

B. Challenges of a Cross-Border Media Environment in the EU

I. Current Risks and Rising Phenomena

Media consumption is an integral part of the everyday life of citizens, no matter in what form, no matter via which distribution channel and no matter for what purpose – entertainment, information or other – it takes place. Media consumption defined in this way is essential for the political decision-making process and thus a foundational element of democracy. While the scope of consumption has increased over the past decades, which is due not only to societal developments but also to technologisation and globalisation of the media landscape creating new access opportunities and new actors, the associated risks have likewise risen. And in regard to the risks, too, their increasing relevance results from factors that come with technologisation and globalisation: Formerly passive consumers are becoming active participants in the media distribution chain, whether by sharing content or even creating it; new players and media formats continue to enter the market; the possibilities of the online environment make access and distribution of content easier, cheaper and more widely available, with national borders hardly playing a role any more.¹² This does not mean that many of the current risks did not already exist before, but they were certainly less widespread, had less impact on a broader scale and therefore were less noticeable.¹³

The different phenomena that are contributing to the risks are diverse – and numerous – and could each be analysed in detailed studies. Their common core is that they concern the dissemination of illegal and harmful content; however, it is not very relevant here to distinguish between these two terms from a societal perspective and to describe the problems they created. Specifically, this involves content that is either prohibited in general or for certain ways of dissemination. Examples include content that is harmful for children and young persons but is made freely accessible to

12 *de Strel/Husovec*, The e-commerce Directive as the cornerstone of the Internal Market.

13 See specifically on issues of media pluralism *CMPF/CiTIP/IViR/ SMIT*, Study on media plurality and diversity online; cf. for risks and harms online *Woods/Perrin*, Online harm reduction – a statutory duty of care and regulator, p. 35.

that age group, especially online, without adequate protection measures. Phenomena span from hate, discrimination, violence and incitement to such behaviour; terrorist content and radicalisation; disinformation, targeted disinformation campaigns and propaganda; content violating human dignity and child sexual abuse material; to content that is specifically harmful only to certain groups, such as pornography or other content that can impair the development of minors.

Recent developments, especially crimes with a terrorist background, the Corona pandemic – associated not only with an increase in disinformation on the pandemic and vaccinations but also with an increase in online crime, such as COVID-19-related scams and exchange of child sexual abuse material¹⁴ – and the Russian war of aggression against Ukraine, have once again underlined, and in some cases even intensified, the danger that such risks create.

Audiovisual content, regardless of who creates it, distributes it and via which distribution channel it reaches the consumer, has a special impact due to various factors. Audiovisual formats are more immersive for the viewer, which is related to cognitive processes.¹⁵ They are ascribed a high degree of credibility – people believe more in what they can see and hear, and a certain standard of production evokes trust, regardless of whether both aspects are still justified against the background of the current state of technology which has facilitated production also for lay persons. Audiovisual formats imprint more deeply on the consciousness – even when they are viewed unconsciously. Consequently, audiovisual content is attributed a high degree of relevance for opinion-forming, which has been acknowledged by courts adjudicating about the relevance of content in the context of freedom of expression.¹⁶ Finally, the multiplication of ‘playout channels’ for such audiovisual content results in recipients being addressed more intensively.

14 *Europol*, Pandemic profiteering: how criminals exploit the COVID-19 crisis, March 2020, see: <https://www.europol.europa.eu/publications-documents/pandemic-profiteering-how-criminals-exploit-covid-19-crisis>. On the other hand, the pandemic has weakened the traditional audiovisual sector (cf. *Cabrera Blázquez et al.*, The European audiovisual industry in the time of COVID-19; *Carlini/Bleyer-Simon*, Media Economy in the Pandemic: A European Perspective), which in its function as public watchdog serves usually as counterbalance to risks such as disinformation.

15 See Flash Eurobarometer 469, Final Report, 2018, pp. 23 et seq.

16 ECtHR, no. 17207/90, *Informationsverein Lentia a.o./Austria*, para. 38.

II. Fundamental Values of the European Union and Allocation of Powers

The way these risks are addressed by the regulatory framework applicable to the dissemination of audiovisual content depends on whether and to what extent they are associated with an impairment of – possibly even constitutionally – protected interests of individuals and the underlying values of states. This question may differ in detail depending on different (constitutional) traditions, and especially in a global dimension it might lead to a different understanding of the required level of protection of individuals and the society. When it comes to the Member States of the EU, however, it is necessary to recall that, irrespective of a possible diversity in approaches in the different Member States, the EU itself is based on a uniform basic understanding of certain rights and values, which are the yardstick for responding to risks in the Single Market. As has been extensively demonstrated in previous studies,¹⁷ the common constitutional traditions of the Member States and the enshrinement of these values in the EU Treaties form a catalogue of principles and values demanding to be safeguarded.

The fundamental rights contained in the Charter of Fundamental Rights of the EU (CFR)¹⁸, in the European Convention on Human Rights of the Council of Europe (ECHR)¹⁹ and in the provisions of national constitutional law of the Member States provide the legal framework that is binding for both the EU and the individual Member States. This impacts both the design of the rules for and the protection of the media landscape. In light of the risk phenomena described above, human dignity as the paramount legal asset in the EU, the protection of minors, freedom of expression and information, media freedom and pluralism, and the privacy of individuals are important elements of this framework. Illegal and harmful content, for example of a terrorist, radicalising nature or such as being capable of impairing development, affects these constitutionally protected positions of Union citizens in different ways and intensities. Although the actors in

17 Cole/Etteldorf/Ullrich, Cross-Border Dissemination of Online Content, pp. 53 et seq.; Cole/Etteldorf/Ullrich, Updating the Rules for Online Content Dissemination, pp. 81 et seq.

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

19 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.

the context of illegal and harmful content dissemination are regularly not the addressees of the fundamental rights protection framework, because the duty to protect fundamental rights directly only applies to state actors, the fundamental rights are still of highest relevance: fundamental rights give rise to responsibilities of public actors to serve as guarantor of the rights. In the context of content dissemination this applies predominantly to the Member States,²⁰ which have duties to ensure a media environment in which recipients can engage in the consumption of content while their fundamental rights are respected and pluralist information sources are available. The extent to which active duties to implement measures in the sense of a duty to regulate arise from fundamental rights depends on the intensity of the impairment and the actual fundamental right that is concerned by the infringement. This duty to protect extends not only to the state as such – and thereby to the legislative power – but also to regulatory authorities, which in the media sector must be independent of the state to guarantee state-independent oversight of content dissemination. These authorities are nonetheless regularly bound by fundamental rights under Union and national law and are obliged to act in the interests of recipients in order to contribute to the goal for safeguarding their fundamental rights position.²¹

It should be emphasised that neither the scope of fundamental rights nor the interests of recipients call for a differentiation according to the type of risk, its format, origin or originator. Rather, the issue is about the objective of protection, i.e. the existence of an overall safe, free and diverse media landscape or audiovisual content environment, which shall be guaranteed by the Member States, irrespective of the means of dissemination or the provider disseminating. Of course, these interests need to be reconciled with possibly conflicting interests that are likewise protected by fundamental rights. These include the freedom of information to access content, the freedom of opinion and the freedom of the media to disseminate content. In addition, other rights, such as freedom of property and freedom of profession of the content creators and distributors, can be affected by

20 Cole/Ukrow/Etteldorf, On the Allocation of Competences between the European Union and its Member States in the Media Sector, Chapter C.

