby, for the online sector, the definition of audiovisual media services covers, for example, streaming offers or media libraries of traditional broadcasters as well as on-demand offers of other providers. However, individual channels or profiles on platforms such as YouTube or Twitch can already fall under this term if they are designed in the way that Art. 1 para. 1 lit. a AVMSD describes and fulfil those criteria. The very broad definition[42] of VSPs includes – irrespective of their size and content provided – a wide range of actors in the online environment providing user-generated audiovisual content. Therefore, it does not only apply to the "obvious" example of providers such as YouTube but potentially also to electronic versions of newspapers and magazines or social network services.[43]

For all of these online actors the AVMSD sets out minimum standards that audiovisual content must comply with. This primarily concerns the protection of minors, the protection against violence, hatred and terrorist content and the content of audiovisual commercial communication (Art. 6, 6a, 9 AVMSD). With regard to VSPs, the implementation of these requirements at national level leaves a wide scope for choosing the form of the rules with recourse to mechanisms of self-regulation and co-regulation. At the same time, the design of the measures to be foreseen in these rules, namely concerning technical systems, is already specified in the AVMSD.

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tain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69–92. An unofficial consolidated version of the AVMSD provided by the EMR is available at https://emr-sb.de/gb/synopsis-avms/.

42 According to Art. 1 para. 1 lit. aa AVMSD, video-sharing platform service means a service as defined by Art. 56 and 57 TFEU, where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate by means of electronic communications networks within the meaning of lit. a of Art. 2 of Directive 2002/21/EC, whereby the organisation of such providing is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing

43 This question depends on the criterion of the "essential functionality" of the respective offer, which is the condition for it to qualify as VSP. In this regard, the Commission provides guidance in its Communication from the Commission Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive, 2020/C 223/02, C/2020/4322, OJ C 223, 7.7.2020, p. 3–9.

Appropriate mechanisms include relevant provisions in the terms of use, the provision of technical systems for labelling advertising by uploaders or reporting and flagging procedures.

Furthermore, the 2018 AVMSD reform introduced provisions that will impact other types of platform providers. Although it does not directly address them by defining them as being within the scope of the Directive, relevant provisions will affect the way these providers offer their services indirectly. In particular, Art. 7a AVMSD authorises Member States to take measures to ensure in their dissemination the appropriate prominence of audiovisual media services of general interest. Art. 7b AVMSD goes a step further and demands that Member States take appropriate and proportionate measures to ensure that audiovisual media services are not, without the explicit consent of the media service providers concerned, overlaid for commercial purposes or modified.[44] This will lead or has already led[45] to provisions for "content intermediaries" at national level, and it is to be expected that there will be a reliance on instruments of self- and co-regulation as foreseen in Art. 4a AVMSD.

Concerning the supervision of the sector, in view of the division of competences between EU and Member States, it is left to the latter to decide on the structures and allocate the powers to a competent body. This allows the Member States to choose the appropriate instruments according to their legal traditions and established structures and to adopt, in particular, the form of their competent independent regulatory bodies in order to be able to carry out their work in implementing the AVMSD impartially and transparently. However, with the 2018 revision of the Directive a number of more detailed requirements about supervision and cooperation between competent bodies in the Member States are established. The expectations towards an independent regulatory authority or body are formulated[46] as well as the procedures for cooperation between individual regulators and

44 Cf. on Art. 7b, for example, *Cole*, Die Neuregelung des Artikel 7b Richtlinie 2010/13/EU (AVMD-RL).

45 Cf. on this for example the new provisions of the German Interstate Treaty on the Media (in particular §§ 80 and 84). An (unofficial) English translation of these provisions – then based on the Technical Regulation Information System (TRIS) notification of the draft version of the Treaty, which for the relevant provisions in §§ 80 and 84 is identical to the final version – is available at https://ec.europa.eu/growth/tools-databases/tris/de/search/?trisaction=search.detail&year=2020&num=26.

46 See the newly formulated Art. 30 and the accompanying Recital 94. On the previous situation when the existence of such regulatory authorities was implicitly ex-

within the network of all the main national regulators for the oversight of audiovisual media services. The pre-existing European Regulatory Group for Audiovisual Media (ERGA) is now formally established by the AVMSD and tasked with providing technical expertise, giving its opinion to the Commission and facilitating cooperation among the authorities or bodies and between them and the Commission.[47]

