1. Background of the Study

1.1. Online Dissemination of Content

The Internet can be regarded as mass medium. As such a mass medium, it contains a huge variety of different content, addressed to different audiences by different distributors. With this, the Internet has also become an integral part of other mass media as well as the media supporting industries, namely the advertising sector.[1] More traditional media providers such as broadcasters or the press remain to be content providers in the digital environment but can make use of the infrastructures of other distribution channels in order to make their content accessible to a wider audience. While at the beginning of the "Internet age" they still mainly used the services of Internet access providers or website hosting providers, for example to provide their own blogs or media libraries, and therefore remained distributors themselves, today they increasingly resort to new distributors such as platforms and other intermediaries that distribute third-party content on the basis of their own offerings. The initial advantage is obvious: content can be made available to a larger and also new audience if it is made available on large platforms with large numbers of users. Content producers therefore compete for the attention of users not only with other content providers but also with intermediaries and comparable providers. These users, however, are to a large extent no longer just recipients as they were 20 years ago. Rather, individual users can also slip into the role of content providers using the Internet, for example if they maintain their own blog or distribute content via third parties such as video-sharing platforms or social networks. All that a user needs is basically an Internet-enabled terminal device and a means of access, e.g. by wireless points. So the roles in the media and content dissemination landscape have certainly changed dramatically in the last years.

The Internet with its multitude of possibilities and communication spaces offers room for a variety of different offers. Content is distributed everywhere and is ubiquitously available, e.g. when using VSPs, social networks, blogs, forums, portals or other platforms. Such content can be found via search engines or the search function of platforms; it is often free

1 *Ohiagu*, in: Kiabara Journal of Humanities 16(2), 2011, p. 225, 225 et seq.

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– at least without payment – and accessible to everyone, including minors, and it can be visual, audio or audiovisual in nature. The type of content is diverse, ranging from current news, general or thematic information, entertainment and education to purely promotional content. A major change that came with the Internet is the constant availability of information, one of the reasons why the "digital age" was originally referred to as the "information age".[2]

One of the more problematic sides of the large amount of information that is provided via the Internet is the false information that is disseminated and which is currently the subject of much legal debate under the heading "online disinformation" in light of the possibilities of influencing public opinion building.[3] Other examples are the strong rise of incitement to hatred, hate speech and other defamatory content, one reason for its increase seemingly being the inherent anonymity of the Internet.[4] Further negative phenomena are terrorist propaganda, which can be disseminated not only in closed networks but also via open platforms such as YouTube or Facebook, copyright piracy, child abuse material[5], and incitement to violence and crime. While some of that content regularly fulfils criminal law provisions, there are other types of content that are only of concern to a certain group of addressees. This refers especially to minors that need a specific protection against content that can be detrimental to their development, such as pornography or depictions of violence. Despite its unsuitability for this group of addressees, such content is nevertheless regularly accessible to everyone via online intermediaries.

These observations apply worldwide. Internet information exchange in principal knows no national borders, and, in particular, there is no need

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2 Cf., for example, *Kirtiklis*, in: Lingua Posnaniensis 59(1), p. 65, 65 et seq. It was also the terminology used in EU law, e.g. when online services were defined as "information society services" or "harmonisation […] for information society" (title of Directive 2001/29/EC).

3 Cf. on the term and the risks of online disinformation, e.g., Report of the independent High level Group on fake news and online disinformation, A multi-dimensional approach to disinformation, available at https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation.

4 Cf. on this, e.g., *Banks*, in: International Review of Law, Computers & Technology 24(3), 2010, pp. 233, 233 et seq.

5 In 2015 alone, the UK Internet Watch Foundation identified 68,092 unique URLs containing child sexual abuse content, hosted anywhere in the world; cf. IWF's 2015 Annual Report, available at https://www.iwf.org.uk/about-iwf/news/post/444-iwf-announce-record-reports-of-child-sexual-abuse-online.

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for a domestic point of contact to address content to the target audience at that specific location.