21 Specifically for the online area see Petkova/Ojanen (eds.), Fundamental Rights Protection Online; see also Lehofer, EuG: Keine Nichtigkeitsklärung der Sanktionen gegen RT France; Lehofer, Überwachen, Blocken, Delisten – Zur Reichweite der EU-Sanktionen gegen RT und Sputnik.

the regulatory framework. When it comes to fundamental rights balancing, in the proportionality assessment the category of content does become relevant in light of the measures allowed to respond to it. Certain type of content enjoys little to no protection against limiting measures – likely this is content that violates human dignity, for example²² – or only a limited protection, which means it is more easy to justify measures to respond to the risks created²³ – likely this would include, in view of potential societal damage, disinformation campaigns, for example²⁴ – or which is only protected against measures in certain contexts, thereby being confronted with a graduated approach – likely this can relate to pornographic content which allows for different reaction measures depending on which age group is to be protected, for example.²⁵

Beyond fundamental rights there are related and accompanying fundamental principles and values of the EU and the Member States that need to be defended against violations. According to Art. 2 TEU, the Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. The Union's aim is to promote peace, its values and the well-being of its peoples (Art. 3(1) TEU), and it shall combat social exclusion and discrimination and promote social justice and protection of the rights of the child (Art. 3(3) subpara. 1 TEU). The role of the EU in that regard relates to both defending the foundational values against external influences and to guarantee their validity within the EU. For that reason, the values are not merely commitments in a preamble

22 Cf. on this, for example, CJEU, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, ECLI:EU:C:2004:614.

23 Cf. on this in the context of the ban of RT programmes in Europe *Ó Fathaigh/Voorhoof*, Case Law, EU: RT France v. Council: General Court finds ban on Russia Today not a violation of right to freedom of expression.

24 McGonagle, “Fake news”: False fears or real concerns?, p. 208; Colomina *et al.*, The impact of disinformation on democratic processes and human rights in the world; Sardo, Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights.

25 See on this Cappello (ed.), The protection of minors in a converged media environment, pp. 53 et seq.

but have a direct impact in that their (assumed) violation can lead to infringement proceedings against Member States.²⁶

Although this protective task gives the EU an active role, at the same time its activity range is limited. Art. 3(6) TEU demands that the Union pursues its objectives by appropriate means but within the competences which are conferred upon it by the Treaties. The existing competence framework allocates powers along the enumeration principle; therefore the conferral of powers is limited. A uniform framework of fundamental rights and values at EU level is not to be understood as a possible basis for a legislative competence of the EU to act in every protective way possible. Although the EU has comprehensive competences in the area of regulating the economy and especially in the context of the single market and thus also with regard to the regulation of media as economic operators, there are also clear limitations relevant in this context: the EU must respect the cultural sovereignty of the Member States and is therefore limited, for example, when it comes to regulating media and content dissemination in their dimension as cultural assets, which holds especially true with regard to ensuring media pluralism, as has been shown extensively in a previous study.²⁷ Consequently, in the past, Member States were left with a broad margin of manoeuvre to achieve their policy objectives in the area of media, which are shaped in particular by their respective constitutional frameworks. This approach was even confirmed in the context of issues concerning a transnational dimension in the single market for media content by the Court of Justice of the European Union (CJEU). In a recent case on the German regional advertising ban for nation-wide broadcasting, the Court highlighted again with reference to its long-standing jurisprudence that Member States should be accorded a certain, depending on context even significant, margin of appreciation with regard to the implementation of the objective of respect for media pluralism. In effect this means that the fact of less strict rules being imposed by one Member State in comparison to another Member

26 See in detail *Cole/Etteldorf/Ullrich*, Cross-Border Dissemination of Online Content, pp. 83 et seq.; for an overview of the handling of the mechanism of Art. 7 TEU see *Diaz Crego/Manko/van Ballegooij*, Protecting EU common values within the Member States.

27 See extensively *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector. Concerning the most recent proposal for a legislative act impacting the media regulation cf. *Ory, Medienfreiheit – Der Entwurf eines European Media Freedom Act*, p. 23 et seq.

III. Regulatory Approaches – Existing and Planned

State does not make the latter's rules disproportionate.²⁸ In addition, the margin of appreciation extends to determining whether there is a pressing social need which may justify a restriction on the freedom of expression and to concerning the exercise of balancing conflicting interests.²⁹

In light of the increasing relevance of the cross-border dimension of content dissemination and reception, the far-reaching powers of the EU to regulate the single market, in which the media and other services using audiovisual content play an important role as economic service, have led to a broad extension of legislative activities by the EU in the more recent past. The tension resulting from the two-fold nature of content as an economic and cultural matter persists, especially since the EU is bound to respect the diversity of its Member States and, above all, their national identities which often are characterised by the way foundational elements of democracy are approached, such as the regulatory framework for the media as opinion building factor. Accordingly, EU single market regulation may not supersede national cultural policy, and, in order to create legal clarity, a distinct demarcation, and at the same time coherence, between the different levels and applicable rules is particularly important.

III. Regulatory Approaches – Existing and Planned

Against the background of the risk phenomena described above and their consideration in light of fundamental rights and the distribution of powers between Member States and the EU, in the following an overview of the relevant legal framework relevant for the dissemination of (audiovisual) content is provided. The legal framework below the level of fundamental values and rights is characterised by the fact that, in contrast to the interests and (legitimate) expectations of recipients protected by fundamental rights, a distinction according to the type of content, its form, creator, distributor and distribution channel is very important here in addition to the relevance for the balancing between fundamental rights protection and appropriate limiting measures. This applies both to the legislative level, which is composed of a network of horizontal and sectoral legal acts at EU and national level that address different types of illegal content or

²⁸ Case C-555/19, *Fussl Modestraße Mayr GmbH v SevenOne Media GmbH, ProSiebenSat.1 TV Deutschland GmbH, ProSiebenSat.1 Media SE*, ECLI:EU:C:2021:89, para. 75.

²⁹ *Ibid.*, para. 91, 93.

conduct, and, as a consequence, to the level of actual law enforcement by regulatory authorities in application of these respective rules.³⁰ In addition, this framework is currently evolving, which must be taken into account when considering the future regulation of cross-border dissemination of audiovisual content.

1. Existing Regulatory Approaches

The ‘heart’ of audiovisual content regulation at EU level lies in the AVMSD. This Directive achieves a minimum harmonisation for the rules concerning the sector in order to ensure free distribution and reception of audiovisual-content-based services across borders while maintaining significant leeway for Member States. The AVMSD already offers solutions to some of the risks mentioned, in particular the protection of minors and the general public from certain content as well as in the field of audiovisual commercial communication.³¹ It addresses the main audiovisual players, both the television and video-on-demand (VoD) providers acting under editorial responsibility and, since the last adaptation of the Directive in 2018, the video-sharing platform (VSP) providers organising the audiovisual content distributed through their services. With that, the Directive covers different means of disseminating audiovisual content, with some of its provisions only referring to certain types of dissemination.

