

# Designing platform governance:

## A normative perspective on needs, strategies, and tools to regulate intermediaries

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# Executive Summary

## I. The regulatory challenge

1. Rational legislation must be grounded in empirical experience, or, at least, empirically-based predictions, which is a challenging task in the context of platform governance. The results of empirical research are only clear in some respects while ambiguous or simply incomplete in others. Regulating intermediaries (e.g., social media and search engines), in order to maintain or enhance the functionality of the news ecosystem, is, therefore, a task under uncertain actual assumptions and forecasts.

2. The regulatory challenge is even more difficult because the normative objectives involved are, in part, ambiguous or controversial. This is, on the one hand, due to the vagueness and need for the conceptualization of the constitutional norms, particularly in the field of constitutional communication law and, on the other hand, caused by the ambivalence or even polyvalence of values and objectives included in constitutional law – especially fundamental rights.

- **Any considerations on platform regulation should be guided by the maxim: The less clear the results from the problem analysis are, the more cautious regulation should remain. Regulatory activism motivated for whatever reason without backing in empirical findings and clear normative goals should be avoided.**

3. In the debate on “regulating the internet”, the normative objectives of communications regulation are

often mixed; however, it is of the utmost importance to clearly distinguish between them, as the need for and justification of regulatory measures depends on which of these objectives is pursued. Roughly, we can distinguish between the following regulatory objectives:

- **problems of individual rights protection**
- **dangers to institutions or the social order**
- **risks that affect the functionality of communication processes for democracy**

4. The regulatory need to protect individual rights against violations through communication on platforms, and to enforce the respective law, is founded on positive, constitutional obligations and is, therefore, comparably clear. The challenge to design appropriate regulations in this field focuses on the choice of regulatory instruments and the question of proportionality.

5. Regarding the risks for the news ecosystem arising from platform communication—the phenomena of disinformation (or, in German, with a wider meaning: “Strategische Kommunikation”)—these should be distinguished from the risks of an unintended degeneration of democratic discourse inherent in the functioning and business models of intermediaries, especially social media platforms. The former is – in principle – little disputed as a disturbing and potentially harmful factor and thus, in principle, can be regarded as



a regulatory challenge. The possibility, necessity, and legal justifiability of regulatory measures in the latter area are much less clear and more controversial.

## II. Regulatory Strategies and Instruments

6. A strategy aimed at completely prohibiting private search engines or social networks due to their presumed negative social effects, or only allowing them under economically unreasonable conditions, appears to be incompatible with constitutional rights and, therefore, has to be ruled out from the beginning.

7. Content moderation is a key service provided for users by platform providers, and it is all the more indispensable from a regulatory perspective.

- **The core question in any debate on the regulation of intermediaries centers around possible or even constitutionally binding legal limits of autonomous content moderation.**

8. The choice of strategy cannot be a strict dichotomy between self-regulation and state regulation; any regulation must establish a form of cooperation with the platform providers.

- **In practice, if platform provider cooperation is necessary to enforce the law, then it is also mandatory under constitutional law.**

9. Fundamental or categorical objections against content moderation by platforms are not viable.

- **Internet intermediaries have an indispensable legal responsibility for the dissemination of content through their services, as far as illegal content is concerned.**

10. There are no legal instruments that can adequately combat the problem of low-quality discourse,

apart from tools that tackle the issue of illegal content. Thus, problems like increased incivility are not candidates for legal regulation. Harmful but legal language can, if at all, only be addressed through content moderation, which, in turn, is influenced by public pressure and can even be co-determined by civil society actors or institutions (community self-regulation).

- **Undoubtedly, the states (or the EU) are prevented from banning harmful but legal content. All attempts to directly or indirectly encourage platforms to keep their communication spaces free of content that, without being unlawful, may have a negative influence on the quality of discourse, would have to be considered unconstitutional.**

11. Public pressure is a very important element of platform governance—especially when it comes to tackling issues related to harmful but legal speech.

- **This is because the scope of action of civil society actors in exerting public pressure on platform providers is wider than that of public authorities and courts.**

12. The important question regarding the constitutional legitimacy and scope of content moderation according to community standards is controversial and has yet to be determined by the highest courts. This question is no longer *whether* fundamental rights have an impact on the relationship between platform operators and users, but *how* stringent this binding of social network providers to fundamental rights is. In constitutional terms it is, at its core, rather a question of equality (equal opportunities) than of free and unconditional access.

- **There are good reasons to assume that the fundamental rights, which also apply in private law, do not completely close any margin for independent community standards of**



**social media platforms but rather require an equal application of such standards.**

13. Self- and co-regulation are often confronted with the suspicion or accusation of a lack of effectiveness. Considering the inevitability of cooperation between regulatory authorities and platform providers this reproach is, in principle, not convincing. However, content moderation efforts must be monitored for their effectiveness. Such monitoring necessitates sufficiently comprehensive and detailed information.

- **Co-regulation, which per definition includes a monitoring and control component, will fail without access to meaningful information. Sufficient information disclosure obligations (transparency) is a prerequisite to effective co-regulation.**

14. Co-regulation combines self-commitments on the part of the platform to comply with self-set or prescribed standards on the one hand and mechanisms of legal control or coercion on the other. If voluntary commitments by platforms are supplemented or backed by legally imposed obligations this must not be criticized in general. However, this conjunction of voluntariness and compulsion must be coherently aligned.

Sudden policy changes—from accepting voluntary commitments to supervisory action by command and force without valid reasons (e.g., for political expediency or lack of patience), or an uncoordinated combination of both approaches—are, therefore, questionable and should be avoided.

15. Regulators can instrumentalize platform moderation practices to enforce the effectiveness of their laws (e.g., defamation law). If carefully crafted, co-regulatory enforcement approaches of this kind do not constitute the unlawful privatization of law enforcement.

- **A categorical rejection of any possibility of obliging private providers to monitor and control the content on their platform on their own is not tenable.**

16. State courts are not in a position, for capacity reasons alone, to examine all suspected cases of possibly illegal content on social media platforms.

- **Demands for a legal framework limiting the liability of platforms to an obligation to delete content only after a judge has declared it illegal must be considered highly unrealistic.**

17. Mediation or dispute settlement bodies can only play a complementary role, but they cannot replace the courts or fully relieve intermediaries of their responsibility to comply with the law.

- **Since dispute settlement bodies cannot have the legitimacy of state courts, the voluntary and non-binding character of this way to settle disputes out-of-court is essential.**

18. The risk of over-blocking can be contained through balanced complaint management procedures including effective redress mechanisms.

- **Such balanced complaint and counter-complaint-remedies, therefore, should be introduced into all legally prescribed monitoring procedures.**

19. Taking widespread practices of “algorithmic moderation” seriously, claims for a return to human-only control mechanisms—without any assistance of filtering technologies (of both either the matching or the classifying type)—seem to be unrealistic. However, unlimited confidence in the ability of technical solutions to autonomously make the normative assessments that are inevitably linked to the judgment of the illegality of communications is inappropriate. With regard to filter technologies, a more constructive



approach (than to suppress such technologies) is to take precautions, e.g. to link these systems as intelligently as possible to human control.

- **Automated filtering must not undermine the functionality of the recently established or proposed and legally based complaint management procedures.**
- **The contribution of automated tools used in content moderation has to be made sufficiently transparent.**

20. A core question regarding the ongoing discussion on a review of the ECD is how far safe-harbor immunity should extend in the future (or not), especially whether intermediaries should continue to benefit from it even if they moderate content and even if this is done proactively using filter technologies.

The safe harbor exemption for communication intermediaries is not a favor of the legislator, which can be revoked at will. The constitutional guarantees of free communication on the internet, which depends on functioning web search services and communication forums, confine the possibilities of increasing liability.

- **The policy margin for tightening the liability of intermediaries beyond the level established by the currently valid law is very limited.**

21. The regime for video-sharing platforms, introduced through the 2018 amendments to the Audio-visual Media Services Directive (AVMSD), Germany's proposed implementation in the Tele Media Act, Germany's 2017 Network Enforcement Act (NetzDG), and the Commission's proposal for a Regulation on Terrorist Content Online (TCOR), all serve as paradigmatic examples of different co-regulatory frameworks for content moderation.

21.a) The German NetzDG (in its currently still valid version) has been the subject of justified criticism.

Apart from severe objections related to its incompatibility with the E-Commerce Directive and the country of origin principle in particular, its design also appears to be highly problematic. Specifically, the rigid deadlines and lack of put-back obligation create an increased risk of over-blocking.

21.b) Article 28b AVMSD can be welcomed as a more appropriate model for balancing the procedural obligations of platform operators.

21.c) While recognizing the need for resolute action against content that may support terrorist violence, the unique nature of the sectoral approach of the TCOR in influencing content moderation is surprising and problematic. It hardly seems to be in line with the principles that otherwise apply in EU law in this domain, especially after the ECD and also the AVMSD. Apart from other points of criticism, the TCOR's proposed administrative supervisory regime is objectionable and incoherent in that it combines both co-regulatory concepts and measures of direct administrative orders.

22. As a regulatory model, the transparency-based arrangement of the EU Regulation on promoting fairness and transparency for business users of online intermediation services (P2BR) is attractive in the context of a liberal regulatory philosophy: platform operators are not prescribed by which standards they must curate but are obliged to account for their freely chosen standards so that every user or competitor can adapt to these standards and use or refuse the service.

- **The P2BR may have paradigmatic significance as a model for other regulatory objectives, for example in media law.**

23. Transparency obligations comprise the first step of platform regulation. They typically interfere less with the freedom of platform operators and users than legal requirements for content moderation.





In principle, transparency obligations are to be welcomed, as they facilitate the disclosure of information that

- enables users and competitors to autonomously decide on whether and how to use the facilities offered by the platform, and spares the need to paternalistically restrict user's freedom of choice,
- provides authorities and other institutions (or even the public) with the necessary data to perform control,
- preserves and even extends the freedom to act of platform providers, insofar as these can be allowed to carry out their own self determined business models and curation policies precisely because their motives and characteristics are clearly visible.

24. Transparency obligations—as with any other interferences with individual freedom—need legal justification and have to be in compliance with the principle of proportionality. Therefore, they must be designed carefully.

25. Transparency obligations, i.e., an obligation to formulate and disclose principles and rules of curation, or obligations to grant access to data concerning concrete procedural practice, should not be criticized as ineffective or insufficient. Rather, they establish the accountability of the platform operators and are thus in themselves a key element of platform governance.

- **An important effect of transparency is that the operators can be held accountable for the consistency in performing their moderation practices.**

26. Perhaps the most important problem regarding information obligations relates to whose information needs these obligations are supposed to satisfy and

to whom they must, therefore, be tailored to in their content and level of detail. One-size-fits-all information obligations are unsatisfactory because they are not sufficient for the much more specific knowledge needs of supervisory authorities while already potentially overburdening everyday users.

- **Transparency obligations have to be designed in a differentiated manner – according to the different needs, risks, and grades of legitimacy, which are to be defined to suit the different beneficiaries of transparency.**

27. Strategies for ensuring content diversity in social media and search engines through non-discrimination requirements are broadly discussed—particularly in the German domestic context. They may even be, according to some scholars, constitutionally prescribed, a hypothesis which, however, appears doubtful.

- **It is not certain that an anti-discrimination regulation under media law is necessary on the basis of the positive obligations arising from the constitutional guarantees of free communication and information**

28. Considerations aiming at introducing new legal provisions to protect against discrimination through intermediaries (for example in media law) must not overlook already applicable anti-discrimination standards in private contract law and in competition law. A duplication of the standards of equality gives rise to intricate problems of competition between possibly different concepts or understandings of equality that can also be accompanied by conflicts of competence. Different notions of legitimate reasons for differentiation, which underlie different but simultaneously applicable rules of equality, can very well lead to seriously contradictory interpretations that are hardly tolerable in a coherent legal system – and thus should be avoided.





- **A severely discriminatory practice by intermediaries, which would necessarily require administrative surveillance beyond that of the competition authorities, does not appear evident, at least not at present.**

29. Possibly a right of social media platforms to have and to carry out a bias or basic tendency may be made dependent on there being a choice of different service providers and correspondingly denied to monopolistic providers. But if comparable other social networks or search engines are available to whom it is easily possible to switch, imposing neutrality obligations on platforms raises substantial concerns, even if these platforms actually have a large number of users.

- **The concept of transparency and (binding) commitment to self-set principles and rules seems less dubious than the concept of a qualitative evaluation of content moderation criteria.**

30. Regulatory philosophies of non-discrimination may differ fundamentally. Concepts related to the “positive discrimination” of general interest content tends to push for more content-related curation, whereas the “neutrality” concept of equal opportunities for all communication content, on the contrary, calls for less curation or, since curation is inevitable, at least for one that is as content blind as possible.

- **Serious reservations can be raised against such an obligation of intermediaries to focus their selection and sorting on higher quality content. Such an obligation is, at least, in tension with the fundamental idea of the legal equivalence of all (legal) communication, which itself is rooted in fundamental rights.**

31. Strengthening of criminal law with respect to offenses through platform communication, as in the German proposal for an act to combat right-wing extremism and hate crime, is a possible but

probably more symbolic than truly effective strategy to improve public discourse. The political leeway for such tightening of the substantive communications law is also rather limited due to strong freedom of expression protections.

32. The very existence of intermediaries—being information systems that do not follow an editorial curating logic—, and their impact on the information ecosystem can convincingly be understood as an argument in favor of policies to maintain and, if necessary, promote professional journalism and editorial media.

- **Editorial media should not be seen as anachronistic institutions that are now being replaced by intermediaries, but as an important complement in a more complex news ecosystem.**

33. It might be appropriate to support a continued institutional role of independent professional media (e.g., a vital public broadcasting service) but also to promote alternative offerings and forces that can contribute to improving the social benefits of intermediaries. The option of state or public funding of private information offers, although it does not involve state bans, nevertheless raises fundamental questions.

- **Under no circumstances should state subsidies be a means to influence the content of media coverage.**

### III. Scope and Competence

34. Regulatory activism in the field of platform governance can generate consistency problems in the legal system. As an increasing amount of different legal acts with different objectives but overlapping areas of application are developed at different levels of regulation (EU and member states, possibly additional regional entities in federal systems, such as Germany’s Länder), the need for a coherent overall review of all these regulations is growing.



- **At both – the EU and the Member state – levels, the bundle of legal standards appears to have grown into a somewhat unsystematic structure and is now subject to considerations of revision.**

35. Internal tensions within EU law, in terms of both regulatory philosophy and content, can be observed on several levels: the relationship between sector-specific regulations on platform responsibility and the ECD as well as the relationship between these sectoral laws themselves, in particular between the AVMSD and the TCOR.

- **There are now two quite different EU law approaches to combating criminal content in platforms with overlapping scope.**

36. Sectoral regulations can respond more precisely to the more specific characteristics or requirements of the narrower regulatory area in question; for example, in the case of platforms, they can be more closely tailored to the very different services and their different risk profiles. A general system of rules, however, if it is designed coherently, is probably more likely to avoid unintentional or insufficiently resolved competing claims of applicability or inconsistencies of different standards regarding the valuations on which they are based.

37. At the member state level, there are also examples of both broader and sectorally specific regulations that are set in different thematic areas, but which raise problems of coordination both among themselves and in their relationship to EU law.

38. As the new German intermediary (and media platform) regulation shows, a comprehensive approach to cover various platform services through one single regime has drawbacks as well.

- **The more general a regulation is in scope, the more likely the risk of regulatory overspill. It**

**would not be appropriate to combine all intermediaries together and subject them all to the same standards.**

- **In particular, uniform provisions for search engines and social media can be criticized for subjecting significantly different communication services to the same rules.**

The drafting of broad, general provisions at the legislative level, combined with a delegation of the task of further differentiation to the competent authority only shifts the problem of adequate solutions for various services to a lower level of regulation and also raises the question as to whether the parliamentary legislature is in this way, meeting its goal of answering the important regulatory questions itself.

39. Significant overlap and present or potential conflicts can also be observed between EU and member state law. For example,

- **Provisions of the German Network Enforcement Act and the French loi Avia problematically overlap with the planned TCOR**
- **The intermediary regulation in the German Interstate Media Treaty will have a considerable overlap with the P2BR**

40. The question of whether a matter of regulation should be harmonized throughout the Union or whether it should be left to the responsibility of the Member States must be analyzed and then answered in all further communication regulation projects. This is, of course, not only a question of expediency, but also one of legal competence and subsidiarity (Article 5 TEU).

41. In terms of political expediency and economic benefits, the advantages of uniform, or, at least, harmonized requirements, for platform governance across Europe seem obvious.



- **The idea of a coherent, comprehensive, and standardized framework (or even a directly applicable regulation) for the better regulation of global platforms is so compelling that it will hardly be stopped**
- **The question of EU competence for comprehensive harmonization of the matter of platform regulation, including the obligations of platforms to ensure the diversity of information, is complex.**

42. The question of whether a “directive” or a “regulation” would be more appropriate for an EU-level regulatory approach is probably less important than other structural decisions. However, this choice is linked to various possibilities for shaping the territorial scope of the applicable law, in particular the country-of-origin-principle (associated only with the act type Directive) or the *lex loci solutionis* (legally possible under a regulation).

42. a) Since a regulation does not have to provide for the country-of-origin principle (to ensure cross-border freedom of services), which is linked to an establishment in a member state (and even more so to only one legally relevant establishment in one member state), it can instead easily apply the *lex loci solutionis*.

42. b) A directive must also reach a sufficiently strong harmonization if – for good reasons – not the country-of-origin principle but the territoriality principle, preferably combined with the *lex loci solutionis* is established, because only in this way can the otherwise threatened fragmentation of the law in Europe and, thus, a serious impairment of the internal market be avoided.

43. With regard to competence, Article 114 TFEU certainly provides for a far-reaching EU competence that is to be understood as functional. However, both politically and legally, a shift in the previously mostly respected boundaries of competence toward the area of safeguarding openness and diversity of information by designing one overall codification must be carefully considered.

- **Legally, a competence of the EU for more far-reaching EU regulations seems at least justifiable if, as a result of the current or future legal fragmentation of the member states in this area, the risk of obstacles against the freedom to provide services or competition in the internal market can be proven.**



## A. Introduction

The rise and success of Internet platforms is profoundly shaping social communication processes and, furthermore, the daily life and behavior of billions of people worldwide. For many observers, this new role of platforms and its impact are even bringing into question the foundations of a democratic public sphere.<sup>1</sup> Stark, Stegmann et al. (2020) impressively describe the dimensions of these changes. This will now be addressed in this study without repeating the empirical findings presented in the Stark report. Instead, this paper aims to address the issue from a normative, legal, and legal-political perspective. It focuses on regulatory reactions and consequences that could or should be drawn from the results of the empirical investigations concerning possible or assumed risks for individual rights and democracy caused by the “platformization” of the information society. The following considerations are, therefore, concerned with the issues of platform governance.

### I. Platform governance

“Governance” is a rather vague term, but for this very reason, it is suitable to use it to describe the whole range of concepts, strategies, and instruments deployed to effectively steer platform policies. With

its characteristically overarching approach, governance covers both concepts of internal management and control by the platform operators themselves, and regulation or influencing from outside (i.e., by the state or other institutions or bodies).<sup>2</sup> Clearly—as the vibrant debate on the relationship and interconnection between the internal curation of social media and heteronomous legal standards and supervisory measures shows—a comprehensive and, therefore, enlightening examination of possible strategies and tools aimed at making (or keeping) communication platforms better compatible with societal, moral, and legal values cannot be limited to legally established instruments of state regulation, but must rather take both into account. Thus, adopting a comprehensive governance perspective.

Platform governance is no longer a matter of mere theoretical debate; rather, in recent years, there has been a lot of regulatory activity in this field at both European- and Member state-levels, and this activity will clearly continue in new proposals and rulemaking in the near future.<sup>3</sup> We are currently witnessing the increased competition between regulatory projects at various levels. This regulatory activism produces measures and laws whose scopes of application overlap and do not seem to be coordinated sufficiently,

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1 See for a thoroughly negative view on the role of Facebook; Siva Vaidhyanathan, *Anti-Social Media*, 2018.

2 Robert Gorwa, *What is Platform Governance?*, 2019; Albert Ingold, *Governance of Algorithms. Kommunikationskontrolle durch “Content Curation” in sozialen Netzwerken*, in: Sebastian Unger, Antje von Ungern-Sternberg (eds.), *Demokratie und künstliche Intelligenz*, 2019, 183 (203 et seq.); Matthias Cornils, *Entterritorialisierung im Kommunikationsrecht*, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 76 (2016), 391.

3 See only the “European Democracy Action Plan” announced by EU Commission Vice President Vera Jourova (march 2020): “online platforms need regulating”, <https://euobserver.com/political/147323>.



especially between the Union and member states.<sup>4</sup> Thus, the phenomenon and problem of regulatory competition are, meanwhile, becoming increasingly important and, therefore, must be dealt with in this study.

Key aspects of the initiatives and regulations have, until now, been the combat against disinformation, hate speech, illegal and terrorist content, and the more effective protection of minors. It may be worth mentioning a few well-known examples of measures either already set in force or still discussed: the German Network Enforcement Act of 2017<sup>5</sup> (now under revision<sup>6</sup>), the French loi Avia<sup>7</sup> (still in the legislative procedure<sup>8</sup>), the Commission proposal for a regulation to combat the distribution of terrorist content online,<sup>9</sup> the code of conduct and other measures at the Union level to tackle disinformation, the amendment of the Audio Visual Media Directive 2018<sup>10</sup>, etc.<sup>11</sup>

However, regulatory approaches to safeguarding information quality are not limited to the fight against illegal or otherwise harmful content, such as disinformation or hate speech. Other regulatory projects have tried to counter more subtle risks, such as the

degeneration (“softening”) of news through the predominant proliferation of “attention-grabbing” messages, which is an obvious strategy of commercial social media platforms to attract and bind users, or a presumably discriminatory algorithmic ranking of search engine results, or of content in the news feed in social media accounts. Proposals of this type (i.e., to protect against discrimination or, something which is not necessarily the same, to safeguard the diversity and accessibility of information on social media and search engines) are less widespread and established than those of the former sort, but there are already some pioneering initiatives in this field as well. Perhaps the most striking example of this kind of regulation—of “media-intermediaries” to ensure the informational preconditions of free opinion formation and, hence, a functioning democratic discourse—is the current reform of Germany’s Interstate broadcasting treaty, recently adopted by the governments of the German Länder.<sup>12</sup>

If there is, by now, a rich and diverse spectrum of concepts, debates, arguments, and even experience on platform governance issues, it is not easier to provide founded assessments on all such legal

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- 4 By the way we now face similar problems in the German federal system with tricky difficulties to demarcate competences of the federal parliament and the Länder, which actually have the legislative competence for media law).
  - 5 Network Enforcement Act (Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken – NetzDG), 1.9.2017, Bundesgesetzblatt I Seite 3352; <https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html>.
  - 6 Artikel 6 (Änderung des Netzwerkdurchsetzungsgesetzes) des Entwurf eines Gesetzes zur Bekämpfung des Rechtsextremismus und der Hasskriminalität vom 19.2.2020 (Proposal of the Federal Government for an act to combat right-wing extremism and hate crime); [https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE\\_Bekaempfung\\_Hasskriminalitaet.pdf;jsessionid=09029AC44C2D092589F76A47E3AFF6B9.1\\_cid297?\\_\\_blob=publicationFile&v=3](https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Bekaempfung_Hasskriminalitaet.pdf;jsessionid=09029AC44C2D092589F76A47E3AFF6B9.1_cid297?__blob=publicationFile&v=3).
  - 7 Proposition de Loi visant à lutter contre les contenus haineux sur internet (Proposal of an act to combat hate speech on the Internet), 20.3.2019 ([http://www.assemblee-nationale.fr/dyn/15/textes/l15b1785\\_proposition-loi](http://www.assemblee-nationale.fr/dyn/15/textes/l15b1785_proposition-loi)), adopted by the Assemblée nationale in first reading on 9.7.2019.
  - 8 Latest status: second reading (nouvelle lecture) of the Assemblée ([http://www.assemblee-nationale.fr/dyn/15/textes/l15t0388\\_texte-adoptee-seance](http://www.assemblee-nationale.fr/dyn/15/textes/l15t0388_texte-adoptee-seance)) and the Sénat on 26.2.2020 (<https://www.senat.fr/leg/tas19-064.html>) after the Sénat deleted the central provision of the proposal (obligation to delete social networks within 24 hours).
  - 9 Proposal for a Regulation on preventing the dissemination of terrorist content online (COM(2018)0640), 12.9.2018 (status now: position of the EP at first reading, 17.4.2019, [https://www.europarl.europa.eu/RegData/seance\\_pleniere/textes\\_adoptes/provisoire/2019/04-17/0421/P8\\_TA-PROV\(2019\)0421\\_EN.pdf](https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2019/04-17/0421/P8_TA-PROV(2019)0421_EN.pdf)).
  - 10 Directive (EU) 2018/1808, 14.11.2018 amending Audiovisual Media Services Directive (2010/13/EU), OJ L 303, 28. 11.2018, 69.
  - 11 See, for example, Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters, 18.4.2018, COM(2018) 225 final (status now: Council, general approach of 11.6.2019, <http://data.consilium.europa.eu/doc/document/ST-10206-2019-INIT/EN/pdf>).
  - 12 Proposal of an Interstate Media Treaty (Medienstaatsvertrag) (approved by the Chiefs of Governments of the Länder on 5.12.2019 but not yet adopted by the parliaments), [https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/ModStV\\_MStV\\_und\\_JMStV\\_2019-12-05\\_MPK.pdf](https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/ModStV_MStV_und_JMStV_2019-12-05_MPK.pdf). For a closer look see below, C. III. 2.



and praeter-legal governance instruments. In many cases, there are viable pros and cons attached to the proposed measures, such as, in cases of transparency, obligations to disclose the ranking criteria of a search engine, obligations or sanctions to establish and enforce the content-monitoring duties of platform operators. Moreover, it is not currently easy to guess whether such a measure is actually necessary or appropriate for solving the presumed problem. All the more, whether this problem actually is a problem, for example, because of alleged but not proven harmful effects on democratic discourse or societal integration, perhaps is controversial itself.<sup>13</sup>

## **II. Objective and structure of the study**

Within this context, it seems to be necessary to provide a conceptual order to the discussion to support the search for reasonable solutions. Therefore, the objective of this paper is to build an analytical framework that captures the diversity of both the challenges and regulatory approaches. In any case, in a thorough legal analysis, it is important to carefully distinguish between the different regulatory needs, objectives, and ideas of platform governance. This has not always been sufficiently conducted in previous contributions to the debate, in which sometimes problems of illegal content (punished hate speech etc.) are mixed with suspected risks of other kinds, such as possibly discriminatory content moderation, an increase in social polarization, a deterioration in the quality of the information repertoire of social media users etc. As far as the conceivable regulatory instruments are concerned, these instruments also cover a broad spectrum, ranging from measures to promote media literacy to obligations to proactively control user content on social networks through the use of upload filters.

The structure of the present analysis is three-tiered.

### **1. Regulatory challenges**

The first dimension is that of regulatory challenges (B.). Whether there is a problem with platform communication and, therefore, a need for regulation is often both difficult to ascertain and controversial.

On the one hand, these difficulties arise from the fact that assessments of the necessity of new regulatory mechanisms (as well as of their suitability and appropriateness in achieving their goals) depend on empirical experience and knowledge, which is still not currently always available or clear. This component of the regulatory problem (i.e., the factual reasons for uncertainty) has been addressed in the Stark report (Stark, Stegmann et al. 2020). It is true that conditions of uncertainty do not rule out any legitimacy of regulation. Nevertheless, rational legislation should be as evidence-based as possible. Thus, uncertainty with regard to the facts makes it more difficult to assess the appropriateness of regulatory concepts and, therefore, to rationally justify measures that may significantly interfere with complex social communications processes, business models and the rights of affected parties and third parties (see below, B. I.).

The challenge of designing a convincing concept of platform governance is also demanding because there is no consensus on the normative goals and social model it should pursue. These differences have a direct impact on the question of how the ongoing change in the social information system should be accompanied by regulatory measures (see below B. II.). It comes as no surprise, therefore, that, in the current increasingly intense debate on new and more stringent approaches to platform governance, very different opinions are held. In general, a distinction

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<sup>13</sup> For example, the problem of societal fragmentation which seems to be exaggerated as new studies show, see Geiß/Magin/Stark/Jürgens, "Common Meeting Ground" in Gefahr?, in: *Medien & Kommunikationswissenschaft* 66 (2018), 502 ff.





can be made between a more offensive and fundamental “strong” regulatory approach<sup>14</sup> and one that is more cautious, specifically limited to avert proven or at least probable threats to individual or collective goods skeptical of far-reaching interventions in the autonomy of markets as well as the socio-cultural development of the information society (B. II.).

