

Judit Bayer

Digital Media Regulation within the European Union

A Framework for a New Media Order



Nomos

Judit Bayer

Digital Media Regulation within the European Union

A Framework for a New Media Order



Nomos

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN 978-3-7560-1617-4 (Print)
978-3-7489-4535-2 (ePDF)

1st Edition 2024

© Judit Bayer

Published by

Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN (Print): 978-3-7560-1617-4

ISBN (ePDF): 978-3-7489-4535-2

DOI: <https://doi.org/10.5771/9783748945352>



Onlineversion
Nomos eLibrary



This work is licensed under a Creative Commons Attribution
– Non Commercial – No Derivations 4.0 International License.

To my family

Foreword

In this era of swift digital transformation, the interplay among media, democracy, and law is increasingly vital. This book, informed by extensive research, delves into the complexities of digital media regulation within the European Union – a region where legal frameworks adapt constantly to new challenges. Most recently, this has been manifested as a comprehensive legislative package finalised between 2020–2024. The book examines the changes induced by these new laws, and how they have laid out the grounds for a new digital information order. With regard to the interdisciplinary nature of the subject matter, the book intends to remain accessible also for non-legal audiences, and starts each chapter with a brief introduction. This is then followed by a more detailed discussion, analysis and assessment of the legal regulations from the perspective of the public discourse.

Part I, "The Media Order," explores the current democratic crisis and the critical role of the public sphere. It probes the essence of public discourse and its rationality, laying groundwork for understanding media freedom and pluralism in the digital age. This section not only defines media freedom from a new perspective, but also examines the effects of algorithmic content ranking, platform ownership, and journalism's role in shaping public opinion.

Part II, "European Initiatives for a New Democratic Media Order," shifts focus to the specific European policies. It examines the evolution of media pluralism policies, media regulation, and the Media Freedom Act's complexities. This segment reflects the interaction between audience rights, media provider responsibilities, and the European Union's role in promoting a democratic media environment. The discussion portrays the developing European media policy as a staggered process that was initiated several decades ago. It progressed through debates, political compromises, and the active formative role of the private media sector, as they shaped jurisprudence through their legal actions and complaints.

Part III addresses new regulatory frameworks for online platforms, focusing on the Digital Services Act, the Digital Markets Act, and the draft AI Act. It explores the significant impact of online platforms and AI on public discourse, including the ramifications of integrating ChatGPT into journalism. These examples emphasize the need for nuanced comprehension

of the digital media ecosystem. The reference to practical developments, notably Elon Musk's acquisition of Twitter, highlights the evolving power structures in the digital sphere. This part adeptly captures the intricate interplay between corporate ownership, individual influence, and their broader implications for the democratization of public discourse. This section is particularly pertinent to the new digital public discourse, due to these regulations' profound influence on public communication and digital platform function. The author's analysis is both informative and approachable, appealing to a broad audience, including those not versed in legal terminology.

The author, a noted expert in European media law and policy, offers deep insights into the complex interplay between digital platforms, information dissemination, market dynamics, and democratic principles. Affiliation with the University of Münster's Institute for Information, Telecommunication, and Media Law has enriched this work. The vibrant academic setting and collaboration with esteemed colleagues have resulted in a book that is both intellectually engaging and informative.

In summary, this book significantly contributes to scholarship in media law and the field of digital information policy. Through a comprehensive analysis of the European Union's media regulation initiatives, it sheds light on the complexities of contemporary democratic discourse, and clarifies their implications for future democratic discourse. For scholars, policymakers, and anyone interested in the intersection of law, media, and technology, this book is an essential resource.

Professor Bernd Holznagel,

Münster, 2024

Table of Content

Preface by the author and acknowledgements	15
List of abbreviations	19
Part one: The media order	21
1 Introduction	21
1.1 The crisis of democracy	23
1.2 The role of public sphere in democracies	27
1.2.1 How public is the public discourse?	30
1.2.2 How rational is the "rational discourse"? Rational versus ritual models of communication	33
2 Media freedom and pluralism in the platform age	39
2.1 Defining media freedom	39
2.1.1 Elements of media freedom	39
2.1.2 Who are the right holders of media freedom?	42
2.1.3 The content of media freedom	45
2.1.4 Platforms in the context of media freedom	48
2.2 The effects of algorithmic content ranking	52
2.3 The value added by journalists and platforms' attempt for substituting them	56
2.4 Dimensions of Media Pluralism	58
2.4.1 Institutional independence	61
2.4.2 Resilience of market and society	63
2.4.3 Structural diversity	64
3 The state's obligation in building a democratic media order	67
3.1 Microscopical rights and Big Data	67
3.2 The right to receive information	71

Table of Content

3.3	User autonomy and nudges	74
3.4	The state's obligation to protect pluralism	77
3.5	Why the EU?	82
Part two:	European initiatives to develop a new democratic media order	87
4	Initiatives in Media Pluralism	87
4.1	The development of European policy in regard of media pluralism	87
4.1.1	The tumultuous story of the media landscape in the new millennium	90
4.1.2	Competence issues and new impetus to the development	93
4.1.3	Understanding the obstacles of the process	96
4.2	European efforts to regulate the broadcast media	98
4.2.1	Opening the box of Pandora: the transformation of broadcasting's interpretation in community law	98
4.2.2	TWF Directive: the Trojan Horse	100
4.2.3	A new era for public service broadcasting	101
4.2.4	The AVMSD today	104
5	The Media Freedom Act	107
5.1	Background	107
5.3	The scope of EMFA	117
5.4	Rights and duties	119
5.4.1	Rights of the audience	119
5.4.2	The rights of media service providers	121
5.5	Safeguards for public service media	124
5.6	Transparency of media service providers	126
5.6.1	How useful is transparency?	127
5.6.2	The conundrum of the ownership database	129
5.7	The Board	133
5.7.1	NRA Independence	134
5.7.2	The Board and the Commission	139

