C. Problems Identified regarding the Cross-Border Dissemination of Online Content

Based on an analysis of the development of the online sector as well as the set-up of the regulatory framework applicable to providers involved in cross-border dissemination of online content as presented above, a number of shortcomings and problems can be identified.[65] These issues concern three areas in particular: the lack of legally binding regulations in certain areas, the question of continued coherence, or even validity, of existing rules and the enforcement of the norms, especially in cross-border situations which includes the question of supervisory structures.

The issue of a lack of binding rules concerns, on the one hand, areas for which no regulation exists at all, although some form of regulatory response could – and likely should – address threats to fundamental rights and values in the EU. On the other hand, some rules are laid down in non-binding texts and therefore cannot be enforced in a legally binding manner. In addition, some of the "targeted measures", as characterised by the Commission,[66] address the specific issues but cannot take into account the possible multiplication of risks – or even the initial generation of them – by the fact that some intermediaries are of systemic relevance due to their size and popularity.

Although there is a variety of rules addressing certain types of illegal content as mentioned above and imposing obligations on (sometimes reduced to specific types of) online intermediaries when such content is disseminated via their services, there is no overarching approach at EU level. This is mainly due to the limited competences of the EU when it comes to regulating content. Media law in general is and remains a competence of the Member States; thus the EU competence is triggered only in the context of the distribution of content when addressing the economic dimension of the single market of the providers involved in this dissemination. It has also repeatedly been acknowledged by the CJEU that differing stan-

---

65 See extensively for a detailed analysis the study *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, *passim*, and for a summary of the problems to be addressed in a reform in particular p. 221 et seq.

66 Commission staff working document, impact assessment accompanying the DSA Proposal, SWD(2020) 348 final, 15.12.2020, Part 1/2, p. 7.

dards between the Member States in regulating content is possible and does not constitute a contradiction with EU law, because in this field no full harmonisation is possible.[67] An illustrative example is the protection of minors, for which there are regularly specific rules in all Member States but no EU-wide harmonised (binding) rules applicable to online providers. For areas like this there is a need – in particular in cross-border situations – for general rules or minimum standards that are not linked to the type of illegality of the content, as this categorisation is left to the national level or other provisions in EU law, but to the totality of providers or offers. So far, the ECD contains such rules only sporadically, for example with regard to information obligations. By contrast, mechanisms of pure self-regulation, which also include commitments on the terms of use of platforms or association standards organised solely by the private sector, have proven ineffective in countering existing threats to fundamental rights and values in the EU.[68] They are not capable of addressing the issue with a democratically legitimised control, nor can such "norms" be enforced from outside of the providers or associations. This flaw can even apply to mechanisms of co-regulation if they do not have provisions about supervision, enforceability and, if necessary, sanctions. Therefore, such approaches need a robust system ensuring effective and fundamental rights-respecting enforcement means.

The second issue is about the question whether the existing legal framework can still claim to be valid (and thus flexible enough) in light of the developments of the past years and future evolution of the online environment. Also, there is a question of consistency of the rules which were not all prepared at the same time or in accordance with each other but – as has been shown – to partly address sector-specific or pressing issues without always keeping a bird's eye view of the existing framework. Especially the continued relevance of the ECD in its current shape has rightly been put into question. The difficulties in applying a ruleset designed two decades ago for a completely different Internet environment have become obvious. The actors have changed, and the role of platforms in the dissemination of online content, thereby influencing the public sphere, has become domi-

67 Cf. e.g. CJEU, C-244/06, *Dynamic Medien*; more recently C-555/19, *Fussl Modestraße Mayr*; further details in *Cole,* Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, and *Cole*, in: AfP, 52 (1), 2021, 1, 1 et seq.

68 Recently also: *Smith*, Enforcement and cooperation between Member States, p. 11.

nant. A general issue is therefore already the categorisation of specific ISS[69], to which the liability regime applies in different levels; thus, this regime has turned out to be no longer reflective of the reality of intermediaries which fulfil these and combined functions today. Furthermore, there are in particular three key aspects in this regard. First, the principal idea for setting up a liability framework granting privileges to intermediaries was based on the idea that they fulfil the condition of neutrality. This observation cannot be upheld as a rule and poses problems in that it contradicts the approach of having more active platforms when it comes to monitoring for illegal content. Second, the precise determination of the notion of "actual knowledge" (triggering the need to act expeditiously) as a requirement for the liability privilege is difficult to apply and difficult to prove, because there are no formalised notice requirements from which actual knowledge could "automatically" be derived. There has also been a certain reluctance in voluntary establishment of efforts to identify illegal content – often referred to as "Good Samaritan" efforts – as it is perceived to endanger the liability privilege. Third, there is a tension between Art. 14 and 15 ECD, which, on the one hand, allow for specific preventive injunctions directed at service providers against infringements but prohibit, on the other hand, imposing on them what is characterised as general monitoring obligations.