Due to legislative initiatives in recent years introduced as different elements of the proclaimed ‘digital decade’, in which the European Commission is (still) striving to make Europe “fit” for the digital age, the AVMSD is, however, no longer the only relevant and specific regulatory instrument governing audiovisual content. In particular, new elements of a more comprehensive platform regulation are relevant either because the players already addressed by the AVMSD at least partly fall in addition under the different types of (new) definitions of platforms themselves or because these platforms as intermediaries are of considerable importance for the distribution and value chain of audiovisual content. In addition, the provisions addressing these new market players apply to providers competing for audience and advertising market shares with the service providers covered by the AVMSD.

³⁰ See for a detailed analysis of the regulatory framework Cole/Etteldorf/Ullrich, Cross-border Dissemination of Online Content, pp. 53 et seq.

³¹ See in detail below C.II.

It is primarily the DSA, which recently entered into force and will become fully applicable from February 2024 (except for some provisions which are applicable before), that is of relevance with its graduated catalogue of obligations for online platforms.³² This graduated response foresees more extensive requirements for very large online platforms when it comes to tackling illegal content, advertising and the protection of minors in comparison to other intermediaries.³³ This Regulation is aimed at fully harmonising the rules applicable to intermediary services in the internal market with the objective of ensuring a safe, predictable and trusted online environment, addressing the dissemination of illegal content online and the societal risks that the dissemination of disinformation or other content may generate, while fundamental rights enshrined in the Charter are effectively protected in this online environment.³⁴

However, although the Regulation revolves around ‘illegal’ content by tying several obligations for intermediary services to this category, when it comes to defining what is illegal (and what not), the DSA does not contain any according substantive rules. Rather, illegal content is defined as ‘any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law’ (Art. 3 lit. (a) DSA). Recital 12 clarifies that this scope covers illegal content, products, services and activities and applies to content, irrespective of its form, that is either itself illegal (such as illegal hate speech or terrorist content and unlawful discriminatory content) or is rendered illegal in view of the fact that it relates to illegal activities. Examples include the sharing of images depicting child sexual abuse, the unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, the sale of products or the provision of services infringing consumer protection law, the non-authorised use of copyright protected material, the illegal offer of accommodation services or the illegal sale of live animals. In contrast, an eyewitness video of a potential crime should not be considered to constitute illegal content merely because it depicts an illegal act, insofar as recording or disseminating such a video to the public

³² Extensively *Ullrich*, Unlawful Content Online: Towards a New Regulatory Framework for Online Platforms.

³³ Cf. also *Lomba/Evas*, Digital services act. European added value assessment.

³⁴ Recital 9 DSA.

is not illegal under national or Union law. Thus, the DSA clearly requires a legal basis outside the DSA to qualify content as illegal, at least for its own regulatory scope and catalogue of obligations (e.g. transparency obligations or notice and action mechanisms), which are then connected to a detailed enforcement and cooperation system laid down in the Regulation.

This flexible approach to a definition is important and appropriate, especially in view of the fact that the DSA is a horizontal and cross-sectoral legal instrument with direct applicability in the Member States, which must maintain coherence with other legal acts and, above all, Member State legislative and regulatory competences. When it comes to the question of coherence, the definition issue for illegal content is not a problem at least in those cases where there is a harmonised and clear statement on illegality in the other piece of EU law or if there is a uniform understanding about illegality of the specific content in national law (for example in criminal law).³⁵ This is quite evident when the case concerns terrorist content, child abuse material, content that infringes copyright or the sharing of private images without the consent of the person concerned. Here, there is not only a uniform EU-wide determination of the illegality of such content but also additional specific rules that different distributors already have to observe or will have to observe in the near future in connection with obligations concerning those categories of content.

Although the Digital Markets Act (DMA), as the other part of the Digital Services Act Package, will have considerable relevance for the audiovisual sector, too, as it imposes obligations on gatekeepers concerning audiovisual content in a competitive context, from which media providers will potentially benefit in many respects, this Regulation is less relevant in relation to the dissemination of illegal content and enforcement issues.³⁶ The rule laid down in Art. 5(5) DMA may turn out to have increased relevance in the present context in the future in that it can impact visibility of content. According to this provision, gatekeepers shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself in comparison to similar services or products of a

³⁵ Cf. on the regulatory framework of the EU governing certain kinds of illegal content in the online sector *de Strel et al.*, Online Platforms' Moderation of Illegal Content Online; *de Strel/Husovec*, The e-commerce Directive as the cornerstone of the Internal Market; *Hoffmann/Gasparotti*, Liability for online content.

³⁶ *Cole*, Overview of the impact of the proposed EU Digital Services Act Package on broadcasting in Europe, pp. 22 et seq.; *Cole*, in: *Cappello* (ed.), Unravelling the Digital Services Act package, pp. 81 et seq.

third party. In addition, the gatekeeper has to apply transparent, fair and non-discriminatory conditions to such ranking. Since this rule extends, for example, to core platform services such as search engines or video-sharing platform services and also protects media content in this regard, it has an impact on the visibility of audiovisual content for the (potential) viewer, at least to a certain extent. However, the way the rule is stipulated, it neither favours certain content that has added social value nor does it exclude illegal content explicitly or regulate its distribution.

For terrorist content, Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online³⁷ contains various obligations for hosting services. This includes, in particular, accelerated response periods to (cross-border) deletion orders from competent authorities, technical and content-related measures and transparency obligations. The proposed Regulation laying down rules to prevent and combat child sexual abuse (CSAM Regulation)³⁸ in case of adoption would also provide for similar obligations for child abuse material. According to the Proposal, not only risk assessment obligations would be imposed on hosting services but also (active) risk mitigation obligations in relation to child abuse material which would be contained within their offerings. This goes as far as the possibility of imposing so-called detection orders with which hosting providers would be obliged to actively search and detect such content.

In addition to the fact that copyright law is already strongly harmonised across the Union especially in the online context, combined with an extensive jurisprudence of the CJEU, Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive)³⁹ – has introduced even more concrete and strict obligations for certain platform providers. According to Art. 17 DSM Directive, online content-sharing service providers shall be liable for copyright infringements by their users if they have not made best efforts to obtain authorisation of the respective right holder and to ensure unavailability of protected works in case they

³⁷ Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, OJ L 172, 17.5.2021, pp. 79–109.

³⁸ Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse, COM/2022/209 final.

³⁹ 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, OJ L 130, 17.5.2019, pp. 92–125.

did not obtain such authorisation and, in any event, acted expeditiously to remove copyright infringements on knowledge.

Finally, with the General Data Protection Regulation⁴⁰ there is an EU-wide uniform and detailed framework of rules on the processing of personal data and related rights and obligations, based on the fundamental right to privacy, which also extends to the dissemination of images and video material. The lack of a legal basis for data processing, which in the case of dissemination of images and videos of individuals regularly will have to be based on consent, leads to the illegality of the processing (in this case: the dissemination) and, as a result, to deletion obligations for those involved in the dissemination, although liability privileges must be observed in the case of intermediary services before notification.

