

SCHRIFTENREIHE
MEDIENFORSCHUNG

BAND 81

Mark D. Cole | Christina Etteldorf | Carsten Ullrich

CROSS-BORDER DISSEMINATION OF ONLINE CONTENT

Current and Possible Future Regulation
of the Online Environment with a Focus
on the EU E-Commerce Directive



LANDESANSTALT FÜR MEDIEN NRW
Der Meinungsfreiheit verpflichtet.



Nomos

SCHRIFTENREIHE
MEDIENFORSCHUNG

BAND 81

Mark D. Cole | Christina Etteldorf | Carsten Ullrich

CROSS-BORDER DISSEMINATION OF ONLINE CONTENT

Current and Possible Future Regulation
of the Online Environment with a Focus
on the EU E-Commerce Directive



Nomos



LANDESANSTALT FÜR MEDIEN NRW
Der Meinungsfreiheit verpflichtet.

Landesanstalt für Medien NRW

Sabrina Nennstiel (Leiterin Kommunikation)
Dr. Meike Isenberg (Leiterin Forschung)
Zollhof 2, 40221 Düsseldorf
www.medienanstalt-nrw.de

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 978-3-8487-6501-0 (Print)
978-3-7489-0643-8 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-6501-0 (Print)
978-3-7489-0643-8 (ePDF)

Library of Congress Cataloging-in-Publication Data

Cole, Mark / Etteldorf, Christina / Ullrich, Carsten
Cross-Border Dissemination of Online Content
Current and Possible Future Regulation of the Online Environment with a Focus on
the EU E-Commerce Directive
Mark D. Cole / Christina Etteldorf / Carsten Ullrich
280 pp.
Includes references.

ISBN 978-3-8487-6501-0 (Print)
978-3-7489-0643-8 (ePDF)

Volumes 1–48 published by VS-Verlag,
volumes 49–80 published by VISTAS Verlag.



Onlineversion
Nomos eLibrary

Published by Nomos Verlagsgesellschaft, Baden-Baden, Germany 2020.
Printed and bound in Germany.



This publication is licensed under the Creative Commons Attribution-NonCommercial-NoDerivatives 3.0 International License (CC BY-NC-ND). Usage and distribution for commercial purposes as well as any distribution of modified material requires written permission.

1st Edition 2020

© 2020 The Authors.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the author.

Preface

Europe ensures both – peace and freedom. Protecting this freedom at the same time means respecting rules based on European core values. It is up to us as independent regulators to enforce our standards of a free media order in Europe.

However, there are currently significant challenges in cross-border enforcement on the Internet. These include, in particular, the enormous duration of the legal procedures and the question of accountability for the cross-border dissemination of illegal and problematic online content. In addition, the uncertainty concerning the jurisdiction between national regulators and the increasing dominance of platforms such as Google, Facebook and Co. as well are part of this complex situation.

Given the obligation to protect fundamental European democratic values, even difficulties in the effective enforcement of rules do not justify not trying to do so. In a nutshell – inactivity is not an option.

In order to ensure a free media order, it is our duty now to define clear responsibilities of all players in this market and to agree on fast and effective procedures between Member States.

The study conducted by the Institute of European Media Law (EMR) on behalf of the State Media Authority NRW is a constructive framework for this – it provides a comprehensive analysis of the EU legal framework as well as the concrete indication of the need for a reform of the E-Commerce Directive.

I thank Prof. Dr. Mark D. Cole and his team for their excellent work and wish you, dear readers, an inspiring lecture.

Dr. Tobias Schmid
Director of the State Media Authority of North Rhine-Westphalia

Summary Table of Contents

Executive Summary	19
1. Background of the Study	41
1.1. Online Dissemination of Content	41
1.2. The Role of Platforms in the Online Dissemination of Content	43
1.3. The Role of Supervisory Authorities in the Online Dissemination of Content	45
1.4. The EU Digital Single Market Context	48
1.5. Structure of the Study	50
2. The Relevant EU Legal Framework for Online Content Dissemination	53
2.1. Fundamental Rights	53
2.2. Fundamental Freedoms	77
2.3. Other Elements of EU Primary Law	83
2.4. EU Secondary Law	91
2.5. EU Support, Coordination and Supplementary Measures	152
3. Detailed Analysis of the E-Commerce Directive	169
3.1. Scope of Application	169
3.2. The Country-of-Origin Principle	173
3.3. The Intermediary Liability Regime	176
4. Towards a Future Regulatory Framework for Online Content	221
4.1. Lessons Learnt	221
4.2. Important Considerations	237
4.3. Possible Avenues	252
4.4. Looking Ahead	262
5. Bibliography	265