These issues are also closely related to the coherence of the ECD with other (sectoral) rules. As described in the previous chapter, a trend towards greater responsibility expectations, especially for platform operators, going beyond soft law instruments can be observed. Overlaps with the horizontal rules of the ECD are unavoidable.[70] These newly created other secondary rulesets must be considered when aligning the existing ECD or creating a new framework. They are also evidentiary of the need for special rules concerning certain providers of ISS addressing specific objectives or particularities. If this presents itself as an issue of coherence already at EU level, it is in addition an issue of fragmentation with regard to the added layer of national level of legislation. The unabated occurrence and rise of illegal content and activity promulgated through platforms have led to the adoption

69 For the preceding problem of whether a provider qualifies as an ISS at all, cf. an overview of CJEU case law recently in *Chapius-Doppler/Delhomme*, in: European Papers, 5 (1), 2020411, 411 et seq.

70 Cf. on this most recently the Opinion of Advocate General Saugmandsgaard Øe, Joined Cases C-682/18 and C-683/18 – *YouTube and Cyando*, where the gap between the currently applicable copyright framework and the DSMD was highlighted in the context of a communication to the public by intermediaries.

of national rules in some Member States addressing this phenomenon based on their legislative competence. The possible result of a fragmentation of an otherwise cross-border market, such as the dissemination of online content, can lead to legal uncertainties for providers operating on a supranational level as well as to problems in enforcement of the national laws.[71] Thus, in order to avoid a further fragmentation of the rules applicable to different types of online service providers and having to introduce new categories of service providers depending on the further development of the online sector, a beneficial outcome can be expected from a newly designed, horizontally applicable framework concerning all types of "information society services" or however they would be addressed. In this context, it is particularly important to consider and closely examine the purposes pursued by special rules in the Member States. Provisions that fall within the remit of the Member States, whether due to a lack of legislative competence of the EU or because opening clauses in sectoral law permit or even require such specific rules by the Member States, should not be seen as targets of such a "defragmentation".

The problems outlined carry over into the enforcement of existing provisions, especially in cross-border situations. The enforcement issue is closely linked to the question of supervisory structures. Fundamental rights requirements and a value-based approach trigger the need for effective law enforcement when it comes to combating illegal or harmful content. This is above all directed at independent national regulatory authorities, which, in connection with the dissemination of online content, are in the current set-up the only competent entities – besides courts if confronted with proceedings concerning such content – which are able to defend the endangered rights and values. It is only these authorities that have the necessary independence which is guaranteed by law, because considered against the background of the protection of freedom of expression not only media but also regulatory bodies overseeing the media need to be independent of the state while bound by fundamental rights protection, unlike in the case of private undertakings.[72]

---

71 Cf. *Montagnani/Trapova*, in: JIL, 22 (7), 2019, 3, 3 et seq, arguing that intermediaries are no longer subject to a conditional liability but instead fall within the ambit of an organisational liability regime.

72 This must be considered in particular against the background of the risks discussed under the heading of "overblocking" and the associated chilling effects on freedom of expression. The threat is seen in transferring the responsibility to private undertakings to decide on the legality of content within the framework of content moderation. Cf. on this *Penney*, in: IPR, 6 (2), 2017; *Quintel/Ullrich*, "Self-

The ECD itself contains only very basic and minimum rules regarding supervision. The Member States are supposed to set up appropriate bodies for this purpose, and general rules are laid down on cooperation between each other, such as complying with requests for information and setting up contact points but without the establishment of concrete cooperation procedures. However, the ECD relies on the COO principle for ISS and thereby on the approach that – with only limited exceptions – there is one Member State that uses its jurisdiction power where necessary vis-à-vis established providers on their territory. It allows for exceptional derogations in case of problems concerning certain overarching goals and enforcement measures. This procedure, which resembles exceptional derogation procedures of the AVMSD, is not only complex in its design but has turned out to be difficult to apply in practice and to be burdensome and lengthy; thus, it has been rarely used irrespective of the fact that Member States or their competent authorities have in the past been pointing out enforcement shortcomings. Therefore this procedure alone has not proven to be a sufficient approach to reconcile legitimate protection interests with the fundamental principle of COO. This poses challenges for regulators who are set up according to other legal bases but are regularly (or mainly) tasked with monitoring content creators rather than content intermediaries.

In addition, there are problems regarding liability privileges, which must also be taken into account in the context of law enforcement and, above all, evaluated by the regulatory bodies before taking action. Questions of classification of a provider as an ISS and, more specifically, as falling under one of the ECD-categories of ISS, but also the necessary assessment of the applicability of a liability exemption, including the prohibition of general monitoring obligations, and the inconsistent application or interpretation of liability exemptions in the Member States do not only limit the possibilities of the regulatory bodies but can also lead to a reluctance on their side to carry out supervisory tasks concerning online content dissemination. This is also underpinned, for example, by the statistics of the Internal Market Information System (IMI)[73], which is intended, inter alia, to facilitate the exchange of information between competent authorities in a given sector. It includes (as a pilot project since 2013) the

Regulation of Fundamental Rights? The EU Code of Conduct on Hate Speech, related initiatives and beyond", in: Petkova/Ojanen (eds.), 182, 182 et seq.

73 For further information cf. https://ec.europa.eu/internal_market/imi-net/library/index_en.htm.

ECD and inter alia enables authorities to enter requests for measures (i.e. to ask another Member States' authorities to take specific measures against an online service provider, for example, if general information requirements are not respected on its websites) and notify measures intended to be taken against online service providers that are based in another Member State. This possibility has hardly been used[74], which is another indicator for the difficulties in cross-border cooperation under the current shape of the ECD.

74 The statistics from 2013 to the third quarter of 2019 show a total of 139 requests and 105 notifications.