Although copyright law is not exclusively oriented to media content, it is obviously highly relevant for any type of protected content disseminated online. The relevant EU Directives and Regulations, especially the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive)[48] and the Directive on the enforcement of intellectual property rights (Enforcement Directive)[49], have been of significant relevance to the online sector since their adoption in 2001 and 2004 because of the prevalence of cross-border dissemination of works protected by intellectual property law. The focus is on the question of the unauthorised public availability of protected works and the responsibility of intermediary services for such situations. A major change in the application of copyright rules in the online sector will come with the DSMD which is currently being implemented by Member States. The deadline for transposition into national law is 7 June 2021. The DSMD defines a new category of "online content-sharing service provider" (OCSSP) as platforms on which users can post large amounts of content that is made publicly available, and the main purpose of which must be to store and publish content uploaded by users. For these providers, a completely

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pected without specific requirements being set, see for example ERGA's statement on the independence of NRAs in the audiovisual sector, ERGA(2014)03, October 2014, available at https://ec.europa.eu/digital-single-market/en/avmsd-audiovisual-regulators, and ERGA, Report on the independence of NRAs. Cf. also *Cole et al.*, AVMS-RADAR, p. 40 et seq.

47 See Art. 30b and the accompanying Recitals 56–58; for further details also the ERGA Statement of Purpose, http://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-02_Statement-of-Purpose-adopted.pdf, and for details about the functioning of the Group the Rules of Procedure, last amended on 10.12.2019, http://erga-online.eu/wp-content/uploads/2020/04/ERGA-Rules-of-Procedure-10-12-2019-ver-1.pdf.

48 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19.

49 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p. 45–86.

new set of obligations will impose a significantly higher level of accountability while at the same time installing a deviation from the liability privilege laid down in Art. 14 ECD. Based on the premise that the platform provider of the new category as described above must generally license content uploaded by users, the providers can only escape direct liability for illegal uploads under certain criteria: according to Art. 17 DSMD they must have made sufficient efforts ("all efforts") to obtain authorisation from rights holders, they must have made every effort to ensure that legally protected content is as inaccessible as possible ("in accordance with high industry standards of professional diligence") and they must, as previously under Art. 14 ECD, remove content expeditiously after becoming aware of it and prevent similar infringements of rights in respect of the work in the future (notice and takedown as well as stay-down measures).[50] With this new provision special rules for a certain category of illegal content online for certain types of ISS are introduced, clearly adjusting the setting as it existed under the ECD.

A different type of illegal content is addressed by the Proposal for a TERREG. After lengthy negotiations in the legislative procedures, an agreement was reached in the trilogue in December 2020.[51] The TERREG aims to improve the effectiveness of the current measures for the detection, identification and removal of terrorist content on online platforms. It addresses hosting service providers which offer their services within the Union, regardless of their place of establishment or their size. A number of obligations to prevent the misuse of their services for the dissemination of terrorist content are to be introduced. These include, inter alia, the introduction of a removal order which can be issued as an administrative or judicial decision by a competent authority in a Member State, obliging the provider to remove the content or disable access to it within one hour. Furthermore, the Regulation requires hosting service providers, where appropriate, to take proactive measures proportionate to the level of risk and

50 Cf. on the fundamental rights dimension *Geiger/Jütte*, Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, with extensive references to studies concerning the DSMD and national transposition proposals,

51 Cf. the press release of the EU Commission of 10.12.2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2372. In the meanwhile the LIBE Committee approved the text provisionally on 11.1.2021 (https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/0331(COD)) and forwarded an according note to the Council (27.1.2021), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_5634_2021_INIT&qid=1612692237149&from=EN.

to remove terrorist material from their services, including by deploying automated detection tools. The rules are accompanied by the obligation to establish complaint mechanisms in order to ensure the protection of the freedom of expression, as well as general provisions on the establishment of competent authorities to act against terrorist content and the cross-border cooperation between them.

The P2B-Regulation creates information and transparency obligations for online intermediation services and search engines that are relevant for the visibility of content and products. The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities. Core elements of the Regulation are, in particular, the obligation to set up an internal system for handling complaints from commercial users and information and transparency obligations including the disclosure of the main determining parameters for the ranking of an online intermediation service and the reasons for the relative weighting of these parameters. In addition, it must be made clear which data collected by the platform may also be used by the participating companies and which data will remain reserved for exclusive use by the provider of the platform. These transparency obligations do not only have significance for the online sector in general but can also be especially relevant for the visibility and findability of media content against the backdrop of the protection of media or information pluralism. The Commission has the power to issue guidelines about the ranking transparency requirements and has announced to "provide sector specific guidance, if and where appropriate".[52]

Data protection law also plays a major role in the context of regulating digital services[53] and in particular concerning online content dissemination. Not only is data and its exploitation for profit (e.g. via personalised advertising) the basis of the business models of a number of online platforms, but (personal) data often also determines, via algorithmic systems,

52 Cf. Targeted online survey on the ranking transparency guidelines in the framework of the EU regulation on platform-to-business relations, https://ec.europa.eu/digital-single-market/en/news/targeted-online-survey-ranking-transparency-guidelines-framework-eu-regulation-platform.

