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UPDATING THE LEGAL FRAMEWORK AND ENFORCEMENT CONCERNING CROSS-BORDER DISSEMINATION OF ONLINE CONTENT

STUDY ON THE EUROPEAN UNION'S LEGISLATIVE OPTIONS CONCERNING SUBSTANTIVE AND PROCEDURAL ASPECTS

Executive Summary

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Executive Summary

BACKGROUND OF THE STUDY

We are living in an age of digitalisation, in which, thanks to the Internet, it is possible to find all forms and types of content, access it, share it with others and disseminate it further. National borders do not matter and, due to the advancing technological developments, language barriers are also disappearing more and more. The digital content market is therefore global, open to development and constantly changing and growing. This not only opens up economic opportunities for companies that can interact with this market, but also offers society a mass of benefits, for example in terms of freedom of information, intercultural exchange or a variety of choices for the consumption of (media) content notwithstanding risks and challenges that come with this globalised exchange. Intermediaries and other platforms that enable or provide access to content, collect and categorise content, provide forums for exchange and content creation by users, are regularly the gatekeepers to these benefits.

The regulation of this multi-sided market of dissemination of online content is as diverse as the actors and types of content – whether video, audio, image-based or text-based – involved. Although with respect to Member States competency with regard to media pluralism and the democratic and cultural functions of media actors there is no fully harmonised media regulation at EU level, there are a number of acts which directly or indirectly address or at least have impact on the media and beyond it the creation of content, its distribution and presentation as well as its consumption. Fundamental rights guarantees of freedom and plurality of opinions and the media, internal market freedoms of unhindered cross-border dissemination and a foundation of EU common values that is also relevant for content dissemination result in a complex network of secondary legislation pursuing different objectives and protection goals.

The creation of this secondary legal framework partly dates back more than 30 years and thus lies in a time when it was hardly imaginable that digitalisation and its effects would be so profound for media and content dissemination and the way recipients use such content. This is why EU secondary law has been repeatedly reformed over the years. These reforms, most recently through the Audiovisual Media Services Directive (AVMSD) and the Directive on Copyright and Related Rights in the Digital Single Market (DSMD), were important steps to make the EU "fit for the digital age". The political guidelines of the new Commission President Ursula von der Leyen and the announced work programme of the European Commission are also based on this approach. A large part of the envisaged initiatives at EU level refer to the new role of platforms in the digital environment – including in the context of the online dissemination of content. This addresses above all the provisions of the E-Commerce Directive (ECD), which, as a cross-sectoral piece of legislation, has formed the cornerstone of the internal market for information society services (ISS) for almost 20 years. The Commission announced that it will address the problems arising from the application of a regulatory framework created in a completely different Internet environment by means of a new Digital Services Act Package as part of a broadly designed reform of which the first steps are announced to be proposed in December 2020.

The application and enforcement of the current legal framework has been confronted with numerous problems, not last due to the above mentioned changes. These include amongst others the following issues, which were extensively analysed in a predecessor study entitled "Cross-Border Dissemination of Online Content – Current and Possible Future Regulation of the Online Environment with a Focus on the EU E-Commerce Directive": The rise of Web 2.0 interactivity led to most intermediaries moving away from being simple "passive hosts" (as is the basic idea and concept of the ECD) to now being interactive content management platforms where the exploitation of user data and network effects are at the centre of the business model. This questions the rather simplistic categorisation of today's platforms as "hosting providers" and blurs the limits of the conditions for claiming liability privileges linked to factors such as "neutrality" and "actual knowledge" of illegal content, despite the fact that the Court of Justice of the European Union (CJEU) has contributed decisively in its case

law to clarifying the interpretation of some of these notions responding to referrals by Member States courts which they needed in their interpretation of national transposition acts of the ECD.

Furthermore, many users are no longer only passive recipients of content only but rather content creators who promote their views or themselves with the most diverse offers on different platforms in text, image, video or audio. The downside of the opportunities offered by the Internet, technology and digitalisation have also become apparent in the meantime: phenomena such as easy access to illegal or copyright infringing content, content inciting to hatred and terrorist propaganda, but also disinformation, are only examples for a problematic aspect of the possibility for users to create and disseminate widely content via intermediaries whereby the latter can regularly invoke the liability privileges of the ECD when it comes to responsibility for illegal or harmful content. This complex situation, with horizontal liability privileges on the part of gatekeepers on the one hand and growing threats caused by regularly anonymous users on the other, has led to difficulties in regulatory practice and made effective law enforcement more difficult, particularly in the fight against illegal online content disseminated across borders.