However, the example of the GDPR also provides a good demonstration of potential application problems of the broad approach to “illegality” due to a lack of a specific definition in the DSA itself, which arise when there is either no EU-wide harmonisation or such harmonisation leaves extensive room for manoeuvre for the Member States. If the publication of images takes place in the context of news reporting, i.e. data processing for journalistic purposes, where a broad definition of this term is to be assumed, then the media privilege pursuant to Art. 85 GDPR is at stake. Without going into detail at this point,⁴¹ this provision requires specific rules in the Member States in relation to data processing for the journalistic work. As a result, very different structures both with regard to the scope of the permissibility of such processing for journalistic purposes and the extent of applicability of the rules of the GDPR and with regard to very different supervisory systems (for example, by media regulatory authorities, by self-regulatory bodies of the press, by internal bodies in the case of broadcasters etc.) have been put in place.⁴² But other diverse applications of GDPR rules can lead to a similar unclear situation even if the publication was clearly not done in the context of journalistic purposes: the GDPR contains an opening clause for Member States to provide by law for a

40 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, pp. 1–88.

41 See on this from a media-related perspective *Cappello* (ed.), *Journalism and media privilege*.

42 Cf. on this in detail *Cole/Etteldorf*, *The implementation of the GDPR into national law in light of coherence and consistency* (forthcoming), Chapter III.

lower age to give consent to data processing by information society services as the age limit foreseen in the GDPR, which in the Regulation is set at 13 years and the deviation allowed to be at most to 16 years.⁴³ This has led to very different rules across the EU as the majority of Member States (18) have used this opportunity to apply a different age range; in result the age of 16 years is relevant in Germany, Croatia, Hungary, Luxembourg, the Netherlands, Poland, Romania, Slovakia and, due to the relevant service providers establishment in that Member State importantly, Ireland, while in the other Member States it is 13 (Belgium, Denmark, Estonia, Finland, Latvia, Malta, Portugal, Sweden), 14 (Austria, Bulgaria, Cyprus, Spain, Italy, Lithuania) or 15 years (Czech Republic, Greece, France).⁴⁴

Similar observations can be drawn with regard to the AVMSD, which determines the “illegality” of certain content or the way of distribution of certain content, which is also relevant in the context of the DSA. While the prohibitions of terrorist content, of content inciting violence and discriminatory hatred or of certain audiovisual communications are relatively clear, the obligation to protect minors from content impairing their development is rather vague and has led to the maintenance of different systems and assessment standards in the Member States (see in detail below, C.II). In addition, the protection of minors in the media is also affected by the fact that content harmful to minors is often not illegal *per se* but only when it is made available to minors or unsuitable age groups. Due to the broad definition of the DSA, which also takes into account “the nature of distribution” when assessing illegality, content that is impairing to development should also fall under this category, but the concrete conditions depend on different national rules (as is also the case in the AVMSD), which is already difficult due to the lack of harmonised age limits and generally due to different traditions in the understanding of developmental impairment risks for development, which is certainly not uniform throughout the EU.⁴⁵ In addition, and supplementing secondary EU legislation, rules in Member States also address – differently – the

43 Article 8(1) GDPR. See on this also *Cole/Etteldorf*, The implementation of the GDPR into national law in light of coherence and consistency (forthcoming), Chapter IV, A.

44 See *TIPIK Legal*, Report on the implementation of specific provisions of Regulation (EU) 2016/679.

45 See extensively of current international standards and developments with regard to the protection of minors in the media *Ukrow/Cole/Etteldorf*, Stand und Entwicklung des internationalen Kinder- und Jugendmedienschutzes.

illegality of certain content, for example within the framework of national laws in broadcasting or media law or in criminal law.

Finally, there is content for which it is widely acknowledged that it is harmful, but the illegality of which is not (yet) laid down explicitly in a law, or at least not uniformly throughout all the EU Member States. This includes, for example, disinformation, which does not cross the threshold of incitement or propaganda, or mobbing, which does not cross the threshold of discriminatory hate speech or criminally relevant coercion/stalking. Here, only a few Member States have partial regulations, such as France on disinformation in the context of elections⁴⁶ or Italy in the context of cyberbullying⁴⁷. This does not mean that intermediary services, for example, cannot take measures against such content via their content policies – which they actually regularly do and which the DSA seeks to recognise.⁴⁸ But if it is not illegal content, the various obligations of the DSA and the enforcement regime are not applicable.⁴⁹

All these rules are not only relevant in the context of the DSA but also describe an essential part of the legal framework for the dissemination of audiovisual content overall. The legal framework is further supplemented by other instruments which, although they regularly do not entail any binding legal consequences for the dissemination of content, are nevertheless relevant for the regulatory regime. In this light certain initiatives on EU level can be mentioned, such as the EU Internet Forum against terrorist propaganda online, the Code of Conduct on countering illegal hate

46 LOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information, OJ France no. 0297, 23.12.2018. See on this *Etteldorf*, in: MMR-Aktuell 2021, 443156.

47 Law of 29.3.2017 no. 17, Disposizioni a tutela dei minori per la prevenzione ed il contrasto del fenomeno del cyberbullismo, Gazzetta Ufficiale General Series n. 127 of 6.3.2017. See on this *Ukrow/Cole/Etteldorf*, Stand und Entwicklung des internationalen Kinder- und Jugendmedienschutzes, Chapter EV.3.c.

48 *de Strel et al.*, Online Platforms' Moderation of Illegal Content Online.

49 Content moderation outside of content being qualified illegal by law is, on the other hand, seen critically in light of threats for journalistic content being interfered by platforms. See on this e.g. *Papaevangelou*, The relationship between journalists and platforms in European online content governance: A case study on a “non-interference principle”.

speech online⁵⁰, the 2018 Code of Practice on Disinformation⁵¹, which was updated by the 2022 Strengthened Code of Practice on Disinformation^{52, 53}, the Alliance to better protect minors online under the European Strategy for a better internet for children⁵⁴, the WePROTECT global alliance⁵⁵ to end child sexual exploitation online and several initiatives in the field of consumer protection⁵⁶.

2. Planned Regulatory Approaches

The regulatory framework for the media or rather content dissemination, including audiovisual content, is continuing to change. The EU is reacting to current threats with new legislative initiatives and instruments.