Legal rules can offer protection against such problematic content. There are actually rules prohibiting certain types of content. Protective mechanisms can be derived from fundamental rights (on this, cf. Chapter 2.1), in particular concerning the protection of personal rights or intellectual property. Additionally, rules on copyright law, criminal law, audiovisual media services law or data protection law also establish rules of conduct that also apply to the online sector (on this, cf. Chapter 2.4.). Nonetheless, while there is a strong foundation of both the EU and its Member States on a set of commonly accepted values to which most prominently these fundamental rights belong, the protection of these values have functioned much better in the "offline world" and during the first phase of wide use of the Internet. However, whether and how content may be disseminated is still relatively easy to answer when considering these rules, but the real question and difficulty is how and against whom rights and claims can be enforced.

1.2. The Role of Platforms in the Online Dissemination of Content

Against whom rights may be enforced depends on who can be held responsible in which form for the distribution or accessibility of content. In this regard, a distinction has always been made between different providers or categories of providers. In the early days of the Internet, however, the players and the conditions under which they operated were different than they are today. There were already search engines at the beginning of the 1990s[6], but it was not until 1999 that the Google search engine was launched, which did not reach today's relevance for many years after.[7] There were also certain distributors, such as Internet access providers or website providers, which around the turn of the millennium could be divided into the categories of hosting, granting only access or even being mere caching services. This categorisation was picked up in legal texts, namely in the E-Commerce Directive (ECD)[8] (on this, cf. Chapter 3.).

6 *Schwartz*, in: Journal of the American Society for Information Science 49(11), 1998, pp. 973, 973 et seq.

7 Cf. the history of the company available at https://about.google/our-story/.

8 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular

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However, this division began[9] to collapse after a few years and at the latest with the emergence and increasing significance of what is commonly referred to as platforms or "intermediaries". From the outset it is clear that there is much more heterogeneity in the categories of service providers than in the early days of the Internet, which can already be seen in the differing choice of terminology with which they are addressed. These types of providers no longer solely host or cache foreign content or give access to it; they need to rather be seen as complex platforms with a multitude of functions.[10]

In the Internet and digital economy, platforms are understood to be intermediaries that bundle media content, market it on digital markets and have an organisation and exclusion technology that enable the creation of a digital end consumer market.[11] Platforms are therefore intermediaries between media or content providers and recipients, i.e. part of the value chain. Due to the changing conditions in the digital environment, however, the term is not suitable for a conclusive definition, as shown by the lack of a detailed description of the organisational structure. Nevertheless, the platforms share some key characteristics, in particular the ability to create and shape new markets based on collecting, processing and editing large amounts of data. By operating in multisided markets, albeit with varying degrees of control over direct interactions between groups of users, they benefit from "network effects". Platforms rely on information and communication technologies to reach their users, and they play a key role in digital value creation.[12] Initially, the business model of platforms was generally[13] not geared towards providing own content but rather towards

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electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17.7.2000, pp. 1–16.

9 For example, Facebook was launched in 2004 and YouTube in 2005, although their reach was of course not as high as it is today.

10 On the changing role of online platforms cf. also *De Streel/Buiten/Peitz*, Liability of Online Hosting Platforms, p. 23.

11 *Sjurts* (ed.), Gabler Lexikon Medienwirtschaft, p. 474.

12 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, COM/2016/0288 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1466514160026&uri=CELEX:52016DC0288.

13 Facebook, for example, recently presented its initiative "Facebook News", where it will publish its own news in cooperation with several publishers and newspapers; cf. ZEIT ONLINE, 25.10.2019, available at https://www.zeit.de/digital/2019-10/facebook-news-tab-app-zeitungen-verlage-soziales-netzwerk.

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collecting third-party content or having it collected and assembled by users. They therefore provide an attractive infrastructure. In order to attract (more) end users, however, the platforms in today's markets must regularly offer something in addition to the mere bundling of content in order to be able to distinguish themselves from competitors. Therefore, editorial measures are also regularly carried out on the platform, for example by categorising media content, integrating algorithms for preference systems, creating playlists or specifying search parameters based on individual user data they collect. Even from this limited selection of editorial measures it can be seen that it is regularly the platforms which decide about the content that is displayed, how it is displayed and to whom. This process is often not transparent for third parties.