These developments, in the form of a growing (close to editorial) influence of platforms on content and its exposure to users as well as increasing threats to (fundamental rights of) EU citizens and the values of the EU, have already been taken up and addressed in other secondary legislation and via several instruments of self- and co-regulation, e.g. via rules for video sharing platforms, online intermediation services or online content-sharing services as specific sub-categories of ISS. However, as some of these rules are explicitly based on or refer to the ECD's liability framework and/or are not covered by the ECD's sectoral exceptions, it is becoming increasingly difficult to ensure coherence between these rules and to provide effective enforcement of sectoral provisions. Concerning the cross-border dimension it has to be considered additionally that differing legislative or administrative approaches by the Member States, some of which have recently adopted sectoral rules for certain types of online platforms in exercising their reserved legislative competencies, constitute a certain fragmentation of the regulatory framework.

The resulting problems are particularly evident when it comes to cross-border enforcement, which is the norm for online distribution of illegal content due to the cross-border nature of the Internet and also the significant market power of (mainly non-European-) ISS. The ECD, which is based on the country of origin principle (COO) and thus determines both the unhindered provision of ISS under the law of the country of origin and the competence of the regulatory bodies of that Member State, does not contain any specific provisions on the establishment and powers of supervisory bodies, nor mechanisms for coherence and cooperation between sectoral regulatory bodies. The provisions contained on Member States' powers to derogate from the country of origin principle, supervisory cooperation and cross-border information exchange follow a minimum harmonisation approach and have not had a very effective impact in practice with the increasing growth of the market and related tasks.

AIM OF THE STUDY

Against this background, the present study briefly recalls the applicable regulatory framework of the European Union and Member States for the cross-border dissemination of online content including the interplay between EU legislative acts and Member States law and the implementation of it. It gives an overview of regulatory options on EU level in general terms that are available in the process of adapting this framework. After that five core issues for reform are identified as concerns the specific area of media and (more general:) content dissemination without going discussing other elements such as e.g. new instruments in competition law concerning online platforms. For each of the five issues the study presents different possible solutions and gives an overview of discussed options. It proposes for the question of the future shape of the clarification of the country of origin principle and its exceptions, the scope of application of the framework for ISS, the liability privilege regime, obligations and duties for service providers including the respect for user rights, and finally of specific issues on the institutional setup for monitoring of compliance and enforcement a concrete way forward.

CURRENT REGULATORY FRAMEWORK OF THE EUROPEAN UNION AND MEMBERS STATES

Considering the legal framework for the cross-border dissemination of online content, basis and framework for any solution are fundamental rights as laid down in the Charter of Fundamental Rights of the EU (CFR), the European Convention on Human Rights of the Council of Europe and the provisions of national constitutional law. These rights feature prominently human dignity, which, according to the CFR, is "inviolable", i.e. needs to be considered as an overarching goal to be protected. They include also the protection of minors on their own behalf. On the other hand, freedom of expression (of service users that create content as well as recipients of this content) and rights of the service providers that might be confronted with increased legal obligations are to be respected. In the context of safeguarding fundamental rights, the Member States' competences in the field of media regulation and ensuring diversity must be preserved, particularly where platforms are concerned which present themselves as media-relevant gatekeepers.

Fundamental freedoms are the core of the single market and, in particular for the functioning of the digital single market in the EU. The fundamental freedoms include the right to establish oneself in a Member State under the jurisdiction of that state, and to provide goods and services within the internal market without being subject to stricter restrictions by the receiving Member State as well as relying on the free movement of capital. In the context of cross-border dissemination of online content, this does not only concern media companies that can invoke these freedoms, but also ISS. Derogations from the fundamental freedoms, whether at national or EU level, must be justified in particular by an objective of general interest and be proportionate. This also applies to varying inclusions in the legislative framework of the COO, which, although not an overriding requirement of the fundamental freedoms, is an expression of the idea of ensuring a free and fair internal market enshrined therein.

The values on which the EU is founded, which are laid down in the Treaties and are not merely theoretical in the light of the procedural mechanisms envisaged, give direction to regulation. In the context of the threats, but also of the benefits of access to information and communication opportunities in the online sector, human dignity, democracy, the rule of law and protection against discrimination are key factors. Not only as benchmarks for a minimum level of regulation, but also as common denominators for the EU and all Member States in light of exercising their competencies.

At the secondary law level, the AVMSD in particular is an essential part of the relevant legal framework for the dissemination of online content, despite the approach of minimum harmonization pursued therein. This is especially noteworthy with the adoption of rules for video sharing platforms adopted with the revision in 2018, which make these types of platform providers more accountable because they are seen as part of the audiovisual media environment and must therefore be subject to at least similar rules to other media services in order to protect recipients. The transposition of the rules, which in some cases offer far-reaching discretion to Member States encouraging self- and co-regulation mechanisms, is currently taking place at Member State level.