## 2. Strategies and instruments of platform governance

The second dimension refers to the diverse strategies of platform governance, and, at a more specific level, regulatory instruments corresponding to such strategies (C.). In this section, different governance approaches will be discussed. Basic regulatory philosophies as self- or co-regulation, on the one hand, and binding legal obligations, on the other, are to be analyzed. Furthermore, some particularly important and, by now, influential concepts (e.g., commitments to transparency, obligations to non-discrimination, or positively moderating content in a diverse and balanced manner) will be assessed. In relation to each of these strategies, paradigmatic examples of concrete solutions (regulatory instruments) that have already been introduced in laws, or are still being discussed, will be presented.

## 3. Scope and competence

In the third chapter (D.), questions regarding the scope of the application of legal instruments and their appropriate regulatory levels will be discussed.

If the necessity of legal intervention is affirmed, as in other areas of law, the question arises regarding the choice of either more specific, sectoral approaches or comprehensive provisions of a broader scope. This question of scope is closely linked to that of competence; therefore, it must be examined whether a regulatory framework should be established in a more centralized manner, particularly by adopting European directives or regulations, or on a member-state or regional level instead.

## III. Definitions and Limitations

Any realizable examination of platform governance will have to be limited and concentrate on selected issues considered to be particularly central. Thus, the present analysis is subject to the following restrictions:

### 1. Intermediaries

In thematic terms, our considerations are initially limited—in line with the Stark report (Stark, Stegmann et al. 2020)—to a specific subclass of platforms (i.e., “information intermediaries”). The term covers online services that provide third-party content, including, for example, user-generated contributions and also media content in any form (text, image, or video), and “aggregate, select and present [this content] in a generally accessible form without combining them into an overall offering” to once again use the definition in the German State Media Treaty already cited in the Stark Report.<sup>15</sup> Therefore, first, telecommunication

14 See for a position in favor of strong regulation, for example, Dieter Dörr, Die regulatorische Relevanz der Organisation massenhafter Individualkommunikation, unter besondere Berücksichtigung der Sicherung der Meinungsfreiheit, Gutachten im Auftrag der Landesmedienanstalten, Juni 2019, and now the study and recommendations of the German Data Ethics Commission (appointed by the Federal Minister of the Interior, <https://www.bmi.bund.de/SharedDocs/downloads/DE/publikationen/themen/it-digitalpolitik/gutachten-datenethikkommission.html>).

15 Proposal Interstate Media Treaty (German Länder), § 2 para. 2 Nr. 16: “Media intermediary: any telemedium which also aggregates journalistic-editorial content of third parties, selects them and presents them in a generally accessible manner without combining them into an overall offering.”





services (acting as conduits, access providers), which are limited to signal transport,<sup>16</sup> are not considered. At the same time, this means that policy issues related to telecommunication networks, such as the question of what constitutes an appropriate concept of net neutrality, are beyond the scope of this analysis.

Secondly, infrastructure-based media platforms (e.g., cable or satellite platforms for broadcasting offers), as well as video and streaming platforms with a closed offer (e.g., Netflix or Amazon Prime), are not considered. While “media platforms”<sup>17</sup>—to use the term introduced for these platforms in the German State Media Treaty, which present a “composed” and, therefore, exclusive overall offer—play an increasingly important mediating role in media content, they are also a possible subject for regulation to ensure diversity and equal accessibility. For example, in Germany, provisions on “Plattformregulierung” have been part of broadcasting law for years, and they have now been tightened and extended to virtual online streaming services in the draft State Media Treaty. In doing so, they provide a model for the comparable yet not as far-reaching new transparency and anti-discrimination regulations for “media intermediaries” in the Treaty. Therefore, it is possible to include “media platforms” in comprehensive considerations of platform governance.

Notwithstanding, our considerations will be focused essentially on social media and search engines, leaving “media platforms” aside. Media platforms offer an editorially compiled selection of media content, but not user-generated content. The specific risks of a potentially worrying influence on the formation of

opinion through the distribution of third-party content via algorithmically curated intermediaries are, therefore, not to be assumed to a similar extent in the case of media platforms. Precisely these risks, particularly associated with intermediaries, for example, the precarious effects of disinformation, illegal content, soft news, etc., are addressed in this study.

The term “intermediary”, however, encompasses very different services whose differences should not be overlooked when assessing their risks and possible regulatory approaches. A search engine has a completely different function than a social network, which, in turn, is different from a messenger service. These differences in functionality naturally also generate different business models and, thus, guiding principles and criteria of content curation as well. If social networks, with their curation of newsfeeds, aim for the most sustainable retention of the user and his attention, the success of a search engine depends on its capacity to provide the user with the most useful answers to his search queries. These differences in function also result in very different risk potentials with regard to the influence of these services on information and opinion formation. In view of these differences, the question arises as to whether a uniform regulatory design covering all types of intermediaries (e.g., in the German State Media Treaty) is an appropriate solution (see below, D. I. 2.).

## 2. Exclusion of sectoral problems

One of the main problems of platform governance is the increasingly sophisticated way in which social

16 See Article 2 (4) of the Directive EU 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing a European Electronic Communications Code: ‘electronic communications service’ means a service normally provided for remuneration via electronic communications networks, which encompasses, with the exception of services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, the following types of services:

(a) ‘Internet access service’ as defined in point (2) of the second paragraph of Article 2 of Regulation (EU) 2015/2120;  
(b) interpersonal communications service; and  
(c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting.

17 Proposal Interstate Media Treaty (German Länder), § 2 Nr. 14: “Media platform: Each service that combines broadcasting, telemedia similar to broadcasting or telemedia in accordance with § 54 (2) sentence 1 into a complete offer determined by the provider.”



network providers manage masses of personal data collected from users (or even third parties) and the resulting threats to privacy and personal integrity. However, this aspect of data protection<sup>18</sup> will also be excluded in this study, especially because the General Data Protection Regulation (GDPR) is already an ambitious set of rules that has achieved paradigmatic importance in similar regulatory considerations worldwide. A deeper examination of the possible weaknesses and improvements of the GDPR in regard to data processing by social media and search engines would extend far beyond the scope of this paper.

The same applies to questions of copyright protection. Of course, some of these questions, which, as is well known, have been the subject of extremely passionate debate in the context of the reform of Union copyright law in recent years, also apply in a somewhat similar way to the challenges of platform regulation discussed here, for example, in regard to the scope and limitations of platform responsibility for illegal content. As has often been described, copyright law has even played a peacemaker role in the discussion on the responsibility of sharing platforms in regard to piracy problems in both the USA and Europe. The extensive civil court case law on file hosting cases, as well as relevant legal acts, especially the new Single Market Directive,<sup>19</sup> therefore, hold a paradigmatic significance for other governance issues, namely the readjustment of platform responsibility for harmful or illegal content by revising the twenty-year-old safe-harbor clauses in the E-Commerce Directive (ECD). In this sense, arguments from the copyright debate (e.g., in the dispute on proactive filtering) should be considered here as well.<sup>20</sup> However,

the risks facing intellectual property processed in copyright law do not centrally concern the problem of possible impairments related to the formation of public opinion—the central issue here—even though the protection of copyrights can also exist in tension with the freedom of communication for third parties.

Finally, the investigation will not delve deeper into antitrust law approaches. The large size of the US companies, which provide the most relevant intermediary services, is relevant, particularly in terms of regulatory matters. A powerful or even monopolistic company can be subjected to much stricter legal measures than small market participants in a pluralistic competitive situation. Moreover, the enormous size and market power of Facebook and Alphabet (the two most relevant giants in the markets of social media and search engines) raises severe concerns of undue power and influence. Demands for stricter anti-concentration control and even unbundling measures are, therefore, quite popular.<sup>21</sup> Nevertheless, these claims are not to be investigated here for the following two reasons:

First, an in-depth examination of the economic implications of competition law approaches to strengthening competition and enhancing the quality of services in the markets in which intermediaries operate would require an effort greater than the scope of this study. Second, is the assumption that measures directed against the market power of platform providers, such as unbundling Google (Alphabet) or Facebook in regard to their acquisitions of other intermediary services (WhatsApp, Instagram, etc.), are not particularly suited for solving the most important problems related to their negative influence on public discourse:

18 See Daphne Keller, The right tools: Europe's intermediary liability laws and the EU 2016 General Data Protection Regulation, 2018.

19 Directive (EU) 2019/790, 17.4.2019 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, 92

20 See for an exemplary warning of a transferral of the "disastrous Copyright in the DSM proactive filtering" into the ECD reform <https://euinternetpolicy.wordpress.com/2019/07/30/the-eu-digital-services-act-what-it-is-and-why-it-shouldnt-happen/>.

21 Suggestive plea for a "Neo Brandeisian Agenda" to stricter control mergers, break up the "Big Techs" etc.: Tim Wu, The Curse of Bigness, 2018; with regard to search engines, for example: Johannes Kreile, Thomas Thälhofer, Suchmaschinen und Pluralitätsanforderungen, Zeitschrift für Urheber- und Medienrecht 2014, 629 (634 et seq.).



the primary issue here. Indeed, the risk of discriminatory practice, particularly by prioritizing own services and hindering competitors, is probably higher in the case of a market-dominant and vertically integrated company, particularly in regard to discrimination for economic reasons. These practices must be decisively detected and prevented by well-equipped competition authorities, something which has already taken place several times in Europe. However, there is little to suggest that the challenges related to the problem of a degeneration in the quality of discourse, such as poor law enforcement, susceptibility to abusive strategic communication, and the alleged structural deficiency of a curation logic focusing on the acceptance of users and advertisers, correlate with the size of platform providers. Otherwise, smaller providers, including Instagram and WhatsApp, prior to their acquisition by Facebook, would have exhibited much more favorable records (in terms of the problems mentioned) than the large market leaders. Conversely, their acquisition would have made these records worse.<sup>22</sup> It is implausible that a few smaller search engines could provide better search results or be more resilient to disinformation strategies than a large one, or that many small social media providers as a whole would be better suited to promote a more civilized and less toxic or polarizing communication climate.

On the contrary, large providers, as alarming as they may be from the view of pluralistic competition, are more likely to have the economic and technological means to remedy at least certain weaknesses and vulnerabilities of their services, such as identifying

and addressing violations of rights or identifying social bots. Economies of scale and (indirect) network effects, therefore, have an impact on search engines and social networks not only in terms of the performance and attractiveness of these services – effects that can hardly be denied. Rather, the ability to provide effective platform governance is also a performance characteristic that is likely to correlate to the size of the organization. This correlation of size and capacity to monitor content and to fulfil corresponding legal obligations has often (e.g., in the copyright debate) been described and also criticized: A high level of mandatory diligence and control (required by legal standards) puts small and start-up companies at an additional disadvantage, thus hindering the emergence of competitors and cementing the power of the large incumbents. However, this critical argument only confirms the expectation that rather large companies are better prepared and capable of meeting demanding governance requirements. This assumption is not necessarily associated with a specific way of content moderation, such as a centralized or decentralized structure of supervision<sup>23</sup> or the use of automated or human supervision resources. These (latter) important questions regarding the design of the moderation architecture should not be easily commingled with the topic of companies' size; they lay on another level. Just because large platform companies are able, and probably particularly inclined, to use advanced AI technologies to support their content mapping and classification processes on a large scale, this cannot mean that preferring smaller companies is a promising way to support a better concept of content moderation, i.e., a concept

22 Even a position like that of the EDRI which is strongly adverse to the “big techs” and alleges the monopolistic silo-structures” of the big social media platforms to be the essential cause for the claimed deterioration of the Internet ecosystem appears to be surprisingly hesitating when it comes to the question of breaking up the “big techs”. Forcing Facebook to give up WhatsApp, or demanding Alphabet to stop running YouTube, even from this standpoint, does not seem to be a promising strategy, see EDRI, Platform Regulation Done Right, 9.4.2020, p. 14: “If breaking up Big Tech is not the way to go for Europe, what is?”

23 For example, Twitter’s “Bluesky” project (<https://www.theverge.com/2019/12/11/21010856/twitter-jack-dorsey-bluesky-decentralized-social-network-research-moderation>) does indeed intend to develop an open and decentralized standard for social media based on blockchain technology, inter alia with a view to improving content moderation. But, aside from the fact that it is currently still completely vague whether and how the idea of blockchain decentralization can be applied to content moderation and whether the idea of an open, protocol-based architecture might not be more driven by the desire to strip away one’s own platform responsibility, the project is certainly not aimed at breaking up the Twitter company. In other words, such considerations are by no means about an approach based on antitrust law.



that is at least as well suited to effectively achieve the objectives of platform governance while better respecting the freedom of platform communication. Synergy advantages resulting from economies of scale should, therefore, not be associated only with a particular type of moderation, namely “algorithmic moderation”.<sup>24</sup> On the other hand, the platform-communication-specific phenomena of mass and rapid infringement of rights etc., which creates the difficult challenge of an adequate curatorial response, do not stop at platforms with only a few hundred thousand or millions of registered users or – to be more precise – at smaller companies that own those platforms. There is simply little to suggest that these companies, with their more limited capabilities and relatively less favorable cost structure, would have better skills to deal with those problems – of course we do not mean tiny networks of a nearly private character providing an almost closed and easily manageable space of communication which certainly are not a realistic alternative to the Facebook-like type of social media.

Moreover, it is easier for a supervisory authority to negotiate and conclude contracts with or control a limited number of known parties than with a spread of different suppliers.<sup>25</sup> A break-up of the giants or better merger control may, therefore, be considered an argument for competition law, yet this is hardly the ideal way to solve problems of cultural and social platform communication.<sup>26</sup>

In any case, regulatory considerations must always bear in mind that the concepts of “external pluralism” (“Außenpluralismus”: decentralization through

anti-trust measures) and “internal pluralism” (“Binnenpluralismus”) are mutually exclusive: one cannot pursue both at the same time, which is often not sufficiently understood in the debate. Regulatory obligations imposed on platforms to enforce neutrality (i.e., to grant equal access or sort content in a non-discriminatory manner) or even to provide for a prioritized findability of content of general interest could only be justified for providers in a position of significant market power. This type of regulation can, as can be learned from competition law, only be justified for dominant companies, while strategies of stricter merger control or the breakup of “the big tech” is aimed precisely at preventing the latter from maintaining their size.

### 3. Focus

Instead, this analysis will focus on the question of how the responsibility and function of platforms should be shaped to ensure the integrity of the rights of users and third parties as well as the formation of individual and public opinion. The question is, therefore, no longer whether intermediaries should curate content or limit themselves to a neutral transmission role as mere conduits—it has long been clear that platforms are neither neutral nor could they be neutral<sup>27</sup>—but rather always and necessarily to curate in some or other way. The key question, then, is how far a legal order of such rules and practices of platform-governance can or should go and how far and in which direction it should override autonomous curatorial concepts of the platforms themselves.

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24 Term: Gorwa, Binns, Katzenbach, Algorithmic content moderation: Technical and political challenges in the automation of platform governance (2020).

25 Of course, this argument can be turned *against* concentration as well insofar as few companies are easier to control by authoritarian governments than a lot of them, Jack M. Balkin, How to regulate (and not regulate) social media, p. 13.

26 Convincingly rejecting the proposal to establish a further “Konzentrationskontrolle” mechanism beyond cartel law to control intermediaries Anna Kellner, Die Regulierung der Meinungsmacht von Medienintermediären, 2019, p. 294 et seq.; skeptical already Matthias Cornils, Die Perspektive der Wissenschaft: AVMD-Richtlinie, der 22. Rundfunkänderungsstaatsvertrag und der “Medienstaatsvertrag”, Zeitschrift für Urheber- und Medienrecht 2019, 89 (100 et seq.).

27 See only Tarleton Gillespie, Custodians of the Internet, 2018, p. 24 et seq. (“The myth of the Neutral Platform”); with regard to search engines Dirk Lewandowski, Is Google responsible for providing fair and unbiased results?, in: Taddeo/Floridi (eds.), The responsibilities of online service providers, 2017, 61 (74: “Every search engine is per definitionem biased ...”).



Therefore, the legitimate and legally tenable aims of such heteronomous curatorial control must first be defined more precisely. Then, strategies and instruments for achieving those aims must be examined, beginning with persuasion strategies aimed at readjusting corporate policy, co-regulation strategies that already include third-party participation and supervisory elements, a modification of the ECD's safe harbor regulations, and administrative supervisory structures and fine sanctions.



## B. The Dimension of regulatory challenge

### I. The factual side of the problem: Evidence-based governance under conditions of uncertainty

Decisions to regulate communications (both on and offline) should be grounded in empirical experience or, at least, empirically-based predictions concerning probable relationships between certain technical, cultural, or economic phenomena and their consequences on public information and opinion formation necessary for the functioning of democracy. Media regulation has always attempted to rely on extra-legal research findings, such as media effect research to justify certain policies (e.g., the rather strict broadcasting regulation in many countries). While these justification strategies have not been consistently convincing in the past, for example, in regard to the allegedly outstanding influence of television on opinion formation, the findings of communication science with regard to the social effects of Internet communication are still more complex. Overall, they are only clear in some respects while ambiguous or simply incomplete in others. Some narratives, such as the filter bubble theorem, which have been debunked as myths, however, live on stubbornly in many popular representations, statements from political leaders, and even scientific works. This is not only frustrating from a scientific point of view but downright dangerous for the legal policy debate, as it exaggerates problem scenarios that do not even exist (to the assumed

extent), pushes the imagination of law makers in the wrong direction, and provokes unnecessary regulatory activism to combat these phantom problems, drawing attention away from any real problems.<sup>28</sup>

According to the Stark report (Stark, Stegmann et al., 2020) the most tangible risks for open and free communication and informed opinion-forming seem to be the following:

- firstly, a certain risk (although not very high nor socially broad) of communicative and social polarization due to targeted disinformation;
- secondly, the promotion of toxic speech, incivility, and polarization as well as the possible informational impoverishment of users due to the general qualitative degeneration of the content released by the attention-catching logic of the platforms' business models; and
- thirdly, the danger of an economically induced depletion of the quality of media and, as a result, a decline in the overall quality of information.

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28 Impressively, Axel Bruns, Filter bubble, Internet policy review, vol. 8, issue 4; convincing warning against hectical activism without sufficient empirical basis Kirsten Fiedler, <https://edri.org/e-commerce-review-technology-is-the-solution-what-is-the-problem/>.





## **II. The normative side of the problem: Uncertainties or controversies in identifying unambiguous objectives**

The specific challenges in identifying appropriate concepts and instruments for governing platforms arise not only from facts but also from the more or less blurry, or controversial normative objectives and standards of protection, flowing from the ECHR, the EU-Charter of Fundamental Rights or the Member-States' Constitutions, which the legal system must implement.

Only the definition of the normative goals decides whether the actual situation is considered a problem eventually calling for regulation, not the facts themselves: A situation is only a problem if it does not conform to the normative idea of how it should be. It is, therefore, crucial to sketch the ideal, legally speaking the normative objective ("Normziel"), with which the actual situation should correspond as closely as possible.

This is not at all trivial but challenging. The interpretation of normative (e.g., constitutional) goals is a difficult task, especially in the context of the constitutional guidelines that frame the legal order for individual and social communication and the media.

In general, disagreements on how to describe constitutional objectives often arise from the characteristic vagueness of the constitutional norms, and the need to conceptualize them. In particular this applies to principles and standards of the constitutional guarantees of free communication, information and the media, due to their functional connection with the principle of democracy. Because of this, the social and institutional relevance of those guarantees to define their legal meaning is more challenging than

in the case of fundamental rights solely protecting individual integrity or freedom. Therefore, questions such as, for example, what social function is associated with freedom of the media? Or, what does "diversity of opinion" or "equality of opportunities to communicate"<sup>29</sup> actually mean, are often controversial.

A second complicating factor, however, is the ambivalence or even polyvalence of values and objectives included in constitutional law (especially fundamental rights) itself. For example, a phenomenon such as "polarization" (of what exactly?: society, debate, style of argumentation?), even if it could be diagnosed empirically, cannot simply be described as a problem in the normative sense, which should be contained as efficiently as possible through regulation. For "polarization" can just as well be seen as an indication of a lively culture of debate, which is particularly important for democratic opinion-forming. From this point of view, a high degree of consensus and of uniform opinions among the population would be a much more worrying sign of crisis than a plurality of strongly divergent, even "polarizing" views.

Moreover, constitutional law on communication matters cannot be broken down into simple one-dimensional guidelines, such as an imperative to realize as much freedom of opinion as possible or, conversely, a duty to guarantee as much data, privacy, or copyright protection as possible. Rather, what is required under constitutional law almost always corresponds to a compromise of conflicting interests, each of which can claim protection under fundamental rights and must, therefore, be balanced. Constitutional objectives, which rules for governing platforms must meet, thus typically arise only from complex procedures for balancing competing legal positions. These results are not at all arithmetical derivations but rather the outcome of evaluations of competent courts, legal

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29 See below, C. III. 2.





scholars, or other interpreters who are often controversial.

In some areas, however, case law has by now developed fairly precise criteria for resolving such conflicts of fundamental rights (e.g., weighing the freedom of expression against the right to privacy). In such cases, the constitutional framework of legislative discretion for regulation appears to be more clearly defined than in cases of conflicts of interests that are still largely unresolved in court. However, this means that the political discretion to decide for or against regulatory action may be all the more restricted by such constitutional limitations.

### III. Conclusions

For both factual and normative reasons, upon closer examination, it is more difficult than often assumed to precisely define the social, economic, cultural, or even psychological problems to be solved by regulation and, thus, the corresponding need for regulation. Important conclusions can be drawn from this insight for the further discussion of governance:

- First, and in general, the motto should apply: The less clear the problem analysis is, the more cautious regulation should remain. Regulatory activism motivated for whatever reason without backing in empirical findings and clear normative goals should be avoided.
- Second, it is essential to distinguish between the various normative objectives of a communications regulation. This is a prerequisite for then assessing the necessity of regulatory measures in relation to each of these objectives. So, categories of more or less urgent regulatory challenges can be built according to various legal protection purposes.

We can roughly distinguish between,

- firstly, problems of individual rights protection,
- secondly, dangers to institutions or the social order,
- thirdly, risks that affect the functionality of communication processes for democracy.

In the first category, we can bundle questions regarding intellectual property, threats to privacy, personal rights, the physical integrity of people (which can be threatened, for example, by incitements to hatred), and concerns regarding the protection of minors. The second category includes objectives such as combating terrorism, ensuring free and uninfluenced elections, and cyber security. In the third category, protection objectives such as safeguarding the diversity of information and opinions as well as the accessibility of socially relevant information for everyone are included.

It goes without saying that these categories are not exclusive: Defaming statements or hate speech about people, especially about officials or public figures, are not only an issue in terms of the rights of the insulted individuals but also, with their chilling effect on free speech and political (or societal) activity, in terms of the processes of democratic opinion formation. Notwithstanding such a differentiation, making the relevant justifications for regulation clearer can thus contribute to a more structured discussion on the necessity of such a regulation.

#### 1. Protecting individual rights

Legal institutions and instruments for protecting individual rights (and also public peace) follow an approach to hazard prevention in terms of the suppression or removal of dangerous content. This kind of regulation is, therefore, of a much simpler structure and generally easier to justify than complex and far-reaching institutional obligations, as, for example,



an obligation to safeguard generally accessible media coverage on important societal issues. Although the former type of content control also regularly encounters harsh criticism in the legal policy debate (accusation of censorship, undue restriction of free speech), it is nevertheless fundamentally less problematic in its legitimacy.

However, this only applies to communication that clearly violates fundamental rights, not to only “harmful” or indecent content. Public authorities bound by fundamental rights are not even entitled to prohibit low-value content or demand its suppression as long as it is not illegal. This important limitation considerably restricts the regulatory discretion, such as improving the quality of content and communicative climate of social media (see below, C. I.). It is even tighter due to the circumstance that these questions of providing legitimate content-related restrictions or even bans on expression are mostly constitutional in their very nature and have now been clarified to a considerable extent in court. This insight is of high relevance for the question of governance: The assessment of expressions of opinion as unacceptable and to be legally suppressed is primarily not political-parliamentary in nature but is pre-decided under the ECHR and domestic constitutional law (see below, C. III.).

Since socially intolerable behavior is essentially already penalized by the law, and there is little room to expand, the present question of further regulation shifts primarily to the aspect of better law enforcement and the prosecution of legal infringements. Of course, the necessity of a more stringent protection of individual legal interests is not equally recognized for all rights. From the vibrant debate on the reform of the copyright directive, we know that, at least in Europe, the protection of intellectual property rights against free exploitation (“piracy”)—for

instance, through the stricter liability of share hosting-platforms—is significantly more disputed than, for example, a more effective prosecution of illegal hate speech or the distribution of child pornography online. The more there is a general consensus on the legitimacy and need for the protection of the respective right, the more it can be assumed that measures to improve the enforcement of this right can expect assent. This applies, for example, to content that clearly incites violence or heavily threatens local politicians or others engaging in public matters. In such cases, the regulatory challenge (to enhance legal protection) seems to be rather plausible. In fact, both the European Union and the member states focus their activities on this regulatory field.<sup>30</sup> Of course, this consensus and acceptance of the need to better protect certain rights or interests is not necessarily global, but may depend on different national or regional traditions and cultures.

- To sum up: The regulatory need to protect individual rights against violations through platform communication, and to enforce the respective law is founded in constitutional positive obligations and, therefore, comparably clear. The challenge to design an appropriate regulation in this field focuses on the choice of regulatory instruments and the question of proportionality.

## **2. Protecting public institutions and interests**

Similar considerations apply to the protection of collective goods, public institutions, and interests against harmful acts, either using or undermining the communication infrastructure of the platforms. In any case, violations of individual rights and further damage to the state or collective goods often go hand

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30 See articles 6, 6a, 9 (1) lit. c)-g), 28b of the AVMSD Amendment Directive concerning a better protection of minors and of human dignity (esp. with regard to content on video-sharing platforms); the proposals of a TCOR and of an eEvidence-Regulation; in France and Germany the enforcement acts to combat criminal content on platforms.



in hand (e.g., in the case of terrorist attacks). Here, too, or even more so, it can be observed that protection goals (e.g., preventing terrorist attacks, ensuring the integrity of democratic election processes), as such, are generally undisputed. However, as in the case of protecting individual rights, the necessity of new, stricter legal precautions is often disputed, and the concrete measures proposed are more often criticized as disproportionate due to their typically high intensity of intervention.

### 3. Safeguarding a functioning “news ecosystem”

With regard to the risks involved in a functioning news ecosystem (i.e., one in which conditions prevail that allow open, diverse, and reliable information to the public), we can distinguish between two problem categories:

- Firstly, “strategic communication” (i.e., the targeted use of disinformation, social bots, etc.) can be identified comparably clearly as precarious.

As the Stark report (Stark, Stegmann et al., 2020) shows, disinformation contributes to people’s increasing uncertainty as to what may be considered true or false and also promotes tendencies of polarization – even if such negative effects sometimes seem to be exaggerated. Furthermore, moral or legal justifications for the targeted use of disinformation strategies, which aim at undermining social stability, are difficult to imagine. Disinformation, therefore, presents a comparatively clear case for countermeasures (i.e., regulation). Therefore, the manifold political and administrative activities taking place in this field are not surprising. Another question is whether the problem, perhaps just because it appears to be that easy to describe, is possibly given disproportionate

weight in relation to other, actually more significant structural causes of the change in communication culture caused by platform communication. However, apart from this skepticism regarding its importance, the problem of disinformation obviously exists, and the difficulties of governance lie more within choosing appropriate and adequate instruments to contain it.

- Secondly, we are dealing with a bundle of phenomena of discourse degeneration that are discussed as a risk to the functionality of democratic opinion formation, but which are much less clear and more controversial in their nature and significance.