There is the aforementioned proposal for a CSAM Regulation, which has met with strong criticism because of the proposed investigation obligations for hosting providers,⁵⁷ which could involve a search of communication content and thus considerable intrusion into privacy. In addition, the European Commission has also proposed a Regulation on the transparency

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- 50 Code of Conduct on countering illegal hate speech online, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-disrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.
- 51 2018 Code of Practice on Disinformation, <https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation>.
- 52 2022 Strengthened Code of Practice on Disinformation, <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>.
- 53 See on these instruments already extensively *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, pp. 152 et seq.
- 54 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A Digital Decade for children and youth: the new European strategy for a better internet for kids (BIK+), COM/2022/212 final.
- 55 <https://www.weprotect.org/>.
- 56 For example, the Joint Action of the consumer protection cooperation network authorities, the Memorandum of understanding against counterfeit goods, the Online Advertising and IPR Memorandum of Understanding, the Safety Pledge to improve the safety of products sold online etc.
- 57 Cf. for example the Recommendation of the German Bundesrat of 5.9.22, Printed Papers 337/1/22, https://www.bundesrat.de/SharedDocs/drucksachen/2022/0301-040/0/337-1-22.pdf?__blob=publicationFile&v=1.

and targeting of political advertising⁵⁸ at the end of 2021. The Proposal aims to lay down harmonised transparency obligations for providers of political advertising and related services to retain, disclose and publish information connected to the provision of such services and wants to establish harmonised rules on the use of targeting and amplification techniques in the context thereof. This essentially includes labelling requirements for political advertising, the establishment of notice mechanisms, the collection of information on the conditions and background of political advertising and their possible disclosure to authorities. In this context, the interesting question can be raised whether a lack of labelling of the content as political advertising could constitute ‘illegal content’ in the sense of the DSA, which, as mentioned, does not only refer to the content as such but also the way in which it was disseminated when assessing its potential illegal nature.

This question is relevant in the case of the labelling obligations for audiovisual commercial communication stemming from the AVMSD, too, but it plays a less decisive role in that context, as the DSA itself imposes labelling obligations for advertising. In the context of the proposed Regulation on political advertising, however, the question takes on a different nuance insofar as the intended definition of political advertising (depending on the outcome of the legislative procedure) is very broad and does not – like the concept of advertising – necessarily presuppose a financial advantage on the part of the advertiser.⁵⁹ Rather ‘political advertising’ means the preparation, placement, promotion, publication or dissemination, by any means, of a message by, for or on behalf of a political actor, unless it is of a purely private or a purely commercial nature, or of a message which is liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour. The latter alternative (“a message [...] which is liable to influence [...]”) can be interpreted in such a way that it also covers reporting on topics of political interest in the context of elections.

Analysing how this relates to the DSA, the connecting factor for harmfulness in this case is – in contrast to content that is capable of impairing the development of minors – not the content (the advertising may be perfectly lawful in itself) but a condition unconnected to the content itself

58 Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, COM/2021/731 final.

59 See on the existing, very different national approaches *Cappello* (ed.), *Media coverage of elections: the legal framework in Europe*.

(the lack of labelling). However, this is comparable to situations in which a legal content is accessible in a way – namely without required access restrictions – that the condition of how it is disseminated makes it illegal. In principle, such an interpretation, depending on the final outcome of the proposed text, would be conceivable in the future for content covered by the Regulation proposal. In any case, the proposal includes in its scope the distribution of audiovisual content regardless of the distributing medium and distributor. ‘Political advertising publisher’ can mean any natural or legal person that broadcasts, makes available through an interface or otherwise brings to the public domain political advertising through any medium. As mentioned, the legislative process is still ongoing with the Council having agreed on its General Approach on 13 December 2022⁶⁰ and the European Parliament following with a common position adopted on 2 February 2023⁶¹.

Finally, regarding the list of current proposals, the EMFA, which was suggested by the European Commission in September 2022, could, if adopted, have an even more fundamental impact on the dissemination of audiovisual content and the audiovisual and media sector *per se*.⁶²

In a very brief recollection at this point, the Proposal comes as a harmonising Regulation and not as a Directive. It lays down common rules aiming at the proper functioning of the internal market for media services, and as an essential element it would see the establishment of the European Board for Media Services (EBMS or – as foreseen in the Proposal itself without an abbreviation – simply: “the Board”) to replace ERGA. In addition, the quality of media services and the conditions for their functioning shall be preserved. More precisely, this aim is to be achieved by a variety of rules including on the rights of recipients of media services and the providers, safeguards for the independent functioning of public service

60 Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising – General approach, ST 16013 2022 REV.1.

61 Amendments adopted by the European Parliament on 2 February 2023 on the proposal for a regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, P9_TA(2023)0027.

62 See for an overview and a first assessment *Voorhoof*, The European Media Freedom Act and the protection of journalistic sources: still some way to go; *Tambini*, The democratic fightback has begun: the European Commission’s new European Media Freedom Act; *Cantero Gamito*, The European Media Freedom Act (Emfa) as Meta-Regulation; *Ory*, Medienfreiheit – Der Entwurf eines European Media Freedom Act, p. 23 et seq.

media, certain duties for news providers and, most importantly, a complex framework for regulatory cooperation in the context of the provision of media services including rules on independence of media authorities or bodies. This proposed institutional setup and cooperation framework will be dealt with in more detail further below (see on the institutional system below, D.II.2.).

With regard to substantive rules, Art. 3 of the EMFA stipulates that recipients of media services in the Union shall have the right to receive a plurality of news and current affairs content, produced with respect for editorial freedom of media service providers, to the benefit of the public discourse. The underlying idea of this commitment follows from the fundamental rights of Art. 11 CFR and Art. 10 ECHR as interpreted by the CJEU and the ECtHR. However, this provision of the EMFA is obviously not to be understood in the sense of an executable legal right of recipients, which they could claim before a court vis-à-vis providers of services or even state powers at large, but rather as an objective, a goal to be reached, whereby the legitimate interests of the users are the justification for the regulatory activity itself. Recital 6 refers in the context of the “right of recipients” as included in Art. 3 of the proposal to the necessity that a minimum level of protection of service recipients should be ensured in the internal market, which is the reason for proposing harmonisation of certain aspects of the relevant national rules for media services. Therefore, Art. 3 needs to be seen in the context and in connection with Art. 4 laying down rights of media services providers, Art. 5 laying down safeguards for public service media providers and Art. 6 laying down obligations for news providers.

Art. 4(1) EMFA creates a right that is similar in its consequences to the provision in Art. 3(1) AVMSD but is not limited to audiovisual media service providers as in the latter framework: media service providers shall have the right to exercise their economic activities in the internal market without restrictions other than those allowed under Union law. Such a right of economic freedom already follows from the freedom to provide services and has been detailed by a dedicated case law of the CJEU.⁶³ The proposed provision does not, however, contain a specific jurisdiction rule or restrictions framework but refers more generally to restrictions that can be imposed if they are in line with EU law. This includes, as Recital 13

⁶³ Cole, in: AfP 2021, 1, 1 et seq.; extensively Cole/Ukrow/Etteldorf, On the Allocation of Competences between the European Union and its Member States in the Media Sector.

underlines, measures applied by “national public authorities”, i.e. not only national regulatory authorities in charge for the media sector. Art. 4(2) contains specific rules in the context of editorial freedom and thus, unlike Art. 4(1), actually has a cultural-democratic ‘stamp’ on it. Member States, including their national regulatory authorities and bodies, shall not interfere in, or try to influence in any way, editorial policies and decisions by media service providers, shall not detain, sanction, intercept, make subject to surveillance or search and seizure, or inspect media service providers and shall not deploy spyware in any device or machine used by media service providers⁶⁴. Again, this protection already arises from Art. 10 ECHR, and the scope of protection for that aspect of the fundamental right goes even beyond the reference in the EMFA Proposal if one considers the interpretation of the ECtHR.⁶⁵ As for other elements of the EMFA Proposal, the reiteration seems to have the aim of ensuring a compliance in EU Member States as deriving from specific secondary law – beyond a fundamental rights basis – and of making it subject to regulatory oversight.