53 The European Parliament considers regulations regarding the use of personal data by platforms to be of particular importance with regard to the Digital Services Act. Cf. Report with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market (2020/2018(INL)).

to whom which content is displayed, recommended and presented. It can also gain importance in the context of law enforcement when it comes to information obligations of platform providers, which require the existence of data and the lawfulness of its disclosure.[54] The main legal bases are provided by the General Data Protection Regulation (GDPR)[55], the Law Enforcement Directive[56] and the Directive on privacy and electronic communications (ePrivacy Directive)[57]. The latter plays a decisive role in the area of electronic communications, i.e. in particular with regard to the storage of data on user terminals ("cookies" and the tracking of users' behaviour) and advertising by means of electronic communications. The data protection framework overall contains provisions on when the processing of personal data is permitted and for what purposes; it regulates the conditions for its transfer to third parties and defines rights for data subjects. The GDPR – and the same would apply if a reform of the ePrivacy Directive takes place along the lines of the Proposal for a Regulation by the Com-

54 The original efforts to harmonise retention of communications data in the Directive 2006/24/EC were annulled by the CJEU, C-293/12, *Digital Rights Ireland*. The e-Privacy Directive of 2002, as last amended in 2009, is supposed to be replaced by an e-Privacy Regulation (Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC, COM/2017/010 final – 2017/03 (COD)). In February 2021, a final agreement has been found among Member States in the Council (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_6087_2021_INIT&from=EN) so that negotiations in the trialogue can now take place. Relevant in this context is also the Interim Regulation on the processing of personal and other data for the purpose of combatting child sexual abuse (COM(2020) 568 final).

55 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.

56 The Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties (OJ L 119, 4.5.2016, p. 89–131) can also play a role as regards law enforcement due to its rules to the exchange of personal data by national police and criminal justice authorities.

57 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002 p. 37–47, as amended by Directive 2009/136/EU.

mission[58] – is based on the market location principle, pursues a strict harmonisation approach[59] and contains specific rules for the design of supervision with the establishment of a differentiated system of cooperation, including the possibility of joint decision-taking in cross-border situations.

In addition, there are instruments that deliberately leave to the Member States room for manoeuvre and the possibility of exceptions for the pursuit of media and cultural policy objectives at the national level, which enable supplementary rules concerning content dissemination.

This secondary law framework is supplemented by a series of measures encouraging self-regulation in EU coordination and support measures. Besides several recommendations in the field of the protection of minors and human dignity[60] there are measures in the area of tackling illegal content online. The latter include the Code of conduct on countering illegal hate speech online[61] and the Commission's Communication on Tackling Illegal Content Online[62] as well as the Recommendation on Tackling Illegal Content Online[63]. Relevant are also the measures addressing online disinformation, resulting mainly in the Code of Practice to address the spread

58 Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM/2017/010 final – 2017/03 (COD), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0010.

59 Nevertheless, even within the framework of this strict harmonisation, there are numerous opening clauses and room for manoeuvre for the Member States. These include, in particular, exceptions in the area of the so-called "media privilege" in Art. 85 GDPR, according to which the Member States are required to adopt rules for data processing for journalistic purposes.

60 See for a more detailed overview as well *Lievens*, Protecting Children in the Digital Era: The Use of Alternative Regulatory Instruments, p. 112 et seq.

61 Available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/countering-illegal-hate-speech-online_en or http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf.

62 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms, COM/2017/0555 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0555.

63 Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C/2018/1177, available at https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32018H0334.

of online disinformation and fake news[64]. These measures lay down a set of guidelines and principles for online platforms aiming to facilitate and intensify the implementation of good practices for preventing, detecting, removing and disabling access to illegal content or online disinformation. Core elements in both fields are transparency and reporting rules as well as cooperation provisions. However, coordination and support measures are legally non-binding, and, regarding the codes of conduct, which the signatories voluntarily committed to, there are no enforcement mechanisms or sanctions so far besides the publication of the assessment by the Commission on compliance and progress of the rules.

64 EU Code of Practice on Disinformation, available at https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation. Further, non-content-specific measures encouraging self-regulation include: the Memorandum of Understanding on online advertising and intellectual property rights, available at https://ec.europa.eu/docsroom/documents/30226; the Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet, available at http://ec.europa.eu/DocsRoom/documents/18023/attachments/1/translations/; the EU Product Safety Pledge, available at https://ec.europa.eu/info/sites/info/files/voluntary_commitment_document_4signatures3-web.pdf; the EU Internet Forum, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6243.