This category comprises the alleged (but not undisputed) problem of the narrowing of the diversity of information caused by platforms, a possible degeneration of discourses necessary for democracy as a result of a shift in the information function from the media to platforms, or discussed risk of content curation as being susceptible to discrimination. The attempt to maintain or even improve the conditions of open and substantial communication through legal measures of platform regulation raises more serious concerns in comparison with the above discussed reasons for regulation to protect individual rights or institutions. Whether the factual and legal situation makes it necessary or even justifiable to subject intermediaries to a more media-like curatorial responsibility or if it imposes duties of neutrality on them because they assume a gatekeeper or public forum role is questionable.<sup>31</sup> Legal obligations for platform operators that interfere with the constitutionally based right of the operators to establish their business model and perhaps, furthermore, paternalistically override the preferences and autonomy of users require careful and critical examination. This will be discussed in more detail below, especially with regard

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31 For a profound and critical argumentation see Martin Mengden, *Zugangsfreiheit und Aufmerksamkeitsregulierung*, 2017, p. 92 et seq.



to the new transparency and anti-discrimination provisions in the German draft of a state media treaty.

- To sum up: With regard to the risks for the news ecosystem arising from platform communication, the phenomena of so-called strategic communication can be distinguished from those of an unintended degeneration of democratic discourse inherent in the functioning and business models of intermediaries – especially social media platforms. While the former is – in principle – little disputed as a disturbing and potentially harming factor and thus, in principle, as a regulatory challenge, the possibility, necessity and legal justifiability of regulatory measures in the latter area are much less clear and more controversial.



## C. The dimension of regulatory strategy and appropriate regulatory instruments

In regard to the strategies and types of measures that could be used for platform governance, decision-makers (i.e., the platform companies themselves, legislators, and governments but also other institutions involved) may choose from a wide range of different options. This spectrum ranges from in-house governance strategies (i.e., designing a company's business model and policy, stipulating their terms of services and community guidelines, forming the algorithms according to these programmatic decisions), to the state-induced yet voluntary commitments of service providers (to moderate, monitor, and control content, and to make the platform's curation principles and criteria more transparent) or civil, penal, and public standards, institutions and procedures of judicial or administrative supervision, and sanctions (e.g., threats of a fine or punishment). Most of these strategies either have long been implemented in communications law or are discussed extensively in legal policy discussions.

It is not possible to analyze and evaluate all varieties of concepts in detail here. Instead, this section will focus on categorizing structural regulatory patterns. Thus, some major categories can be distinguished, namely strategies for regulatory reticence accompanied by expecting or stimulating self-regulation, arrangements of co-regulation, strategies of promotion and support (institutional, informational, educational, or financial), the whole gamut of legal obligations (civil-law, administrative, or criminal liability), and supervisory and enforcement mechanisms, including sanctions. Only in an exemplary manner

will these patterns be linked here with certain important content-related regulatory concepts, namely approaches to tightening the responsibility of intermediaries in terms of the content they distribute, tightening material standards for network communication, imposing transparency obligations, and preventing discrimination on platforms. These concepts are respectively exemplified by some of the legal instruments already introduced or proposed. Particularly at this level of concrete regulatory instruments, only a small selection of paradigmatic examples is possible within the scope of this study.

It should be mentioned that,

- a strategy aimed at completely prohibiting private search engines or social networks due to their presumed negative social effects, or only allowing them under economically unacceptable conditions (perhaps substituting them by publicly organized and financed services) has to be ruled out from the outset.

Banning these services would not only infringe on the economic fundamental rights of the providers as well as the users' rights to communicate, but it would also be a massive interference in the free development of social communication processes for which a viable justification is hardly conceivable. In particular, no justification for such a ban could be found with the argument that intermediaries are competitors in traditional media for public attention – which is undoubtedly the case – and would,



therefore, contribute to a negatively assessed change in the information landscape. A policy of institutional protection aimed at forever immunizing traditional media and their intermediary function against competition from platform services cannot be compatible with liberal constitutions, which are, in essence, open to dynamic developments and changes in economic, technological, and cultural conditions.

- The law can influence the practice of intermediaries in such a way that it produces as few societally disadvantageous and, therefore, intolerable effects as possible. However, regarding the ambiguous and controversial assessments of the impact and risk potentials that platform communication has, the law cannot forbid their business model in general, since a government in office or a parliamentary majority would find a world without social media or private search engines, as in the past, better.

## **I. Regulatory reticence and self-regulation (content moderation)**

### **1. Autonomous and heteronomous regulation: Basic clarifications**

A comprehensive perspective on platform governance must not overlook the possibility of consciously dispensing with steering and heteronomous control and instead leaving the respective decisions to the platforms, the customers and users, i.e., economically speaking, to all market participants. This does not necessarily mean a policy of *laissez-faire*. Rather self-regulation can be accompanied by efforts to influence the decision-making practice through persuasion or moral pressure. It is in accordance with the comprehensive concept of governance that varieties

of either solely interest-driven or societally influenced self-regulation are implied. In fact, these options play an extremely important role in platform regulation.

#### **a) Content moderation**

Content moderation is a permanent and mass practice of all social networks. It is, as already noted, a necessary task of social media providers that, today, consumes a considerable portion of their resources. Since content moderation is self-regulation this regulatory approach is even the most striking characteristic of platform governance. Even if they began with the guiding principle of a platform for the free exchange of users that was as open and unedited as possible, network providers had to learn that this vision was illusory, and they could not avoid taking on a supervisory role. All this has often been described and will not be discussed here furthermore.<sup>32</sup>

- Thus, the core question in any debate on the regulation of intermediaries and, especially, their responsibility for the content on the platform is whether there are, and, if so, which are possible, or even the constitutionally binding legal limits of, autonomous content moderation.

Answers are to be given in terms of where and to what extent the content moderation of platforms should be supported, supplemented, corrected, or restricted by external impulses, such as through legal standards and procedures of control or mechanisms of enforcement or cooperation with technically competent institutions, social institutions, or organizations that can provide input to enhance moderation.

Therefore, the choice of strategy cannot be based on an exclusivity of the concepts either of self-regulation

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32 See only Gillespie (note 27), p. 5 et seq.



or of state regulation. The major dimension of the content moderation of large platforms alone demonstrates that it would be impossible to deprive the platforms of this task and reserve control of content exclusively to the courts or authorities.

- Due to their massive advantage in terms of technological knowledge and information, which platform providers have with regard to their algorithmic content curation, any regulation can only be promised through establishing a form of cooperation with such providers, however this mechanism may be structured.

It is important to understand that any decision on the relationship between self- and third-party control is, therefore, a decision on governance, which includes the renunciation of content-related regulation by law or public authorities. Such abstention—and, instead, a preference for strategies providing more autonomous self-regulation (or that integrates the knowledge and evaluation of civil society organizations<sup>33</sup> or joint expert committees)—should, therefore, not be readily stamped with the pejorative label of inaction or even failure of regulation.

### **b) Using of or relying on content moderation to comply with state obligations to protect**

Regulatory reticence is not appropriate where there are constitutional obligations demanding governments, parliaments, and courts to regulate by means of public power. This is undoubtedly the case when state legislators bear positive obligations to protect fundamental rights from horizontal violation by individuals, groups, or institutions. Moreover, courts are entitled to apply these laws by prohibiting the distribution of infringing content, awarding damages or even imposing penalties. The Member States of the ECHR, bound by the

fundamental rights guaranteed by this convention and the case law of the ECtHR as well as by their domestic constitutions, are obliged to ensure the sufficiently effective protection of the fundamental rights of people affected by communications on social networks through law and appropriate enforcement mechanisms, especially in a functioning jurisdiction. States must not ignore these obligations by simply leaving such protection of fundamental rights to the platforms themselves. In particular, they must provide legal remedies by which affected persons can reasonably and effectively obtain legal protection against violations of, for example, their right to privacy.

This does not mean, however, that a regulatory strategy could not make use of platforms' ability to contribute to the protection of legal interests themselves. In terms of the large number of (attempted or realized) violations of individual rights or other legal standards through communication via social networks, it is essential that operators cooperate in preventing or eliminating these violations. The best-equipped judiciary or public authority would be hopelessly overburdened with the task of ensuring the integrity of the legal system on its own. Partially widespread ideas that only state authorities, especially courts, should be allowed to decide on the prevention of the distribution of illegal content are not sufficiently aware of the actual very limited abilities of law enforcement by state prosecution authorities and courts. These methods of law enforcement are always expensive, cumbersome, and selective—if not even only symbolic in nature—especially in criminal law.

- If platform provider cooperation is necessary to enforce the law in practice, it is also mandatory under constitutional law.

The constitutional positive obligation of states to protect results in an obligation to hold platforms legally

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33 Gorwa (note 2), p. 16 ("community self management"); Ingold (note 2), 183 (203 et seq.).





responsible for preventing the dissemination of infringing content, if, however, only under specific conditions. A strategy of regulatory reticence cannot go so far as to exempt intermediaries from any legal responsibility.

## **2. No option: Prohibition of content moderation**

Content moderation conducted by platform companies is an important but often criticized pillar of platform governance.<sup>34</sup> The more vigorous a practice of control and deletion of content by platform operators is (whether based on a concept of genuine self-regulation according to restrictive terms of service or forced by governments or authorities), the louder the criticism of “private censorship” will be. This argument can be directed against all concepts of regulation allowing, encouraging, or forcing platforms to control content, including not legally disciplined practices of content moderation<sup>35</sup> according to self-determined standards (e.g., prohibiting “harmful”, “indecent”, or “inappropriate” content) as is the case with all current available social media services (although their moderation policies differ in detail). By rejecting the platforms’ practice of content moderation the critics argue for an obligation of the platforms to distribute all content unless it has been prohibited by a court or authority. Following this idea, self-monitoring mechanisms should be legally restricted or at least bound by precise legal prescriptions to minimize over-blocking risks and prohibit discriminatory practices.

From a liberal point of view, which highly esteems freedom of speech and the marketplace of opinions, this is a thoroughly sympathetic view. Nevertheless, it cannot be convincing, at least not in a strong,

unrelated version that rejects any curatorial responsibility of the intermediaries themselves. In this form, it is simply no longer legally viable. According to the case law of the highest courts in Europe, it is clear that search engines, for example, are legally obliged not to display certain search results because they would violate the right to data protection or a right of personality of the person the displayed website is about. This obligation exists not only because such a responsibility can be derived from the relevant provisions of data protection or civil law, but also because it is required under constitutional law. The court decisions of the European Court of Justice or the German Federal Constitutional Court, for example, clarify this responsibility using constitutional reasoning: The fundamental rights of the persons concerned require such liability on the part of the search engine, if and insofar as in balancing the competing rights, they take precedence over the accumulated rights of the content provider to whose site the link is made as well as of the search engine users and the business interests of the search engines themselves.<sup>36</sup> Also, as already noted, one would completely overestimate the real capacities of administrative or judicial enforcement if the obligations of intermediaries to control and remove content were considered acceptable only after judicial review or by court order. Moreover, even such a requirement would not conform to the long-established legal principles, which do indeed recognize intermediaries’ own responsibility, at least in the sense of the notice-and-take-down principles deriving from copyright law.

- In this context, there is no doubt that Internet intermediaries have an indispensable legal responsibility for the dissemination of the content through their services, as far as illegal content is concerned.

34 Content moderation, therefore, is a steering instrument of platform governance (in the wide sense of this term). Beyond that, it is also a lever for heteronomous steering insofar as the “voluntary” commitment (and the expected behavior resulting from it) is permanently under strong public (and governmental) pressure and furthermore, at least in the case of co-regulation, monitored by authorities.

35 See for example Access Now, Protecting free expression in the era of online content moderation, may 2019.

36 See CJEU, 13. 5. 2014, C-131/12 – Google Spain, para. 81 et seq.; 24. 9. 2019, C-507/17 – Google LLC [portée territoriale], para. 45; German Constitutional Court, 6.11.2019 – 1 BvR 276/17 (Recht auf Vergessen II), para. 95 et se.



Legal developments have long since surpassed libertarian ideals of the unlimited, completely content-blind openness of platforms. Such ideas, therefore, can be overlooked when debating Internet governance strategies today.

### 3. Public pressure on platforms' content moderation

#### a) No option: Pressure for content moderation beyond the constitutional boundaries of the freedom of expression

From an opposing view, which is primarily about achieving a better climate of discourse in social networks, strategies could be interesting in urging operators to curate their content more extensively and rigorously, even beyond that which is required by law today; however, such strategies also hardly appear to be legally tenable.

Rather, a regulatory approach aimed at suppressing communication that does not clearly violate human dignity, reputation, or incitement to violence but is only indecent, crude, hurtful, and, therefore, does not cross the boundaries of criminal liability, appears to be highly problematic within the constitutional background outlined above. Not only the free speech case law of the US Supreme Court on the First Amendment<sup>37</sup> but also the European courts have never left any doubt that the constitutionally protected freedom of speech includes the right to make primitive, banal, nonsensical, uncouth, or even hurtful

statements.<sup>38</sup> Insofar as the “incivility” of communication is understood as a general term for precarious yet not unlawful statements, opinions, or forms of expression, it is, therefore, not only tolerated but even protected according to the highest ranking law. The subjective moral evaluation and normative constitutional assessment of “incivility”, which is decisive in the question of regulation, can diverge widely here, an insight which has already been confirmed again and again in other contexts of socially irritating communication (e.g., criticism of religion, demonstrations of political extremists).

Whereas (disputedly) social networks are granted the right to content moderation below the threshold of illegality (this will be discussed below),

- the state (or the EU) is undoubtedly prevented from banning not unlawful but only undesired content.

Consequently, they are also hindered by constitutional law to force, urge, or “nudge” platforms to ensure that the dissemination of uncivilized but not illegal content is ceased. Content moderation by platforms cannot be instrumentalized to indirectly restrict free communication by state law if governments, public authorities, or courts could be prohibited from doing so directly.<sup>39</sup>

The commission's (informal) note on a future Digital Services Act (DSA) seems to be somewhat ambiguous with regard to this: On the one hand, it affirms the necessity to clearly distinguish between illegal and

37 *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964): “Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”.

38 ECtHR, 13.07.2012, Nr. 16354/06 – *Mouvement raëlien suisse v. Switzerland*, § 48: “Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance, and broadmindedness without which there is no ‘democratic society’”.

39 This (correct) legal argument has often been combined with the (less convincing) accusation that state pressure to remove unlawful content is unconstitutional because it tempts providers to over-block, see Sebastian Müller-Franken, *Netzwerkdurchsetzungsgesetz: Selbstbehauptung des Rechts oder erster Schritt in die selbstregulierte Vorzensur?* – Verfassungsrechtliche Fragen, *Archiv für Presserecht* 2018, 1 (10).



merely “harmful” content. Harmful content should not be subjected to strict “notice and action type obligations”, but, on the other hand, the DSA-note argues for codes of conduct and the “strengthened role of the regulator” in cases of harmful content.<sup>40</sup> If this refers to options of state-guided or induced voluntary commitment, it is questionable for the reasons outlined above. Thus, such ideas should not be pursued further in the debate on platform regulation.

- In short, all attempts to directly or indirectly encourage platforms to keep their communication spaces free of content that may indeed have a negative influence on the quality of discourse but which must not be suppressed by the state authorities would have to be considered unconstitutional.

This, for example, also limits the ability of public authorities to participate in campaigns to combat false information presented on social networks—or to initiate such campaigns. Even “disinformation” (or “fake news”), i.e., “verifiably false or misleading information which is created, presented and disseminated for economic gain or to intentionally deceive the public and may cause public harm”<sup>41</sup> does not necessarily have to be illegal under criminal or civil law and constitutional standards. This is probably not the case, for example, if no one’s rights are affected by a false statement. And erroneously incorrect information (“misinformation”) can even be protected under constitutional law, for example, in the case of a *lege artis* researched journalistic report which nevertheless proved to be incorrect in retrospect. Forcing or inciting social networks to suppress content of this kind (at least of the latter type) would not be a valid option for state interference.<sup>42</sup>

The EU Code of Conduct on Disinformation, which was developed under the leadership of the EU Commission in order to achieve the objectives set out by a Commission’s Communication presented in April 2018, is, therefore, an interesting example of a balancing act that attempts to induce far-reaching voluntary commitments by companies on the one hand, while at the same time respecting the legal limits of government intervention described above. The Code is a treaty signed by (*inter alia*) Facebook, Google, and Twitter in October 2018; thus, it is an instrument of self-regulation but induced and also monitored by the Commission. Whether the balancing act was completely successful (i.e., whether the code avoided any obligation that also covers constitutionally admissible content) is not to be examined here. Important is the idea behind this project: The code endeavors to make it clear that all obligations must be in accordance with the law and, in particular, with the principles deriving from the ECHR, especially the fundamental right of the freedom of communication. For example, it explicitly states that “Signatories should not be compelled by governments, nor should they adopt voluntary policies, to delete or prevent access to otherwise lawful content or messages solely on the basis that they are thought to be ‘false’”.<sup>43</sup>

### b) Legitimate public pressure

This does not mean that public pressure on social networks is not a possible strategy for influencing their moderation policies. On the contrary, public pressure through politics, social institutions, the users themselves, and the advertising industry (and

40 DG Connect, (informal) Note on a future Digital Services Act, p. 5 et seq.; for a critical assessment: <https://edri.org/more-responsibility-to-online-platforms-but-at-what-cost/>.

41 See EU Commission, Communication “Tackling online disinformation: a European approach”,

[http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=51804](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=51804), para. 2.1.; preamble of the EU Code of Practice on Disinformation.

42 Josef Drexler, *Bedrohung der Meinungsvielfalt durch Algorithmen*, Zeitschrift für Urheber- und Medienrecht 2017, 529 (540 et seq.).

43 Code of Practice on Disinformation, I. (vii).



also by the bearers of public power) is, in practice, a very important means with which to persuade social networks to change their curation practices in order to contain some of the weaknesses of platform communication.<sup>44</sup>

However, the possibilities of the various actors from whom public pressure is exerted vary: Insofar as this pressure comes from the network community itself or arises from societal debate, it may be an effective strategy for developing a more civilized communication culture below the threshold of legal bans.<sup>45</sup> These social forces can, therefore, exert an influence that is denied to the holders of state power and, therefore, play an important role in platform governance. The network's moderation policy will, to a certain extent, give way to public pressure, for example, by modifying the newsfeed algorithm of social media, as Facebook and others have already done in order to maintain or increase the satisfaction of users and customers.

Another central influencing factor is the behavior of the platform users themselves. Indeed, the details of the programming of the recommender systems of social media platforms are not accessible and, therefore, not known. They belong to the "black-box" data that prominently contribute to the often-described opacity of platform curation. Also, personalized recommendation almost certainly does not work in a simple one-way-street logic in such a way that the algorithm reacts solely to the user's signals, without any attempt to conversely influence the user's behavior. Presumably these processes are configured in a much more complex way that leads to a scheme of mutual impact

and response.<sup>46</sup> But, undoubtedly, the user and her behavior have a central role in this relationship; the user's signaling is of prior significance, for steering recommendation outcomes, this is the very essence of personalization. This factor should not be overlooked or neglected when discussing the reasons for the actual appearance of the users' information environment presented to them on social media platforms. It is, therefore, by no means only the platforms, but also the users themselves who are responsible for "their" recommendation outcomes.<sup>47</sup> If this applies to outcomes that can be viewed critically from a public interest and democratic perspective ("low quality"), this user position also offers an opportunity to influence the "improvement" of the quality of information, for example through measures that strengthen the users' awareness of their formative power and their personal responsibility. This factor—users' customs and preferences—is under the influence of social debates. Thus, public pressure may have the power to improve the communicative and social climate of social networks by containing disinformative or hurtful but not unlawful content.

Content-related pressure from state (or EU) institutions, on the other hand, as mentioned above, is limited to encouraging platforms to be more effective in preventing the distribution of illegal content. Within this limitation, pressure to stimulate self-regulation can be quite effective. It has often been described that stricter content moderation through platforms is driven considerably by the motive of avoiding state regulation,<sup>48</sup> especially in the case of globally active services, which could incur high costs if they had to comply with the many different legal regulations of

44 Terry Flew, Fiona Martin, Nicolas Suzor, Internet regulation as media policy: Rethinking the question of digital communication platform governance, *Journal of Digital Media & Policy*, vol 10, No. 1, 33 (42).

45 Helen Margetts, Rethinking Democracy with Social Media (<https://onlinelibrary.wiley.com/doi/10.1111/1467-923X.12574>), 109 (119).

46 See Paddy Leerssen, *The Soap Box as a Black Box: Regulating transparency in social media recommender systems* (2020), p. 4.

47 Leerssen, *ibid.*

48 Gorwa (note 2), p. 13.



different countries. As far as state incentives are concerned, using this motive is in principle legitimate.<sup>49</sup> If this encouragement of voluntary commitments is backed by subsidiary legal obligations in the event of non-compliance or by monitoring mechanisms, then it is already an elaborate form of legally bound self-regulation (i.e., co-regulation) (see below, II.).

### **c) Conclusion**

- Public pressure on the practice of social networks is a very important element of platform governance. However, the scope of action for civil society actors to exert such pressure is wider than that of public authorities and courts.
- Legal means to combat the issue of low-quality discourse are barely available, except in the case of illegal content. This much-described problem of the increasing deterioration of the communication climate in social networks ("incivility") is beyond the threshold of illegality and not a candidate for legal regulation.<sup>50</sup> This task could only—if at all (see below)—be accomplished by autonomous yet societally influenced content moderation.<sup>51</sup>

## **4. Content moderation synchronized and restricted to law enforcement?**

A most controversial and practically most important question of platform governance is whether (and to

what extent) social media operators have the freedom to shape their communication house rules or whether, conversely, they are bound by state law in this respect. The scope of genuine self-regulation depends on the answer to this question. Social media may not even be entitled to generate stricter content moderation beyond state prohibition laws and, thus, ensure a better communication climate. Whether this is so depends primarily on how fundamental rights coin the private law relationship between users and platform operators. If it is assumed that social media platforms, at least large or market-dominant ones, today play an extremely important public function as an information intermediary, it can be concluded that it has a special responsibility to ensure users' freedom of communication, which is protected by fundamental rights, a responsibility comparable to that which otherwise only applies to public authorities. If large intermediaries are public forums in this sense,<sup>52</sup> it follows that they are increasingly bound by fundamental rights. The freedom to autonomously design community standards or guidelines would be accordingly restricted or even completely abolished.

In fact, this view is very popular, but not undisputed. The current case law of German civil courts may serve as an example of the still ongoing discussion of this issue. Some German District Courts and Higher Regional Courts have confirmed the aforementioned position in case law, for example, by holding that Facebook or YouTube are not entitled to delete user posts or block accounts unless these posts also violate state law (i.e., they constitute, for example, a

49 Mark Bunting, <https://freespeechdebate.com/discuss/the-uk-can-show-the-way-on-platform-regulation-but-not-by-treating-facebook-and-google-as-publishers/>.

50 Drexler, *Zeitschrift für Urheber- und Medienrecht* 2017, 529 (542 et seq.).

51 Plea for a platforms' right to moderate: Daphne Keller (<https://www.washingtonpost.com/outlook/2019/07/29/stubborn-nonsensical-myth-that-internet-platforms-must-be-neutral/>).

52 Accepted as a possibility in German Constitutional Court, 22.5.2019 – 1 BvQ 42/19, in: *Neue Juristische Wochenschrift* 2019, 1935; this judgement will be discussed in the following.





punishable incitement to violence or insult).<sup>53</sup> However, a majority of courts in more recent judgements have contradicted this opinion.<sup>54</sup> So far, the decisions of the highest courts (namely the Federal Court of Justice) on this fundamental question have not yet been issued. The German Constitutional Court has also not yet decided this question on the merits but has only granted a preliminary injunction requiring Facebook to temporarily unblock the user account of a right-wing (or extremist) political party (“Der III. Weg”).<sup>55</sup> Similarly, the Court of Rome (a first instance court) ruled – also in a preliminary procedure – that Facebook must reactivate and restore the pages of the Italian neo-fascist party CasaPound.<sup>56</sup> However, both cases have the particularity that they had to be discussed against the background of the specific constitutional right of political parties to equal opportunities to address the public in political competition: A market-dominating platform such as Facebook, which is an essential means for small political parties, in particular, to attract attention, can possibly bear a special responsibility for this specific constitutional requirement.

This discussion cannot be described in all details here.

- However, the following considerations speak in favor of a view that leaves the social media platforms, at least the smaller, non-dominant ones, but possibly also Facebook, a certain latitude to formulate independent standards, i.e., that do not

confine their moderation role completely to the enforcement of state law.

As a starting point it should be noted that social media companies, if they hold an important factual position as information intermediaries, are, of course, not completely free to determine content-related conditions for communication on their platforms. There is no doubt that the fundamental rights of the persons involved in the communication processes, in particular the freedom of communication of the users publishing or linking contributions as well as that of the receiving users, must be observed while setting community standards or deciding on the removal of content from a search engine’s search result list,<sup>57</sup> regardless of how this commitment to fundamental rights is constructed from a legal point of view (e.g., in the sense of a direct or, as predominantly assumed in German constitutional law, indirect third-party effect).

- The question is not *whether* fundamental rights have an impact on the relationship between platform operators and users (and thus also on the autonomy of private contracting parties) to design the terms of service and community guidelines, and to agree on them.

This is undoubtedly so and has even been acknowledged by the courts, which conceded that Facebook or the other networks have some leeway to set somewhat stricter community standards compared to the

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53 Higher Regional Court (Oberlandesgericht) München, 24.8.2018 – 18 W 1294/18, para. 30: “It would be incompatible with the duty to reconcile the competing fundamental rights positions according to the principle of practical concordance if the respondent [Facebook], on the basis of a “virtual domiciliary right”, were allowed to delete the contribution of a user on the social media platform that she provides, in which she sees a violation of her guidelines, even if the contribution does not exceed the limits of permissible expression of opinion.”; same wording in Higher Regional Court (Kammergericht) Berlin, 22.3.2019 – 10 W 172/18 (with regard to a YouTube video), para. 19.

54 Higher Regional Court (Oberlandesgericht) Dresden, 8.8.2018 – 4 W 577/18, para. 23 et seq.; Oberlandesgericht Stuttgart, 6.9.2018 – 4 W 63/18, para. 27 et seq.; Oberlandesgericht Karlsruhe, 28.2.2019 – 6 W 81/18 (Facebook), para. 55 et seq.; District Court (Landgericht) Offenburg, 20.3.2019 – 2 O 329/18, para. 81 et seq.

55 Bundesverfassungsgericht, 22.5.2019 – 1 BvQ 42/19, in: Neue Juristische Wochenschrift 2019, 1935.

56 Tribunale di Roma, 12.12.2019, R.G. 59264/2019.

57 See CJEU, 24.9.2019 – C-136/17 (GC et al.), para. 66, 75 et seq.



legal restrictions on freedom of expression, for example in terms of fighting words or nudity.<sup>58</sup>

- Rather, the main question is *how* stringent this binding of social network providers to fundamental rights is (i.e., whether they are subject to the guarantees of freedom of communication and/or equal treatment similar to that of government or public authorities and courts).

Admittedly, the recent jurisprudence of the ECJ regarding the search engine Google seems to pursue a strict course, according to which the search engine is fully bound to consider fundamental rights. According to this argumentation, the search engine is treated like a state court and is, therefore, obliged to carry out a complex balancing of all the fundamental rights positions involved.<sup>59</sup> However, in terms of the specific function of search engines, it is conceivable that only these, and not all intermediaries, are subject to such a strict obligation (i.e., an obligation to curate search results in a way that reflects the fundamental rights of those interested in or affected by this informational service). In particular, the communicative function of social media and, therefore, also the constitutional requirements relating to this function are clearly different compared to search engines. The purpose of general social networks is not to find and indicate the best possible sources of information in response to a targeted information request. Therefore, from the outset there can be no comparable

legitimate expectation of social media to fulfil an information task as objectively and completely as possible, as is the case with general search engines. Rather, in regard to social networks and their commitment to fundamental rights, there are better reasons to adopt a more moderate position in line with the majority of (German) civil courts:

- A crucial difference from the mere arbitration role of the state courts in weighing fundamental rights is that the operators of intermediaries can claim their own interests, which, in turn, are protected by fundamental rights and must be inserted into the parallelogram of constitutional forces.<sup>60</sup>

A state analogous view of the very large intermediaries, which would deprive them of any protection of their fundamental rights, would wrongly disregard these legitimate interests.<sup>61</sup> The size and power of a company may justify special legal ties—the idea behind competition law, telecommunications law, and even general civil law; however, these factors do not legitimize the abolition of any protection of fundamental rights.

Apart from this, in terms of the platform operators and their freedom of curation, this is not only about interest in making a profit.

- Rather, terms of use that prohibit certain content can also correspond to the expectations of most users in the social network.