In that sense Member States shall, according to Art. 4(3), establish an independent authority or body to deal with complaints about infringements of Art. 4(2). Whether this body has to be different from the regulatory authorities, addressed in Art. 4(2) as the ones that may not impede the journalistic work, is not entirely clear from the provision. Going beyond

64 This last part of the provision in para. 2 is obviously to be read in light of the developments surrounding the Pegasus software. According to Amnesty International’s investigative research, a number of governments, including European countries such as Hungary and Poland, are alleged to have used the surveillance software “Pegasus” from the Israeli cyber security company NSO Group to monitor electronic devices and their communication connections (e.g. various messenger services). According to a list of persons monitored published by Amnesty International, not only suspected terrorists and criminals but also journalists, politicians and lawyers were affected. The case is currently being investigated by a special committee of enquiry of the European Parliament (see https://www.europarl.europa.eu/doceo/document/TA-9-2022-0071_DE.html).

65 *Voorhoof*, The proposal of a European Media Freedom Act and the protection of journalistic sources: still some way to go, pp. 2 et seq., even critically points out that Art. 4(2)(b),(c) and (3) are not corresponding to the protection of journalistic sources as provided in Art. 10 ECHR and the case law of the ECtHR guaranteeing the right of journalists to protect their sources. He criticizes that guarantees of source protection at the level of media service providers, producing and broadcasting news and journalistic content, should not be less than the guarantees of source protection that can be invoked by (individual) journalists and (employed or freelance) media-workers in application of Art. 10 ECHR.

journalistic work in general, an enhanced protection for the independent functioning of public service media is foreseen: Art. 5 stipulates that public service media shall provide a wide range of information and opinions to the recipients in an impartial manner and contains requirements on the composition and protection of their boards⁶⁶ (transparency and protection against discrimination in the appointment procedures and conditional protection against dismissal) as well as on the allocation of resources. To monitor compliance with these requirements, Member States shall also establish independent monitoring authorities or bodies. As the title of the provision suggests (“Safeguards for the independent functioning of public service media providers”), Art. 5 does not contain any rules on the establishment or exact functioning of the public service media, for example independence requirements. This results from the explicit assignment for these aspects of organising public service media (at least for the broadcasting sector) to the Member States not only viewing the competence allocations but also in light of the so-called Amsterdam Protocol.⁶⁷

Art. 6 EMFA contains specific duties for those media service providers that offer news and current affairs content. They include information obligations vis-à-vis the general public on ownership structures; this goes beyond the existing optional provision of Art. 5 para. 2 AVMSD, which has so far hardly been applied in the Member States⁶⁸ in the form of binding legal provisions. Furthermore, news providers shall take measures that they deem appropriate with a view to guaranteeing the independence of individual editorial decisions. This aims, in particular, at guaranteeing that editors are free to take individual editorial decisions in the exercise of their professional activity and at ensuring disclosure of any actual or potential conflict of interest by any party having a stake in media service providers that may affect the provision of news and current affairs content. This is a far-reaching approach although it would leave a lot of space on how this goal would be achieved.

66 Art. 5(2) refers to “head of management and the members of the governing board of public service media providers”. However, the design of public service media varies considerably in the Member States, especially with regard to structural issues (see e.g. *Dragomir/Söderström*, *The State of State Media*). Whether the provision therefore extends to the possibly analogous application according to meaning and purpose to existing (different) structures or requires the creation of the addressed structures is not clearly indicated.

67 Protocol on the system of public broadcasting in the Member States, OJ C 340, 10.11.1997, p. 109.

68 See *Cappello (ed.)*, *Transparency of media ownership*.

Additionally, in the following chapters there are further elements that are being addressed, among others a rule on how providers of very large online platforms shall deal with providers of media services that are created under editorial control and therefore operate within existing regulatory frameworks. This provision can be seen as a first supplementary rule to DSA, which still has to become applicable. There are rules which have an impact on the financial situation of media services providers, both in connection with concentration rules and with allocation of state funds via advertising or the way that audience measurement tools have to be designed and applied. The substantive rules of the EMFA therefore do not specifically address the dissemination of audiovisual content specifically. Several of the rules aim at addressing some of the problem areas described above, but they do so to a limited extent and – except for the institutional dimension – without amending the currently applicable legislative framework for audiovisual media services, namely the AVMSD. Some of the more general goals, such as the introduction of certain structural requirements for public service media or the guarantee of editorial freedom for news media, can have an indirect effect against instrumentalising media for the purposes of disinformation or state-driven propaganda. However, the relevance of these aspects in relation to foreign (non-EU-based) providers, which is one of the most pressing issues identified recently, is limited, and that context is only addressed concerning institutional cooperation specifically proposed in Art. 16 of the EMFA. The role of intermediaries, which are an important element of the public opinion forming process, is only included to a very limited extent.⁶⁹ Nonetheless, the institutional changes proposed by the EMFA with an amending effect for the AVMSD concerning the rules on ERGA and the cooperation mechanisms between the national regulatory authorities are very important for the question of reacting to the dissemination of illegal or harmful audiovisual content across borders, which is why they will be analysed in more detail below.

⁶⁹ See on this aspect *Seipp/Helberger/de Vreese/Ausloos*, Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law. The authors describe how the nature of opinion power is changing and shifting from news media to platforms and how this needs to be addressed in regulation. In light of the EMFA, they conclude that the rules on empowering a resilient media are just first approaches, which need to be scrutinised further and in detail, but that they may provide elements for a media concentration law in new style.

3. Consistency and Coherence?

As shown, there is a multitude of rules that directly or indirectly deal with the dissemination of audiovisual content. This applies to both the EU and national level. Consistency and coherence of the current and future legal framework are therefore essential – also in view of an effective protection of the fundamental rights of recipients.⁷⁰

In order to assess the coherence of the legal framework for the dissemination of audiovisual content, the AVMSD as the core element of regulation at EU level combined with its implementation in the Member States should be the starting point.⁷¹ In the past, this ruleset was rarely the subject of debates about its interaction with other legal acts mainly due to three aspects. Firstly, from the very beginning the AVMSD (then still the Television without Frontiers Directive (TwFD)) was intended to achieve minimum harmonisation in order to enable and facilitate the cross-border transmission of television services in the internal market, so that it established a concise but limited sector-specific framework of rules which therefore did not correlate with other rules. Secondly, the AVMSD as sectoral law did not overlap with other clearly distinguishable sectoral approaches, and only more recently horizontal legislative acts regulating the EU Digital Single Market have become more relevant in the context of the AVMSD. Thirdly, the AVMSD is at the heart of Union ‘media law’, i.e. in an area in which the EU has only limited competences in comparison to the retained competences of the Member States.⁷² A general provision detailing its relationship to other legal acts – besides Art. 4(7) AVMSD, which explicitly laid down a rule-exception relationship towards the e-Commerce Directive⁷³ – was not regarded as a necessary inclusion. Where overlaps

70 See on this in *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, pp. 118 et seq.; *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, pp. 40 et seq.; in light of the EMFA: *Cantero Gamito*, Consistent Regulatory and Self-Regulatory Mechanisms for Media Freedom in the Digital Single Market, pp. 4 et seq.; critically also *Dreyer/Heyer/Seipp/Schulz*, The European Communication (Dis)Order.