However, it is not only the media-specific secondary legislation that is relevant for the online content dissemination, but also other sectoral provisions that, for example, primarily pursue economic or consumer protection policy objectives. The DSMD defines a new category of "online content-sharing service provider" introducing a completely new set of obligations for these; the Platform-to-Business Regulation creates certain information and transparency obligations for online intermediation services and search engines relevant for the visibility of content and products. Existing rules, such as the General Data Protection Regulation (GDPR) with its strictly harmonizing approach establishing the marketplace principle, are just as relevant for the online or platform sector as much as are those currently under discussion, for example the Proposal for a Regulation on tackling terrorist content online. In addition, there are instruments that deliberately leave room for manoeuvre and the possibility of exceptions for the pursuit of media and cultural policy objectives at the national level, which enable supplementary rules concerning content dissemination. This is supplemented by a series of measures encouraging self-regulation at the level of EU coordination and support measures, for example in the area of hate speech and disinformation. Overlaps with the horizontal rules of the ECD are unavoidable. These secondary legal bases must not only be brought into line with any new or to be reformed legal bases, but also shows that there are and must be special rules for certain providers of ISS that address specific objectives and particularities.

REGULATORY OPTIONS ON EU LEVEL

On this basis of competencies, fundamental rights and values the EU has a wide range of regulatory options using mainly the achievement of a functioning (digital) single market as legal basis. When considering these options there is a need to reconcile this objective, which is fundamentally driven by economic considerations and policy, but has considerable impact on other sectors which are already regulated at the Member State and EU level, with exactly those rules which can also pursue other objectives. However, there is a large variety of players in the online platform sector that offer different services to different recipients using different content, technologies and user interfaces, but still have in common (to varying degrees) that they "only" offer access to certain content or services. Therefore, there is a continued need for horizontally applicable rules which allow for sector-specific approaches to be upheld. The sector-specific perspective – be it consumer protection, media, cultural, telecommunications, competition, criminal, copyright or data protection law, to name relevant examples – through which the regulation of ISS must also be viewed despite their common features as "intermediation services", makes full harmonisation within a single set of rules impossible. For this reason, the horizontal approach that is to be retained in principle calls for a detailed examination of existing legislative approaches and the establishment of sectoral exceptions and room for manoeuvre for the Member States exercising their competencies regarding for example cultural policy or safeguarding pluralism while taking into account impact on the freedom of expression.

On the one hand, this requires that the general rules e.g. on duties and obligations of service providers are content-neutral and open enough for the dynamic and continously changing nature of the online environment which requires a flexible way of responding to new challenges. This could entail laying down fundamental principles and rules in the horizontally applicable act while leaving room for specific additions or supplementary action in the future but also by ensuring an openness for the actual application of the existing rules originating from other legislative acts. The granting of powers to competent and professional authorities to formulate or draw up concretising guidelines is a means that has already been tried and tested in many sectoral legislative acts at EU and Member State level and which enables these to agree on common standards and enforcement procedures.

On the other hand, this means that not only the existing rules in the ECD need to be revised or replaced, but a new assessment must also be made as to which sectoral rules should continue to take precedence over the general rules of the ECD and where there must be (additional) sectoral exceptions in the light of competence limitations of the EU. This concretely means that measures taken at (EU or) national level in order to promote cultural and linguistic diversity and to ensure pluralism must still be excluded from a harmonisation approach. This calls for a general clarification of the relationship between existing rules on EU and Member State level, in particular the continued priority of sectoral regulations such as the AVMSD or the DSMD even if these also refer to instruments or rules that will be placed in the horizontal act, too.

Regarding the question of the appropriate legal instrument, there are several possible options for binding and non-binding legislative acts. It should be borne in mind that, although previous measures in the area of self-regulation have proven to be beneficial for the development of best practices and the establishment of cooperation and dialogue, shortcomings concerning effective enforcement, not last due to a lack of access to more reliable data needed to assess compliance, have become evident. Co-regulation mechanisms should therefore be a minimum option to be considered but they, too, need to take these shortcomings into account by involving appropriate supervisory mecha-nisms and provide for sufficiently concrete obligations. The proposed new regulatory framework should be laid down in a Directive to the extent that it would otherwise limit Member State discretion in implementation in a field – media regulation – that is closely connected to their reserved competence. It would be difficult to argue the need for a Regulation as overarching instrument especially considering its quality as horizontal approach, which must take into account a number of sectoral exceptions and Member State competence which is why full harmonization cannot take place anyway. Possibly, different instruments depending on the main legal basis for the provisions will have to be envisaged. If a Regulation is chosen as overall instrument, irrespective of its more limited flexibility with regard to downstream sectoral legislation, it would have to be designed with sufficient opening clauses or connectors to Member State laws.