58 See all judgements of the Higher Regional Courts quoted above (note 54).

59 CJEU, 24.9.2019 – C-136/17 (GC et. al.), para. 77: “It is thus for the operator of a search engine to assess, in the context of a request for de-referencing relating to links to web pages on which information is published relating to criminal proceedings brought against the data subject, concerning an earlier stage of the proceedings and no longer corresponding to the current situation, whether, in the light of all the circumstances of the case, such as, in particular, the nature and seriousness of the offence in question, the progress and the outcome of the proceedings, the time elapsed, the part played by the data subject in public life and his past conduct, the public’s interest at the time of the request, the content and form of the publication and the consequences of publication for the data subject, he or she has a right to the information in question no longer, in the present state of things, being linked with his or her name by a list of results displayed following a search carried out on the basis of that name.”

60 While there is no doubt that intermediaries can invoke fundamental rights, it is disputed which fundamental rights these are, whether these are only economic fundamental rights (for this position with regard to Google German Constitutional Court, 6.11.2019 – 1 BvR 276/17 (Recht auf Vergessen II), para. 105: only article 16 EU Charter of Fundamental Rights, not Article 11 ) or also guarantees of freedom of expression or even freedom of the media (see for this position for example Benedikt Grunenberg, Suchmaschinen als Rundfunk, 2017; Kellner (note 26), p. 91 et seq..

61 See Ingold (note 2), p. 183 (199 et seq.); Jörn Lüdemann, Grundrechtliche Vorgaben für die Löschung von Beiträgen in sozialen Netzwerken, Multimedia und Recht 2019, 279 (280 et seq.).





The contractual relationships of social media operators exist not only with users with an interest in the publication of content that may be just legal but violate community standards, but also with those who reject this kind of content and, therefore, insist on compliance with community standards. It is difficult to understand that a private platform operator could be obliged to abandon the culture of communication desired by himself and a majority of his users on his platform, and to lose many users and advertisers who no longer find this communication environment attractive simply because some users want to use this platform as a forum for statements that contradict this culture.

Regarding the other side of the conflict of rights, it is also difficult to believe that a *prima facie* fundamental right of every user to be heard on the platform should carry such weight that all other interests just outlined would be overcome. There has never existed a fundamental right to have one's own opinion or assertion of facts disseminated by others (not even in traditional media)—nor does such exist today simply because there are now, as never before, opportunities available to achieve such an audience effect.<sup>62</sup>

At least a claim to a *non-arbitrary assessment* of a user's opportunity to get his content distributed can arise from the fact that such an opportunity has been provided by a private provider. This right not only derives from a contract (e.g., the general terms and conditions) in accordance with civil law principles, but may also have a constitutional basis in the fundamental right to equal treatment.<sup>63</sup>

- The question of the constitutional binding of the social media operator's discretion to moderate content is, therefore, essentially a question of equality, a question of equal participation in communication opportunities that are, in principle, open to all.

However, if the basic rights of users whose communication is restricted by platform operators can only protect these users from unjustified discrimination, there is hardly any starting point for constitutional criticism against a uniform application of generally applicable community standards which, according to their guiding principle, aim for the equal treatment of all users. This is the real and rather convincing reason why, in cases in which the decision of the social network operator to remove a user contribution could be based on a sufficiently specific, not surprising and not unreasonable, and, therefore, valid, community standard, the German civil courts have largely accepted it, even if the contribution may not have been unlawful according to statutory civil or penal law. This reasoning does not mean that it is not possible to draw even more stringent conclusions from specific constitutive guarantees of non-discrimination, in particular in the above-mentioned case of political parties. Although this question has not yet been decided on the merits, it is not unlikely, according to the considerations of the Federal Constitutional Court (and also of the Court of Rome) in the above mentioned preliminary injunctions, that very influential platforms will be obliged not to block a political party's accounts or delete its contributions, unless the party has been officially excluded from political competition in a court procedure provided

62 The German Constitutional Court did not decide in its judgement of 6.11.2019 – 1 BvR 276/17 (Right to be forgotten II) on the question whether a content provider is entitled by his fundamental right of expression to claim for a publication of his content through an intermediary, see para. 108; only with regard to the opposite case, i.e., the judicial prohibition of publication against the will of the intermediary, did the court decide that the freedom of opinion of the content provider, the content of which is at stake, must be taken into account, see *ibid.*, para. 108 et seq.; this is also acknowledged in the Jurisprudence of the CJEU, see judgement of 24.9.2019 – C-136/17 (GC et al.), para. 66, 75 et seq.

63 Acknowledgment of a public forum doctrine leading to the applicability of the constitutional equality principle to a private (but monopolistic) undertaking: German Constitutional Court 11.4.2018 – 1 BvR 3080/909 (Ban on visiting football stadiums), para. 38 et seq.



for this purpose, or the contents in question violate state criminal laws.

- To conclude, the important question regarding the constitutional legitimacy and scope of autonomous and not legally bound content moderation is controversial and not yet definitely clarified in court.
- However, there are good reasons to assume that the fundamental rights, which also apply in private law, do not completely close any margin for independent community standards but rather require an equal application of such standards.

## II. Co-Regulation (or Regulated Self-Regulation)

This limitation also has to be respected within all approaches to co-regulation. Co-regulation has always played a major role in areas in which the protection of legal interests largely depends on the cooperation of the media or platforms, such as the protection of minors.<sup>64</sup> This approach has been further enhanced in the amended AVMSD.<sup>65</sup> It is based on the assumption that “measures aimed at achieving general public interest objectives in the emerging audio-visual media services sector are more effective if they are taken with the active support of the service providers themselves.”<sup>66</sup> However, compared to pure self-regulation, models of co-regulation intervene more strongly in the autonomy of the company, in our case, by binding content moderation to legal standards and possibly subjecting it to administrative supervision.

The somewhat ambiguous term of co-regulation thus comprises various forms of the legally institutionalized and monitored self-regulation of companies or individuals. The AVMSD outlines the EU understanding of the concept as follows: “In co-regulation, the regulatory role is shared between stakeholders and the government or the national regulatory authorities or bodies. The role of the relevant public authorities includes recognition of the co-regulatory scheme, auditing of its processes and funding of the scheme. Co-regulation should allow for the possibility of state intervention in the event of its objectives not being met.”<sup>67</sup>

### 1. Effectiveness and appropriateness of co-regulation mechanisms

Any self- and co-regulation must first live with the suspicion and accusation of a lack of effectiveness. On the basis of the results of a study on the best practices of co-regulation, the Commission assumes that, particularly in the media sector, effective self- and co-regulation schemes, which fulfil the essential criteria of well-functioning self and co-regulation, can be very effective.<sup>68</sup> For example, the removal rates in the implementation of the code of conduct on countering illegal hate speech online by the big companies seem to have risen impressively in the last few years. Therefore, the fourth evaluation on the Code of Conduct on Countering Illegal Hate Speech Online of February 2019 asserts that the code is “an effective tool to face this challenge”.<sup>69</sup> However, this assessment has been criticized, with some countering that the sheer number of removals is not a meaningful indicator of success. Certainly, the sheer number of deletions is not yet a sufficiently meaningful indicator

64 See for an overview Cornils (note 2), p. 391 (428 et seq.).

65 See AVMSD-amendment-Directive (2018), recital 12-14, 29-31, article 4a, 9 para 3-5.

66 AVMSD-amendment-Directive (2018), recital 13.

67 AVMSD-amendment-Directive (2018), recital 14.

68 See COM, Effectiveness of self- and co-regulation in the context of implementing the AVMS Directive, Final Report, April 2016.

69 [https://ec.europa.eu/info/sites/info/files/code\\_of\\_conduct\\_factsheet\\_7\\_web.pdf](https://ec.europa.eu/info/sites/info/files/code_of_conduct_factsheet_7_web.pdf)



of the effectiveness of a monitoring mechanism to combat illegal content. It can initially only indicate that the platform operator has taken action at all, and on what scale. That is better than nothing, but it does not say whether the decisions taken and the criteria applied were justified or whether they were suitable for effectively addressing and solving the problem of illegal content. By differentiating the record of deletions according to certain categories of violation (of the community standards) and providing a short description of the internal supervisory procedures the published transparency reports, for example of Facebook,<sup>70</sup> provide somewhat more orientation. However, this kind of overview-transparency does not allow a critical analysis of the control procedure and decision in specific cases.

- Whether content moderation efforts are effective and appropriate to achieve the specified goal, therefore, can only be properly examined if this analysis is based on sufficiently comprehensive and detailed information. Co-regulation, which always includes a monitoring and control component, must fail if it does not have access to meaningful information as a prerequisite for such control.

## 2. Consistency and reliability of co-regulation

Apart from these controversies on effectiveness, another problem has to be considered when creating strategies of co-regulation. Co-regulation is typically characterized by the coupling of arrangements of the self-commitment or self-management of the platform operator on the one hand and mechanisms of legal coercion on the other. Approaches to self-regulation have often been accompanied by the threat of

coercion by the state or by the creation of subsidiary legal obligations or supervisory powers if such self-regulation fails. Apparently, this coupling strategy is also particularly prominent in platform governance, especially in regard to the multiple efforts made to encourage the big Internet platforms to better control the content they disseminate.

Compulsion can be exercised through a law that has already been enacted, as in Germany (Network Enforcement Act) or soon in France (loi Avia), or also through the fact that the enactment of such a law hangs over companies as a sword of Damocles. The EU itself does not rely exclusively on the voluntary commitment approach and the civil law provider responsibilities within the framework of the ECD. As evidenced in both the proposal of the Terrorist Content Online-Regulation and in Article 28b of the AVMSD, and soon, perhaps, in the DSA as well, the EU is also looking to modify the liability privilege concept of the ECD through the introduction of stricter operator obligations (for more details, see below). Irrespective of what one thinks of these developments, the approaches to negotiate and cooperate with companies while simultaneously issuing legal obligations and sanctions are intertwined in a somewhat peculiar manner.<sup>71</sup>

If voluntary commitments by platforms are supplemented or backed by legally imposed obligations this, must not be criticized in general. Rather it follows a comprehensible rationale: The “voluntary” commitments of the platform operators are flanked by legal pressure on these operators in order to encourage their willingness to give in. All the more, this “double strategy” could be justified by the fact that the instrument of contract will always only be considered for a few large partners but not for all those to be covered by the obligations.

<sup>70</sup> <https://transparency.facebook.com/community-standards-enforcement#hate-speech>.

<sup>71</sup> See however AVMSD-amendment-D, rec. 14, presenting a rather offensive justification of a combined approach that does not renounce (but call for) legal obligations even in the case of self-regulation.



Nevertheless, from a legal point of view, this doubling of approaches must be, in any case, coherently aligned.

- From the principles of legal certainty and proportionality, it can be concluded that an approach based on negotiations and voluntary commitments must not allow for the exercise of coercion or sanctions simultaneously.

When a government or public authority opens the instrument of self-regulation to private companies, it generates trust. In a constitutional state, this creates a legal obligation to respect this trust. Surprising policy changes without objective reasoning (e.g., for reasons of political expediency or lack of patience) are, therefore, questionable and should be avoided.

### **3. Forced and supervised content moderation in order to prevent infringements of the law**

If co-regulation is characteristically a concept of work-sharing in which the regulatory objectives are defined by the state but the procedures and measures for achieving these objectives are left to the companies (and this is, in turn, under official supervision), then it encompasses all arrangements aimed at the most effective enforcement of state law through the content moderation by the platform operators. It can, therefore, include all the approaches currently under discussion, which aim to increase the responsibility of platform operators for illegal content, establish effective complaints procedures, and threaten sanctions in the case of inadequate compliance.

First, it should be recalled that any approach to tightening the responsibility of providers must only aim to induce them to be more effective in preventing the distribution of illegal content – as measured by the standard of state law and not by the community guidelines. Any “clean-up” obligation extending beyond this, would be, as previously explained, unconstitutional.

However, legal barriers to the permissible expression of opinion and (regularly more far-reaching and stricter) community standards overlap, and these thus practically take over the benchmark function for monitoring, even if this also serves to fulfill legal monitoring obligations. State regulation, which, of course, is already in place, can instrumentalize the moderation practices of platforms to enforce the effectiveness of the state’s protection laws, such as defamation law.

A clear example is the German proposal for an amendment to the *Telemediengesetz* (TMG: Tele Media Act, still in the legislation procedure), which aims to implement Article 28b AVMSD. Section 10c para. 1 TMG states:

“(1) Video sharing platform providers are obliged to use provisions in their general terms and conditions which

1. prohibit their users from uploading illegal content or unlawful audio-visual commercial communications to the video sharing platform, and
2. which grant them the right to remove or block access to illegal content uploaded by users or to unlawful audio-visual commercial communications.”

Greater legal liability pressure can also provide a motive to make community standards even stricter in order to minimize platforms’ liability risks.

#### **a) Platforms’ responsibility for preventing the dissemination of illegal content**

Thus, all variants of legally enforcing content moderation address one central objection raised by critics of any liability of platforms. This well-known objection specifically claims the risks of “privatized-censorship” and “over-blocking”. According to this criticism, the



platform providers should under no circumstances be entitled or even obliged to perform a quasi-judicial function.<sup>72</sup> An increased liability incites providers to suppress not only content whose illegality is proven but also other content only possibly or presumed to be unlawful. Since, as a precaution, such an incentive leads to the deletion of content that is not, in fact, unlawful, it is, according to the critics, likely to impair free communication.

In fact, this reproach is not only directed against an increase in liability (as currently discussed), which may exacerbate the over-blocking problem but does not cause it—but against any accountability of the intermediaries. This criticism, therefore, also applies to the established concept of only reactive obligations to check (along the lines of notice and take/stay-down). Thus, this criticism is only very limitedly convincing for the following reasons.

First, as has already been pointed out above and using the example of case law in regard to search engines, a full rejection of intermediaries' responsibility to carry out inspections of the content on their platform would not only contradict the principles of liability under tort law, which have been recognized for decades but would also hardly be compatible with the constitutional positive obligation of legislators and courts to protect persons and institutions affected by defamatory content. The civil or even criminal liability of private individuals (and companies) for unlawful statements has always been a

matter of course—even without prior judicial clarification of the infringement.<sup>73</sup> It is simply not true and a misunderstanding that only courts might be entitled to interpret the law. Rather the specific (important but limited) function of courts is to *definitely* decide on the lawfulness or illegality of an action or omission in cases brought to it. Courts do not (apart from some exceptions) create the legal responsibility of a person, company or other entity but presuppose and find it when sentencing the person or entity because of a violation of law.

The question is, therefore, not whether companies which operate a platform could be legally responsible for their dissemination of content at all and, therefore, obliged to interpret and apply the relevant laws imposed on them but only how far this obligation and thus liability should reach, in other words how the relevant law imposing or limiting the liability should be designed with specific regard to intermediaries. There are, of course, good reasons for the safe harbor clauses protecting Internet host providers, as laid down in section 230 of the US Communications Decency Act as well as in the ECD.<sup>74</sup> Maintaining a certain kind of limitation of liability is essential for the functioning of most parts of the platform-economy on the Internet, but it should be clear that this is nevertheless a "privilege" (i.e., an exception to the responsibility that any person who causally contributes to infringements of the law usually bears). Therefore, any consideration on platform governance cannot be based on a too simple blanket

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72 See for this utmost popular position only Georgios N. Yannopoulos, *The Immunity of the Internet Intermediaries reconsidered?*, in: Taddeo/Floridi (eds.), *The responsibilities of online service providers*, 2017, p. 443 (456), who, however, argues for a stricter curatorial responsibility of the providers (this is a pattern of argumentation that seems to be shared quite often); EDRI, *Platform Regulation Done Right*, 9. April 2020, 17, 32.

73 Martin Eifert, *Rechenschaftspflichten für soziale Netzwerke und Suchmaschinen*, *Neue Juristische Wochenschrift* 2017, 1450 (1451); Martin Eifert, *Das Netzwerkdurchsetzungsgesetz und Plattformregulierung*, in: Eifert/Gostomzyk (eds.), *Netzwerkrecht*, 2018, 9 (40: „Erstzugriff der Plattformbetreiber: Rechtliche Normalität“ [Initial intervention by platform operators: legal normality]; Matthias Cornils, *Behördliche Kontrolle sozialer Netzwerke: Netzkommunikation und das Gebot der Staatsferne*, *ibid.*, 217 (217 et seq.); Nikolaus Peifer, *Netzwerkdurchsetzungsgesetz: Selbstbehauptung des Rechts oder erster Schritt in die selbstregulierte Vorzensur? – Zivilrechtliche Aspekte*, *Archiv für Presserecht* 2018, 14 (19 et seq.).

74 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Articles 12-15; a similar limitation—but not complete abolition—beyond the scope of the ECD's privileges is acknowledged in the Member States' jurisprudence on civil law injunction claims (approved by the ECJ), see for example German Federal Court of Justice, 25.10.2011, VI ZR 93/10 ("blog post"), developing a set of procedural rules for the notice and take-down-mechanism under civil law.





condemnation of any practice or legal obligation of private operators to monitor or supervise content on their platforms.

Second, if the rather common criticism of “privatized-censorship” (or, in general, self-regulation) includes a plea for a regulated and supervised mechanism, it must face the objection that a control of communicative content exercised by governments, other authorities, or even judges (e.g., in countries with limited judicial independence) is perhaps no better (or even worse) than autonomous monitoring. While some critics oppose the “privatization of law enforcement”, others complain with at least the same verve about public intervention in the freedom of communication as soon as a regulatory proposal provides for administrative supervisory powers, an experience that could be achieved in the discussion on the German Network Enforcement Act, even though this law only assigns quite limited competences to the competent Federal Office of Justice (Bundesamt für Justiz).<sup>75</sup>

If, in adding both criticisms, both private control and control by public authorities, were legally precarious or even prohibited, any attempt to provide for requirements for more responsibility to control would be impossible, even if such control was necessary to protect the fundamental rights of affected people or undertakings. Clearly, such a reasoning would reach a legal impasse.

- Therefore, a categorical rejection of any possibility of obliging private providers to monitor and control the content on their platform on their own is not tenable.

Third, as already noted, the fact that state courts are not in a position, for capacity reasons alone, to examine all suspected cases of possibly illegal content on social media platforms, is blatantly clear.<sup>76</sup>

- Considering this, demands for a legal framework limiting the liability of platforms to an obligation to delete content only after a judge has declared it illegal must be considered highly unrealistic.

Independent dispute settlement bodies supporting the platforms’ moderation procedures are certainly a valuable organizational component which can contribute to enhancing the quality of decisions and to reduce the burden on the courts. However, they are quite certainly not a panacea which would simultaneously solve the problem of overburdening the courts and satisfy the demand for a transfer of the legal decision-making competence for assessing the legality of content on the platform from the platform operators to an independent body.

- Mediation or dispute settlement bodies can only play a complementary role, but they cannot replace the courts or fully relieve intermediaries of their own responsibility for compliance with the law.

The idea to replace the exclusive jurisdiction of the state courts by an exclusive jurisdiction of quasi-judicial panels with similar functions,<sup>77</sup> meets the same objection of practical impossibility regarding the vast amount of complaints and, beyond them, of presumably illegal content detected by internal automated systems. Court proceedings, including those before independent arbitration boards, always presuppose

<sup>75</sup> Indeed critics of the German Network Enforcement Act combined both reproaches (inappropriate “privatization of the enforcement of rights” and precarious powers of a public authority in supervising the social networks); critical to this reasoning: Cornils (note 73), p. 217.

<sup>76</sup> Meanwhile, this seems to be accepted also by advisers who strongly argue against an obligation or even right of platform providers to exercise “privatized censorship”, see EDRI, Platform Regulation Done Right, Position Paper on the EU Digital Services Act (9.4.2020), p. 32.

<sup>77</sup> This seems to be the ratio of the EDRI position paper on the EU Digital Services Act, see EDRI, Platform Regulation Done Right (9.4.2020), p. 31 et seq.





that there are parties who appeal to these boards and who are, therefore, also prepared to give evidence on the merits, i.e., in particular, to present facts supporting the own legal opinion. Certainly, these disputed cases, in which the parties make well-founded statements, make up only a small part of the overall monitoring task and the extent of illegal and thus deleted content.<sup>78</sup> In those cases, dispute settlement bodies indeed may take over the – not always but sometimes – difficult task to make the necessary legal assessments, but they certainly cannot do so in view of the masses of illegal content flooding the platforms on a large scale and where there is either no complainant or no defendant willing to face the complaint.

In accordance with this, the current European legislation convincingly provides for voluntary and non-binding settlement mechanisms: While the P2BR obliges online intermediary services to install a cooperation with mediators (Article 12), the AVMSD requires Member States to set up dispute settlement procedures (Article 28b para. 7).<sup>79</sup>

- Since dispute settlement bodies cannot have the legitimacy of state courts, the voluntary character of this way to settle disputes out-of-court is essential.

Proposals that stipulate that the bodies have exclusive jurisdiction and that their decisions are binding

on the state courts are incompatible with this. A decision transferred to a duly certified dispute settlement body can only have the effect of relieving the provider of further responsibility for the content: the provider has fulfilled its obligations by involving the body and is thus in particular not liable for the illegality of content that the body has erroneously not objected to. However, the possibility of settling the dispute can in no way exclude judicial legal protection, even if the parties have initially agreed to settle the dispute but are not satisfied with the settlement procedure or the outcome of this.<sup>80</sup>

Fourth,

- over-blocking risks can be limited, if not avoided, by means of complaints procedures, which also provide a put-back mechanism providing for a remedy to get re-inserted a contribution that had been removed without justification.

In the current state of legal development, such mechanisms—which also provide the author of a contribution (i.e., the “uploader”) suspected of being unlawful with the opportunity to make a statement that could possibly lead to the reinstatement of such content if, after review, it turns out to be compatible with state law and community standards<sup>81</sup>—should already be self-evident. The jurisdiction of civil courts has established not only a mechanism that grants users whose

78 There is currently a great discrepancy between the huge number of reported cases on the one hand and the very small number of cases where the uploader has been given the opportunity by the social media service to make a statement on the other, see for example transparency report (according to the German NetzDG) on Twitter, second half year 2019: 137.171 vs. 137 (<https://cdn.cms-twdigitalassets.com/content/dam/transparency-twitter/data/download-netzdg-report/netzdg-jul-dec-2019.pdf>).

79 In Germany, both draft laws to implement the AVMSD, therefore, provide for such a dispute settlement procedure. Whereas, the provision in the TMG-amendment proposal is only brief and general in nature (sect. 10b para. 3 sent. 3), sect. 3c of the NetzDG amendment proposal states in detail the conditions an accredited settlement body must fulfill, and the procedural rules.

80 Rightly expressed in Article 28b para. 7 AVMSD and – even more clear – in Article 12 para. 5 P2BR.

81 From the point of view advocated here (see above, I. 4.), the put-back claim is to be granted only if the content in question is compatible with state law *and* with the community standards – insofar as these are themselves valid.



content is the subject of a complaint, a right to be heard.<sup>82</sup> Rather, courts have also acknowledged the contractual right of registered users, backed by their fundamental rights, to see unjustifiably removed content restored—without explicit statutes providing for such.<sup>83</sup> No statutory regulation will be able to fall short of this standard;<sup>84</sup> if regimes do not yet contain appropriate precautions, they should be amended (e.g., the German Network Enforcement Act till now lacking a put-back mechanism)<sup>85</sup>.

For example, Article 28b (3) lit i) AVMSD (2018) requires member states to ensure that all video-sharing platform providers under their jurisdiction apply (*inter alia*) a measure of “establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users’ complaints to the video-sharing platform provider in relation to the implementation of the measures referred to in points (d) to (h)”.

The forthcoming, currently drafted German act to implement the AVMSD-Amendment Directive, therefore, explicitly provides for a put-back-mechanism: “The procedure must ensure that the video sharing

platform provider restores non-illegal content that was removed as a result of a complaint pursuant to § 10a (1) and lifts blocks of access to non-illegal content that were imposed as a result of a complaint pursuant to § 10a (1).”<sup>86</sup>

In detail, of course, different designs of a notice and action-procedure are possible and also suggested: While, for example, the civil law moderation model of the German Federal Court of Justice provides for the possibility of mutual comments (of both the issuer and the uploader) *before* a final decision by the provider is issued, the mechanism in the current draft of the NetzDG amendment is designed as an *appeal* procedure against an already made “original” decision of the social network operator.<sup>87</sup>

Fifth, such complaint management procedures may further contribute to alleviating the concern that platform operators would not be able to distinguish legitimate from illegal content through their control procedures, which, of course, include automated filters. The use of filters to search for terrorist or pornographic content, for example, has long been common practice and is unavoidable given the

82 German Federal Court of Justice, 25.10.2011, VI ZR 93/10 (“blog post”): This notice and action-mechanism, which was developed almost ten years ago by Germany’s highest civil court on the basis of the provider’s civil law “Stoererhaftung” (liability for breach of duty of care), consists of a court-like procedure moderated by the provider, in which both parties, the issuer of the notice and the uploader, must be given the opportunity to substantiate their reasons for the alleged illegality resp. legality of the notified contribution. If the uploader succeeds in shaking the accusation of alleged illegality (e.g., the untruthfulness of an assertion) and if the issuer thereupon remains silent on this defense, the provider is generally not obliged to carry out further checks itself and is entitled to leave the contribution on the platform without incurring liability – even if the contribution objectively violates the law.

83 Technically, under German law, this is a judicially imposed obligation to refrain from a deletion of a specific contribution – or from blocking a user’s account – with the consequence that the user may reinstate the video or post, see Higher Regional Court (Kammergericht) Berlin, 22. 3.2019 – 10 W 172/18; District Court (Landgericht) Nürnberg-Fürth, 7.6.2019 – 11 O 3362/19.

84 DG Connect, Internal note on a future Digital Services Act, p. 5: “Uniform rules for the removal of illegal content such as illegal hate speech would be made binding across the EU, building on the Recommendation on illegal content and relevant case-law, and include a robust set of fundamental rights safeguards.”; See also Article 17 (9) DSM: “Member States shall provide that online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.”

85 See for a proposal to introduce a put-back-mechanism into the NetzDG Alexander Peukert, Gewährleistung der Meinungs- und Informationsfreiheit in sozialen Netzwerken, Multimedia und Recht 2018, p. 572 et seq.; see now the recent proposal for a federal parliamentary law amending the NetzDG of 3.4.2020, Bundesrat, Drucksache 169/20, which finally provides for a fully developed complaint management system (respecting the AVMSD): see section 3b (“Gegenvorstellung”) of the draft which is currently in the legislation procedure.

86 Bundesministerium für Wirtschaft und Energie, Referentenentwurf eines Vierten Gesetzes zur Änderung des Telemediengesetzes und zur Änderung weiterer Gesetze (22.7.2019) (Federal Ministry of Economics and Energy, Draft of a fourth act to amend the Law on Telemedia, § 10b (1) Nr. 6)).

87 It is worth noting that the NetzDG amendment draft requires that the appeal decision of the social network must be issued by a person other than the person who issued the original decision, sect. 3b para. 2 no. 3.



flood of content on platforms today. Automatic control systems can certainly—and have been doing so on a large scale for a long time—make a valuable contribution to identifying suspicious candidates posting illegal or community standard-violating content.<sup>88</sup> Taking these practices and developments seriously, claims for a change back to only human control mechanisms without any assistance of filtering technologies (of both either the matching or the classifying type) seem hardly to be realistic.<sup>89</sup> This does not mean to disregard the risks and pitfalls of automated moderation and control. As is well known, civil society organizations have not ceased to strongly object against this practice, and they can rely on good reasons to do so. Even in the future, automated filtering will probably not be capable of using more elaborate AI-technologies, to accurately detect irony or satire nor master intricate legal distinctions sufficiently.<sup>90</sup> Perhaps even more worrying than these shortcomings might be an ever more perfectionist performance of proactive detecting technologies following the email-spam-filter pattern: If the major social media platforms are already boasting that they are proactively keeping their communication space free of a large proportion of illegal content even before the latter has been brought to anyone's attention—and at least to a certain extent without a human in the loop—then the concern is worth thinking about that very soon we perhaps will get used to a comfortable situation where all the actually challenging problems of interpreting and assessing precarious content have

dissolved and, therefore, are no longer visible and under critical supervision of the public.<sup>91</sup>

- Thus, an unlimited confidence in the ability of technical solutions to autonomously make the normative assessments that are inevitably linked to the judgment of the illegality of communications is inappropriate.
- However, instead of categorically excluding filter technologies, a more constructive approach is to take precautions, e.g., to link these systems as intelligently as possible – not necessarily without exception – to a second procedural step of human control, thus also maintaining the functionality of the recently established and legally based complaint management procedures, and finally to make the contribution of automated tools sufficiently transparent in the overall control context.