Table of Contents

List of Abbreviations	15
Executive Summary	19
English Version	19
Deutsche Fassung	29
1. Background of the Study	41
1.1. Online Dissemination of Content	41
1.2. The Role of Platforms in the Online Dissemination of Content	43
1.3. The Role of Supervisory Authorities in the Online Dissemination of Content	45
1.4. The EU Digital Single Market Context	48
1.5. Structure of the Study	50
2. The Relevant EU Legal Framework for Online Content Dissemination	53
2.1. Fundamental Rights	53
2.1.1. Fundamental Rights Sources: EU Charter, European Convention on Human Rights and National Constitutional Law	55
2.1.2. Relevant Fundamental Rights	58
2.1.2.1. Human Dignity	58
2.1.2.2. Rights of the Child and Protection of Minors	60
2.1.2.3. Respect for Private and Family Life	63
2.1.2.4. Freedom of Expression and the Media	66
2.1.2.5. Freedom to Conduct a Business	69
2.1.2.6. Right to Property	71
2.1.3. Fundamental Rights Protection Obligations	73

Table of Contents

2.2. Fundamental Freedoms	77
2.2.1. Freedom of Establishment and Freedom to Provide Services	77
2.2.2. Free Movement of Goods	82
2.3. Other Elements of EU Primary Law	83
2.3.1. Fundamental Principles and Goals of the EU	83
2.3.2. Relevant EU Competencies	86
2.3.2.1. Legal Bases for an EU Competence in the Media Sector	86
2.3.2.2. The Specific Legal Bases for the ECD	89
2.4. EU Secondary Law	91
2.4.1. e-Commerce Directive	91
2.4.1.1. Historical Background	92
2.4.1.2. Further Developments	95
2.4.1.3. Main Goals and Principles of the Original ECD	99
2.4.2. Audiovisual Media Services Directive	101
2.4.2.1. Historical Development up to the Latest Revision in 2018	101
2.4.2.2. Overview of Relevant Rules for the Online Context	108
2.4.2.2.1. Personal Scope of Application	108
2.4.2.2.2. Country-of-Origin Principle	110
2.4.2.2.2.1. Importance of the Principle and Changes Related to It in the Recent Reform	110
2.4.2.2.2.2. Home State Jurisdiction Rule	112
2.4.2.2.2.3. Exceptional Derogation of Free Flow of Information	114
2.4.2.2.2.4. Exception in Case of Circumvention	114
2.4.2.2.3. Minimum Harmonisation Concerning Specific Types of Content	116
2.4.2.2.4. Supervision and Sanctions	121
2.4.3. Data Protection and ePrivacy	123
2.4.3.1. Data Processing and the Media Privilege	124
2.4.3.2. ePrivacy Directive and GDPR	127
2.4.3.3. Market Location Principle	131
2.4.3.4. Supervision and Sanctioning	134
2.4.3.5. Jurisdiction and Cooperation of Authorities	136
2.4.4. Intellectual Property Rules	139
2.4.4.1. The InfoSoc and Enforcement Directives	139
2.4.4.2. The DSM Directive	140

2.4.5. Further Relevant Legislative Acts	148
2.4.5.1. Platform-to-Business Regulation	148
2.4.5.2. Proposal for a Regulation on Preventing the Dissemination of Terrorist Content Online	149
2.5. EU Support, Coordination and Supplementary Measures	152
2.5.1. The Recommendations on the Protection of Minors and Human Dignity	152
2.5.2. The Actions Concerning the Tackling of Illegal Content Online	156
2.5.3. The Actions Concerning the Tackling of Online Disinformation	162
3. Detailed Analysis of the E-Commerce Directive	169
3.1. Scope of Application	169
3.1.1. Territorial Scope	169
3.1.2. Functional Scope	170
3.1.3. Personal Scope of Application	171
3.2. The Country-of-Origin Principle	173
3.2.1. Application	173
3.2.2. Derogations	174
3.2.3. Exemptions to the Scope of Application	176
3.3. The Intermediary Liability Regime	176
3.3.1. Historical Backdrop	176
3.3.2. The Approach Chosen by the EU	177
3.3.3. Categories of Specific Information Society Service Providers	178
3.3.4. The Three Types of Specific Intermediary Service Activities	181
3.3.4.1. “Mere Conduits” According to Art. 12 ECD	181
3.3.4.2. Caching According to Art. 13 ECD	182
3.3.4.3. Hosting According to Art. 14 ECD	183
3.3.4.4. No General Monitoring Obligations According to Art. 15 ECD	184
3.3.5. Delineation between National and EU Responsibilities	185
3.3.6. Illegal Content – Challenges to EU Intermediary Liability Exemptions	186