This changing role of platforms leads to the conclusion that with the ever-growing availability of user-generated audiovisual content, which is disseminated outside of more traditional channels that necessitated a provider with editorial responsibility, existing categories of online services need to be questioned.

1.3. The Role of Supervisory Authorities in the Online Dissemination of Content

There is no general supervision of content disseminated via the Internet. Insofar this type of dissemination of audiovisual content is significantly different than it was and is the case for broadcasted content. Supervision of online disseminated content by definition would be much more challenging if it would be attempted in a comparable way, given the diversity of the content, addressees of monitoring efforts and the regulatory areas concerned as well as the cross-border character of such dissemination. Rather, there are several regulatory frameworks that address the online dissemination of content partially. This applies, for example, to audiovisual media services with the Audiovisual Media Services Directive (AVMSD)[14] of the

14 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, pp. 1–24, as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of

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EU or copyright questions with Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive)[15] and in future with the national transpositions of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM Directive)[16]. These are only two examples for rulesets that have an impact in the shape that they have been transposed by the Member States of the European Union (EU).

While copyright law pursues an approach of enforcing rights through private individuals in the form of asserting claims, it is supervisory authorities under the umbrella of the AVMSD that monitor compliance with the rules and regularly have a set of possible sanctions at their disposal which enables them to also enforce the implementation of the requirements (e.g. with regard to the protection of minors or protection against incitement to hatred) vis-à-vis providers. However, as far as online content is concerned, AVMSD only applies to the extent that the respective providers and services are within the scope of the Directive, i.e. audiovisual media services (linear and non-linear), commercial communication and, in future, video-sharing platforms (VSPs). Platforms therefore do not per se fall within the scope of AVMSD but only if their "essential functionality […] is devoted to providing programmes, user-generated videos, or both, to the general public […]" (Art. 1 para. 1 lit. aa AVMSD). This is problematic insofar as the supervisory authorities are dependent on the cooperation of the platforms (the distributors) in the performance of their tasks, either because there is no separate content creator or because they have no access to this content creator for certain reasons (e.g. because the original creator cannot be determined or there is no way of establishing a contact). Therefore, it would be a viable option if authorities could get access through other rules. The ECD, which is applicable to information society services, could be an obvious path, but with its aforementioned categorisation it provides for liability privileges of these types of service providers which can as a result also exclude the liability of platform providers (cf. Chapter 3.3.).

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audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, pp. 69–92.

15 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, pp. 10–19.

16 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.

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It is not only the scope of application of the relevant Directives that limits the powers of supervisory authorities; it is also the territoriality of each service, since the AVMSD, and in principle also the ECD, prescribes the application of the country-of-origin principle relying for the question of jurisdiction on the Member State where a provider is established. Access to non-domestic providers of services is therefore not easily possible within the AVMSD or ECD framework. This poses a particular problem in the online context, as the offers do not require a local connection point in a sovereign territory in order to address their offers to the local public. Therefore, in this case the respective authorities are dependent on the cooperation of regulatory authorities in other countries, which is partly regulated in the Directive but with relatively complicated and lengthy procedures.

There is also a factual and regulatory problem, both in the audiovisual media sector and other areas where supervision is foreseen (including at national level) and in criminal law: providers are often not identifiable or reachable, either because they do not comply with existing (national or European) information obligations or because such obligations do not exist. In this case, the possibility of procedural access to the higher-level Internet access providers would be relevant. This, however, is not necessarily an easy alternative answer considering possible conflicts with freedom of expression. Such supervisory powers are therefore regulated in a very diverse manner in the EU Member States and globally.[17]

As a result of these framework conditions, supervisory authorities are often unable to perform the task assigned to them by law or are unable to do so effectively, whether due to deficits in the area of the legal framework or practical hurdles. This means in conclusion that the dissemination of online content across borders is challenging the national and EU legal frameworks for monitoring service providers and enforcing the law. Not only the vast amount of, and increasingly easy access to, illegal or harmful content via online service providers raises the question how efficient enforcement can be organised. Also there is, due to the uncertainty of who is re-

17 Cf. for non-EU area, for example, the new Russian Law No. 608767-7 amending the Federal Law on Communications and the Federal Law on Information, Information Technologies and Protection of Information with a view to ensuring the safe and stable functioning of the Internet on the territory of the Russian Federation (available at http://publication.pravo.gov.ru/Document/View/0001201905010025) which entered into force on 1 November 2019 and provides, inter alia, for the possibility of the Russian media regulatory authority blocking Internet sites via contact points the internet service provider are obliged to establish.