A realistic view on the possibilities for monitoring and assessing large-scale communication in global networks is appropriate, thus signifying a shift away from perfectionist demands for an ideal monitoring practice that no longer makes any mistakes. Legality tests conducted by human inspectors and even judges are far from being perfect either; however, they do sometimes seem to be overestimated. If there is a human review of, firstly, all cases brought to examination by a complaint (via notification procedures) and, secondly, almost all cases which fall into a grey area of legal doubt and, therefore, are flagged

88 See Ingold (note 2), p. 183 (201 et seq.).

89 Not only in the copyright sector (see CJEU 27.3.2014 – C-314/12 (UPC Telekabel Wien, para. 42 et seq) and the TCOR proposal but also with regard to defamatory content automated filtering has been at least implicitly acknowledged and even presupposed by the case law of the courts, see CJEU, 3.10.2019, C-18/18 – Eva Glawischnig-Pieczek v. Facebook Ireland, para 46; see for a closer analysis of this case (considering the Advocate General's opinion) Daphne Keller, *Dolphins in the Net: Internet Content Filters and the Advocate General's Glawischnig-Pieczek Facebook Ireland Opinion*, sept. 2019; see also the German case law with regard to file-sharing hosting platforms, Federal Court of Justice, 12.7.2012 – I ZR 18/11 (Alone in the Dark), para. 28 et seq., 15.8.2013 – I ZR 85/12 para. 40 et seq. (para. 46: "duty to do everything technically and economically reasonable to prevent further infringements of rights with regard to the work protected in favour of the applicant on its servers")

90 CJEU, 16.2.2012 – C-360/10 (SABAM v. Netlog), para. 50. This is a frequently voiced and, of course, proper criticism, see for example, Chloé Berthélémy, Jesper Lund, <https://edri.org/fighting-defamation-online-ag-opinion-forgets-that-context-matters/>; <https://edri.org/e-commerce-review-mitigating-collateral-damage/>.

91 Gorwa, Binns, Katzenbach, *Algorithmic content moderation: Technical and political challenges in the automation of platform governance*, p. 11 et seq.



for further examination it is not really convincing why such a practice should lead to untenable excessive interference with freedom of communication.<sup>92</sup> Whether however, in order to confine the application of filtering technologies, a strict distinction between forbidden proactive general monitoring (in the sense of Article 15 ECD) and allowed or even required “specific” filtering, can be maintained, may be questionable.<sup>93</sup>

The often-described daily practice of content moderation of the big social media providers, which is often outsourced to poorly paid human controllers in foreign countries, is, by now, not too convincing. There is certainly still considerable potential for achieving better practice. In this sense, the much-discussed Facebook Oversight Board project, for example, can be, despite some doubts,<sup>94</sup> *prima facie* seen as an interesting approach to attaining better structured content moderation that is more independent and sensitive to reconcile competing fundamental rights in searching for appropriate decisions with regard to hard cases of dubious (but not evidently unlawful) content.

A closer look at the currently already introduced models for such procedural obligations follows below, under c).

### **b) Tightening platforms’ liability by relaxing the ECD safe harbor clauses**

A key focus of the regulatory debate is the idea of tightening the responsibility and liability of intermediary operators. This is not surprising: If the platforms, with their curation practices, are largely identified as the core of the problem, it is obvious to hold their operators responsible and demand the stronger supervision of the content, which is expected to improve communication in social media. Legal responsibility can be established in various ways, and these different approaches have long been discussed or already implemented in law.

One starting point is, of course, to increase the existing provider liability under the civil law of the member states, either by a narrower interpretation of the ECD’s safe harbor clauses in the jurisdiction or, more broadly, by its currently discussed future amendment (i.e., its withdrawal or relativization).

The ECD reform discussion<sup>95</sup> cannot be addressed here in full detail, but, in essence, it is clear (e.g., from the note on the DSA) that, according to these considerations, the distinction between “active” and “passive” services, which is characteristic of the current privilege system, might become abandoned or at least softened.<sup>96</sup> There are indeed good reasons to reconsider this distinction: Precisely because quasi-editorial curating and especially content moderation by the platform providers is becoming increasingly

92 More skeptical (with regard to a structural incapacity of automatic *and* human controllers to make the intricate legal assessments) Ingold (note 2), p. 183 (22)

93 <https://euinternetpolicy.wordpress.com/2019/07/30/the-eu-digital-services-act-what-it-is-and-why-it-shouldnt-happen/>. However, if this criticism supposes that Article 15 ECD provides for a “prohibition of general monitoring”, this assumption appears to be, at least, imprecise: Article 15 prohibits member states from imposing such monitoring on a mandatory basis, but it does not prohibit platforms themselves from using automatic systems to proactively detect illegal (or standard-incompatible) content.

94 Somewhat skeptical Robert Gorwa, Timothy Garton Ash, Democratic Transparency in the Platform Society, p. 18 et seq.

95 See, for example, Sophie Stalla-Bourdillon, Internet Intermediaries as Responsible Actors? Why it is time to rethink the E-Commerce-Directive as well, in: Taddeo/Floridi (eds), The responsibilities of online service providers, 2017, p. 275 et seq.; for a harsh criticism against the reasoning in the DSA-note <https://euinternetpolicy.wordpress.com/2019/07/30/the-eu-digital-services-act-what-it-is-and-why-it-shouldnt-happen/>.

96 DG Connect, Internal note on a future Digital Services Act, p. 2: “For example, concepts such as “active” or “passive” hosts, linked by the court to the notion of “optimising content”, appear outdated in light of today’s services.”



important on user-generated content platforms, also driven by growing legal and moral obligations, the old ECD-categories, on which the liability privilege bases – here: of the passive host provider (Article 14 ECD) – no longer quite fit.

Of decisive importance for the realignment of the provider (or: service) categories is, of course,

- the core material question of how far safe-harbor immunity should extend in the future (or not), especially whether intermediaries should continue to benefit from it even if they moderate content (which they do) and even if this is done proactively using filter technologies (which is the case).

The categories must be designed in accordance with the answer to this question.

So far, however, no clear and unambiguous position seems to have been found in the European legal policy debate on this central question as to the course to be taken. If the note on a DSA commits itself to the core maxim of the safe harbor clauses, according to which access and host providers may not be subject to the general obligation to monitor content (Article 15 ECD) while at the same time supports instruments of proactive control which then, however, have to be

protected by a “Good Samaritan clause” (following the US example in sect. 230 (c) (2) DCA<sup>97</sup>) because quasi-editorial proactive monitoring would otherwise drive providers into full liability (especially if it goes hand in hand with the simultaneously propagated flexibilization of the “outdated” distinction between active and passive hosts),<sup>98</sup> there is apparently still no conclusive and sophisticated concept behind these considerations as to how exactly a new formulation of liability should look for which intermediary services. Indeed, this indecisiveness is probably due to the fact that, in principle, both possibilities are conceivable, either a way to limit the scope of the privilege, i.e., to tighten liability of intermediaries, or a way to renew and stabilize the privilege, in particular to the benefit of curating and thus not only passive platform providers.

Following the former, concept intermediaries (e.g., host providers) would be treated more like fully responsible content providers (i.e., similar to media) in terms of liability law—at least insofar as they are inclined (or legally forced) to implement a quasi-editorial moderation practice.<sup>99</sup> This would mean that the restriction of the control obligations of operators to known (in particular, reported) infringements of the law (ex post reaction obligations), which is currently still in force (but has already been softened in

97 DSA-Note, p. 5: “Finally, a binding “Good Samaritan provision” would encourage and incentivize proactive measures, by clarifying the lack of liability as a result of Such measures, on the basis of the notions already included in the Illegal Content Communication.”; see for an instructive view on the intricate (and not yet fully clarified) questions concerning Article 15 ECD, the criteria for attributing own – press like – responsibility even without prior notification etc. Peggy Valcke, Aleksandra Kuczerawy, Pieter-Jan Ombelet, Did the Romans get it right? What Delfi, Google, eBay, and the UPC TeleKabel Wien have in common, in: Taddeo/Floridi (eds.), The responsibilities of online service providers, 2017 p. 101 et seq.

98 Behind that lays a serious problem: If a higher level of intermediaries` content moderation is induced by legal requirements and intermediaries comply with this expectation they risk being increasingly regarded as editorial media and, therefore, to be fully responsible according to the active/passive-scheme. Thus, this can be suspected to be a circular logic: regulation itself produces conditions which then may justify the regulation; see for this “media-alike” view: Flew, Martin, Suzor, Internet regulation as media policy: Rethinking the question of digital communication platform governance, Journal of Digital Media & Policy, vol 10, No. 1, 33. The US model of the safe harbor clause intends to avoid this counterproductive effect (in terms of the desired privilege) by granting the more diligent moderator the same privilege as the platform that does not perform moderation (precisely this is the “Good-Samaritan”-idea), see Gillespie (note 2), p. 30 et seq.

99 DG Connect, Internal note on a future Digital Services Act, p. 5: “In addition, the concept of active/passive hosts would be replaced by more appropriate concepts reflecting the technical reality of today’s services, building rather on notions such as editorial functions, actual knowledge and the degree of control.”





copyright law<sup>100</sup>), could be more or less largely overcome, meaning that intermediaries could possibly also be subject to ex ante checking obligations with regard to the content posted on them.

This shift in the boundaries of liability could also be designed in a more subtle form which, at least apparently, upholds the leading principle of Article 15 ECD but nevertheless presses providers to increase their proactive control efforts. The amended copyright law,<sup>101</sup> the proposed TCOR,<sup>102</sup> new adjustments in the case law on the monitoring obligations of providers (without<sup>103</sup> and after notification<sup>104</sup>), and the DSA-note<sup>105</sup> already point in this direction: If an operator's monitoring obligations are expanded after an alleged violation of law has been reported to him (e.g., to prevent repeated, similar, or even only comparable violations of the law in the future), the obligation to react (if it claims for far reaching and strict control) can transform into a proactive obligation to review—even if the principle of waiving general monitoring is formally retained. This weakening of safe-harbor protection may be based on the consideration that social media platforms, if they exercise proactive control anyway, thereby demonstrating their ability to do so, may be subject to a respective legal obligation because the central justification for the liability privilege has been vanished.

On the contrary, going the other way would mean maintaining and, moreover, strengthening the protection of the safe harbor, even if the providers in fact exercise a kind of proactive surveillance to better protect the rights of individuals and enforce the respective protection laws. A policy maxim like this would indeed promote an idea like the Good Samaritan Clause.

Of course, this choice, for the one way or the other, is primarily a political decision and not entirely determined by legal norms. Nevertheless, there are constitutional limitations to be respected.

- The safe harbor exemption for communication intermediaries is more but a favor of the legislator, which can be revoked at will. Instead, the policy margin for tightening the liability of intermediaries is limited.

This is especially obvious with regard to search engines. The case law of the German Federal Court of Justice, for example, has already made it clear that search engines, in particular, must not be subjected to testing obligations that extend beyond their current state of merely reactive testing following notification (even in the case of the auto-complete function, considered to be an “active” part of the service),

100 See CJEU, 27.4.2014 – C-314/12 (UPC Telekabel Wien), para. 42 et seq.; Article 17 (3) DSMD (“When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.”), see also recit. Nr. 65.

101 See the previous footnote.

102 COM, TCOR Proposal, recit. Nr. 19: “A decision to impose such specific proactive measures should not, in principle, lead to the imposition of a general obligation to monitor, as provided in Article 15(1) of Directive 2000/31/EC. Considering the particularly grave risks associated with the dissemination of terrorist content, the decisions adopted by the competent authorities on the basis of this Regulation could derogate from the approach established in Article 15(1) of Directive 2000/31/EC, as regards certain specific, targeted measures, the adoption of which is necessary for overriding public security reasons. Before adopting such decisions, the competent authority should strike a fair balance between the public interest objectives and the fundamental rights involved, in particular, the freedom of expression and information and the freedom to conduct a business, and provide appropriate justification.”

103 ECHR (Grand Chamber), 16.6.2015 – No. 65469/09 (Delfi AS v. Estonia), para. 111 et seq.; The CJEU too has endorsed a standard for “diligent economic operators” to attribute knowledge of manifestly illegal content on the platform to the provider, so that the provider no longer benefits from the immunity under Article 14 ECD, see. CJEU, 12.6.20011 – C-324/009 ((L`Oréal v. Ebay), para. 120 et seq.

104 CJEU, 3.10.2019 – C-18/18, Glawischnig- Pieczek/Facebook Ireland, para. 41 et seq.

105 DG Connect, Internal note on a future Digital Services Act, p. 5: “While the prohibition of general monitoring obligations should be maintained as another foundational cornerstone of Internet regulation, specific provisions governing algorithms for automated filtering technologies – where these are used- should be considered, to provide the necessary transparency and accountability of automated content moderation Systems.”





because this would call their function into question.<sup>106</sup> From the above outlined constitutional argumentation, which consists, in its essence, of balancing competing rights, follows that the responsibility of search engines is limited and must remain limited (i.e., it must not be aggravated by a legal change of the currently applicable liability regime (based on the principles of the ECD). The functionality of search engines, which, with probably somewhat weaker plausibility, may also apply to social networks, because of their utmost importance in the functioning of the Internet, is under constitutional protection. If this is true,

- the constitutional guarantees of free communication on the Internet, which depends on functioning web search services and communication forums, confine the possibilities of increasing liability (e.g., in regard to an eventually intended reduction of the safe-harbor protection for search engines but also for blogger portals and other intermediaries).<sup>107</sup>

### c) Tightening platforms' liability by establishing procedural obligations related to content moderation

Other concepts of law enforcement include introducing civil or public law procedural obligations that elaborate or supplement civil liability (e.g., a complaint management system, such as in the AVMSD or P2BR), either coupled with genuine administrative supervision (e.g., the TCOR) or reinforced with sanctions (e.g., threats of fines, as in the German Network Enforcement Act). Insofar as these examples can serve as different models of paradigmatic significance of how to design a co-regulatory framework for content moderation, they are to be described here in short.

### (1) The regime of video-sharing platforms in the AVMSD 2018

In addition to audio-visual media services, the amended AVMSD now also covers video-sharing platform services in a separate Chapter IXa. These services differ from media services in that the platform provider has no editorial responsibility for the programs or user-generated content made available on the platform. Social networks are also included but only if they make videos available as an essential functionality (Article 1 para. 1 b) aa) AVMSD).

The video-sharing platform regulation is limited to the protection of elementary legal interests (e.g., the protection of minors, protection against hate speech and punishable communication content, Article 28b para. 1); in addition, the basic regulation of commercial communication in Article 9 (i.e., separation and recognizability of advertising, prohibition of certain advertising content) is applicable to platforms (Article 28b para. 2).

In Article 28b para. 1 and 2 AVMSD, the objectives of the member states' obligation are defined:

"Without prejudice to Articles 12 to 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect:

- (a) minors from programmes, user-generated videos and audio-visual commercial communications which may impair their physical, mental, or moral development in accordance with Article 6a(1);
- (b) the general public from programmes, user-generated videos and audio-visual commercial communications containing incitement to violence

<sup>106</sup> See, for a particularly clear example, German Federal Court of Justice 27.02.2018, VI ZR 489/16 (Internetforum), para. 33 et seq.

<sup>107</sup> See ECtHR, 2.2.2016 – No. 22947/13 (Magyar Tartalomszolgáltatók egyesülete and Index.hu ZRT v. Hungary, para. 82: requiring pre-monitoring obligations beyond a functioning notice-and-take-down system (as the domestic courts did) "amounts to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet"; Valcke, Kuczerawy, Ombelet (note 97), p. 114.



or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter;

(c) the general public from programmes, user-generated videos and audio-visual commercial communications containing content the dissemination of which constitutes an activity which is a criminal offence under Union law, namely public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541, offences concerning child pornography as set out in Article 5(4) of Directive 2011/93/EU of the European Parliament and of the Council (\*) and offences concerning racism and xenophobia as set out in Article 1 of Framework Decision 2008/913/JHA."

Article 28b para. 3 AVMSD addresses the moderation measures member states shall provide in order to ensure that the platforms' content moderation practices are effective in protecting minors and "the general public" as well as being in accordance with the fundamental rights of the users. To this end, the directive defines a catalog of measures that member states must ensure is put in place by the platform providers. These measures consist of platform providers' obligations to set up evaluation and complaint mechanisms (e.g., flagging and rating, complaint management).

Article 28b para. 3 sent. 6 AVMSD states:

"Those measures shall consist of, as appropriate:

(a) including and applying in the terms and conditions of the video-sharing platform services the requirements referred to in paragraph 1;

(b) including and applying in the terms and conditions of the video-sharing platform services the requirements set out in Article 9(1) for audio-visual commercial communications that are not marketed, sold or arranged by the video-sharing platform providers;

(c) having a functionality for users who upload user-generated videos to declare whether such videos contain audio-visual commercial communications as far as they know or can be reasonably expected to know;

(d) establishing and operating transparent and user-friendly mechanisms for users of a video-sharing platform to report or flag to the video-sharing platform provider concerned the content referred to in paragraph 1 provided on its platform;

(e) establishing and operating systems through which video-sharing platform providers explain to users of video-sharing platforms what is the effect of the reporting and flagging referred to in point (d);

(f) establishing and operating age verification systems for users of video-sharing platforms with respect to content which may impair the physical, mental or moral development of minors;

(g) establishing and operating easy-to-use systems allowing users of video-sharing platforms to rate the content referred to in paragraph 1;

(h) providing for parental control systems that are under the control of the end-user with respect to content which may impair the physical, mental or moral development of minors;

(i) establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints to the video-sharing platform provider in relation to the implementation of the measures referred to in points (d) to (h);

(j) providing for effective media literacy measures and tools and raising users' awareness of those measures and tools."



As previously mentioned in regard to the obligation to install a redressing mechanism, the German proposal for an amendment of the Tele Media Act implements this obligation by requiring video platform providers to provide an “easy findable, user-friendly, and transparent” reporting procedure to flag presumably illegal content (section 10a TMG) as well as an “appropriate, transparent and effective procedure for the examination and remedying of the notified complaints” (section 10b TMG).

**(2) For example: Mandatory moderation under the German Network Enforcement Act**

Obligations to moderate content, as imposed by the Network Enforcement Act 2017 (NetzDG), vary from those under the AVMSD/TMG but more in regard to the details and not so much in principle. The NetzDG, similar to the AVMSD/TMG, does not establish the direct supervision of social networks via a public authority but rather establishes a series of organizational and procedural obligations, defining certain breaches of such obligations as administrative offenses subject to a fine (as, in fact, the TMG already does and will do in the amended version even more extensively, expanded to the new TMG-duties imposed on video-sharing providers; see above).

The most important obligations imposed by sect. 2 and 3 of the NetzDG only apply to social networks with at least two million registered users in Germany (section 1 para. 2 NetzDG). This restricts the scope of application to a small group of providers. In fact, only six providers (Facebook, YouTube, Twitter, Change.org, Google Mountain View, and The Jodel Venture) published reports in January 2019 regarding complaints related to illegal content, thus fulfilling the obligation under Section 2 NetzDG.<sup>108</sup>

This obligation to publish a report every half a year, as well as obligations, according to section 3, demanding

the provision of a functioning complaint procedure, both address the system of “complaint management”, which social media providers (above the two-million threshold) are obliged to provide.

The key obligations are defined in sect. 3 para 2 NetzDG: Providers are required to remove obviously illegal content within 24 hours and other, less obvious illegal content “usually” within seven days, a deadline that can be extended under certain circumstances (e.g., if the legality of the respective content depends on facts or if an officially accredited institution of self-regulation has been invoked). “Illegal content” does not refer to every piece of content not in accordance with any legal standard but only content infringing on one or more provisions of the *Strafgesetzbuch* (criminal code) enumerated in section 1 NetzDG. The NetzDG designates a federal authority (the Federal Office of Justice) as responsible for the prosecution and punishment of the administrative offenses which are, however, bound to the prerequisite of a “systemic failure” in providing the complaint management system. A single mistake, such as the non-removal of illegal content, is not sufficient to justify a fine. The maximum fine is five million euros.

To characterize the model in short, the Federal Office has no administrative supervisory tasks or powers in regard to social networks, although it does have almost all power in investigating in criminal proceedings. The compliance system of the NetzDG, which is sanctioned with fines, is, therefore, not proving to be an example of a supervisory regime under administrative law. It only transforms well-known obligations under the civil law notice-and-take-down “Stoererhaftung” (liability for causing infringements of rights) into public law, following the model of financial market supervisory regulation. The NetzDG regime is, therefore, limited to the establishment of duties of conduct that do not depend on private contractual

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108 Deutscher Bundestag, Drucksache 19/7023.



relationships and, institutionally, to the establishment of the administrative offense sanctioning of “systemic failure” (i.e., structurally insufficient fulfilment of duty). In addition, the competence of the Federal office in judging the legality of the content of communication has been withdrawn in favor of a reservation of the right of the local court to make a regular assessment; this is clearly stated in the draft explanatory memorandum in order to prevent the Federal Office from being accused of quasi-censorship.

In the meantime, the aforementioned bi-annual transparency reports for the first reporting periods (since 2018) are available. These reports include the number of complaints and deletions and thus also provide a first impression of the effects of the law. The number of complaints based on the NetzDG varies considerably among providers.<sup>109</sup> This is primarily due to the very different designs of the NetzDG complaint procedures in relation to the procedures provided for complaints about violations of community standards. Namely, the specific NetzDG reporting form provided by Facebook requires a much higher effort to make use of compared with the one used for the community standards, and is also hidden. In its fine notice against Facebook dated 3 July 2019, the Federal Office of Justice (Bundesamt für Justiz) assessed this as being a violation of the transparency obligations under Section 2 NetzDG, because the overwhelming part of Facebook’s complaints and deletions were only recorded via the flagging procedure in accordance with the community standards, but were not included in the transparency report under the NetzDG which, therefore, was judged

incomplete.<sup>110</sup> Only a minor part of these complaints (about a fourth) has been approved; allegedly there are a lot of complaints lacking substance. Even if the quantitative proportion of the outcome of both complaint regimes is not transparent for all social media due to the lack of fully comparable information, it is likely to be a common characteristic of all social media procedures (whether on Twitter or on Facebook) within the scope of the NetzDG that the vast majority of deletions are made on the basis of community standards or guidelines, while only a small proportion is based on the obligation from the NetzDG alone in connection with the relevant criminal offenses.<sup>111</sup> This confirms the assumption that the task of keeping platforms free of illegal content is fulfilled primarily by internal governance efforts (self-regulation) and only to a lesser extent by compliance with (additional) legal norms stemming from the national law of European states.

Some critics see this as confirming their assumption that the NetzDG is of little use and not even necessary.<sup>112</sup> This can be countered by the fact that the NetzDG does, after all, lead to the deletion of some content in accordance with German legal standards, which would remain unobjected under the American-influenced community standards. It can also be argued that the NetzDG formalizes the procedural obligations for managing complaints and can thus influence social media providers to provide more convenient complaint channels than those based solely on the platform’s terms or community standards. In fact, the Federal Office of Justice has already initiated a considerable number of investigations concerning

109 Facebook, for example, indicated in its 4<sup>th</sup> report that it had received 3,087 complaints (considering 4,274 pieces of content) using the (specific) NetzDG form within the second half of 2019 (only 674 in the first half) ([https://about.fb.com/wp-content/uploads/2020/01/facebook\\_netzdg\\_January\\_2020\\_english.pdf](https://about.fb.com/wp-content/uploads/2020/01/facebook_netzdg_January_2020_english.pdf); Google reported over 275,000 complaints on YouTube for the second half of 2019 (<https://transparencyreport.google.com/netzdg/youtube?hl=de>).

110 See Ben Wagner et al., *Regulating Transparency? Facebook, Twitter and the German Network Enforcement Act* (2020).

111 The Google transparency report (regarding YouTube) explicitly breaks down this proportion into figures: According to this description the removal quote due to the NetzDG varies from about 20 percent (infringements of privacy – this comparably high score probably reflects the somewhat weaker level of privacy protection under US law and consequently the YouTube community guidelines) to about 5 percent (defamation and hate speech) to about 0.2 percent (pornography).

112 See, for example, the parliamentary group of the Liberals (Freie Demokratische Partei) in the German Federal Parliament, *Deutscher Bundestag, Drucksache 19/9225* (9.4.2019), p. 5, 7.



possible breaches of these obligations, even though a fine has been imposed only once (on Facebook).<sup>113</sup>

In legal terms, the Network Enforcement Act has attracted a large amount of criticism. A probably preponderant number of legal scholars have even declared the law to be unconstitutional and contrary to Union law. Some of these accusations are of no further interest in terms of analyzing the NetzDG as a possible regulatory model for other member states or the EU, because they specifically concern German constitutional issues, such as the violation of the federal competence order by the enactment of the federal law diagnosed by some critics. Some other in fact grave reproaches related to the supposed non-compliance with EU law, particularly the violation of the country-of-origin-principle of the ECD and the limitation of liability in favor of host providers according to Article 14 ECD, apply not only to the NetzDG but also to other similar member states regulations, such as the French loi Avia.

Many legal scholars have convincingly argued that the applicability of the NetzDG *ratione personae*, which depends only on the aforementioned minimum number of registered users in Germany and, therefore, encompasses the large US social media platforms, violates the ECD's country-of-origin principle. Meanwhile, the competing AVMSD and its implementation in the drafted amendment of the German TMG respect this principle explicitly. The same disregard of the country-of-origin-principle seems to also apply to the drafted loi Avia in France. The individual case-related exceptions provided in article 3 para 4 ECD hardly legitimate a general and systematic repeal of the fundamental principle

of the ECD—not even for the purpose of effectively combatting hate crimes, as the German Government had claimed in its attempt to justify the law.<sup>114</sup> Moreover, the reasoning that a calculated violation of the ECD by member states could provide an impetus to dynamize the debate on revising the legal framework to govern platforms at the Union level and might, therefore, still be within the range of acceptable political provocation is witty,<sup>115</sup> but can hardly justify the violation.

Admittedly, this problem, as well as the problem of the incompatibility of the 24-hour or 7-day deadlines for the removal of illegal content as claimed by some, with the more flexible responsibility of the host provider's obligation to control in Article 14 ECD, is a problem corresponding to regulatory measures of this type at the member state level. It could be avoided by coherent regulation at the EU level, which includes a modification of the ECD (see below).

However, the central accusations against the NetzDG (and the loi Avia), which are derived from the fundamental rights of the freedom of communication and information, would also apply to an EU regulation. In fact, at the core of the matter are once again accusations of the inadmissible privatization of law enforcement and an over-blocking risk that disproportionately restricts the freedom of communication and the equality of communicative opportunities. For such reasons, these points of criticism do not appear very convincing, at least not if the legally prescribed structure of the complaint management system is balanced and contains effective precautions against excessive deletion practices.

113 Deutscher Bundestag, Drucksache 19/16264, p. 46: by 2019, as many as 1,268, mostly concerning possible breaches of the requirements for complaint management.

114 See only Karl-Heinz Ladeur, Tobias Gostomzyk, Gutachten zur Verfassungsmäßigkeit des Entwurfs eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG) i.d.F. vom 16. Mai 2017 – BT-Drs. 18/12356 (<https://www.cr-online.de/NetzDG-Gutachten-Gostomzyk-Ladeur.pdf>); Gerald Spindler, Der Regierungsentwurf zum Netzwerkdurchsetzungsgesetz – europarechtswidrig?, Zeitschrift für Urheber- und Medienrecht 2017, 473 (475 et seq.); and even – whereas defending the NetzDG in other respects – Eifert, in: Netzwerkrecht (note 73), 9 (23 et seq.).

115 Eifert, *ibidem*.





- Certainly, the example of the German NetzDG (in its currently still valid version) meets with justified criticism.

Apart from other severe objections which, however, are related to the Member State level of this legislation (in particular: likely incompatibility with the country-of-origin-principle) and do not concern the regulatory structure as such, this design also appears to be highly problematic in view of the risk of over-blocking if only because it provides rigid deadlines and (so far) does not include a put-back obligation.

- However, this does not imply that a better-balanced legal ensemble of the most important elements of a complaints procedure and monitoring mechanism to improve protection against criminally relevant content cannot be a sensible solution that creates legal certainty if designed to be sensitive to fundamental rights. In this sense, Article 28b AVMSD can be welcomed as a more appropriate model for balancing the procedural obligations of platform operators.