71 Cf. on this and the following *Cole/Etteldorf*, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, pp. 40 et seq.

72 On the latter aspect extensively *Cole/Ukrow/Etteldorf*, On the Allocation of Competences between the European Union and its Member States in the Media Sector.

73 This provision will need to be adapted to the entry into force of the DSA in a future amendment.

could occur, the other legal acts (passed later than the TwFD and most of them referring to some very specific areas such as tobacco advertising, copyright, advertising for medical products or technical aspects leaving aside content issues) clarified their relationship to the AVMSD in their own provisions by giving this Directive precedence.⁷⁴

In the recent past, however, this situation has fundamentally changed, essentially attributable to the (still progressing) convergence of the media landscape and to the rise of digitalisation and globalisation.⁷⁵ While the AVMSD continues to follow the approach of minimum harmonisation, the spectrum of rules and of the actors addressed has been significantly expanded with the last revision in 2018. Furthermore, several changes to existing legal acts and proposals for new ones have changed the ‘regulatory environment’ in which the AVMSD is situated in. This leads to more obvious tensions because these other acts either address the same players as the AVMSD or address the distributors (or: intermediaries) of, and gateways to, audiovisual content. This applies not only to the rules contained in the AVMSD but also to the rules which the AVMSD deliberately omitted, so that Member States’ media regulation can fill them within their leeway for regulatory action in those fields.

Especially the DSA has many potential points of overlap with the AVMSD as it regulates the distribution channels for (audiovisual) content and the competitors of audiovisual media service providers concerning audience and advertising markets.⁷⁶ Some players – especially VSPs, but possibly also audiovisual media services that offer content online in a com-

74 For example, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, pp. 36–68), Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.6.2003, pp. 16–19), Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 217, 5.8.1998, pp. 18–26), Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, pp. 15–21).

75 See also *Cornils*, Designing Platform Governance: A Normative Perspective on Needs, Strategies, and Tools to Regulate Intermediaries, pp. 73 et seq.

76 Cf. on the relevance of the DSA for the broadcasting sector also in light of the AVMSD *Cole*, Overview of the impact of the proposed EU Digital Services Act Package on broadcasting in Europe, pp. 8 et seq.

parably designed manner – are addressed by both sets of rules imposing obligations on them in (partly) a very similar manner. For example, according to Art. 26(2) DSA, an online platform (which could be a VSP) is obliged to provide users with a function with which they can declare whether the content they upload constitutes or contains commercial communications, while Art. 28b(3) AVMSD obliges Member States to ensure that VSPs comply with the rules on commercial communication of the AVMSD (Art. 9), stating that measures shall consist (*inter alia*) of “having a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications as far as they know or can be reasonably expected to know”. This means that AVMSD and DSA are applicable in parallel to exactly the same situations. The rules of the AVMSD are fleshed out by the Member States in their national law, leaving them rooms for manoeuvre. Some Member States have used this margin, while others rely on the list of appropriate measures that VSPs can take as they are mentioned in the Directive (see below C.II.).⁷⁷

The DSA is in contrast stricter and, as a Regulation, directly binding while obliging foreign and EU providers to the rules harmonised on EU level. Similar conclusions can be drawn regarding the above-mentioned labelling obligations of providers (both audiovisual media services and VSPs) under Art. 9 AVMSD and the transparency of advertising under Art. 26(1) DSA, for which the AVMSD rule leaves Member States the space on how to achieve the goal. A further example concerns Art. 6 and 6a AVMSD, according to which Member States shall ensure that audiovisual media services and (in conjunction with Art. 28b) VSP providers take appropriate measures to protect, *inter alia*, minors from content impairing their physical, mental or moral development and the general public from content containing incitement to violence or hatred, which for VSPs may include establishing and operating transparent and user-friendly flagging and reporting mechanisms. The DSA, in turn, does not impose directly active obligations (e.g. deletion or blocking), but it achieves this indirectly by obliging hosting providers to set up notification procedures, which in turn can result in knowledge about illegal content giving rise to liability.

Depending on the interpretation of ‘illegal content’ under the AVMSD as described above, this structure could lead in the end to the situation that

⁷⁷ In general on consistency of VSP regulation *Sorban*, The video-sharing platform paradox – Applicability of the new European rules in the intersection of globalisation and distinct Member State implementation.

audiovisual content of an audiovisual media service provider that is distributed on a corresponding online service is legal under the AVMSD (or the respective national frameworks) but needs to be treated as illegal under the DSA. In other words, as under the AVMSD the category of harmful content encompasses content that may impair the development of minors but is not *per se* illegal (see below C.II.2.), proportionate measures have to be taken to ensure that minors do not normally see this content. The DSA on the other hand does not make a comparable reference to harmful content, only referring to illegal content. This also applies concerning enforcement where Art. 8, for example, refers to actions against illegal content by the relevant national authorities. The question arises whether harmful content under the AVMSD could constitute illegal content under the DSA. If such content is made available without adequate safeguards and is as such violating the AVMSD and its applicable national transpositions, such content should be understood as being illegal under the DSA.

Similar examples can be invoked with regard to the other legal instruments mentioned above. For VSPs, it may not seem clear which rules prevail in case of possible overlaps with their obligations stemming from combatting content covered by Art. 28b in conjunction with Art. 6(1)(b) AVMSD (public provocation to commit a terrorist offence) and requiring appropriate (technical) measures from them on the one hand and their obligations to fight against terroristic content under Art. 5 TCO Regulation on the other hand. Similarly, risk mitigation obligations in relation to child abuse material under the CSAM Proposal could after enactment potentially overlap with Art. 28b in conjunction with Art. 6 and 6a AVMSD. Additionally, both sets of rules address (at least indirectly) issues of media literacy and the protection of minors in (online) media.⁷⁸ The proposed Regulation on political advertising with its potentially wide scope also requires compliance by audiovisual media services and VSPs. Concerning the EMFA Proposal,⁷⁹ it is not very clear from the draft how new information obligations for news providers (Art. 6 EMFA Proposal) interact with information

⁷⁸ See on these aspects Draft opinion of the Committee on Culture and Education for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse (COM(2022)0209 – C9-0174/2022 – 2022/0155(COD)), 18.10.2022, https://www.europarl.europa.eu/doceo/document/CULT-PA-737365_EN.pdf.