CLARIFICATION OF THE COUNTRY OF ORIGIN PRINCIPLE AS BASIS AND ITS EXCEPTIONS

The COO is not only the basis of the ECD, but also of other legal acts regulating services with typically (also) cross-border nature, such as the AVMSD. It is a consequence of establishing an internal market based on the use of the fundamental freedoms. The application of the principle creates legal certainty for providers, as they basically only have to deal with the legal systems of a single Member State and only have to deal with that State or its competent regulatory bodies in procedural terms, even if they provide their services in other Member States, too. This is particularly essential in the online sector, since the services offered are regularly cross-border in nature without the provider necessarily having to actively orientate the service to a specific Member State market. This applies first and foremost to media content. The COO is therefore particularly important not only for large and internationally oriented ISS, but also for SMEs and start-ups, which regularly would have more difficulties to obtain detailed information about the legal requirements in all Member States, let alone to comply with them.

For this reason, the fundamental validity of the COO should remain untouched. However, the possibility for Member States of resorting – in urgent cases directly – to measures against (domestic) technical "carriers", in particular Internet Access Providers (IAPs), instead of (foreign) content providers or host providers in case of responding to illegal content without this constituting a breach of the COO per se, needs to be explicitly stated in order to avoid unclarity and resulting hesitation on the part of regulatory authorities to act in this way in high-risk cases. Identified problems, especially in connection with the cross-border dissemination of online content and associated enforcement difficulties, should be clearer addressed by defining derogation cases as well as the possibility to rely on the market location principle for content originating or disseminated by non-domestic providers in certain clearly defined cases. Such a newly found procedural setup could serve as blueprint for possible future clarifications of COO/market destination distinction also for other parts of the legal framework concerning content, in particular the AVMSD.

The Member States' power to derogate from the COO for certain service providers on the grounds that public interests are endangered must be maintained, but the procedure should be clarified and streamlined so it can lead to a binding result within a reasonable and that means short period of time. In particular, it should be assessed whether the general interest objectives contained so far are sufficient to take account of existing problems. This is especially relevant with respect to the definition of incitement to hatred, which has also been expanded under the AVMSD. Subject clarification should also be foreseen as regards a broad understanding of the protection of minors, which goes beyond protecting against illegal content. The scope of that protection continues to result from Member State law. Furthermore, the possibility of expanding the scope to include threats to democratic elections (e.g. in light of disinformation campaigns) and public safety, explicitly with reference to terrorist propaganda, should be taken into consideration to react current and increasingly relevant threats. The streamlining of the envisaged procedure of participation of the Member State of establishment and the Commission should include the establishment of concrete information and reaction obligations of the participating Member States and tight deadlines to do so. The establishment of a dispute settlement procedure in cases of conflict with the participation of a body composed e. g. of representatives of the regulatory authorities appears useful. This could be based on cooperation of competent bodies (see below) and include fast track and joint discussion/decision-making procedures in order to be both efficient but as mindful as possible for the COO.

The same applies to the power of deviation in emergency cases with correspondingly much tighter obligations. In cases of emergency derogation, there should be a tiered system of options, in particular according to the level of risk of the content or infringement, which also takes into account the responsiveness level of enforcement in the competent Member State. Given the fact that, with regard to non-EU providers, it would be possible - with due respect to limits under public international law – to act in accordance with the market location principle under Member State law anyway, since there is no harmonized EU legislation governing the validity of the COO for such providers, the enforcement of law and fight against illegal content within the EU must not be subject to excessive hurdles when it comes to high-risk content such as content that violates human dignity or terrorist propaganda irrespective of where it originates. Details of this should be developed especially within the cooperation of competent bodies.

DEFINING THE SCOPE OF APPLICATION OF THE FRAMEWORK

The need for an update of the definitions concerning the scope of application of the relevant framework for information society services has become evident over the years. Whilst the very general information society services definition dating back to 1998 allowed and allows an inclusion of all different types of actors in the online environment, it is not sufficient when it comes to applying specific rules for different actors. For that reason, already the ECD introduced specific categories of providers which under certain circumstances profit from liability exemptions. While the more technical transmission-oriented categories (mere conduit, caching) were hardly problematic in their application, the actually relevant category is that of hosting service provider. The latter has created problems not only its interpretation (namely concerning neutrality/passiveness and actual knowledge criteria as well as the possible reach of preventive injunctions against these), which were not completely resolved by case law of the CJEU, but also through a differing approach on Member State level. In addition to the changed nature of what may have in the past been a more identifiable category of host providers both in terms of business model but also technical capacity, recent years have shown that – in these cases outside of the content dissemination context – even the ISS definition as such may be difficult in its application when distinguishing from more specific definitions (e.g. transportation service) concerning new types of intermediaries or platforms.