The German Federal Government has now consecutively adopted two draft laws to amend the NetzDG. The first one leaves the obligations of complaint management as such unchanged but only supplements them by an additional obligation to transmit to the Bundeskriminalamt (the Federal Office of Criminal Investigation, i.e., the Central Office for the Coordination of Criminal Prosecution in Germany) the content of a possible violation of certain enumerated

offenses as well as the IP address of the users who have posted or shared such.<sup>116</sup>

Only the second proposal for a NetzDG amendment<sup>117</sup> addresses the question of improving the management rules in favor of a more balanced procedure following the European standard (e.g., Article 28b AVMSD)<sup>118</sup> regarding a complaints mechanism that takes into account both sides (the complainant and the user against whose content the complaint has been made). In particular, now a “put-back mechanism”, which has been called for many times in the debate,<sup>119</sup> is proposed as a new part of the compliance rules set down in the NetzDG. the

### (3) The administrative supervisory regime of the TCOR proposal

The approach of the new proposal for a regulation preventing the dissemination of online terrorist content is far more authoritarian in character, compared to the AVMSD and even the NetzDG mechanisms, with massive obligations backed by high sanctions and strong powers of intervention by authorities. The proposal comes at the end of a development that has been discernible for some time, which is also, at the Union level, characterized by partial departure from the originally propagated pattern of the voluntary self-commitment of Internet platforms and a shift toward binding legal obligations.

This development leaves behind the restraint of the AVMSD, which is, as described above, committed to the co-regulation approach. It even extends beyond obligations to the reactive control and removal of

116 Gesetzentwurf der Bundesregierung eines Gesetzes zur Bekämpfung des Rechtsextremismus und der Hasskriminalität v. 21.2.2020, Bundesrat, Drucksache 87/20, Article 6.

117 Gesetzentwurf der Bundesregierung eines Gesetzes zur Änderung des Netzwerkdurchsetzungsgesetzes v. 3.4.2020, Bundesrat, Drucksache 169/20.

118 Also the French Loi Avia from the outset seems to be less one-sided compared to the German NetzDG since it explicitly provides for an obligation (under threat of fine) to consider the legal arguments in favor of the lawfulness of the content in question, and to abstain from unjustified deletion, and for a procedure of “contre-notification” (Article 2).

119 See only Matthias C. Kettemann, Stellungnahme als Sachverständiger für die öffentliche Anhörung zum Netzwerkdurchsetzungsgesetz, 15.5.2019, pp. 20 et seq. ([https://www.hans-bredow-institut.de/uploads/media/default/cms/media/up8o1iq\\_NetzDG-Stellungnahme-Kettemann190515.pdf](https://www.hans-bredow-institut.de/uploads/media/default/cms/media/up8o1iq_NetzDG-Stellungnahme-Kettemann190515.pdf)).





illegal content in terms of limited civil law liability according to the ECD or the German Network Enforcement Act. Instead, and in obvious tension with the previously applicable liability exemptions in the ECD, the TCOR proposal also establishes proactive obligations to control, including automated filtering.

The proposal is far-reaching, both in regard to the definition of hosting service providers, which are not subject to any quantitative or qualitative restriction and, therefore, already includes any website with a commentary function (Recital 10) and in regard to the “terrorist content” covered, which includes texts or presentations in which support for terrorist acts can be observed (Article 2(5)).

The TCOR proposal not only formulates, tightens, and sanctions operator obligations, it also establishes tight regulatory supervision with considerable powers of intervention (administrative supervisory regime). The compliance obligations of the hosting services themselves (with regard to the obligations to respond to requests for removal and notification as well as proactive inspection obligations) are also subject to close supervisory control and monitoring.

The supervisory regime essentially consists of three levels: The authority can issue a removal order in regard to terrorist content it has identified, which must be followed by the service provider within one hour (Art. 4: removal orders); it and/or Europol can report possible terrorist content and thus trigger the obligation of the provider to check and react (Art. 5: referrals). The obligation to set up proactive checking mechanisms, including the use of automated tools (Art. 6: proactive measures), is formulated more vaguely but can be concretized by an official order

for concrete measures. The recitals make it clear that the obligation to take proactive measures should, on principle, only go so far as to be compatible with the prohibition of obligations to the general monitoring of Article 15 ECD, but that this may also be different if there are special reasons of public safety; in this respect, the new regulation claims priority over the ECD privilege (Recital 19).

It is well-known that this commission proposal has also been met with very strong criticism, similar to the NetzDG case.<sup>120</sup> The European Parliament decided, upon first review, to delete or mitigate key elements of the proposal, particularly the instrument of administrative referral (which has been deleted completely, while the instrument of a removal order has been accepted) and the imposition of proactive measures using automated systems (which is now explicitly excluded).<sup>121</sup>

The criticism both from civil society organizations advocating for an open “censorship-free” Internet and from associations in the platform industry already refer to the broad scope of the regulation (hosting service providers) and the concept of terrorist content, which is considered too broad and vague and, therefore, susceptible to abuse. The proposal was reproached for being unnecessary and not relying on sufficient empirical evidence to justify its necessity. The instrument of a removal order issued by the competent authority is not linked to the requirement of judicial authorization, as recommended in No. 1.3.2. of the Council of Europe’s Committee of Ministers’ Recommendation on the roles and responsibilities of Internet intermediaries (7.3.2018).<sup>122</sup>

Furthermore, the combination of two completely different instruments for the same problem (e.g.,

120 Access Now et al., Joint Letter opposing the proposed Terrorist Content online Regulation, 4.12.2018; Nina Mafi-Gudarzi, Legal Tribune Online 2.10.2019.

121 EP legislative resolution of 17 April 2019, P8\_TA-PROV(2019)0421.

122 [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680790e14](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14).



removal order and referral), of which it is unclear as to how they relate to each other, does indeed seem odd. In this form, the proposal thus provokes two opposing accusations: the reproach of a problematic devolution of decision-making responsibility by platforms (“referral”)<sup>123</sup> and the questionable evaluation of communication content by public authorities (“removal order”). These may, if under the control of authoritarian governments, even in Europe, pursue an agenda of the repression of free communication.

- While recognizing the need for resolute action against content that may support terrorist violence, the unique nature of the sectoral approach of the TCOR to influencing content moderation is surprising. It hardly seems to be in line with the principles that otherwise apply in EU law in this domain, especially after the ECD and also now the AVMSD.

With the instrument of direct state removal orders, the co-regulation approach, which characterizes the AVMSD and even the NetzDG, has, in any case, already been abandoned. This incoherence problem will be addressed later (see below, D.).

### III. Further legal obligations

#### 1. Transparency

A classic regulatory concept in many areas and also in communications and media law has always been that of requiring transparency. Transparency obligations also play an important role in the already established practice of platform governance and in the debate on the further development of such governance, both at the level of Union law and in the member states.<sup>124</sup> Existing or discussed information obligations of

platform providers naturally correspond to very different issues, such as the ownership structure of the company offering the platform, the handling of user data, and the principles and criteria for selecting and sorting the content posted on the platform (i.e., to the moderation policy of the platforms, which is the main focus here). Obligations of the latter kind can be applied at various levels. They can be limited to the request of a general description of the guiding idea and the central principles of curation. However, they can also be aimed at algorithm programming and, in this respect, require more or less extensive insight into the “black box”. Otherwise, they may demand (with a higher or lower level of detail) a description of substantive criteria for access as well as the ranking and placement of content.

The protective purposes of such transparency obligations, and, therefore, their regulatory context, may also differ. Obligations under contract and commercial law to disclose the curating maxims and sorting criteria serve to ensure contractual fairness and equal opportunities in competition, obligations to provide information under data protection law support to control what is happening with personal data, and transparency requirements under media law aim at safeguarding the diversity of information and opinion.

##### **a) Transparency in safeguarding fairness in business completion: The P2BR example**

As it is fully committed to the concept of transparency, the EU P2B Regulation is an interesting example in this context. It is true that the P2BR aims to serve economic freedom and the freedom of competition in addition to consumer interests, which, at first glance, seems to be somewhat outside the thematic scope of this study. However, the regulatory objectives and

123 See – though not with explicit regard to the TCOR – EDRI, Platform Regulation Done Right (9.4.2020), p. 25.

124 See, for example, Gorwa, Ash, Democratic transparency in the Platform Society (2020).



instruments are those that are also used in a comparable way to provisions for safeguarding the diversity of information and opinion at the member state level (e.g., in the previous Interstate Broadcasting Treaty for Germany, now extended in the draft Interstate Media Treaty; see below). The problem with possible discriminatory practices, or, at least, non-transparent access criteria for online intermediation services regarding their treatment of business services, is, therefore, comparable to the selection of offers or search results by intermediaries from a more general point of view regarding the equality of communicative opportunities.

- Albeit its limited scope of application and its competition law protective purpose, the P2BR, therefore, has paradigmatic significance as a model for other regulatory objectives, for example, in media law.

Moreover, the P2BR not only addresses intermediary portals for online traders but also general search engines, insofar as they index websites and display in their search result lists websites, on which users commercially offer goods or services (Art. 1 para. 2). Thus, the P2BR covers information intermediaries that also fall within the application of intermediary regulations under media law.<sup>125</sup>

The main regulatory objective of the P2BR is to ensure the transparency of access and the sorting of maxims and criteria in the general terms and conditions of online intermediation services or, in the case of search engines with which there is no contractual relationship, on the website of the search engine itself (Article 5). In this respect, the regulation provides information obligations as well as an obligation to justify the suspension or termination of the provision of

the online intermediation service to a business user (Article 4). In particular, criteria and reasons justifying the preferential treatment of business users must be described (e.g., for a direct or indirect payment of a fee) (Article 7).

Unlike, for example, the provisions on intermediary regulation in the draft German Interstate Media Treaty, the P2BR does not provide a direct interdiction of discriminatory treatment. In particular, it refrains from declaring certain motives or reasons for a differentiating treatment by a platform operator to be illegitimate. Rather, it is limited to the obligation of transparency, the provision of a complaint management system, and the granting of legal protection (Art. 9 et seq.). Thus, it does not directly interfere with the freedom of the differentiation of providers.

The distinctive charm of this transparency approach of the P2BR lies in the fact that it, therefore, does not, at least in principle, claim to evaluate the principles and criteria of intermediary platforms and search engines for the treatment of content as such (as legitimate or illegitimate) but instead only requires that the operators disclose their criteria in an easily available and understandable manner, providing users with a statement on the reasons for a decision that is disadvantageous for the user (e.g., a decision to restrict, suspend, or even terminate the provision of the online intermediation service; Article 4 P2BR).

The transparency obligations of the P2BR also have an anti-discrimination effect.<sup>126</sup> As the obligation to define the “main parameters determining ranking” (Article 5 (1) P2BR) is related to the general terms and conditions of online intermediation services, the generality of these provisions alone results in an obligation to treat all business users (and parties of

<sup>125</sup> For example, in the German Interstate Media Treaty (Section 2 no. 13b, Sections 53c et seq. E-MStV).

<sup>126</sup> See also Article 11 (1) P2BR: “That internal complaint-handling system shall be easily accessible and free of charge for business users and shall ensure handling within a reasonable time frame. It shall be based on the principles of transparency and equal treatment applied to equivalent situations, [...]”; Alexander Peukert, Faktenchecks auf Facebook aus lauterkeitsrechtlicher Sicht, in: Wettbewerb in Recht und Praxis 2020 (coming soon).



contract) equally, which can then be enforced under the law of contract (if necessary in court). In addition, the services covered by the scope of the application of the regulation are, of course, subject to the prohibitions of discrimination under competition law, which can refer to the criteria disclosed under the P2BR. Thus, if the transparency of the curatorial principles does indeed lead to a legally significant and enforceable self-binding of the platforms to these principles, it is nevertheless true that, according to this concept, the principles as such are not controlled or assessed by authorities or courts—in any case not according to standards that would be established in the P2BR itself.

- As a regulatory model, the P2BR-design is very interesting and also attractive in the context of a liberal regulatory philosophy: platform operators are not prescribed by which standards they must curate, but they are obliged to account for their freely chosen standards, so that every user or competitor can adapt and use or refuse the service.

## **b) Transparency: The entry level of regulation**

Transparency obligations are the entry level of any imperative regulation. They are also less controversial compared to other measures—which may be an explanation for the fact that the P2BR was adopted without major difficulties, unlike, for example, the much more disputed TCOR proposal—because they do not restrict the scope of action of the obligated companies, apart from the self-binding effect

triggered by the commitment to generally applicable standards. Reducing information asymmetries to improve conditions for the autonomous decision-making of users, competitors, or advertising customers is a regulatory objective to which little can be objected.

- All the more, transparency not only preserves freedom to act but can even extend it. Actions can be permitted precisely because their motives and characteristics are clearly visible, whereas they would have to be prohibited if these motives and characteristics were kept in the dark.

This is known from many examples, and it is even the leading principle of media advertising law: product placement can be judged as admissible, unlike surreptitious advertising, when it is identified as such (Article 11 (3) d) AVMSD).

The same applies to content moderation: If social bots or statements suspected of being false are marked as such, they do not necessarily need to be deleted or blocked.<sup>127</sup> If advertisements are stored in a library easily accessible to the public, this may help researchers detect precarious or misinformative strategic advertising.<sup>128</sup>

All the more so, clear commitments can expand the scope of action if they are incorporated into contractual agreements. In this case, a certain curation policy, maxims for selection and sorting, the parameters for concretizing these maxims, and so on are not only clear, but have even been agreed upon—naturally under the conditions of private and competition

<sup>127</sup> With regard to social bots, after further proposals for a ban had been rejected, this transparent approach has now been adopted by the German Länder, see Section 18(3, sent. 1) draft of a Interstate Media Treaty: “Providers of telemedia in social networks are obliged to indicate the fact of automation in the case of content or messages created automatically by means of a computer program, provided that the user account used for this purpose was made available for use by natural persons according to its outward appearance.” Social network providers are – under threat of a fine – requested to supervise this obligation (Section 93(4); see Jens Milker, “Social -Bots” im Meinungskampf, *Zeitschrift für Urheber- und Medienrecht* 2017, 216; Kevin Dankert, Stephan Dreyer, *Social Bots – Grenzenloser Einfluss auf den Meinungsbildungsprozess?*, *Kommunikation & Recht* 2017, 73.

<sup>128</sup> See, however, with respect to disappointing experiences with the Facebook ad library: <https://www.nytimes.com/2019/07/25/technology/facebook-ad-library.html>



law, which safeguard contractual justice. Since terms of service and community guidelines, which govern content moderation in practice, are, as already mentioned, part of the contract between the social network provider and the user, it is of the utmost importance. In fact, questions regarding the scope of content moderation and, thus, platform governance are today determined to a considerable extent by the rules of civil contract law—especially civil law rules on general terms and conditions—although these are influenced by the fundamental rights that must also be observed in private law relationships. In this respect, German civil courts, for example, have recently decided that the margin of social media platforms to prohibit or downgrade content on the basis of clearly formulated community guidelines, which are themselves recognized as valid, is greater than in the case of unilateral decisions made by the operator that are unsupported by contractual standards.<sup>129</sup> Admittedly, it is still controversial and not entirely clear how great this additional scope for curation opened up by agreed terms of service is, and this question is addressed below, in the next section.

- However, the hypothesis that transparent contractual conditions can support content moderation and, therefore, are an important instrument of platform governance is, after all, quite probable and convincing.

However, on closer examination even transparency regulation is not free from problems. Transparency obligations are not always “soft”; on the contrary, they can seriously affect the individual rights of obligated persons or companies if, for example, they require the disclosure of strictly confidential details or if they involve a high level of bureaucracy. They can also create undesirable side-effects by allowing information to fall into the wrong hands, thereby enabling

malicious or harmful acts to be carried out.

Both effects have been intensely discussed in recent years with regard to the idea of “opening the black box”, i.e., obligations to give insight into the algorithms of platforms’ recommender or moderation systems. This debate should have made it clear by now that an obligation to disclose the algorithms that steer intermediaries’ curation would be neither meaningful (on the contrary, with regard to the risks of abuse and manipulation, it would create) nor capable of being justified, because they would be contrary to the business secrets of the companies which are protected by economic fundamental rights.<sup>130</sup>

- Thus, transparency obligations as any other interferences with individual freedom need legal justification and, in particular, have to be in compliance with the principle of proportionality.

In the case of intermediary regulation, this raises the sensitive question of how extensive and detailed the disclosure obligations of platform operators should or may be – below the threshold of, at any rate, disproportionate public disclosure of the algorithm code.

On the other hand, transparency obligations are often accused of being ineffective: according to this viewpoint, mere transparency without subsequent obligations to act does not create incentives to change pejoratively assessed behavior and is, therefore, no sufficient or appropriate regulatory instrument. But precisely in the context discussed here, as shown above, the transparency obligations do not typically stand alone, but are a prerequisite for accountability based on them.

Transparency obligations, i.e., an obligation to

129 Higher Regional Court (Oberlandesgericht) Dresden, 8.8.2018, 4 W 577/18 (concerning Facebook Community Standards, III 12. – hate speech), para. 18 (juris).

130 See only Wolfgang Schulz, Kevin Dankert, *Die Macht der Informationsintermediäre*, 2016, p. 67.



formulate and disclose principles and rules of curation, or obligations to grant access to data concerning concrete procedural practice, should not be blanketly criticised as ineffective or insufficient. Rather, they establish the accountability of the platform operators and are thus in themselves a key element of platform governance. From transparency arises a pressure for consistency and equal treatment: the operator can at least be held to his own standards and decisions, must justify deviations from them. Perhaps the most important problem regarding information obligations is whose information needs they are intended to satisfy and to whom they must, therefore, be tailored to in their content and level of detail. Regulatory authorities, courts, professional business partners or competitors, and academic researchers or civil society observers require different and usually much more precise information than users of social media, who, generally, do not take note of or understand detailed descriptions of terms of use anyway and for whom an excess of provided data can even be counterproductive by leading to a poorer state of effective information (transparency overload).<sup>131</sup> Therefore, a single one-size-fits-all information obligation is likely to be unsatisfactory because it is not sufficient for the much more specific knowledge needs of supervisory authorities while already potentially overburdening “simple” users. This consideration argues in favor of providing for the graduated information obligations of intermediaries according to the functions and persons entitled to information.

From a legal view, it is important to see that both public access to and (wider or narrower shaped) exclusive rights to information raise questions of suitability and necessity of the respective design of the transparency concept, furthermore questions concerning the legitimacy of the beneficiary or rightsholder of the information claim: Disclosure open to the general public

can claim the advantage of not having to justify the privileges of certain beneficiaries and the exclusion of other interested parties. But it has, of course, just in contrary, for example, to a disclosure *in camera* of a court, to be limited to less sensitive, but also less precious and useful information, from which no one can extract anything for harmful purposes. On the other hand, a deep insight into the data recording the moderation practice of social media, made available exclusively to academic researchers or interested activists, may provide most valuable information for a better understanding and accountability of the platforms but goes hand in hand with the problem of privilege: Why do these interest groups have the right to access, but other people or institutions do not? And a democratically legitimate supervisory authority, which is moreover also subject to sanctioned secrecy obligations, can certainly claim a right to get informed in a much more extensive and detailed manner than the general public or any social group – but this must not in turn lead to an uncontrolled position of administrative power in the precarious area of the control of free communication. This quite cursory view on the pros and cons of a wider or narrower entitlement to information may give an impression of how complex serious policy considerations on this subject have to be.

- Anyway, it seems to be preferable that transparency obligations have to be designed in a differentiated manner – according to the different needs, risks and grades of legitimacy, which are to be defined to the different beneficiaries of transparency.

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<sup>131</sup> See for a three-categories-framework of different beneficiaries of transparency obligations (user-facing disclaimers, government oversight, research partnership with academia and civil society) and finally for a plea for public disclosure Paddy Leerssen, *The Soap Box as a Black Box: Regulating transparency in social media recommender systems* (2020).





## 2. Obligations to non-discrimination to safeguard equal opportunities and diversity of information

### a) A double standard of non-discrimination: Article 94 German Interstate Media Treaty

In the new (drafted) German Interstate Media Treaty, the transparency rules – both for media platforms and for media intermediaries – form a central component of regulation. However, this media law regulation does not solely rely on transparency obligations but combines them with regulations that define prohibitions of discrimination. Therefore, this German legislation can be regarded as an interesting example of this type of regulation. Furthermore, this media law ban on discrimination is not, as the regulation discussed above, aiming to prevent illegal content, but it is (explicitly) intended to secure the “diversity of opinions” as a democratic requirement (i.e., a completely different regulatory objective). Moreover, this anti-discrimination regulation is not limited to the easily plausible idea, which is well-known in civil contract law and also inherent in P2BR (see above), that intermediaries should treat all users equally according to their community standards (i.e., not make arbitrary deviations from these standards in individual cases). Rather it goes beyond that: In particular, both selection or sorting that systematically and without objective reason deviate from the criteria made transparent and criteria which “directly or indirectly and systematically impede offers in an unfair manner” are prohibited. The intermediary regulation in the Interstate Media Treaty thus encompasses two prohibited acts of discrimination, one which is less problematic—albeit somewhat less elastic than the indirect non-discrimination protection according to the P2BR pattern—deviation from the self-set criteria and one which is

rather problematic—the creation of unacceptable differentiation criteria in the Community Standards.

Article 94 para. 1 and 2 Interstate Media Treaty states:

“(1) In order to safeguard diversity of opinions, media intermediaries may not discriminate against journalistically and editorially designed offers on whose perceptibility they have a particularly high influence.

(2) Discrimination within the meaning of paragraph 1 shall be deemed to exist if, without objectively justified reason, the criteria to be published pursuant to § 93 paras 1 to 3 are systematically deviated from in favour of or to the disadvantage of a particular offer or if these criteria directly or indirectly and systematically hinder offers in an unfair manner.”<sup>132</sup>

### b) Anti-discrimination regulation of intermediaries: Constitutionally required?

As already mentioned above, the goal of ensuring diversity pursued by this protection against discrimination is less clear and less unambiguous in its legitimation than the protection of personal integrity required by fundamental rights. Therefore, the justification based on this reason is more fragile when it comes to extensive state intervention in the curatorial freedom of the platforms (i.e., their freedom to self-determine the differentiation of content).

- In particular, it cannot be considered certain that an anti-discrimination regulation under media law is necessary on the basis of the positive obligations arising from the constitutional guarantees of free communication and information.

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132 Mine translation, M.C.



If the constitutional obligations of governments and legislators in the Union and the member states to protect individual rights are comparatively clear, this cannot be said about the possible duty to safeguard informational prerequisites of democracy, (i.e., an open, well-informed, discrimination-free public discourse through imposing appropriate legal obligations on platform providers to achieve such qualities).

Indeed, there are those in the debate who consider legal provisions for ensuring diversity as not only politically opportune but also constitutionally mandatory. From this point of view, the decades-old philosophy of subjecting broadcasting services to specific and far-reaching obligations, as, in particular, the obligation to offer a thematically manifold, balanced, and informative programme, now also calls for application to intermediaries, since they perform a similar function of informing the public.<sup>133</sup> A statutory regulation of intermediaries to ensure the diversity of information that goes beyond the generally acknowledged duty to comply with the self-set terms of services and community standards (no discrimination by deviation) but additionally requires “discrimination-free” selecting and ranking criteria would, therefore, be constitutionally mandatory.

Of course, it cannot be ruled out that constitutional courts will adopt this position and demand a legal order for the operation of intermediaries to safeguard public discourse and thus protect democracy.

- For the reasons outlined above, however, such a transfer of the media paradigm, and all the more of the broadcasting (and not the press) paradigm, to social media and search engines, appears highly questionable, at least at present.

Social media may have become a source of information that, to some extent, competes with the media; however, this does not justify equating them and their way of providing information—not to mention search engines or messenger services which have a completely different function—with media. Intermediaries are neither gatekeepers in the narrower sense of exclusive control over access to information<sup>134</sup> nor, which can be learned from the empirical studies, as shown in the Stark report (Stark, Stegmann et.al., 2020, 4.1.), do they actually control the “information repertoires” of their users. A constitutional mandate to ensure the diversity of content in social media and search engines, therefore, appears to be at least doubtful—even in Germany in which constitutional standards safeguarding media pluralism and the diversity of information are extraordinarily sophisticated according to the jurisdiction of the German Constitutional Court).

### **c) Plural standards of non-discrimination?**

Is a media law regime for safeguarding non-discrimination under administrative supervision actually sensible or even necessary? To answer this question,

133 See from the German debate for example Rolf Schwartmann/Maximilian Hermann/Robin L. Mühlenbeck, Eine Medienordnung für Intermediäre, *Multimedia und Recht* 2019, p. 498 (499 et seq.); Tobias Schmid, Laura Braam, Julia Mischke, Gegen Meinungsmacht – Reformbedürfnisse aus Sicht eines Regulierers, *Multimedia und Recht* 2020, p. 19 et seq.; also the joint commission of the federal government and the governments of the Länder (“Bund-Länder-Kommission zur Medienkonvergenz”) which in 2015 and spring 2016 drew up the paper, which has already laid out the basic features of intermediary regulation, seems to have assumed that there is an obligation under broadcasting constitutional law to regulate such services <https://www.bundesregierung.de/resource/blob/997532/473870/07ba875e860ada4556526641bd9151b6/2016-06-14-medienkonvergenz-bericht-blk-data.pdf?download=1> (p. 32); for considerations on a transfer of the (German) constitutional approach of “institutional freedom” (developed in the early decades of post WWII Germany) to the intermediaries: Thomas Wischmeyer, making social media an instrument of democracy, *Eur Law* 2019, 169; reluctant, however, Schulz, Dankert (note 130), p. 49; critical: Albert Ingold, *Meinungsmacht des Netzes*, *Multimedia und Recht* 2020, 82 (84 et seq.).

134 See for a tiered “normative model of gatekeepers” Mengden (note 31), p. 167 ff.; pleasingly clear words rejecting the, at the core, illiberal idea of the Facebook-dependent user, who must, therefore, be protected from himself: Higher Regional Court (Oberlandesgericht) Düsseldorf, 26.8.2019 – VI-Kart 1/19 (V) (Facebook I), *Neue Zeitschrift für Kartellrecht* 2019, 495 (499 et seq.).



one important consideration must not be overlooked, which, as far as can be seen, has hardly been sufficiently addressed in the debate. This consideration concerns the relationship between the prohibition of discrimination under media law and the obligations of equal treatment already discussed, which, ultimately rooted in the fundamental principle of equality, characterize the civil and business law standards binding platform operators in regard to content moderation.

- This duplication of the standards of equality – in civil and competition law and in public media law – gives rise to intricate problems of competition between possibly different concepts or understandings of equality that can also be accompanied by conflicts of competence in which regulatory competences are shared, such as in a federal state or in relations between member states and the EU.

It is conceivable, for example, that civil courts may consider a community standard and a disadvantageous treatment of a contribution or account based on it to be justifiable and lawful, while a media authority, applying the non-discrimination rule under media law, may find the same community standard or its application to be contrary to equality—and vice versa.

Admittedly, in general, it is not impossible in law for different, co-existing regimes serving different protective purposes to impose different requirements on one and the same conduct. However, especially with regard to the principle of equality, different standards and results are precarious, because this affects not only one party, which may have to meet cumulative requirements under different regulations, but two sides whose required equal or unequal treatment is at stake. If, for example, the civil court (or competition court) interdicts a social media operator to unfavorably treat a post or account in comparison to others because it considers them legally equal, yet the

media authority allows precisely this unequal treatment to be objectively justified, the latter decision negates the claim granted to the user by the former judgement—and vice versa).

The problem becomes even more apparent if the case is exacerbated by the fact that the media authority not only *allows* the relatively poorer treatment of the post or account but even *demand*s it from the operator, because, from the perspective of media law, they allegedly have a much lower information value than the contributions or accounts they are compared with.

- This scenario should demonstrate that different notions of legitimate reasons for differentiation, which underlie different but simultaneously applicable rules of equality, can very well lead to seriously contradictory interpretations that are hardly tolerable in a coherent legal system.

It is also an awkward situation for a platform operator not only to be confronted with a single standard of equality in a state legal system—which is difficult enough in the case of transnationally active services—but also to have to satisfy different expectations of different authorities by formulating its community standards and curatorial practice, a task which is practically impossible to solve in the case of divergent expectations.