3.3.7. EU Intermediary Liability Framework – How the CJEU Has Dealt with the Challenges	188
3.3.7.1. Challenge : The Question of Neutrality of Hosts	188
3.3.7.2. Challenge 2: Actual Knowledge	192
3.3.7.3. Challenge 3: Preventive Injunctions and Duties of Care	194
3.3.7.3.1. L’Oréal v Ebay (C-324/09)	195
3.3.7.3.2. Scarlet Extended (C-70/10) & Netlog (C-360/10)	196
3.3.7.3.3. McFadden (C-484/14)	196
3.3.7.3.4. Eva Glawischnig-Piesczek v Facebook Ireland (C-18/18)	197
3.3.7.4. Other Intermediary-Related Case Law	199
3.3.8. Defining a “Duty-of-Care” Standard	200
3.3.8.1. The Reasoning behind New Responsibilities for Internet Intermediaries	200
3.3.8.2. Proposals for a “Duty of Care”-Approach	202
3.3.8.3. Illegal Content, Technical Standards and the New Approach	204
3.3.8.4. Duty of Care for Internet Intermediaries in the EU Framework	205
3.3.9. Intermediary Liability Provisions in Sectoral Legislation	207
3.3.9.1. Sectoral Provisions in Digital Single Market Acts	207
3.3.9.1.1. Audiovisual Media Services Directive	207
3.3.9.1.2. DSM Directive	209
3.3.9.2. Other Rules Complementing the ECD Liability Provisions	211
3.3.9.2.1. InfoSoc and Enforcement Directive	211
3.3.9.2.2. 2016 Guidance Note to the Unfair Commercial Practices Directive	212
3.3.9.2.3. Regulation on Market Surveillance and Compliance of Products	213
3.3.9.2.4. Directive on Combating Terrorism	215
3.3.9.2.5. Proposal for a Regulation on Preventing the Dissemination of Terrorist Content Online	215
3.3.9.2.6. General Data Protection Regulation	217
3.3.9.2.7. Platform-to-Business Regulation	218

4.	Towards a Future Regulatory Framework for Online Content	221
4.1.	Lessons Learnt	221
4.1.1.	Difficulties in the Application of the ECD	221
4.1.2.	New Actors, New Approaches and New Regulatory Models	222
4.1.3.	Margin for Member States in Implementation: the Example of GDPR	225
4.1.4.	Institutional Dimension of Enforcement on National and EU level: the Example of the GDPR	227
4.1.4.1.	The European Data Protection Board Compared to Other Sectors	228
4.1.4.2.	Essential Factors for Institutional Organisation	230
4.1.4.3.	The Setup between National DPAs and Their Cooperation on EU Level	232
4.1.5.	Application to the ECD of Interim Findings Relating to the GDPR to the ECD	235
4.2.	Important Considerations	237
4.2.1.	Value-based Approach Necessitates Effective Enforcement	237
4.2.2.	Involvement of Industry through Self- and Co-regulatory Measures	239
4.2.2.1.	Defining Self- and Co-regulation	240
4.2.2.2.	Advantages and Disadvantages of Self- and Co-regulation	241
4.2.2.3.	Existing Forms of Self- and Co-regulation in the Online Environment	246
4.2.2.4.	Possible Forms and Conditions of Co-regulation on EU Level	248
4.2.3.	The Principle of Proportionality	250
4.3.	Possible Avenues	252
4.3.1.	General Considerations	252
4.3.2.	Adjusting Country-of-Origin and Market Location Principle	253
4.3.3.	Institutional Setup and Cooperation in Enforcement	258
4.3.4.	Improving Conditions for Enforcement	259
4.4.	Looking Ahead	262
5.	Bibliography	265