⁷⁹ Arguing for a more complementary approach in the EMFA *Cantero Gamito*, The European Media Freedom Act (Emfa) as Meta-Regulation.

obligations applicable to any type of audiovisual media services (Art. 5(1) AVMSD) in the way they have been transposed nationally. Other questions of overlap⁸⁰ could concern how rules on market concentration (Art. 21 et seq. EMFA Proposal) relate to existing national rules⁸¹ on transparency of media ownership in transposition of the AVMSD (Art. 5(2) AVMSD).⁸² Requests for enforcement of obligations by VSPs sent from one national regulatory authority to another as foreseen in Art. 14 EMFA Proposal are closely connected with the general VSP obligations according to Art. 28b AVMSD which again are dependent on the respective national transposition.

This brief illustration of overlaps and areas of potential tension serves the purpose to show that more attention needs to be given on how to resolve these interactions on regulatory level in order to create not only coherence but also legal certainty for providers and the regulatory authorities when enforcing the law. Until now, most of the mentioned legal instruments only rely on a simple ‘without prejudice’-rule when it comes to stating their interrelation to the AVMSD and other secondary law. Art. 2(4) DSA, for example, states that the DSA is without prejudice to the rules laid down by other Union legal acts regulating other aspects of the provision of intermediary services in the internal market or specifying and complementing this Regulation, in particular Directive 2010/13/EU. At first glance, this appears to give a clear priority in the relationship in the sense of a primary lex specialis (AVMSD) versus a lex generalis (DSA), but a closer look reveals the watering down of this seemingly clear rule: for example, Recital 68 no longer speaks of ‘without prejudice’ but of the DSA “complementing” the AVMSD, and Recital 10 stipulates that, to the extent that Union legal acts (such as the AVMSD) pursue the same objectives as those laid down in this Regulation, the rules of this Regulation should apply in respect of issues that are not addressed or not fully addressed by those other legal acts

80 See on this in general but not specifically with regard to the EMFA Proposal *Piskiewicz/Polo*, Old and new media: the interactions of merger control and plurality regulation.

81 Extensively *CMPF/CiTIP/IViR/ SMIT*, Study on media plurality and diversity online, pp. 202 et seq.

82 See on this *Cappello* (ed.), Transparency of media ownership; *Cappello* (ed.), Media ownership – Market realities and regulatory responses; On national implementation cf. *Deloitte/SMIT*, Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD), pp. 127 et seq.; cf. also *Seipp/Helberger/de Vreeze/Ausloos*, Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law.

or for which those other legal acts leave Member States the possibility of adopting certain measures at national level. This reads more like a collision rule, which ultimately gives priority to the DSA and leads to the fact that supervisory authorities need to elaborate on the purpose of the specific rule of the AVMSD before taking action themselves or turning the matter to the Digital Services Coordinator in their Member State (if the DSC differs from the authority).

Similarly, the Political Advertising Proposal contains in its Art.1(4)(f) a ‘without prejudice’-rule to the AVMSD as well while at least picking up possible tensions in Recitals 58 and 60 by suggesting that Member States “may designate, in particular”, the national regulatory authorities or bodies under Article 30 AVMSD for the oversight of the proposed Regulation and pointing to ERGA in light of making the best use of existing cooperation structures. The CSAM Proposal also contains the rule that it shall not affect the rules laid down by the AVMSD, whereby Recital 7 CSAM Proposal, differently worded, again speaks of “without prejudice”. The TCO Regulation is clearer: According to Art.1(5), the TCO Regulation generally shall be “without prejudice” to the AVMSD, and specifically the latter shall “prevail” when a situation concerns audiovisual media services as defined by the AVMSD. This collision rule is put in more concrete terms in Recital 8 by stating that in conflict situations AVMSD has primacy. At the same time, nonetheless, the obligations of other providers, particularly VPSs under the TCO Regulation, shall remain unaffected. Finally, the EMFA would amend the AVMSD with regard to institutional structures, but there is no general ‘shall-not-affect rule’ in relation to the substantive provisions of the AVMSD, while explicitly only institutional rules of the AMVSD are being changed. On the other hand, Art.1(2) provides for such a clarification vis-à-vis the DSA, so that shortcomings of the already uncertain relationship with the AVMSD could be further fostered after enactment of the EMFA.

IV. Scenarios for Illustration

The following (fictitious) scenarios are introduced to illustrate pressing issues when applying the currently valid law. They pick up in a more concrete form the challenges described above. Subsequently, in this study they will be used in the concluding sections to demonstrate how changes to the legal framework could improve the situation on how to tackle these types of situations.

Scenario 1:

Provider X operates an online platform XYXYX as a website on which users can freely upload audiovisual content generated by them. The content made available is exclusively of a pornographic nature, which is the focus of the platform's design and description. The platform offers the content in a categorised manner, includes search functions and makes recommendations for specific content to users entering the platform. The text content of the website is entirely in the language of EU Member State B including for the majority of the titles and descriptions of the videos, which are created by the users when uploading the content. Before users accessing the platform XYXYX can watch a video for the first time, they are asked to confirm that they are at least 18 years old by clicking the button "OK" following the text box indicating this question; there are no further measures foreseen for age verification or limitation of access to any of the content made available on XYXYX. The imprint of the website lists company X as provider of the website, which has its registered office in EU Member State A. In EU Member State B, the website is available under the top-level domain of ".b" (XYXYX.b).

Scenario 2:

Broadcaster C is based in State D, which is located outside of Europe. It is directly financed by State D, and it is openly communicated that D has the power to take editorial decisions over the programme of C. C does not have any other subsidiaries or offices within or outside of the EU. C broadcasts in its linear offer a daily programme dealing with current medical and health issues. In several of these programmes, persons declared as medical experts for the field spoke repeatedly about findings that Corona vaccinations cause serious damage to health. This is done without reference to any scientific evidence. They further spread the theory that governments of EU Member States are aiming to reduce population numbers by mandating the use of the vaccinations. Senior management staff of C have publicly declared that government representatives of State D decided on the content of these programmes and selected the 'experts' to be invited. The linear offer of C is broadcast both via satellite operated by a provider in a EU Member State and via a live stream on the internet, which runs on C's own servers. In both ways the offer is available in EU Member State E and the programmes in question have corresponding subtitles in the national language of E.

As a result of those broadcasts there has been considerable unrest among the population of E, and a considerable decline in the vaccination rate in the population could be observed compared to the situation before the programmes were broadcast.

Scenario 3:

Provider F operates a social media platform on which users can network with each other and share content in various forms (text, images, audio, video, combinations thereof) with each other and with the general public. The website on which the platform is operated is accessible in all Member States of the EU, but under different top-level domains. F has its headquarters in state G which is located outside Europe. It operates a European branch in EU Member State H, in the offices of which the design of the offer is decided in a binding manner for the offer as it is put on the market in the EU area under all the top-level domains which are available in the EU Member States, namely those with a country-specific top-level domain. User I, who registered himself as user on the platform with a valid email address under a pseudonym, shares a video which is publicly available and not only to registered users of the platform. In the video he can be seen masked and armed with a rifle and calls in an electronically distorted voice for an attack on the head of government of State J, which is an EU Member State. The real name or even place of residence of the user are not made known on the platform. The video in question is shared multiple times by other users and subsequently spreads widely over the whole network across different EU Member States.