As a minimum reaction to this, existing definitions regarding the scope of a new or amended act concerning online content dissemination need to be substantially reworked and integrate the elements of interpretation guidance already offered by the CJEU. Preferably, at least the definition of hosting provider is replaced by a broader definition which does not rely any longer on the distinction of active/passive nature of the service provider as this is no longer decisive nor a clear indicator. Beyond having (in continuation of the ISS definition) a very general and broad definition addressing all types of online services providers or more specifically all types of platforms and intermediaries which should be open enough to encompass future new types of services, there should be room for more specific categories of providers so more specific rules can be attached to these. These could be either provided by sector-specific rules which continue to exist besides the horizontally applicable legislative act – examples for which would be the specific type of platform addressed by the AVMSD (VSPs) or the DSMD – or within the horizontal act itself. Taking into consideration the role that platforms play as intermediating instances between content producer and content user/consumer, there has to be at least a specific category of "content platforms/intermediaries" which can be distinguished from other types of platforms that also act as intermediaries between two parties and also have organisational influence on the interaction but do not concern content. This does not mean that comparable rules cannot be applied to these different types of providers, but it safeguards that the significance in the context of content dissemination can be adequately addressed.

Specific online content dissemination platform definitions exist already, such as in the AVMSD and the DSMD, but in creating an additional content intermediary definition, any type of platform contributing to the exchange of content in the public sphere – irrespective of whether it relates to audiovisual content or any other type of content and whether it fullfils the detailed requirements laid down in existing definitions – could be addressed and included in the regulatory framework. The broader definition should limit the criteria to a few, namely addressing information society service providers that offer the storage of or access to content (created/uploaded/shared) by recipients of the service with the aim of making it available to other recipients of the service and clarifying that (for this activity) the content producer is not under the authority or control of the provider (in which case the provider anyway falls in other categories). Only when it comes to applicability of specific rules should a further differentiation be made which reflects the degree of organisational involvement (actual and potential) as the differentiating standard. This would still allow for a distinction by editorial influence (= e.g. AVMS categories in the AVMSD), curatorial influence (organisation, presentation etc. of the content, = AVMSD-VSP- or DSMD-type, but also as in proposal TERREG) and merely technical transmission which is in principle reduced to direct communication forms or technical facilitation (e.g. Internet access providers). In addition, to (a) newly formulated category/ies, the different impact of providers can also be reflected. This would allow for certain exemptions in the substantive rules concerning certain types of providers that otherwise would fulfil the criteria (e.g. non-profit types of services) or for considering economic disparities between major players and smaller market participants. However, these should not be entirely excluded from the category. Instead, while the

core elements of the rules such as treatment of illegal content should fully apply to all providers within the scope, such providers could only be confronted with a subset of rules in the implementation. Further, it should be considered how regulatory transparency can be increased by providing – either based on an own categorization in a registration process reviewed by a supervisory authority or established by the latter – lists of content intermediaries falling under the definition and, where applicable, jurisdiction of a specific Member State. A periodic evaluation of the definition – which would be more difficult if it is exclusively integrated in a Directive or even Regulation – or, preferably, the empowerment of competent bodies to give application guidance of the definition by listing criteria (also of new types of services) that can be regarded as fulfilling an element of the definition.

REFORMING THE LIABILITY PRIVILEGE REGIME

The starting point concerning the disputed liability privilege regime in the ECD is the following: without having harmonised EU rules on liability under certain conditions providers including host providers were shielded against application of liability rules on Member State level. While the original introduction of this regime was meant to safeguard innovation and offer legal certainty for „new" service providers when developing especially services allowing content exchange, the situation has changed entirely: the unclear reach of the liability exemption has partly led to a limited contribution by providers in taking a more active role in preventing dissemination of illegal or harmful content and partly made enforcement against such content especially by competent bodies difficult. This lack of enforcement online has not only led to a significantly different approach towards ensuring content standards in more traditional forms of content dissemination and via intermediaries. Fundamental values of the EU including an efficient proteciton of fundamental rights necessitate, however, a comparable approach concerning (from user perspective) comparable types of content dissemination. Therefore, the question of upholding or amending the liability privilege regime has to be looked at through an entirely different lens than when it was introduced.

Without having to question the liability privilege per se, it needs to be shaped in a way that it does not hinder or limit efficient enforcement of rules e.g. concerning illegal types of content. Although it is already possible to be introduced under the current ECD, a clarification in that sense should be undertaken that the question of liability privilege is a separate matter from imposing certain obligations on intermediaries that go beyond the reactive measures needed to be able to benefit from the liability privilege. The latter currently is based on providers' expeditious reaction by removing or disabling access to illegal content when gaining actual knowledge. The criteria such as "knowledge" could be defined more clearly and ideally accompanied by the obligation of introducing specific procedures leading to this knowledge. In addition, the limited set of reactive measures should be elaborated including possible measures in reaction to illegal content that go beyond a simple removal. As mentioned, already the current ECD and the interpretation by the CJEU allow Member States to request measures that reflect due care of the providers without these conflicting with the prohibition to introduce general monitoring obligations. This prohibition should be upheld in as far as it constitutes an element in protecting the widest possible use of freedom of expression by recipients of the service, but should be clarified as not hindering proactive duties of content intermediaries depending on certain conditions as set out below.