List of Abbreviations

AG	Advocate General
Art.	Article
AVMS	audiovisual media services
AVMSD	Audiovisual Media Services Directive
AVMS-RADAR	AudioVisual Media Services – Regulatory Authorities’ Independence and Efficiency Review (study)
BeckOK	Beck Online Kommentar
BEREC	Body of European Regulators for Electronic Communication
B2B	business-to-business
B2C	business-to-consumer
CCHSO	Code of conduct on countering illegal hate speech online
CFR	Charter of Fundamental Rights of the EU
CJEU	Court of Justice of the EU
COD	Ordinary Legislative Procedure and former Co-decision procedure
COM	Communication
CPD	Code of Practice on Disinformation (EU)
C-	Case-
DCMA	Digital Millenium Copyrighting Act (US)
DG	Directorate-General
DOS	Denial of Service
DPA	Data Protection Authority
DSL	Digital Subscriber Line
DSM Directive	Directive on copyright and related rights in the Digital Single Market
DVBl.	Deutsches Verwaltungsblatt
DöV	Zeitschrift für Öffentliches Recht und Verwaltungswissenschaften
EC	European Community
ECD	e-Commerce Directive

List of Abbreviations

ECHO	Report of the Commission on Ending Childhood Obesity
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECU	European Currency Unit
EDPB	European Data Protection Board
EDPL	European Data Protection Law Review
EDPS	European Data Protection Supervisor
EEA	European Economic Area
EEC	European Economic Community
EECC	European Electronic Communications Code
ELJ	European Law Journal
EJIL	European Journal of International Law
EMR	Institute of European Media Law/ Institut für Europäisches Medienrecht
EP	European Parliament
ERGA	European Regulators Group for Audiovisual Media Services
et seq.	et sequens (Latin) / and the following
EU	European Union
EuGRZ	Europäische Grundrechte-Zeitschrift
EuR	Zeitschrift für Europarecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
FTC	US Federal Trade Commission
GDPR	General Data Protection Regulation
GewArch	Gewerbearchiv
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
HLEG	High Level Expert Group
ICT	Information and Communications Technology
IMCO	Committee on the Internal Market and Consumer Protection
InfoSoc Directive	Directive on the harmonisation of certain aspects of copyright and related rights in the information society
IP	Intellectual Property
IPRED	Intellectual Property Enforcement Directive
IPRs	Intellectual Property Rights
ISDN	Integrated Services Digital Network
ISO	International Organization for Standardization

ISS	Information Society Services
ISSP	Information Society Service Provider
IT	Information Technology
JHA	Justice and Home Affairs
JIPITEC	Journal of Intellectual Property, Information Technology and Electronic Commerce Law
JuS	Juristische Schulung
K&R	Kommunikation & Recht
lit.	litera (Latin) / letter
LRTK	Lithuanian Radio and Television Commission
MMR	Multimedia und Recht
M&K	Zeitschrift für Medien & Kommunikationswissenschaft
NetzDG	Netzwerkdurchsetzungsgesetz
NJW	Neue Juristische Wochenschrift
NRA(s)	national regulatory authority(ies)
OJEU	Official Journal of the European Union
OJ C	Official Journal – Information and Notices
OJ L	Official Journal - Legislation
para.	paragraph
P1ECHR	Protocol No. 1 to the ECHR
P2B	Platform-to-Business
SEC	Single European Code
Slg.	Sammlung der Rechtsprechung
SME	small and medium-sized enterprises
SSRN	Social Science Research Network
supra	ut supra / as above
subpara.	subparagraph
SWD	Commission Staff Working Document
TEC	Treaty establishing the European Community
TERREG	Regulation on preventing the dissemination of terrorist content online
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TV	Television
TwFD	Television without Frontiers Directive
URL	Uniform Resource Locator

List of Abbreviations

UWG	Gesetz gegen den unlauteren Wettbewerb
VAT	value added tax
VoD	Video on Demand
VSP(s)	video-sharing platform(s)
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WP	Working Paper
WTO	World Trade Organization
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZAW	Zentralverband der deutschen Werbewirtschaft
ZöR	Zeitschrift für öffentliches Recht
ZPEU	Zeitschrift für das Privatrecht der Europäischen Union
ZUM	Zeitschrift für Urheber- und Medienrecht
5G	5 th Generation