Thus, a key question is whether a legal system can really include different concepts of non-discrimination at the same time, especially if these competing assessments have to find their common root in the same constitutional base, namely in the relevant fundamental right to equal communicative opportunities—as has been demonstrated above with regard to the civil law reasoning behind community standards. If, as a consequence of this reasoning and with respect to this common constitutional ground, this question is denied, it is all the more questionable as to how the uniform application of the prohibition of



discrimination can be ensured by different decision-making bodies and whether this duplication is at all necessary and thus proportionate. If the media supervisory authorities are thus prevented from developing and enforcing their own specific ideas on legitimate grounds for differentiation or illegitimate discrimination, it is indeed doubtful whether additional protection against discrimination under media law is really necessary.

It *must* be necessary since, being an encroachment on the platform operators' freedom of curation, which is protected by fundamental rights, and moreover on the social autonomy of communication processes, it must comply with the principle of proportionality. This would only be convincing if the contractual rights or claims for protection under competition law and the corresponding judicial remedies were not sufficient to provide protection against inappropriate business conditions or unjustified deletions or discriminatory treatment in individual cases.

- A severely discriminatory practice by intermediaries, which would necessarily require administrative surveillance beyond that of the competition authorities, does not appear evident, at least not at present.

Apart from this problem regarding the need for additional protection against discrimination under media law, the question also arises as to which uniformly applied differentiation criteria of a social network

should actually be qualified as illegitimate. As long as these criteria are primarily geared toward the needs of the user (personalized compilation of the news-feed), this algorithm programming can hardly be condemned as illegitimate, even if such a personalized information environment may, in many cases, not meet the democratic ideal of the curious, critical, and well-informed citizen.

However, even if the (second) non-discrimination standard is intended only to prevent curation principles and criteria that follow a certain ideological agenda to whom a social network or search engine may possibly be committed<sup>135</sup>, it is unclear whether such a ban would be necessary or appropriate.<sup>136</sup> Why a platform should not have the right to be attached to a particular ideology or religious or political belief, comparable to the press which has such a right, if such an ideological or political profile or even agenda is disclosed in a transparent way so that everyone can see for what ideas his provider stands?<sup>137</sup>

Possibly such a right of social media platforms to have and to carry out a tendency may be made dependent on there being a choice of different service providers and correspondingly denied to monopolistic providers. But if comparable other social networks or search engines are available to whom it is easily possible to switch, imposing neutrality obligations on platforms raises substantial concerns, even if these platforms actually have a large number of users.<sup>138</sup> In any case, these questions have not been definitely decided by the courts just yet. The same applies to the question

135 To date, there is no evidence that the major intermediaries have systematically imprinted a political tendency on their curation, see Kellner (note 26), p.81, 86: "hypothetical problem".

136 Calling for a non-discrimination rule to ensure equal access and findability (committed to the neutrality paradigm), supplementary to the already existing competition law standards Kellner (note 26), p. 131 ff.

137 The Bund-Länder-Commission's report 2016 (note 130) recommended an exception from the non-discrimination requirement for "specialised intermediaries", provided that the specialization is made clearly recognizable, and furthermore affirmed the right to self-determination of religious and ideological communities (p. 37). This possibility of creating a specialised intermediary has now been incorporated into the transparency rule of the Interstate treaty (sect. 93(2)) – but not into the non-discrimination rule (sect. 94). This does not clearly exclude the possibility of accusing a social network of discrimination on ideological grounds, even if this ideological programme has been made obvious by the provider.

138 Convincing skepticism against the concept of neutrality to be a regulatory maxim with regard to intermediaries Schulz, Dankert (note 130), p. 71 et seq.



of the scope of applicability (i.e., whether only quasi-monopolistic or at least market-dominant companies can be covered, etc.).

- The concept of transparency and (binding) commitment to self-set principles and rules, as known from the P2BR and the first non-discrimination standard in the German Interstate Media Treaty, seems less dubious than the concept of a qualitative evaluation of content moderation criteria (as provided for in the second non-discrimination standard in the Media Treaty).<sup>139</sup>

#### **d) Positive discrimination to safeguard diverse and rich information?**

Even more delicate is the question of whether the protection against discrimination under media law is not to be associated with completely different ideas and expectations than those which already determine the protection of equal opportunities by the civil courts. This extends beyond the competition and coherence problem that has been previously discussed and toward the substantive dimension of a different kind of protection against discrimination that is specifically aimed at ensuring diversity. This is, therefore, about a specific media law rationale for the protection against discrimination. An answer to this question requires ascertaining to what extent protection against discrimination is at all a suitable concept for achieving the goal of securing the diversity of information and opinion.<sup>140</sup>

The very demand for an additional discrimination protection regime under media law indicates that this type of discrimination protection probably does

not stop at preventing negative discrimination but actually aims for a certain kind of positive discrimination of “higher value content”. It is true, in the German example, only the (historically older) regulation of media *platforms* (i.e., cable network providers and streaming platforms such as Netflix), not the new regulation of intermediaries, extends beyond mere protection against “negative” discrimination. It provides—now in the amended version—an obligation of the operators to give preferential treatment to certain broadcasting offers that are considered particularly relevant for journalistic purposes in that these offers must be presented on the platform’s user interface in such a way that they can be easily found. Thus, this is an even more far-reaching pattern of privilege for certain media content, as is already known from the older must-carry rules in cable regulation. It may be a conceivable pattern also for regulating intermediaries in future, even if the German prototype of an *intermediary* regulation does not go so far yet (at least not explicitly).

A media law regime for protecting the diversity of information is not necessarily—in the German version of a media-platform regulation it is obviously not—interested in guaranteeing all users equal opportunities to publish or disseminate all their contributions, regardless of their content, on the platforms. Rather, it may seek to control the selection and ranking decisions of platform operators in such a way that content with an assumed higher information value is favored over other content. This can certainly be combined with an equal treatment requirement regarding the class of privileged content, such as journalistic pieces from all or perhaps only certain classified media.

<sup>139</sup> In substance similarly Schulz, Dankert (note 130), p. 71 et seq.

<sup>140</sup> Interesting considerations relating to this: Natali Helberger, Paddy Leerssen, Max Van Drunen, <https://blogs.lse.ac.uk/media/2019/05/29/germany-proposes-europes-first-diversity-rules-for-social-media-platforms/>; the basic paper from which the Intermediary Regulation of the Interstate Media Treaty has evolved, i.e., the 2016 report of the Bund-Länder Commission (note 130), still mentions both discrimination protection goals (diversity of opinions and equality of opportunities) side by side without differentiation (see p. 33).





A prohibition of discrimination of this kind would, therefore, not really apply to all communication on social media but would, in fact, only aim to protect certain parts of it that are considered particularly relevant. In the German example, such an approach focused on how information content, which is also in line with the media law character of the regulation, can already be concluded in the case of intermediary regulation (and not only in the regulation of media platforms with their explicit privilege component) from the fact that this regulation only covers “media intermediaries” (i.e., those who also make media content accessible in their search results or newsfeeds. It is also in line with the widespread analysis in media theory that risks to a satisfactory quality of people’s information today are not actually based in a lack of diversity of content and choice, rather than in people, on the contrary, being overwhelmed by a flood of information without any guidance through editorial selection and preparation. Diversity, in the sense of this regulatory approach, is thus not a state of “chaotic” mess and the equal availability of all (legal) content on a platform which is, like a town hall, central marketplace or other public forum, not interested—and must not be interested—in the different information value of this content but conversely a planned and organized diversity which provides at least a minimum service of general interest information.

- In all, such a concept of positive discrimination (in favor of content of general interest) tends to push for *more* content-related curation, whereas the concept of equal opportunities for all communication content, on the contrary, calls for *less* curation or, since curation is inevitable, at least for that which is as content blind as possible.<sup>141</sup>

Logically, and in terms of the law, contrary to what might seem at first sight to be the case, such an approach to curation that positively safeguards diversity may well be compatible with the principle of equality. A ban on discrimination may even *require* differentiation: Since the principle of equality demands not only the equal treatment of what is essentially equal but also the unequal treatment of what is essentially unequal, it may well be understood, in the context of content moderation, in the way a defined class of high-value content is to be treated differently (i.e., preferentially) than another class of low-value content.

EU Law seems to accept the idea of a privileged discoverability of general interest content on platforms; the competence of member states to impose such obligations has now explicitly conceded in Article 7a AVMSD—albeit under the conditions of a clear definition of the respective general interest objectives and compliance with the principle of proportionality.<sup>142</sup>

- However, in substance, serious reservations can be raised against such an obligation of intermediaries to focus their selection and sorting on higher quality content.<sup>143</sup> Such an obligation is, at least, in tension with the fundamental idea of the legal equivalence of all (legal) communication, which itself is rooted in fundamental rights.

In principle, no judge or official is entitled to evaluate the communicative relevance of statements or opinions. If users now by law have to be confronted with general interest content in their newsfeeds even though it does not correspond to their preferences at all, it can also be at least a worrying disregard of the users’ ability and right to have a decisive influence on their communication environment. Additionally,

141 Drexler, Zeitschrift für Urheber- und Medienrecht 2017, 529 (536).

142 See recit. 25 AVMSD-Amendment Directive (EU) 2018/1808.

143 Convincingly rejecting the idea of obligating intermediaries to positively safeguard diversity and also to counter manipulatory user communication Kellner (note 26), p. 292 ff et seq.; see also Matthias Cornils, Vielfaltssicherung bei Telemedien, Archiv für Presserecht 2018, 377 (386); Ingold, Multimedia und Recht 2020, 82 (85).





social media would be mandatorily pushed into a role to assist the dissemination of media content, even if this is not the basic idea of its service. At least, it needs further discussion as to whether such a regulation that subjects all kinds of communications services to the institutional function of the media only because they catch the attention of their users complies with the constitutional framework safeguarding free communication and opinion formation.<sup>144</sup>

### **3. Strengthening substantial standards to protect individual rights or collective goods**

Certainly, a strategy for improving the climate of discourse can also be sought by modifying the substantive legal standards for permitted communication, such as by introducing new criminal offenses for online-specific acts of infringement. Such tightening of the standards of prohibition has already been taking place in the field of criminal law by introducing or sharpening specific offenses which deal with online communication.

For example, the aforementioned proposal for a German act to combat right-wing extremism and hate crime<sup>145</sup> provides, in its second part, (apart from the amendment of the NetzDG described above) for a tightening of certain criminal offenses by amending the *Strafgesetzbuch* (StGB: criminal code). Namely, inter alia, the catalog of criminal offenses in section 126 StGB, the breach of the public peace by threatening criminal offenses, is to be extended to the effect that in the future the threat of dangerous physical injury (section 224 StGB) will also be punishable. The scope of application of section 140 StGB (reward and approval of criminal offenses) is also to be extended,

so that, in future, not only the approval of committed or attempted criminal offenses is covered by the offense but also the approval of offenses not yet committed. Insulting statements made in public, in a meeting, or by distributing writings (section 11, para. 3 StGB) are to be covered in the future by a qualification in § 185 StGB and be punishable by a maximum of two years imprisonment.

- However, it is clear that tightening up penal law is often more a symbolic than truly appropriate and necessary means of solving a social problem.

In general, the demand for stricter criminal laws or higher penalties is a popular political strategy as soon as socially undesirable behavior moves to the forefront of the general interest. This is also true in the field of communications criminal law. Many of the relevant offenses are hardly ever applied, and, if they are, the penalties are usually minimal.<sup>146</sup> While this is certainly also due to limited law enforcement capacity—this deficiency could be counteracted, as often called for, by better equipment of the public prosecutor's offices, police, and courts—there are also substantial reasons which weaken the persuasive power and the effectiveness of state bans on communication. The most important reason is the strong constitutional protection of the freedom of expression in western democracies, against which any interference must be justified. Severe penalties with a lasting intimidating effect on freedom of speech can hardly be reconciled with this.

In particular, a tightening of content related criminal law is thereby also rather limited. Decisions on prohibiting communication to protect privacy, human dignity, reputation etc. are constitutional in nature and, therefore, a matter of case law. Thus, as already

144 Critical Albert Ingold, Digitalisierung demokratischer Öffentlichkeiten, in: Der Staat 56 (2017), 491 (510 et seq.).

145 [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Bekaempfung\\_Rechtsextremismus\\_Hasskriminalitaet.html](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Bekaempfung_Rechtsextremismus_Hasskriminalitaet.html).

146 See for example regarding the still existing provisions on blasphemy or religion-related hate speech (in Germany, for example, § 116 Strafgesetzbuch), Matthias Cornils, Legal Protection of Religion in Germany, in: Jeroen Temperman/ András Koltay (eds.), Blasphemy and Freedom of Expression, CUP 2017, p. 358 et seq.



noted, there is a rich judicial case practice in this area, coordinated and harmonized throughout Europe by the case-law of the ECtHR, in which the boundary between the expression of opinion or assertion of facts, which is still admissible, and the prohibited communicative violation of rights has been increasingly clarified. The test criteria and considerations, which are decisive for this demarcation of boundaries are, however, derived from the rights of the ECHR (and, nationally, from the fundamental constitutional rights); they are thus at the highest level of the hierarchy of norms.

This insight is important in regard to regulatory possibilities. On the one hand, it is clearer than anywhere else what needs to be regulated in this area: Unjustified violations of rights through communication must be capable of being legally prosecuted by means of criminal, civil, or regulatory law and in the procedures provided for this purpose. European states bound by the ECHR have a positive fundamental rights obligation to provide for appropriate prohibitions of expression or distribution of content violating an individual's right—as well as adequate remedies. However, the substantive decision as to whether and under what conditions an expression of opinion is to be prohibited is essentially determined by the rules of convention and constitutional law and not by those which democratic legislators in parliaments could freely determine. The idea of a context-related comprehensive case-by-case assessment (“ad hoc balancing”) and the framework of requirements developed for this purpose from the ECHR and the European constitutions leave little room for a normative definition of priority rules, especially in respect to the relationship

between freedom of communication and personality rights.<sup>147</sup>

## IV. Institutional support

A striking example of institutional support for strengthening the conditions of a functioning democratic opinion-forming process is the maintenance of a public broadcasting service—in some states also press subsidies.

- Intermediaries being information systems that do not follow an editorial curating logic can convincingly be understood as an argument in favor of policies to maintain and, if necessary, promote all the more professional journalism and editorial media. In this perspective, editorial media should not be seen as anachronistic institutions that are now being replaced by intermediaries, but as an important complement in a more complex news ecosystem.

Intermediaries could thereby be respected in their own right, would not have to be forced into a media-like position and be subject to media law obligations which would become inevitable if they had to take over the full succession in the traditional media function.<sup>148</sup> In such a complementary model, the different rationalities of both systems can develop side-by-side.<sup>149</sup> The media continues to provide important information, classification, and explanatory services upon which communication via intermediaries depends just as, conversely, direct communication in the platforms can be a source of information and a

147 See Matthias Cornils, Article 10 ECHR, in: Gersdorf/Paal, Informations- und Medienrecht, Kommentar (Beck -Online-Kommentar); and Matthias Cornils, Weighing Content: Can expression be more or less important? Categorical or case by case-balancing and its (respective) disposition to rank relevance of communication, in: András Koltay/Paul Wragg (eds.), Research Handbook on Comparative Privacy & Defamation, forthcoming.

148 Drexler, Zeitschrift für Urheber- und Medienrecht 2017, 529 (543); (not really convincing) opposite approach: need to treat intermediaries like media (and thus to impose on them the ethos and legal burden of the media) because they allegedly overtake the function of the media: Jack M. Balkin, How to Regulate (and Not Regulate) Social Media, 2020.

149 German Constitutional Court, 18.7.2018 – 1 BvR 1675/16, 1 BvR 745/17, 1 BvR 836/17, 1 BvR 981/17 (public broadcasting fee), para. 77 et seq.



corrective factor for the editorial media as well. The German Federal Constitutional Court has clearly emphasized this idea in its recent case law. In particular, the importance of public broadcasting is said to have even increased today under the conditions of platform communication. This can be understood to mean that the Federal Constitutional Court also tends towards the opinion expressed here that intermediaries should not be treated constitutionally like media and should be obliged to ensure diversity, as the broadcasters are.

Following this model, the establishment of public non-commercial institutions in the field of search engines, or other Internet services as well, is sometimes also suggested. The recently intensified efforts to combat disinformation, ranging from fact-checking networks to active strategic counter-communication from the newly established task forces under the auspices of the European External Action Service,<sup>150</sup> are also part of this category of institutional support. Finally, the whole range of measures in the field of education and promotion of media literacy fall under this dimension.

- The option of state or public funding of private information offers, although it does not involve state bans, nevertheless raises fundamental questions. Under no circumstances should state subsidies be a means to influence the content of media coverage.

This does not exclude any differentiation, for example, in the funding of the press; however, this differentiation must be designed in an opinion-neutral way.<sup>151</sup> In any case, a subsidized press is no longer a

fully private press but must meet the expectations and obligations of the financier.<sup>152</sup> A publicly funded and organized search engine will function differently from Google—probably not obviously better given the company's enormous financial and innovative power. This is not just an economic issue either but touches on the fundamental logic of the service in question and thus the cultural dimension of the news ecosystem. However, and notwithstanding these difficulties, as a consequence of the findings to date,

- it might be appropriate to support a continuing institutional role of independent professional media (e.g., a vital public broadcasting service) but also to promote alternative offerings and forces that can contribute to improving the social benefits of intermediaries, since the possibilities of a hard law steering of intermediaries are apparently limited.

150 For a critical analysis see Paul Butcher, Disinformation and democracy: The home front in the information war, EPC discussion paper January/2019.

151 German Constitutional Court, 6.6.1989 – 1 BvR 727/84 (Postal Newspaper Service), para. 28: “Article 5 (1) sentence 2 of the Basic Law [requires], that any influence on the content and design of individual press products as well as distortions of competition in the publishing sector as a whole be avoided. State subsidies may neither favour nor disadvantage certain opinions or tendencies.”

152 See with regard to the German Basic Law, which guarantees the press not only as an institution but also as a private sector press German Constitutional Court, 5.8.1966 – 1 BvR 686/62, 1 BvR 610/63, 1 BvR 512/64 (Spiegel), para. 37; Matthias Cornils, in: Martin Löffler, Presserecht, 6<sup>th</sup> ed. 2015, Landespressegesetz § 1, para. 174.



## D. The scope of application and competence

Legislators are always faced with the choice of designing their regulations either broadly and comprehensively or in a sectoral manner, addressing only specific and particularly urgent problems. Of course, the first decision to make is whether to introduce a regulation with regard to the respective phenomenon at all or to leave the matter to self-regulation by the market or societal activities. Once the need to intervene has been affirmed, the question arises as to the nature of the proposed scheme, especially in terms of its scope of application.

This question also plays an important role in platform governance.

- As an increasing amount of different legal acts—with different objectives but partly overlapping areas of application have been and are being created at different levels of regulation (EU and member states, partly further subdivisions in federal systems such as in Germany)—the need for a coherent overall system of all these regulations is growing.

This means, in particular, that the alternative between either an overarching general regulation of as many or all issues as possible or a structure of numerous special regulations, which must then be well—and probably better than previously—coordinated with each other, is gaining importance.

The increasing problems of coherence naturally are also aggravated by the complexity of the European

multi-level system due, in particular, to the principle of the limited attribution of competences to the Union (principle of conferral). A comprehensive codification also requires a comprehensive competence of the codifying legislator. Insofar as the EU does not have such a comprehensive competence, it is limited to, at most, sectoral regulations. Questions of the material scope of regulation and of competence (i.e., in the European multi-level system, the regulatory level, are thus interlinked. For this reason, a careful examination of regulatory competence is particularly important for a possible (and currently discussed) project of comprehensive platform governance at the Union level, which may involve both the problem of control and responsibility for illegal or harmful content and issues of ensuring diversity and freedom from discrimination, thus encroaching on areas previously left to the member states (see below, 4.).

However, the question of scope and, therefore, coherence also occur at one and the same level, particularly in the course of EU legislation, indicating potential for improvement in the way the areas of application are tailored or at least mutually coordinated.

- This new plurality of different regimes, which has grown over the last few years, some of which have a general scope of application while others are limited to specific sectors, deserves attention not only because of the problems of demarcation or coordination that arise as a result; rather, in the course of this development, substantive differences in concept, even of a fundamental nature,



between different regulations become apparent, which raise the question of whether the legal system thus created is, on the whole, sufficiently coherently based on common principles and guiding principles.

Of course, these substantive differences also are related to the conditions under which the respective legal acts were created, such as, at the EU level, different internal competences in the commission and different objectives and regulatory philosophies in the various sectors (e.g., internal and external security, audio-visual media, telecommunications, economic and competition law).

## **I. Scope of legislation and its impact on the coherence of EU law**

At the level of EU legislation, this drifting apart of different regulatory ideas and regulatory designs can be clearly observed:

It is becoming clear that the safe-harbor rules limiting the liability of platforms in the 20-year-old e-commerce directive (ECD), which is comprehensive in its scope, are coming under increasing tension with other later adopted or proposed sectoral legislation aimed at increasing the responsibility of platform providers. It is, therefore, unsurprising that the possible need to revise the ECD itself has now become a focus of the reform debate (see above). However, internal tensions within EU law in terms of philosophy and regulatory content relate not only to the relationship between sector-specific regulations on platform responsibility and the ECD but also to the relationship between these sectoral laws themselves.

## **1. Competing models: The AVMSD and the TCOR proposal**

As far as internal tension within EU law is concerned, the emerging competition between the supervisory regime of the TCOR proposal, the rules for video-sharing platforms in the amended AVMSD, and the safe harbor provisions in Articles 14 and 15 of the ECD are striking. The supervisory powers of the TCOR follow a completely different “police law” rationality than the provisions for platform operators in Article 28b of the AVMSD. If the latter seek to maintain compatibility with the ECD, the tension between the TCOR rules and the old liberal accountability regime for host providers is palpable. Furthermore, the scope of the AVMSD overlaps with that of the TCOR, and the former also aims to protect against criminal content and, thus, especially content that promotes terrorism.

- To a certain extent, there are now two quite different EU law approaches to combating criminal content in platforms with overlapping scope.

Of course, it is not impossible to use different regulatory models for different problem situations and challenges, even sector by sector: regulations for the protection of minors or for copyright protection do not necessarily have to be designed in the same way as those for combating terrorism (e.g., via mechanisms for preventing or removing online content that could promote terrorist acts). The uniformity of law and its instruments is not a value in itself. Accordingly, it cannot be said that a regulatory philosophy that summarizes all regulatory challenges arising from a cultural technique in an overarching general codification must, in all circumstances, be regarded as superior to multiple sectoral regulations. Even the GDPR, acclaimed as a milestone of a comprehensive codification of data protection, contains, a plethora of derogations and opening clauses, by virtue of which the member states are entitled to lay down different rules (e.g., in Article 85, concerning data



processing for journalistic, literary, artistic or scientific purposes).<sup>153</sup>

- Sectoral regulations can respond more precisely to the more specific characteristics or requirements of the narrower regulatory area in question; for example, in the case of platforms, they can be more closely tailored to the very different services and their different risk profiles.
- A general system of rules, however, if it is designed coherently, is probably more likely to avoid unintentional or not sufficiently clearly resolved competing claims of applicability or inconsistencies of different standards regarding the valuations on which they are based.

However, it must be sufficiently flexible to leave room for the necessary differentiation, either by means of exceptions or by means of sufficiently abstract rules, which are then specified in detail at a lower level of regulation (e.g., by implementing provisions or at individual case level).

## **2. Sectoral or comprehensive approach: A change of course in the EU?**

In fact, it has been known for months that the Commission is considering a far-reaching recast of the regulatory framework for the platform industry, including a revision of the ECD—although this idea has not yet been specified in detail. The above-mentioned note on a future Digital Service Act explicitly mentions a possible change of course in the regulatory

approach of the European Union.<sup>154</sup> Thus, the current Commission's concept of a "sector and problem-specific approach" shall be complemented by "a revised set of rules" making the recently adopted rules "more impactful through a harmonization step". Nevertheless, the paper lacks clarity: What does "complementation" mean in this context? Should the sector-specific rules that have just been adopted (i.e., the copyright directive, the P2B regulation, the provisions in the AVMSD considering video-sharing platforms, the proposed TCO regulation) be replaced, or should the new general rule only be added to the old rules which continue to apply? The latter option would obviously give rise to considerable new coherence problems. At least, this problem is also acknowledged and addressed in the note itself.<sup>155</sup>

Apart from that, however, it seems clear that the proposed approach is aimed at being very comprehensive, thematically in terms of the subjects regulated and in terms of the range of services covered.<sup>156</sup> Of course, while it is not yet clear which regulatory subjects the announced provision of "a clear, uniform and up-to-date innovation friendly regulatory framework in the Single Market" should cover, apparently, the note emphasizes the harmonization of the now fragmented rules aiming "to tackle online harms and protect legal content", but it extends beyond this and mentions the need of a review of the ("outdated") liability rules of the ECD in general. This is to eliminate competition disadvantages and entry barriers for European companies and innovative services, especially collaborative economy services. Furthermore, it makes references to online advertising services, transparency obligations for algorithmic

<sup>153</sup> See Jürgen Kühling, Mario Martini, Die Datenschutz-Grundverordnung: Revolution oder Evolution im europäischen und deutschen Datenschutzrecht, in: Europäische Zeitschrift für Wirtschaftsrecht 2016, 448; Matthias Cornils, Artikel 85 DSGVO, in: Hubertus Gersdorf, Boris Paal (eds.), Beck Online Kommentar Informations- und Medienrecht (2019).

<sup>154</sup> For a critical perspective see: <https://netzpolitik.org/2019/leaked-document-eu-commission-mulls-new-law-to-regulate-online-platforms/>; <https://edri.org/more-responsibility-to-online-platforms-but-at-what-cost/>.

<sup>155</sup> The last "question for discussion" posed in the note is: "How can we ensure proper coordination across instruments, e.g. during the transposition period for Copyright and the revised AVMSD?"

<sup>156</sup> Highly critical: <https://euinternetpolicy.wordpress.com/2019/07/30/the-eu-digital-services-act-what-it-is-and-why-it-shouldnt-happen/>.





recommendations systems of public relevance, interoperability standards, and requires an (institutional) “regulatory structure” to “ensure oversight and enforcement of the rules”. With regard to the kind of platforms addressed, the note seems to be rather clear in its commitment to a broad approach: “The scope would cover all digital services, and in particular online platforms. [...] would address all services across the Internet stack from mere conduits, such as IPSs to cloud hosting services”.

### 3. Coherence problems in competing regulations at the EU and member state levels

- At the member state level, there are also examples of both broader and sectorally specific regulations that are set in different thematic contexts, but which thus raise problems of coordination both among themselves and in their relationship to EU law.

The emerging conflict between civil (contract) law and media law standards of non-discrimination in Germany has already been mentioned above. However, there are further examples that can illustrate the problem.

#### a) For example: Complexity of platform regulation in Germany

The drafted German Media Treaty is, in terms of platforms, a body of rules and regulations stemming from the tradition of broadcasting law, which is designed to comprehensively regulate issues related to ensuring the diversity of information in and the accessibility of media content on platforms. In order to safeguard diversity, the Media State Treaty

introduces new provisions for media intermediaries and video-sharing platforms while also extending the already existing provisions on platform regulation to virtual platforms and substantially modifying these latter provisions on “media platforms”. Taken as a whole, these new provisions undoubtedly aim to create a comprehensive regime covering all types of platforms under the common objective of ensuring diversity. But the example also immediately makes clear the limits of this claim to be as complete a regulation as possible:

#### (1) Interstate Media Treaty (Länder) and Tele Media Act (federal legislation)

Firstly, the regulation of media platforms and intermediaries in the Interstate Media Treaty is by no means exhaustive and exclusive. For example, the regulations on the responsibility of platforms, which extend back to the ECDE, are still not to be found in the State Treaty but in the Federal Act on Telemedia (TMG). This division of regulatory responsibility, which is rooted in the German federal competence system, continues in the new regulations on video-sharing platforms, which are to be issued by the member states in accordance with the AVMSD. The main provisions concerning the monitoring obligations of video platform operators will be implemented in the TMG, while the State Treaty will focus on a few organizational provisions, particularly the obligation to establish an authorized delivery agent.<sup>157</sup> Furthermore, the Interstate Media Treaty does not cover the topic of the protection of minors, which, for disputed reasons of competence, is itself divided into two parts: a separate Interstate Treaty on the Protection of Minors in the Media (concerning the protection of minors in the electronic media) and the Federal Youth Protection Act (concerning the protection of minors in the press). Finally, the obligations of social networks to introduce a functioning system for complaint management and the deletion of criminal content, are not regulated

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157 Sections 97-100 German Interstate Media Treaty (draft).



in the Interstate Media Treaty but established, again controversially, by the federal government in the Network Enforcement Act 2017.