The combination of liability privilege with separate obligations and duties of providers would better reflect the crucial position of content intermediaries in facilitating the use of fundamental rights but also suppressing illegal use. It would further allow a dependence on compliance with the obligations and duties in order to be able to continuously profit from the liability exemption as well as foreseeing sanctioning instruments in case of non-compliance. To recall in this context: the liability exemption for content dissemination is dependent on the relevant content not being own content of the intermediary in which case normal liability would apply. In that context the circumstances should be defined under which intermediaries become liable for illegal user content if they do not disclose the identity of that user to supervising bodies in order for them to be able to take action against the user. In order to avoid further unclarity about when "curation" (i.e. organisational involvement of the intermediary in the content dissemination) comes close to "editorial control" (which would establish liability directly), adding the layer of responsibility (= obligations and duties) at least clarifies that irrespective of the liability exemption these types of providers have compliance obligations. Underlining in the EU legislative act that such responsibility can include not only the way "illegal" but also harmful content as defined by the laws of the Member States is treated, would contribute to a better balancing of the diverging interests at stake. Finally, in the context of liability exemption it should be noted that although technical

services, such as IAPs are not the primary addressee for enforcement measures against illegal content dissemination, they too can be target of actions taken by competent bodies with which they have to comply irrespective of their liability exemption.

INTRODUCING OBLIGATIONS AND DUTIES FOR SERVICE PROVIDERS

As mentioned above, obligations and duties can be introduced for service providers in a more spelled out way than just referring to the possibility of foreseeing duty of care standards as is currently the case. These responsibility-oriented instruments do not concern the question of liability (or its exemption) in individual cases of violation of the applicable legal framework, but a separate regime which allows holding the content intermediaries accountable in case of non-compliance with the structural expectations concerning their responsibility. The advantage of introducing responsibility requirements in a harmonising legislative act at EU level is responding to the pan-european (and typically global) activity of most relevant service providers and thereby giving these legal clarity in a comparable way as it was done with the initial ECD and the introduction of (common) liability exemptions. In addition, these would allow for applying joint enforcement standards even if specificities of national law need to be taken into account by competent national bodies. Finally, it would clarify the possibilities of introducing such measures beyond the current step-by-step evaluation of national measures by the jurisprudence of the CJEU.

The expectations towards intermediary responses to their responsibility should – respecting a proportionality approach – take into consideration the type and position of the service provider concerned as well as the level of harm and the risk of its occurence. Concerning the intermediaries, a graduated approach will be applied depending on the impact of the service for the general public, which in turn concerns both the actual service offered as well as the market or opinion power allowing for exempting certain categories of especially small or emerging providers from certain obligations and imposing potentially stricter obligations for platforms with significant intermediary powers. Concerning the level of harm this means that the measures expected should be more strict for high-risk, high-impact and high-probability types of content compared to responses to risks at the lower end of the scale. This approach needs to refer to the types of harms that should be prevented by responsibility measures, without, however, having to define them in detail. For that purpose, existing sector-specific provisions can be referred to or used and it also allows Member States to uphold their legislative framework defining the categories of illegal or harmful content to which such measures would then correspond.

The carving out of responsibility requirements as mentioned in a summarized form below can lean itself on the approach of the revised AVMSD concerning appropriate measures to be taken by VSPs, as it already establishes a detailed responsibility standard which is separate from the other rules of the Directive that concern providers of content with editorial (and therefore increased) responsibility. The AVMSD-approach also refers to the use of codes of conduct in a co-regulatory setting, which allows to include established practices by industry as long as there is an inclusion of some form of robust and independent oversight e.g. through endorsement by competent regulatory bodies. The obligations (so-to-speak the rules within the responsibility framework) and duties (the tasks to be fulfilled) require diligent economic operators to follow the concept of risk management which is based on an initial risk assessment and the responses to identified risks. As is established practice in other areas such as for financial services or for personal data processing the assessment equates to a systematic preparation and preparedness for reacting to risk situations in practice. Risk thereby does not mean individual cases in which a potential violation of content standards occur and necessitate a reaction but include avoidance measures so that risks do not even materialize. Depending on the outcome of the risk assessment the expected risk responses or mitigation strategies can derive from practices and standards that are commonly accepted and laid down by certified standard-setting bodies which regularly will include reference to state of the art technology. A further possibility to enhance legal certainty for content intermediaries as far as their responsibility is concerned, is to list the basic measures in the legislative act but foresee the further concretisation by Guidelines adopted by the Commission or competent national regulatory bodies or other designated institutions.

