Safeguarding freedom – securing justice

Answers from Academia – A Legal Analysis –

Prof. Dr. Mark D. Cole
Director for Academic Affairs at the
Institute of European Media Law (EMR),
Professor for Media and Telecommunication Law,
University of Luxembourg

12 November 2019, Brussels
Setting the Scene

liability?

terrorist propaganda?

content provider?

online piracy?

originators?

host provider?

public incitement?

pornography?

discrimination?

intermediary?

user?

violence?

access provider?

hate speech?

platform?

disinformation?

legal framework?

 december 2019
Overview

Setting the scene

Introducing the EMR study

Legal framework

- Fundamental rights and freedoms
- Other primary law
- Secondary law

Lessons learnt

Conclusions for the future
Introducing the EMR study

- **Aim**
  - presenting a detailed overview of the overall legal framework concerning cross-border dissemination of online-content
  - putting special focus on the question of liability and the current interpretation of the E-Commerce Directive
  - identifying areas that need to be resolved either by legislative action or forms of increased cooperation between Member States and competent authorities
  - finding approaches for an improved enforcement of legal standards in the online context

- **Executive Summary and more information**
  - [www.medienanstalt-nrw.de/e-commerce](http://www.medienanstalt-nrw.de/e-commerce) or
  - [http://emr-sb.de/e-commerce-study](http://emr-sb.de/e-commerce-study)
Structure of the EMR study

- Background of the study
- Legal framework
  - Fundamental rights and freedoms
  - Other primary law (EU values, principles and competencies)
  - Secondary Law
    - E-Commerce Directive (ECD)
    - Audiovisual Media Services Directive (AVMSD)
    - General Data Protection Regulation and ePrivacy Directive
    - InfoSoc, Enforcement and DSM Copyright Directive
    - Upcoming legal acts: Platform-to-Business-Regulation (application 2020) and Terrorist Content Regulation (?)
  - EU support, coordination and supplementary measures
- ECD in detail
  - scope, intermediary liability, CJEU interpretation
  - “duty of care”-standard
  - comparison with other sectoral liability provisions
- Towards a future regulatory framework for online content
  - Lessons learnt and important considerations
  - Possible avenues and looking ahead
Overview

Setting the scene

Introducing the EMR study

Legal framework

Fundamental rights and freedoms

Other primary law

Secondary law

Lessons learnt

Conclusions for the future
Legal framework - fundamental rights

Human Dignity

Right to property

Freedom to conduct a business

EU Charter of Fundamental Rights (CFR)
European Convention on Human Rights (ECHR)
National constitutional law

online service providers

content creators / providers

Freedom of speech and the media

Rights of children / protection of minors

users / minors

Private life and data protection

Safeguarding freedom – securing justice, Brussels, 12.11.2019

Institute of European Media Law | www.emr-sb.de
Legal framework - fundamental rights

Human Dignity

Right to property

Freedom to conduct a business

EU Charter of Fundamental Rights (CFR)
European Convention on Human Rights (ECHR)
National constitutional law

FH - online service providers

Freedom of speech and the media

Rights of children / protection of minors

Private life and data protection

content creators / providers

users / minors
Legal framework - fundamental freedoms

- Fundamental freedoms = building stones for the functioning of the single market in the EU
- Guaranteeing freedom of establishment and freedom to provide services
- Connected with country of origin-principle: Companies can choose where to establish themselves as well as to provide cross-border services in the EU and thereby fall under the jurisdiction of a specific State. In principle, activities of such entities cannot be stopped by other Member States when they cross their borders.
- But: Member States (MS) can impose limitations on the free movements when measures are justified
- In case of applicable specific secondary law measures restricting the freedoms need to be evaluated based on that legislative act
Legal framework – other primary law

To be taken into consideration

- **EU values, goals and principles** (Art. 2 et seq. TEU):
  - such as safeguarding human rights and human dignity, pluralism, non-discrimination, tolerance, justice, ...
  - on the one hand, in the accession procedure pursuant to Article 49 TEU, basic values acquire significance as a substantive legal prerequisite
  - on the other hand, non-compliance with the values in the procedure pursuant to Art. 7 TEU may lead to a restriction or suspension of MS rights

- **(Reserved) competencies** of MS, inter alia in the media sector

- **Connection** between values and competencies: Where the EU has competence and the MS are barred from applying their rules, the values and goals necessitate that the **EU itself ensures framework** to enable MS when applying these rules to achieve the values and goals.
Overview

Setting the scene

Introducing the EMR study

Legal framework
  - Fundamental rights and freedoms
  - Other primary law
  - Secondary law

Lessons learnt

Conclusions for the future
Secondary law: overview

Timeline European/EU secondary law and amendments


Audiovisual Media Service Directive (EU) 2018/1808 (AVMSD)  
(former: Television without Frontiers Directive 89/552/EEC)

General Data Protection Regulation (EU) 2016/679 (GDPR)  
(former: Data Protection Directive 95/46/EC)

E-Commerce Directive 2000/31/EC (ECD)

DSM Copyright Directive (EU) 2019/790 (DSM)  

Upcoming: P2B Regulation (applicability)

TERREG
Secondary law: overview

Timeline European/EU secondary law and amendments

1989
1995
2000
2005
2010
2015
2020


E-Commerce Directive 2000/31/EC (ECD)


Upcoming: P2B Regulation (applicability) TERREG

Digital Services Act?
Legal framework – secondary law: specifically E-Commerce Directive