## (2) Precariousness of a comprehensive approach encompassing different types of services

Secondly, the platform regulation in the Interstate Media Treaty itself, albeit attempting to regulate this matter comprehensively also makes clear the downsides of such a comprehensive regulatory approach. Since the scope of such rules is extended to very different services (e.g., to meet the perpetual demand for a “level playing field”),<sup>158</sup> they must contain both exceptions and special rules that take account of the respective differences. Therefore, the must-carry-obligations long established in German broadcasting law are, therefore, still limited to infrastructure platforms (e.g., cable providers) in the draft treaty and do not apply to over-the-top services, i.e., services offered via the open World Wide Web (e.g., Netflix or Zattoo), although the latter are also media platforms in the broader sense of the Interstate Media Treaty.<sup>159</sup> However, critics of the new comprehensive approach (including virtual platforms and intermediaries) go beyond this point and thus reject other obligations now applicable on OTT platforms, such as the obligation to grant non-discriminatory access. They complain, with good reason, that these services usually do not cause a gate keeper-problem comparable to that of the infrastructure platforms and that there is, therefore, no necessity to subject them to comparable regulation.<sup>160</sup>

Similarly, the now envisaged overarching scope of the intermediary regulation provisions, which includes social media as well as search engines and news aggregators (although they are completely different in terms of functionality and significance in the formation of opinion, is strongly criticized.<sup>161</sup>

- The more general a regulation is in scope, the more likely the risk of regulatory overspill. Indeed, there is no doubt that it would not be appropriate to combine all intermediaries together and subject them all to the same standards.

For this reason, the authors of the Interstate Media Treaty draft stress that the competent authorities (i.e., the state media authorities organized independently of the state) should make the necessary distinctions when applying the provisions of the Treaty.

- However, the drafting of broad, general provisions at the legislative level, combined with a delegation of the task of further differentiation to the competent authority only shifts the problem of adequate solutions for various services to a lower level of regulation and also raises the question as to whether the parliamentary legislature is in this way, meeting its goal of answering the important regulatory questions itself.

In any case, such a delegation of the central aspects of the regulation of the administration does not serve

158 The call for a “level playing field” has been for years (or even decades?) a ceterum censeo of private broadcasting companies arguing to be discriminated against the press or online on-demand-service providers because of being subject of the relatively stricter regulation of linear broadcasting services in the Union and the Member States; the argument, of course, can be used to criticize other allegedly unjustified unequal legal treatments as well (for example between infrastructure-based platforms and “virtual” platforms etc.).

159 Proposal Interstate Media Treaty (German Länder), § 52b (1) “The following provisions apply to infrastructure-based media platforms. [...]”. Critical against extensions of must-carry-rules on virtual platforms (not compatible with the principle of proportionality and, therefore, unconstitutional) for example C. Wagner, in: Binder/Vesting (eds.), Beck’scher Kommentar zum Rundfunkrecht, fourth edition 2018, § 52 RStV §§ 50 ff.

160 Dreyer/Schulz (Hans-Bredow-Institut Hamburg), Stellungnahme zum zweiten Diskussionsentwurf eines Medienstaatsvertrages der Länder vom Juli 2019: “In any case, a general ban on discrimination does not do justice to the different forms of new platforms and user interfaces and their respective functions and their theoretical relevance for the opinion-forming process.” (transl. MC).

161 Dreyer/Schulz (ibid): “The logic of aggregation, the motives and the production process, the user-related need for information and the role of these types of services in the process of opinion formation are so different that such a broad concept [of the media intermediary] must lead to difficulties at the level of legal application. (transl. MC).



legal certainty. This is clearly a disadvantage of a necessarily more abstract comprehensive codification.

This complicated and—from the outside perspective of an observer who is not used to a federal system—certainly confusing the attribution of various aspects of platform governance to different levels of competence and laws in German law is not to be discussed in further detail here. However, it should hopefully have become clear from the brief outline of some of the coexisting regulations in Germany that this regulatory plurality is indeed associated with a number of highly controversial problems of competence and coherence. It also reflects, to a certain extent, the increasingly pluralistic structure of various EU rules governing platform regulation that has grown over the years (e.g., the TMG representing the German law to implement the ECD while the Media Interstate treaty (until now the “Broadcasting and Telemedia Interstate Treaty”) implements the AVMSD, and so forth.

- In sum, at both the EU and the member state levels, the bundle of legal standards appears to have grown into a somewhat unsystematic structure and is now subject to considerations of revision.

#### **b) Overlaps and present or potential conflicts between EU and member state law**

As mentioned at the outset of this paper, regulatory activity is now increasingly being proclaimed at both levels, the Union and the member states, and is thus experiencing an increasing amount of competition. The former reluctance on the part of the Union to regulate content and ensure media pluralism appears to be gradually becoming abandoned. This can be observed in the reformed AVMSD—albeit to

a limited extent<sup>162</sup>—as well as in the European Commission’s efforts to encourage Facebook, Google, and others to delete illegal content more effectively. Already, the EU’s sectoral legislation, such as the P2B Regulation or the planned TCOR, overlap in areas that have, thus far, only been addressed by the member states. This growing competition of laws causes considerable, hardly recognized, let alone solved, coherence problems.

For example, Germany is, as previously mentioned, now attempting to implement the provisions of the AVMSD considering the moderation obligations of video-sharing platforms (article 28b AVMSD) in an amendment to the TMG while at the same time leaving the competing provisions of the still existing Network Enforcement Act (NetzDG), which address, least partially, the same problems, untouched. Thus, in a way, the German NetzDG has been overtaken by the EU-AVMSD for the sub-sector of video-sharing services. Although both laws (the TMG implementing the AVMSD and the NetzDG) provide for rules on how to address reports of illegal, in particular criminal, content, these procedural rules are incongruent, and a rule of precedence is needed. The draft of the TMG Amendment Act, therefore, orders that “the provisions of the Network Enforcement Act [...] take precedence over the provisions of Sections 10a and 10b TMG”. Technically, this may solve the problem of competing standards, and it may be argued that the stricter deletion obligations of the NetzDG only apply to very large social networks (which have two million registered users in Germany or more), such as video platforms like YouTube, whereas the more elastic obligations of the AVMSD/TMG also cover—without any de minimis threshold—smaller video platforms. Admittedly, Article 28b (6) of the AVMSD also allows member states to impose stricter requirements than those set out in the directive. Nevertheless, the

<sup>162</sup> See, for example, articles 7a and 7b AVMSD Amendment Directive; indeed these provisions only empower the member states to regulate but refrain from establishing rules at the EU-level. Nevertheless, they refer to the subjects of ensuring quality of information (i.e.: permission to member states to establish obligations to show general interest content prominently) and of content protection (i.e.: protection against overlay and other unwelcome modification of content) which hadn’t been covered by the Directive until now.



coexistence of two regimes for complaint management systems, the primary of which (in the NetzDG), in its still valid version, is clearly less mature and, therefore, subject to considerable legal concerns, is not substantially convincing.<sup>163</sup>

The compatibility of the NetzDG with EU law is, as briefly described above, also doubtful in other respects (in particular: probable incompatibility with the country-of-origin-principle of the ECD), and the German example illustrates the extent to which the Union's action in this area already limits the scope of member states acting solitarily.

- Furthermore, provisions of the German Network Enforcement Act and the French loi Avia problematically overlap with the planned TCOR.<sup>164</sup>

According to the nature of the legal act “regulation” (Article 288 para. 1 TFEU), the concrete obligations of the TCOR, which are directly applicable in the member states (if the TCOR will be adopted and enter into force), do not tolerate any duplication in member states’ legislation—let alone any divergence in substance.

- Furthermore, the intermediary regulation in the Media State Treaty, even if the drafters deny it, will have a considerable overlap with the P2BR<sup>165</sup> insofar as the latter includes search engines.

It is doubtful whether the different scopes of application of the two transparency rules as well as the

admittedly different objectives (fairness in economic competition and safeguarding the diversity of opinion) can justify clearly overlapping, therefore, competing, and thus potentially contradictory legal requirements, which are all the more subject to different jurisdictions (of either the European or, exclusively, the domestic courts).

## **II. Level of legislation on platform governance matters**

Member states’ legislation on platform governance, which has been put in place in recent years, puts pressure on EU policies. This is particularly the case when member states’ specific rules call into question the functioning of the internal market or, as described, even undermine the uniform application of Union law.

### **1. Legal fragmentation through divergent legislation on platform regulation matters at the member state level**

- The more frequently member states implement their own different legal concepts and designs, (e.g., a content monitoring system for intermediaries), the more fragmented the legal situation in Europe becomes in an extremely important area of the internal market and also of the, in any case ideal, common cultural values.

163 As described above, the draft of a further NetzDG amendment law recently introduced in the parliamentary procedure now aims to implement Article 28b AVMSD also in the NetzDG. Although this may mitigate the problem of different standards described above, the doubling of the implementation of the directive in two acts makes the phenomenon of overlapping even more obvious.

164 Compare the very concrete powers authorities are conferred with by articles 4-6 of the TCOR (Removal orders, Referrals, request of proactive measures) with the procedural duties of social media networks according to the French or German enforcement acts.

165 Compare Article 5 para. 2 Regulation (EU) 2019/1150: “Providers of online search engines shall set out for corporate website users the main parameters determining ranking, by providing an easily and publicly available description, drafted in clear and unambiguous language on the online search engines of those providers. They shall keep that description up to date.” with the proposed § 93 para. 1 German Interstate Media Treaty, which deal with the same obligation on search-engines: “Providers of media intermediaries shall keep the following information easily perceptible, directly accessible and permanently available in order to safeguard the diversity of opinions: 1. the criteria which decide on the access of a content to a media intermediary and on its whereabouts, 2. the central criteria of aggregation, selection and presentation of content and their weighting, including information on the functioning of the algorithms used in understandable language.” (transl. M.C.).



In fact, some member states, such as Germany and France, are currently moving in this direction. Platform governance, especially under the banner of taming the giant US companies, has obviously become a policy area that promises to generate political returns and has, therefore, also become interesting for national solo efforts. This applies to both measures against hate speech and criminal content as well as transparency obligations or requirements for the non-discriminatory curation of content.

## **2. Member states' legal activism being an incentive for developing EU Law**

Due to the fragmented and centrifugal effects of these activities of the member states, it is understandable that the Union legislator feels challenged to become even more engaged in this policy area. In fact, the decentralized initiatives currently under way may even provide the impetus for a further centralization push in platform governance in the direction of greater harmonization or even full regulation by EU law, an effect which, may be either desirable and intended or, on the other hand, contrary to the objectives actually pursued by the member state governments.

Besides, the commission has already shown clear skepticism towards the practice of divergent legislation in the member states, especially the German and French laws. The leaked note regarding the potential features of a future DSA is quite clear in this respect: the proposed general rules on transparency obligations for algorithmic recommendation systems should explicitly also serve the purpose of avoiding "that member states impose parallel transparency obligations at national level, thus providing for a simple set of rules in the Single Market." Obviously, should the plan become a reality, this calls into

question member states' real and possible efforts to regulate intermediaries.<sup>166</sup>

- From a more fundamental perspective, the question as to whether a matter of regulation should be harmonized throughout the Union or whether it should be left to the responsibility of the member states must be analyzed and then answered in all further communication regulation projects. This is, of course, not only a question of expediency but also of legal competence and subsidiarity.

## **3. Political and economic advantages of a Union-wide legislation**

In terms of political expediency and economic advantageousness, the advantages of uniform or at least harmonized requirements for platform governance across Europe seem obvious. The larger intermediaries offer their services globally. Although it may not be the first concern of European legislators to offer the currently leading US service providers the most uniform and, therefore, easier to manage conditions for their activities in Europe, it might nevertheless be desirable to formulate a uniform strategy towards US corporations backed by the full market power of the Union. Harmonized standards are, therefore, all the more urgently in the interest of possible future European competitors. The undoubtedly desirable objective of increased competition in social networks and search engines, overcoming the current highly concentrated structure of providers, does not require further explanation and is easier to achieve under equal and uniform conditions.

- In general, it seems probable that the idea of a coherent, comprehensive, and standardized framework (or even a directly applicable

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<sup>166</sup> See COM, Proposal of a TCO-Regulation: "A fragmented framework of national rules to tackle terrorist content online is appearing and risks increasing."





regulation) for the better regulation of global platforms is so compelling that it will hardly be stopped.

National advisors, as well, call for a European solution to overcome, or in the case of future regulations, to avoid regulatory fragmentation in Europe.<sup>167</sup> In legal terms several models for a centralized management of the regulatory task at the EU level can be considered, which all the more are understood from various legal acts already in force. This variety results from different possible combinations between the nature of the legislative act, i.e., either the *directive* or the *regulation* (and furthermore the scope and degree of harmonization respectively chosen) on the one hand, and the *principle determining the scope of the act* on the other hand. With regard to the latter, either the territoriality principle, or the country-of-origin-principle, or the *lex loci solutionis* may be considered. They differ in their level of harmonization and effectiveness both in terms of achieving the regulatory objectives (e.g., effective curbing of illegal content) and in terms of protecting the integrity of the internal market. Without going into this question in detail here, the alternatives can be outlined as follows.

- Whether the type of legal act chosen is the directive, which requires implementation by member state law, or the directly applicable regulation, is possibly less important than other structural decisions.<sup>168</sup> What is more decisive is the form the directive or regulation takes, either as (wholly or largely) closing full harmonization or as a mere framework or minimum rule with considerable scope from which member states can specify and deviate.

The regulation has the advantage (if its scope is not weakened by exceptions and regulatory reservations

in favor of the member states) of creating a single, identical body of rules throughout the Union. It, therefore, does not require rules on the territorial applicability of the various member state rights in Europe and is particularly effective at ensuring the marketability of services in the internal market.

- Since a regulation does not have to provide for the country-of-origin-principle (to ensure cross-border freedom of services), which is linked to an establishment in a member state (and even more so to only one legally relevant establishment in one member state), it can instead easily apply the *lex loci solutionis* (e.g., like the GRDP).

This means—and is, therefore, of the utmost importance with regard to transatlantic or globally active Internet services—that platform providers, irrespective of whether they are established in the Union or not, are subject to European law provided that their services are geared toward use in Europe, which is the case for all major US services. On the other hand, a regulation, since it leaves no room for implementation by the member states, is presumably politically more difficult to get approved in regulatory areas with more divergent interests and positions of the member states, or only at the price of exceptions, opening clauses, or an unsatisfying low standard of harmonization.

Therefore, the legal form of a directive is also conceivable if it sets sufficiently substantive standards, which, in turn, is a prerequisite for the adequate protection of the functioning of the internal market. This is indispensable if the directive is combined with the country-of-origin-principle (as in the case of the ECD and the AVMSD), because, otherwise (with only low or no coordination), the well-known risks of forum shopping are likely to arise (e.g., in terms of US platforms,

167 See, for example, the report of the Data Ethics Commission (charged by the German (federal) Minister of the Interior), that emphasizes the “European way” of regulation (p. 226 f.).

168 A Directive too can fully harmonize the law of the member states whereas regulations (as, for example, the GDPR) may contain far-reaching “opening clauses”, which overall lead to a more directive-like character, see with regard to the former Data Protection Directive 95/46/EC German Constitutional Court, 6.11.2019 – 1 BvR 276/17 (Right to be forgotten II), para. 38 et seq.





in the notorious form of the “Ireland problem”), and it cannot be expected that the other member states will accept these much discussed risks much longer. The country-of-origin-principle of the ECD, although it refers to the progressive idea of an open internal market with the lowest possible transaction costs, has been criticized, because its precondition that all member states can rely on legal standards in the respective country of establishment that are acceptable in their view has turned out to be fragile and, also, because it stands in the way of the applicability of EU or member state law to foreign platform services without regard to an inner-European establishment. If the type of a directive is chosen, this could be a reason to abandon the country-of-origin-principle and instead establish the *lex loci solutionis*, as the member states currently leading the way in platform regulation are already doing—even if in partial disregard of the ECD.

- Of course, the directive must also reach a sufficiently strong harmonization if not the country-of-origin but the territoriality principle, preferably combined with the *lex loci solutionis* is established (e.g., copyright law, which is fully harmonized in regard to protected rights and limitations), because only in this way can the otherwise threatened fragmentation of the law in Europe and, thus, a serious impairment of the internal market be avoided.

However, whether the Union is currently in the political condition to achieve sufficient agreement among the member states and also sufficient majorities in the European Parliament with regard to common action, particularly uniform and generally accepted standards of regulation, is another matter. Some European legislative procedures, such as the intricate deliberations on the DSMD or now the TCOR, have

made it clear that there are major, sometimes fundamental differences of opinion in terms of the appropriate instruments in platform regulation within and between the institutions involved in the legislative process, particularly between the Commission and Council versus Parliament.

- Compared to these difficult conditions for reaching a consensus in the European legislative process legislation, the member states may have advantages in efficiency, but only if due to the respective constitutional conditions for legislating the barriers to a political agreement are smaller and there is less pressure to compromise.

This, for example, is not the case with regard to subjects of German media law being subject to the legislative power of the Länder). And the recent complications in the parliamentary procedure on the French loi Avia may serve as an example of the fact that even in centrally organized member states, consensus or at least legislative majorities to adopt statutes on platform regulation issues are not always easy to reach: The Sénat did not accept the central provision still approved by the Assemblée Nationale on the 24-hour removal obligation of platforms; thus, the proposal has, therefore, entered a new round of deliberation<sup>169</sup>. It could be once again understood that the fundamentally divergent points of view on the appropriate legal arrangement of the content responsibility of platforms need to be discussed at all levels, at the EU and member state level.

### III. The question of competence

Of course, there is also the problem of regulatory competence: comprehensive codification also

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169 See Rapport n° 239 (2019-2020) de M. Christophe-André FRASSA, sénateur et Mme Laetitia AVIA, député, fait au nom de la commission mixte paritaire, chargée de proposer un texte sur les dispositions restant en discussion de la proposition de loi visant à lutter contre les contenus haineux sur internet, déposé le 8 janvier 2020; <http://www.senat.fr/rap/19-239/19-239.html>; see for a short overview <https://www.20minutes.fr/politique/2677923-20191218-lutte-contre-haine-ligne-senat-vote-version-proposition-loi-tres-difference-assemblee>.



requires the comprehensive competence of the codifying legislator. Even if it is accepted that the Union's internal market competences give it very far-reaching room to maneuver, the adoption of an increasing amount of regulatory issues previously regulated in the member states' media law requires careful consideration. Thus, if also in the field of platform regulation, the EU exhibits a regulatory competence based on the attribution of competence for fundamental freedoms and for ensuring the functioning of the internal market (Article 114 TFEU) while additionally respecting the principles of subsidiarity and proportionality, it does not mean that this competence also comprehensively covers all questions of the safeguarding diversity of information or the better enforcement of the civil or penal protection of personality rights. Due to a lack of competence with regard to the cultural dimension of broadcasting, the EU has, since the adoption of the Television Without Frontiers Directive in 1989,<sup>170</sup> refrained from a complete and full harmonization of the broadcasting law of the member states and instead limited itself to a "minimum harmonization approach"<sup>171</sup> of the subject matter insofar as it is of particular importance for the freedom to provide services in the internal market (e.g., the framework for regulating commercial communications). Notwithstanding this thematically limited scope of the former TVWFD, community competence was widely denied at the time (e.g., by all German Länder) insofar as the directive (as the AVMSD

still does today) contained (and continues to contain) regulations with not only economic but also cultural significance.<sup>172</sup> Traditional areas of regulation for ensuring diversity, such as the prevention of media concentration, have so far not been claimed by the EU but rather left to the member states.

It is true that considerations to raise this subject matter to the level of EC (now EU) law were made years ago, such as by the Commission and the Parliament, but they have not been taken any further due to doubts as to whether the Union has sufficient competence.<sup>173</sup> In its 2018 revision, the AVMSD again refrained from introducing rules to ensure the diversity, findability, or quality of content on platforms but explicitly confirms the given power of member states (Article 7a AVMSD). The new regime for video platforms (Article 28a, b AVMSD), correspondingly, is designed only to prevent harmful content—not to safeguard diversity or non-discrimination. The TCOR proposal which is based on Article 114 TFEU as well, is also limited to measures to protect legal interests against illegal – terrorist – content and is, therefore, not a media law regulation in the narrower sense.

Additionally, the ECD expressly makes its scope of application subject to the reservation that it "does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the

170 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23.; see from the recitals: "Whereas this Directive lays down the minimum rules needed to guarantee freedom of transmission in broadcasting; whereas, therefore, it does not affect the responsibility of the Member States and their authorities with regard to the organization – including the systems of licensing, administrative authorization or taxation – financing and the content of programmes; whereas the independence of cultural developments in the Member States and the preservation of cultural diversity in the Community therefore remain unaffected."

171 See COM, proposal for a directive amending the AMVSD, 25.5.2016, COM(2016) 287 final.

172 Especially: the rule on events of major importance for society (now Article 14 AVMSD), the rule on short news reports (now Article 15 AVMSD), the system of quotas for European works (now Articles 16 and 17 AVMSD); see for further information on the then spectacular dispute of competence regarding the TVWFD German Constitutional Court, 22.03.1995 – 2 BvG 1/89, BVerfGE 92, 203.

173 See Commission Green Paper 'Pluralism and media concentration in the internal market' (COM(92)0480—C3-0035/93), and the Parliament's resolution on the Green Paper, OJ C 44, 14.2.1994, 177; European Parliament (2008) Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union (2007/2253(INI)); see further Kommission zur Ermittlung der Konzentration im Medienbereich, Dritter Konzentrationsbericht (2007): Crossmediale Veflechtungen als Herausforderung für die Konzentrationskontrolle, p. 54 et seq.; Jörg Ukrow, Georg Ress in: Eberhard Grabitz, Meinhard Hilf, Martin Nettesheim (eds.), Das Recht der EU, AEUV Art. 167 para. 231 (Oct. 2019), both denying EU-competence to legislate on the subject.



defence of pluralism” (Article 1 para.6). This boundary between e-commerce law, which is determined by Union law based on the internal market competence, and content-related and function-related media law, which is left to the member states, is also reflected in Germany in the distribution of competences between the federal level (TMG as an implementation of the ECD) and the Länder (press and broadcasting law).

- Against this background, from a political point of view, a shift in the previously respected boundaries of competence toward the area of safeguarding openness and diversity of information by designing one overall codification must be carefully considered. In any case, it is likely to meet with some resistance in the member states.
- From a legal perspective, the question of EU competence for comprehensive harmonization of the matter of platform regulation, including the obligations of platforms to ensure the diversity of information, is complex.

On the one hand, Article 114 TFEU certainly provides for a far-reaching competence. It has long since recognized that internal market competence is to be understood as functional (i.e., related to the functioning of the market and not only to a specific subject). Therefore, it can also be used when other regulatory objectives are pursued, such as health or consumer protection.

On the other hand, it is also true that Art. 114 TFEU does not give the Union a general and comprehensive competence to regulate the internal market. The case law of the Court of Justice makes it clear that the principle of conferral and, thus, the legally necessary limitation of internal market competence—so that it

does not degenerate into a blank authorization not provided for in the Treaty, covering all policy areas—must be respected. Harmonization is, therefore, tied to conditions. In particular, it has not been considered sufficient that the act to be adopted ‘has only the incidental effect of harmonizing market conditions within the Community’, whereas it is primarily intended for other purposes.<sup>174</sup> However, it is controversial as to what extent it is important for the competence from Art. 114 TFEU that the Union measure focuses on the objective of protecting the internal market and does not primarily serve other purposes.

This applies, in particular, to the relationship between internal market competence and other “parallel competences”, as defined in Article 2(5) TFEU, which are provided for elsewhere in the treaty and grant only the Union the power to take promotional and supporting measures while expressly excluding the harmonization of member state law.<sup>175</sup> This is also the case for the cultural sector, which includes audio-visual creation, and, in particular, broadcasting (Article 167 TFEU). Admittedly, it is uncertain and requires closer examination (which cannot be made here) as to whether, and if so to what extent, the Union’s competence to promote culture and the associated exclusion of harmonization measures (Article 167 (5) TFEU) actually encompasses the regulation of platforms insofar as it is aimed at ensuring their information function.

Apart from this, at least the case law of the European Court of Justice seems to be inclined to consider Art. 114 TFEU as applicable in addition to the parallel competences (i.e., Art. 167 TFEU), irrespective of the regulatory objective (internal market or other protective purpose) which the measure primarily pursues. Especially in its judgements concerning the Tobacco Advertising Directives, the criterion that the measure

174 ECJ, 17.03.1993, C-155/91 (Directive on waste disposal), para. 19; see also ECJ, 18.11.1999, C-209/97 – Commission v. Council (Regulation on mutual assistance between the administrative authorities of the member states and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters), para. 35.

175 Stefan Korte, in: Christian Calliess, Matthias Ruffert (eds.), EUV/AEUV, 5<sup>th</sup> ed. 2016, Art. 114 AEUV para. 138 et seq.



in question must aim at securing the functioning of the internal market, and (in this case) not with the objective of protecting health (Article 168 TFEU), has been quite clearly rejected. According to this jurisdiction, competence, as defined in Article 114 TFEU, may be used despite the achievement of the other objective being a “decisive factor in the choices to be made”.<sup>176</sup>

If the essential limitation of internal market competence cannot be attained by requiring that the focus of the measure revolve around safeguarding the functioning of the internal market, a precise examination of the conditions of this competence under Article 114 TFEU must take place. These conditions, which must be met in order for the European legislator to be able to exercise the power conferred by internal market competence, are that the national rules whose harmonization is sought by the measure are liable to either restrict the exercise of the fundamental freedoms or cause significant distortions in competition.<sup>177</sup>

Thus, a “mere finding of disparities between national rules is not sufficient to justify having recourse to Article 95 EC” (now Article 114 TFEU), whereas it “is otherwise where there are differences between the laws, regulations or administrative provisions of the member states which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market.”<sup>178</sup> “If the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely

and the measure in question must be designed to prevent them.”<sup>179</sup> Furthermore, the harmonizing measure, according to its regulatory content, must actually aim at securing the internal market. Article 114 TFEU can be used as a legal basis “only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market”.<sup>180</sup>

Whether these prerequisites would be met for a comprehensive re-organization of the responsibility of platforms at the Union level, including the objective of ensuring diversity and the quality of information through platforms, to stabilize the processes of democratic opinion formation, cannot be discussed in more detail here.

- To conclude: Legally, as a consequence of the principles set out above for the understanding of Article 114, a competence of the EU for more far-reaching EU regulations seems possible if, as a result of the current or future legal fragmentation of the member states in this area, the risk of obstacles against the freedom to provide services or competition in the internal market can be proven.

176 ECJ, 5.10.2000 – C-376/98 – Germany v. EP and Council (Tobacco Advertising Directive I), para. 88; ECJ, 12.12.2006, C-380/03 – Germany v. EP and Council (Tobacco Advertising Directive II), para. 39.

177 ECJ, 8.6.2010, C-588/08 – The Queen on the application of Vodafone et al. v. Secretary of State for Business, Enterprise and Regulatory Reform, para. 32; see for more detailed information Korte (note 175), Art. 113 AEUV para. 39 et seq.

178 ECJ, 12.12.2006, C-380/03 – Germany v. Parliament and Council (Tobacco Advertising Directive II), para. 37; see also C-491/01 – British American Tobacco (Investments) and Imperial Tobacco, para. 60; C-434/02 – Arnold André, para. 30; C-210/03 – Swedish Match, para. 29; C-154/04 and C-155/04 – Alliance for Natural Health and Others, para. 28.

179 ECJ, 12.12.2006, C-380/03 – Germany v. Parliament and Council (Tobacco Advertising Directive II), para. 38; see also C-350/92 – Spain v Council, para. 35; C-377/98 – Netherlands v Parliament and Council, para. 15; see for a closer look Hans-Holger Herrfeld, in: Jürgen Schwarze (ed.), EU-Kommentar, 4<sup>th</sup> ed. 2018, Art. 114 AEUV para. 31: “preventive harmonisation”.

180 ECJ, 2.5.2006, C-217/04 – UK v. Parliament and Council, para. 42.



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