The responsibility framework will include a number of areas for which (certain) intermediaries need to have measures in place complying with accepted standards. These will partly be of a proactive nature, partly reactive and concerning the latter also be a link to the question of liability: measures to be taken as a reaction to a notification about illegal content can expand from merely taking down that content (failure to do so leading to actual liability) to ensuring future non-reappearence of that content ("staying down") as well as following up the action with information to concerned parties as well as to competent bodies in a reporting mechanism. Therefore, a clear distinction between types of duties is not necessary.

Guidance concerning the procedures to be installed and followed for notification of illegal content is a minimum request for the future act, especially if the liability privilege remains unchanged and is therefore dependent on the adequate response to such notifications. These procedural elements should include the way reporting is possible and facilitated, the conditions for response measures and redress possibilities, whereas especially the technologies to be used need not be specified in the law itself. The same applies for other types of technical measures that might be within the measures expected from intermediaries, such as e.g. age verification systems or content flagging systems. Another main area for which more detailed requirements are needed in the legislation concerns transparency. This entails transparency towards users and affected recipients of the service in case of content blocking or removal, through informing about the use of algorithmic instruments and their main functionalities, it also includes transparency towards competent bodies charged with supervision of the service both as a general reporting obligation as well as responding to individual requests. Concerning content moderation policies, transparency is not sufficient nor the above-mentioned reaction in case of notification. In light of the role of content intermediaries these have to be able to demonstrate that they are using policies that do not limit freedom of expression beyond the combatting of illegal and harmful content and how they adhere to the idea of a rule of law-approach in case of disputes about decisions made by guaranteeing different levels of challenging these in an easily accessible manner.

This basic set of requirements which has been exemplified above is complemented by relying on accepted standards in the way the requirements are to be reached. This combination of laying down the responsibility approach in the law but relying strongly on such standards allows on the one hand for a flexible and continuous evolution of these standards as well as a close involvment of the industry in identifying possible standards. The system then allows – beyond the question of liability in specific cases – to hold content intermediaries accountable and imposing potentially also a sanctioning regime which does not respond to invididual cases of illegal content dissemination but the lack of readiness by disregarding the expected standards. In that way, burden of proof lies with the providers and encourages compliant behaviour. As a result, the limiting of dissemination of illegal or harmful content online seems more promising than by only relying on individual cases brought forward by private parties or public authorities.

INSTITUTIONAL SETUP FOR MONITORING OF COMPLIANCE AND ENFORCEMENT

Creating rules necessitates ensuring their enforcement in case they are not complied with. Besides enforcement by private parties, designated bodies – typically public authorities – are in charge of monitoring compliance of supervised persons or entities and reacting in case of violations. The rules not only have to allow for an efficient enforcement by taking into account procedures and an institutional setup, but there also has to be an adequate implementation of this setup by the competent entity. This holds especially true if the subject matter of regulation requires specific types of enforcement bodies, as is the case for oversight of media and other types of content communication for which freedom of expression prohibits direct state influence in the monitoring. Although the creation of rules on an EU level may seem to call for bodies enforcing these rules on EU level, the application of rules deriving from EU law in most cases is still dependent on and assigned to authorities of the Member States. Even though the existing and future rules on ISS concern activities that typically have a cross-border dimension and will often concern providers active in all or the majority of EU Member States, the enforcement should continue to rely on the Member State level. This concerns at least the category of providers relevant for this study, the content intermediaries. For those there is a comparability to media-type regulatory conditions that allocate the competence with Member States not last because of national, regional or local specificities which – at least for media regulation including the extended scope of

the AVMSD – should be able to be included in enforcement approaches. Irrespective of this competency assignment cooperation structures are possible.

The COO is reason for both giving the supervisory power to Member States' (country of origin's) bodies while calling for the improvement of cooperation between these competent bodies on a pan-European level in order to ensure the effective enforcement across borders within the single market. Firstly, however, the rules have to frame the supervisory structure either by defining it on EU level or by requesting Member States to do so along a certain amount of given criteria in their national law. The COO clearly not only attaches jurisdiction to the establishment of providers but also the obligation of the Member States with jurisdiction to use their supervisory powers. Efficient oversight of content-related activity therefore necessitates not only independence from influence by public or private parties, the adequate equipment by assigning relevant competence and providing sufficient means and ensuring relevant expertise, as well as the authorization to contribute to a transnational cooperation. For this purpose and because of the comparability of the monitoring task relating to content intermediaries a reliance on regulatory bodies charged with this type of supervision since a long time seems an obvious solution. But even if such expanded coverage of content-related supervision is not assigned to national regulatory authorities equivalent to the ones under the AVMSD, that Directive can serve as blueprint for the criteria to establish adequate bodies. Where supervision of content intermediaries necessitates new powers, such as e.g. in order to measure compliance with responsibility requirements or, to name a concrete example, transparency obligations, these have to be expressly assigned, such as in the example information rights vis-a-vis providers or the possibility for auditing. These new powers can extend to sanctioning possibilities for non-compliance with the responsibility requirement which is to be seen separate from the question of potential liability in specific cases of content dissemination.