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sponsible for the content and which party in the process of disseminating content from its production to the reception by the end-user has an active role and could be held liable, a strong call for reconsidering the applicable rules.

1.4. The EU Digital Single Market Context

On 5 May 2015, the Commission presented its strategy for the creation of a Digital Single Market[18], which addressed the fact that

> *"[t]he global economy is rapidly becoming digital. Information and Communications Technology (ICT) is no longer a specific sector but the foundation of all modern innovative economic systems. The Internet and digital technologies are transforming the lives we lead, the way we work – as individuals, in business, and in our communities as they become more integrated across all sectors of our economy and society."*[19]

The main objectives of this strategy were to create better access to online goods for consumers and businesses, to ensure that citizens and businesses can take full advantage of the opportunities of digitalisation and to design the legal environment for digital networks and services. The reform of data protection law was already in full swing with the proposal for the General Data Protection Regulation (GDPR)[20] and was planned to be supplemented by a draft Regulation on Privacy and Electronic Communications.

On the basis of these objectives, the strategy of the Commission included an overall package for a Digital Single Market which resulted in numerous initiatives, the revision of many existing legal acts and the adoption of new rules. Amongst these were the modernisation of rules on copyright (DSM Directive) and audiovisual media services (AVMSD) in the light of

18 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A Digital Single Market Strategy for Europe, COM(2015)192 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192.

19 Ibid., point 1.

20 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.

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digitisation as well as new telecom rules[21] and many additional measures that will be presented in this study in more detail.

The creation of better access to online goods included also "new rules on e-commerce"[22] establishing in particular new rules on geo-blocking[23] and on purchasing digital content and services[24]. The strategy recognised that "[o]nline platforms (e.g. search engines, social media, e-commerce platforms, app stores, price comparison websites) are playing an ever more central role in social and economic life: they enable consumers to find online information and businesses to exploit the advantages of e-commerce". It, however, did not include the proposal for a reform of the ECD specifically but mentioned rather aspects of competition law in the online context by outlining that some platforms have evolved to become players competing in many sectors of the economy. It further held that the way they use their market power raises a number of issues that warrant further analysis beyond the application of competition law in specific cases.

Furthermore, the Commission revealed plans to combat illegal content on the Internet. It did so by first underlining that the principles of (limited) liability enshrined in the ECD have underpinned the development of the Internet in Europe. However, it was considered that, "when illegal content is identified, whether it be information related to illegal activities such as terrorism/child pornography or information that infringes the property rights of others (e.g. copyright), intermediaries should take effective action to remove it" and that "the disabling of access to and the removal of illegal

21 The so-called connectivity package (see for details and sources https://ec.europa.eu/digital-single-market/en/policies/improving-connectivity-and-access) included a new rule book for providers of internet access and communication services with the European Electronic Communications Code, common EU broadband targets for 2025, a plan to foster European industrial leadership in 5th generation (5G) wireless technology and a voucher scheme for public authorities who want to offer free Wi-Fi access to their citizens (WiFi4EU).

22 Cf. on this part of the policy https://ec.europa.eu/digital-single-market/en/new-eu-rules-e-commerce.

23 A new regulation on EU level (Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I , 2.3.2018, pp. 1–15) ensure that online sellers must treat all EU consumers equally regardless of where they choose to shop from.

24 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22.5.2019, pp. 1–27.

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content by providers of hosting services can be slow and complicated"[25]. Possibly a full reform of the ECD was nonetheless not tackled because of the factor that "[i]t is not always easy to define the limits on what intermediaries can do with the content that they transmit, store or host before losing the possibility to benefit from the exemptions from liability set out in the e-Commerce Directive"[26]. It should be noted that this observation may be a factor to be considered in the context of a reform but hardly serves as explanation not to attempt a reform if such reform is regarded to be necessary.