- ECD is a **horizontally** applicable ruleset for information society services (ISS; predefined in Directive of 1998) in single market
  - original goal: predictable and simple rules for the emerging internet economy
- ECD contains a set of **liability exemptions/limitations** for intermediaries defined in Art. 12-15 ECD
- ECD establishes a **minimum harmonisation** approach and a relatively strictly applied **country of origin principle** (with no prior authorisation-rule)
- ECD has **no explicit extraterritorial scope**, MS are free to regulate activities of ISS providers established outside the EU.
- ECD allows **derogations** by MS from the country of origin principle in certain fields (cf. Annex) and situations (Art. 3 para. 4 ECD)
Legal framework – other secondary law: AVMSD

- AVMSD is the cornerstone for the distribution of (linear and non-linear) audiovisual content online founded on two main principles
  - country of origin principle ensures that there is in principle only one control of the provider by the MS under whose jurisdiction it operates and consequently the content flows freely
    But: for MS derogation possibilities and prohibition of circumvention
  - Agreement of minimum conditions assuring that only content legal in that sense is available. But: possibility of deviation and margin for implementation.
- AVMSD has been revised once every decade and adapted to new social and technological developments, particularly in the digital environment
- 2018 reform concerned rules on hate speech, protection of minors and comm.comm. and responded to changes in the audiovisual media landscape by including video-sharing platform services in its scope
Legal framework – other secondary law: Further relevant legislative acts

- **DSM Directive 2019**
  - creation of a **specific definition** of “online content-sharing service provider” which refers to different criteria than existing comparable provisions
  - introduction of a completely **new category of obligations** for such providers

- **GDPR 2018**
  - important regarding its **technical and transnational** approach (marketplace principle) allowing domestic authorities to address non-EU providers

- **P2B-regulation (applicable July 2020)**
  - **wide scope** of application and increased **transparency obligations** questioning passiveness of platforms

- **Upcoming TERREG (?)**
  - obligations for certain **proactive measures** by hosting service providers

- **Certain EU coordination, support and supplementary measures**
  - inter alia in the fields of **protection of minors, hate speech (illegal content) and disinformation**
Overview

Setting the scene

Introducing the EMR study

Legal framework
  - Fundamental rights and freedoms
  - Other primary law
  - Secondary law

Lessons learnt

Conclusions for the future
Lessons learnt

Definitions and categories of providers established 20 years ago (although clarified by the CJEU) do not longer fit the changing market realities with platforms now regularly being interactive content management platforms.

Premise of wide reaching protections for passive hosts as long as they do not have any actual knowledge of illegal content or activity has been consistently questioned and reinterpreted by courts:

- difficulty concerning condition of ‘neutrality’
- difficulty of determining ‘actual knowledge’-concept
- difficulty of resolving tension between obligations under Art. 14 ECD (infringement prevention injunctions) and Art. 15 ECD (no general monitoring)
Lessons learnt

- New solutions in related legal acts adapted to changed market conditions see a move away from liability immunities to **formulating explicit responsibilities** for these new online platforms.

- Development of **alternative approaches / notions** in jurisprudence or other sectoral approaches such as:
  - ‘diligent economic operator’
  - ‘duty of care’-standards including preventive duties following risk-based approach.

- But: approach so far and development question upholding existing ECD liability exemptions in an untouched way.
Overview

Setting the scene

Introducing the EMR study

Legal framework

Fundamental rights and freedoms

Other primary law

Secondary law

Lessons learnt

Conclusions for the future
Conclusions for the future

- Avoiding further fragmentation of the rules applicable to different types of online service providers
  - EU should strive to either replace the existing cross-sectorial approach in form of the ECD by a new horizontally applicable act concerning all types of (newly defined) “information society services” or
  - amend existing ECD in a way that it clarifies the conditions under which liability exemptions do not apply as well as its scope (which type of providers covered)
Conclusions for the future

- Inactivity is not an option
  - in light of EU values and fundamental rights if no legislative clarification be achieved in the near future, competent authorities will have to apply existing rules also to cross-border dissemination of content in a more proactive manner
  - such activity may include testing the limits of existing provisions such as the reach of the liability limitations for providers targeted by a measure
  - for online content dissemination a clear policy conclusion can be observed that action is necessary which can not only include legislative but also executive measures
Conclusions for the future

▪ Involving industries will be important
  • in order to achieve activity by the obliged providers themselves
  • to rely on the development of industry standards
  • to allow regulatory approach of a less infringing nature on fundamental rights

▪ But: necessary to remind that any form of co-regulation necessitates the possibility of action by regulatory authorities if compliance is not achieved via the industry approach as well as involvement by regulators in the process of creating “rules” such as robust and measurable codes of conduct
Conclusions for the future

- Two main challenges remain to be resolved: a substantive and a procedural question concerning which body is in charge of enforcing rules
  - maintaining the country of origin principle creates the necessity to establish marketplace principle aspects, e.g. regarding simplifying the procedures of intervention by a MS or authority that does not have primarily jurisdiction
  - need for clear assignment of competencies to bodies in charge of monitoring and supervising online service providers with a more formalized type of cooperation between competent national regulatory authorities in the EU
Franz-Mai-Straße 6
66121 Saarbrücken
Germany
Tel  +49/681/99275-11
Fax  +49/681/99275-12
Mail  emr@emr-sb.de
Web  www.emr-sb.de
www.europaeisches-medienrecht.de