Concerning the cooperation on EU level different degrees can be conceived: national competent bodies could come together for a loose exchange of viewpoints and comparable non-binding activity; they could be part of a specifically created body in which they contribute to formalized cooperation which includes joint decision-making in some cases by majority opinion; finally, they could be part of a cooperation system with a separate body created on EU level. The lowest form of engagement is inappropriate, as it does not ensure any form of joint agreements on directions of regulatory action. The example of the European Regulators Group for Audiovisual Media Services (ERGA) clearly shows how changing the format from a more loosely structured group (then based on a Commission Decision) to a formally established body with assigned tasks in the revised AVMSD allowed it to elevate the exchange of best practices and development of common guidelines by its Members. For both above mentioned degrees of more intensive cooperation there are a number of examples in more recent legislative acts of the EU. Namely the European Data Protection Board (EDPB) brings together the national supervisory authorities which in a formalized consistency procedure can issue joint opinions on procedures of individual authorities and in the event of disputes even make binding majority decisions concerning cross-border cases. It can be regarded as the main source of inspiration when considering the further enhancement of cooperation – laid down in law – of competent bodies charged with media and content communication oversight. Especially concerning possible specific EU rules for systemic platforms (which can include content intermediaries) an even more enhanced form of cooperation in supervision that includes the creation of an additional body is envisageable. It could lean on the creation of the Single Supervisory Mechanism for banking supervision, which foresees direct authority only for significant banks, however taking into consideration the very specific nature of that system and the pre-existence of a relevant body with the European Central Bank.

The actual form of cooperation will depend on the agreed substantive rules and its structure can use existing models which are adapted to the specifics of the market for online content dissemination and which is put in context with other forms and institutions charged with oversight of other types of platforms covered by the new rules. This can include regulatory structures for consumer protection, competition law or newly created dedicated bodies concerning the platform sector. Defining the cooperation and the powers assigned to the cooperation structure, which could include establishing e.g. sanctioning powers, in detail is easier possible in form of a Regulation, which potentially would have to be created separate to the substantive ruleset (as was the case for the Body of European Regulators for Electronic Communications (BEREC)). However, the example of ERGA shows that it is also possible within a Directive containing provisions that need transposition by Member States. In whatever form it is laid down, the cooperation tasks should extend at least to concretising the application of the rules where assigned to do so, agreeing on common enforcement standards, giving opinions on cases of cross-border content dissemination in case of dispute about the treatment in the country of origin, ensuring efficient information provision between each other in concrete cases and

participating in fast-track-procedures for urgent cases which justify a market destination oriented exception to the COO. Beyond the cooperation between national competent bodies, cooperation (on national but also on EU level) includes working together with supervised entities especially in co-regulatory approaches, but with other supervisory bodies e.g. in data protection or competition law, too.

CONCLUSIONS

1. Based on these findings, some main conclusions for the preparation of a future-oriented framework for online platforms on EU level can be drawn. The suggestions that are presented in this study concern specifically 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 in reforming the horizontally applicable framework for information society services. This means on the one hand that a number of the suggestions are not aimed at creating a rule that differs from those applicable to other types of platforms and thereby can be integrated in the general new or amended provisions. On the other hand, certain rules will have to be tailored towards the special role content intermediaries play, while making sure that the interconnection with existing acts as well as possible supplementary rules of Member States is addressed.

2. The study proposes solutions based on the approach that regulating content intermediaries results from and respects the fundamental rights basis and the core European values and is not only motivated by ensuring a single market with expansive use of the fundamental freedoms with only very limited restrictions. Therefore, possible additional burdens for intermediaries that will arise in the future are reflective of their position, in many cases amounting to dominant market power, but certainly having a crucial function between content creation and consumption by users. These rules are not meant to hamper the ability of platforms to act as economic operators in the single market, but integrate them in a more clearly defined manner in the safeguarding of a functioning public communication sphere.

3. The new ruleset does not necessarily have to be very detailed, but it will at least lay down certain common regulatory goals (such as fairness, transparency and accountability) and enable on that basis the involvement of supervisory authorities or other bodies charged with the oversight and enforcement of such standards in the further detailing of requirements. It is important to emphasise that if online content intermediaries are included in a more stringent regulatory framework in light of their special function and the role they play in facilitating the exchange and debate of opinions and content, then this also impacts the question of supervision: such competent bodies will have to fulfil criteria guaranteeing efficiency and independence from state powers, supervised entities and private parties as is the case with established national regulatory authorities in the field of audiovisual media services. The latter or other comparable institutions need to be empowered with the task and equipped accordingly. In addition, enhanced forms of cooperation in order to respond more efficiently to problems resulting from the cross-border dimension need to be designed, which can include cooperation bodies and other institutions on EU level in which coordination and possibly certain decision-making takes place.

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