The Commission did announce a comprehensive analysis of the role of platforms, which was carried out with its Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe.[27] In this Communication, the Commission announced its intention to create a level playing field for comparable digital services, to ensure responsible behaviour of online platforms to protect core values, to address transparency and fairness for maintaining user trust and safeguarding innovation and to foster open and non-discriminatory markets in a data-driven economy. Regarding the existing intermediary liability regime, the Commission opted for a sectorial, problem-driven approach to regulation which, in addition to the new rules of the AVMSD and the DSM Directive, covered coordinated EU-wide self-regulatory efforts by online platforms. This in turn has led to numerous initiatives, in particular on illegal online content, hate speech and disinformation (cf. Chapter 2.5), which are being developed with the participation of industry.

1.5. Structure of the Study

The aim of this study is to analyse the current legal framework for the dissemination of online content and to identify problems arising from it as well as identifying possible paths for the future. Particular attention will therefore be paid to the provisions of the ECD, which will be analysed in this study in order to identify whether the application of these rules and its scope are still up-to-date. In a second step, this background analysis will make it possible to highlight those areas which need to be adapted by

25 COM(2015)192 final, supra (fn. 18), point 3.3.2.
26 Ibid.
27 COM/2016/0288 final, supra (fn. 12).

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changing the legal framework, as well as the possible adaptation of administrative procedures under existing law.

For that purpose, it is necessary to initially set the scene by presenting an overview of the overall applicable legal framework in the online context (Chapter 2).[28] Not only the ECD is of relevance here but also a differentiated set of other rules on European level. As the most important principles that also impact the creation of any regular legislative act, fundamental rights are crucial (Chapter 2.1). They provide the "legal framework for the legal framework". In the EU specifically the fundamental freedoms (Chapter 2.2) are in particular relevant in the cross-border environment as they shape the European (Digital) Single Market. A general framework, which both the Member States and the EU have to observe in the Union legal framework, has also a priority significance at EU primary law level (Chapter 2.3): the objectives and values of the EU, which are of decisive importance in a value-based approach to legislation and regulation, and the division of competences between the EU and its Member States need to be taken into consideration. Primary law principles are incorporated into the secondary law of the EU, which takes on many different forms in the context of the online dissemination of content (Chapter 2.4). There is not only a single legal framework that plays a role in the digital environment. Instead there are a variety of Directives that address various aspects of relevance such as copyright, advertising or criminal content. For each of them the main provisions and elements of regulation that are potentially relevant in the context of online content dissemination and for the competences of national regulatory authorities will be addressed. This chapter concludes with an overview of non-binding sources of rules that recently have played an important role for addressing problems with online content dissemination (Chapter 2.5).

As the main applicable legislative act taking a horizontal approach to the online environment, it is the ECD which is in the focus of this study. In Chapter 3, the ECD is analysed in detail by putting a focus on its scope of application, the country-of-origin principle that the ECD follows and the intermediary liability regime. With regard to the latter, it is crucial to present the categories of Information Society Services (ISS) in the ECD, on one hand, and to draw on the relevant jurisprudence of the Court of Justice of the European Union (CJEU), on the other hand, in order to then raise the question which challenges result with regard to illegal online con-

28 The authors would like to thank Ass. iur. *Jan Henrich* for his preparatory contributions to some parts of this chapter of the study.

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tent. The aim is to identify whether there is a duty of care-standard which online platforms have to fulfil. The chapter ends with the analysis of sector-specific liability provisions and their comparison with the provisions of the ECD as well as the examination of the compatibility of these regulatory regimes with each other. The question of continued relevance of these rules or whether they are outdated will also be discussed in this context.

Based on these findings, Chapter 4 deals with the future regulatory framework for online content. It summarises the lessons learnt in the application of the existing legal framework before considering possible avenues, in particular regarding a possible revision of the applicable legal acts, namely the ECD, in light of online content dissemination realities of today.

The study was completed in November 2019 and reflects developments until that point; subsequent changes for the preparation of the publication version were limited to formal aspects. The above reprinted executive summaries of the main findings of the study were already published in the context of the conference "safeguarding freedom - securing justice" organised by the Media Authorities in cooperation with the State Media Authority NRW and the Institute of European Media Law on 12 November 2019 in Brussels.

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