

# Safeguarding freedom – securing justice

**Answers from Academia  
– A Legal Analysis –**

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# Overview

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Fundamental rights and freedoms

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Secondary law

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Conclusions for the future

# Setting the Scene

**liability?**

**enforcement?**

**online piracy?**

**terrorist propaganda?**

**pornography?**

**discrimination?**

**content provider?**

**intermediary?**

**originators?**

xtube?

Twitter?

Pinterest?

WhatsApp?

Dailymotion?

TikTok?

Photobucket?

Aparat?

Instagram?

vimeo?

rediff?

Snapchat?

Tumblr?

Google?

Flickr?

**user?**

**violence?**

Younow?

PornMD?

Twitch? Sine Weibo?

**host provider?**

**access provider?**

**public incitement?**

**platform?**

**hate speech?**

**disinformation?**

facebook

**legal framework?**

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# Introducing the EMR study



## Legal framework and enforcement concerning cross-border dissemination of online content

Study on the current and possible future regulation of online content and  
online service providers in consideration of the EU E-Commerce Directive

Prof. Dr. Mark D. Cole  
Ass. iur. Christina Etteldorf  
Carsten Ullrich, LL.M.

with contributions by  
Ass. iur. Jan Henrich

## ■ 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>

# Structure of the EMR study



## **Legal framework and enforcement concerning cross-border dissemination of online content**

Study on the current and possible future regulation of online content and online service providers in consideration of the EU E-Commerce Directive

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- 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

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# Legal framework - fundamental rights

## Human Dignity

**Right to property**

**Freedom of speech  
and the media**

online  
service  
providers

**Rights of children /  
protection of minors**

EU **C**harter of  
**F**undamental **R**ights (CFR)  
European **C**onvention on  
**H**uman **R**ights (ECHR)  
National constitutional law

**Private life  
and data  
protection**

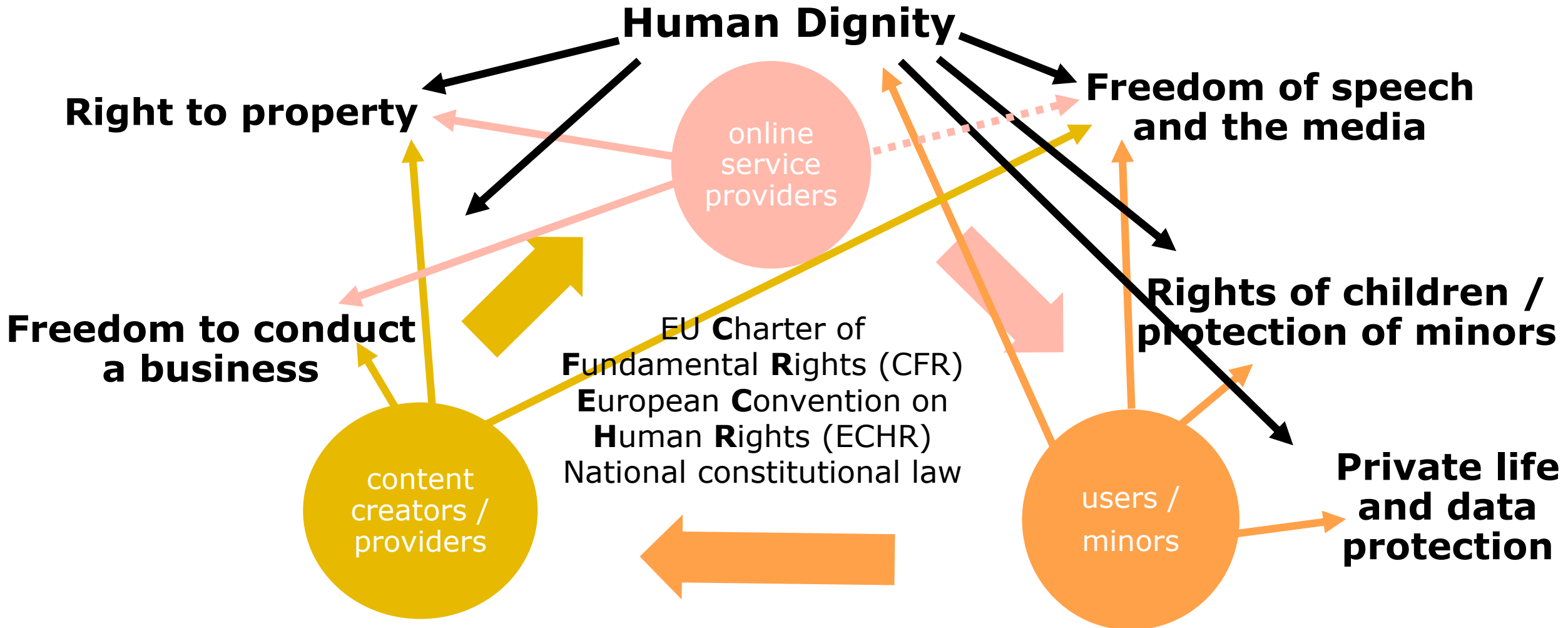
users /  
minors

**Freedom to conduct  
a business**

content  
creators /  
providers



# Legal framework - fundamental rights



# 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

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# 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.

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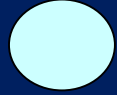
# Secondary law: overview

## Timeline European/EU secondary law and amendments

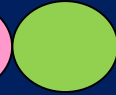
1989



1995



2000



2005



2010



2015

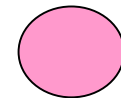


2020



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

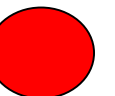
General Data Protection Regulation (EU) 2016/679 (GDPR)  
(former: Data Protection Directive 95/46/EC)



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

DSM Copyright Directive (EU) 2019/790 (DSM)  
(supplementing: InfoSoc Directive 2001/29/EC)

Upcoming: P2B Regulation (applicability)  
TERREG



# 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) ?

Digital Services Act?

DSM Copyright Directive (EU) 2019/790 (DSM)  
(supplementing: InfoSoc Directive 2001/29/EC)

Upcoming: P2B Regulation (applicability)  
TERREG

# 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**

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## DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 8 June 2000

- **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)

- 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

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# Conclusions for the future

AVMSD      GDPR      TERREG  
DSM      P2B Regulation

- **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**



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