5.8	EMFA's approach to the "Russia Today" problem	141
5.8.1	The background of the ban	142
5.8.2	Treatment of the problem by EMFA	146
5.9	Media concentration	147
5.9.1	New aspects to assess in media concentration	147
5.9.2	The procedural rules on assessment of media concentration	150
5.10	State advertising	151
5.11	Media content and online platforms	155
5.12	Monitoring and evaluation	161
5.12.1	From mutual distrust to mutual trust	162
5.12.2	Possibilities: proposals for amendment	163
5.13	Epilogue	166
	Part three: A regulatory framework for online platforms	167
6	The Digital Services Act and the Codes of Practices	167
6.1	Prologue to DSA: the legacy of the E-Commerce Directive	167
6.2	Aims, scope and structure of DSA: more than just services	172
6.2.1	Scope	174
6.2.1.1	Quo Vadis, Platform?	174
6.2.1.2	Who else are not platforms?	176
6.2.2	Territorial scope	177
6.2.3	The structure of DSA	179
6.3	Regulating illegal content: transparency and fair procedure. A detailed scrutiny.	181
6.3.1	Liability and due diligence	181
6.3.2	Immunity, as a constraint on liberty	183
6.3.3	The liability framework	185
6.3.4	Due diligence	188
6.3.4.1	Platforms' terms of services	191
6.3.4.2	Transparency reporting obligations	192
6.3.4.3	Transparency reporting for online platforms	194
6.3.4.4	Further obligations for very large online platforms	194

6.3.4.5 Scrutiny of the shared data	196
6.3.5 Rights of the users in the notice-and-takedown procedure	197
6.4 Specific obligations for online platforms	199
6.4.1 Alternative dispute resolution	200
6.4.2 Trusted flaggers	203
6.4.3 Measures related to content governance	205
6.5 Very large online platforms' due diligence obligations	207
6.5.1 The system of risk-management and co-regulation	208
6.5.2 The risk assessment in DSA	210
6.6 Self- and co-regulation as part of the legal regime	213
6.6.1 The hidden traps of auditing	215
6.6.2 The incentives, execution and objectives of the codes under DSA	220
6.6.3 The soft power of the codes	221
6.6.4 The Strengthened Code of Practice on Disinformation	222
6.6.5 The Code's content: Reordering the information landscape	224
6.6.6 Interim summary on DSA and the Code of Practice on Disinformation	230
6.7 The Code of Conduct tackling illegal hate speech	231
6.8 Crisis protocols	233
6.9 Summary on the DSA and its regulatory structure	234
6.10 The relationship of AVMSD, ECD and DSA	236
7 Regulation of the Digital Market	239
7.1 The regulatory philosophy of the Digital Markets Act	239
7.2 Comparing social and business platforms	241
7.3 Quo Vadis, Platforms? #2	244
7.4 Obligations of gatekeepers	247
7.4.1 A less unfair use of data	247
7.4.2 Prohibition of paralysing contractual conditions	252
7.4.3 Advertising transparency	253

7.5	Prohibition of self-preferencing	254
7.5.1	No expropriation of personal data	254
7.5.2	Equal treatment	256
7.5.3	Non-discrimination and fairness in ranking?	258
7.6	The pros and cons of interoperability	260
7.7	Enforcement of DMA	263
7.8	The impact of DMA – summary	265
8	Political advertising	269
8.1	Emerging frontiers in political advertising	269
8.2	The pitfalls of personalized targeting	271
8.3	The protection of political speech	273
8.4	Why was self-regulation insufficient?	276
8.5	The Regulation on political advertising (RPA)	278
8.5.1	The concept of RPA	278
8.5.2	The scope of the RPA	280
8.5.2.1	The definition of a political actor	281
8.5.2.2	The second condition: the impact of the message	282
8.5.2.3	The payment element	283
8.5.2.4	Explanatory features	285
8.5.3	Non-discrimination and third countries	285
8.5.4	Responsibilities of the actors	286
8.5.5	Political advertising by VLOPs	287
8.5.6	Rules on targeting	289
8.5.7	Enforcement of RPA	291
8.6	The interplay between the DSA and the Strengthened Code of Practice against Disinformation	292
8.7	Interim conclusion on RPA	293
9	The wider technological environment: AI Act	295
9.1	A literally disruptive technology	296
9.1.1	The scope and subject matter of the AI Act	298
9.1.2	The regulatory model	301

Table of Content

9.1.3	Prohibited AI practices	302
9.1.3.1	Manipulation	302
9.1.3.2	Social scoring	304
9.1.3.3	Biometric identification	305
9.1	High-risk AI systems	307
9.1.1	The scope of high-risk AI systems	307
9.1.2	Updating the list of high-risk systems	309
9.1.3	Requirements for high-risk AI systems	313
9.1.4	Obligations of various actors within the value chain	316
9.1.5	Taking responsibility for algorithmic systems	317
9.2	General purpose AI models (GPAI)	318
9.2.1	Media uses of AI	319
9.2.1.1	Authorship and copyright: whose content?	321
9.2.1.2	Liability for AI-generated content	323
9.2.1.3	Liability for AI-generated content in the media	324
9.2.2	Deep fakes	327
9.2.3	Legal concerns related to training data of GPAI	329
9.3	The impact of AI and conclusion	330
10	Bird's Eye View: Concluding Thoughts	333
10.1.	The new transformation of the public discourse	333
10.2.	The stake of the game: a historical shift	334
10.3.	The role of media and the might of platforms	336
10.1.	Trust in media, trust in politics	338
10.2.	Constructing a value-centred European order	339
11	References	343