F. Looking Ahead

In an overall assessment of the situation concerning the regulatory framework for online content dissemination on the level of the European Union, there are several findings to be highlighted. With the two Proposals for a DSA and a DMA the Commission has responded, after a long period of reluctance to address the issue more broadly beyond sectoral approaches, to the widely acknowledged need for reforming the rules concerning online platforms. As was analysed extensively in a previous study of the authors, the reliance on the ECD as a horizontal framework regulating the ISS resulted in negative outcomes: the way the rules were applied and interpreted did not allow for an efficient response to the dissemination of illegal and harmful content online nor a cross-border enforcement of the standards laid down in the ECD and the EU legislative framework altogether.[272] The purpose of this follow-up study was to identify the legislative options for responding to the pressing need of reforming the current framework and propose ways forward. This was done by evaluating the way that the DSA Proposal addresses the issues and suggesting – where appropriate – in which way the Proposal should be further adapted in the course of the legislative procedure ahead.

Without any doubt, the Proposals are to be welcomed: they promise in the final outcome to be the basis for a sustainable regulatory framework for the digital sector and can put the EU in the position of setting standards in a way that was already successfully done with the GDPR.[273] The Proposals are ambitious not only because they are aimed at addressing intermediaries in total but because they identify specific categories of providers that are essential for the connection between businesses and users and are then under special scrutiny as gatekeepers (in the DMA) or that have such an impact that they have to comply with specific additional obligations (as VLOPs in the DSA). As a condition for that, and in line with more recent legislative approaches such as the GDPR or the VSP provisions in the AVMSD, neither the applicability of the proposed Regula-

272 *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content.

273 In this sense also *Ukrow*, Die Vorschläge der EU-Kommission für einen Digital Services Act und einen Digital Markets Act, p. 57.

tions nor the jurisdiction depends on an establishment of the concerned providers in an EU Member State.

However, a number of concerns exist which should be taken into account in the further shaping of the Proposals. Partly, these are connected to the approach chosen in the two Proposals, and for other issues there is a more specific need to clarify some of the suggested new rules. One of the more fundamental concerns relates to the way this new framework, which mainly means the DSA, would affect the regulation of content intermediaries. 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 these, and they are in the focus of this study. As much as a horizontally applicable framework for ISS promises a unified and overarching approach to any type of such intermediary service as covered by the DSA Proposal, it can also be problematic in addressing specificities of certain categories of platforms or services. The basic rules can and should apply to any type of ISS, but the requirements for rules that impact media and communication content are different to that of a marketplace where goods and services are traded. Considering the Member States' retained power to regulate the media, from the outset it should be questioned whether a Regulation is the appropriate instrument to introduce the new rules. Beyond that principal question, the current version of the Proposal does not yet sufficiently take into account the existing framework for supervision and enforcement of rules concerning content dissemination. In view of the goal that the same rules should apply (and be enforced) for content online as for content offline, there should be a further clarification of how the new general rules relate to existing or future rules specifically enacted for regulating content dissemination. This also concerns existing supervisory structures that have an established experience of dealing with the sensitive balancing of fundamental rights when tackling content matters. With the still new AVMSD in transposition stage, the cooperation structures – namely in a body such as ERGA – stemming from a media services approach should rather be reinforced by the new approach than questioned when creating new overarching authority structures with a focus on one major DSC per Member State.

The proposed DSA takes into account the position of intermediaries which, due to network effects, in many cases have acquired dominant market power and generally provide a crucial function between providers of services and end users. It imposes on certain types of platforms due diligence obligations that add a second, free standing pillar next to the question of liability for information hosted (to mention only the most im-

portant category besides providers offering mere conduit or caching services) by recipients of the service. The liability exemption chapter is transferred from the ECD to the proposed DSA with very few changes and by adding some clarifications about what type of orders can be imposed on providers under the liability exemptions. As the set of these rules included in Chapter II on the liability of the providers of intermediary services are in addition of any outcome regarding the liability exemptions, it is important to have a clear integration of those obligations of providers also in the enforcement procedures. In addition, there appear to be links between the conditions for liability exemptions and the allegedly free-standing due diligence obligations of Chapter III. This relation needs to be clarified because any intermediary that is found liable will also face the remedies and sanctions under national and applicable sectorial Union law, and it is important to clarify the enforcement steps in case of violation of the obligations to follow orders mentioned in Chapter II in connection with that matter.

The idea of being able to deal under certain circumstances with issues emanating from providers with an establishment outside of a given EU Member State, as far as the regulatory authority observes a negative impact of a – possibly targeted – service, is the right approach. However, this necessitates adequate structures and procedures, and again it is advisable to reconsider whether the institutional set-up of the current Proposal can sufficiently respond to this need, as has been shown in this study.

The Proposal relies in parts on enforcement tools that emanate from the self-regulatory approaches to include online platforms by ways of codes of conducts and memoranda of understanding. These kind of arrangements have, previously, only had limited success. The use of standards and more incisive oversight measures, such as audits, is applied in a rather limited way in the current Proposal. Standards could be used more broadly across areas such as risk management, and it should be reconsidered to expand such reliance on standards also for other platforms than only the category that have to observe the strictest measures. Meanwhile, outsourcing of audits to the private sector alone can be problematic if it is not accompanied by a solid public oversight framework in the proposed DSA. Apart from that, the layered approach to due diligence obligations could be simplified by extending obligations solely defined for VLOPs to online platforms in general.

Especially concerning the oversight structures, the current approach of the Proposals has to be criticised. At least for the approach in the DSA it is not sufficiently explained why the cross-border treatment of cases, when a competent regulatory authority does not act in a way that ensures efficient

enforcement of the rules, should move from a joint forum of national regulatory authorities to the Commission. Generally speaking, existing regulatory structures should be taken more into account and an inclusion of the Member States' competent authorities and bodies should be sought, not only in cases that fall under their jurisdiction but also when it comes to resolving conflicts in cross-border cases. The Proposals already foresee a certain set of expectations about the set-up of authorities involved in the supervision of intermediary services providers. It should, however, be considered whether the strict criteria that, for example, apply to the regulatory bodies in the audiovisual media sector or to the data protection authorities, especially concerning independence from state powers, supervised entities and private parties and with regard to assignment of powers and capacities enabling efficiency, should not be more clearly integrated also in the current Proposal. As already mentioned, the cross-border dimension of the problem does not necessarily call for a centralised body on a supranational level but for efficient cooperation between authorities confined to their borders as well as with the bodies and institutions on EU level. In extending the approach of the Proposal it should be considered to upgrade joint bodies with decision making powers in a kind of consistency mechanism when there are disputes about the enforcement in specific cases and vis-à-vis specific providers.

Assuming that the new ruleset will stand in principle for a long period of time and will shape the digital intermediaries market at least for a decade, the suggested rules should be seen as a good basis which can be improved in the legislative procedure in order to reach a solution that responds in a promising way to the challenges previously identified.