

### The European Communication (Dis)Order: mapping the media-relevant European legislative acts and identification of dependencies, interface areas and conflicts

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LEIBNIZ-INSTITUT  
FÜR MEDIENFORSCHUNG  
HANS-BREDOW-INSTITUT

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Wolfgang Schulz*

# THE EUROPEAN COMMUNICATION (DIS)ORDER

Mapping the Media-Relevant  
European Legislative Acts and  
Identification of Dependencies, Interface  
Areas and Conflicts

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## 1. Background and aims of the study

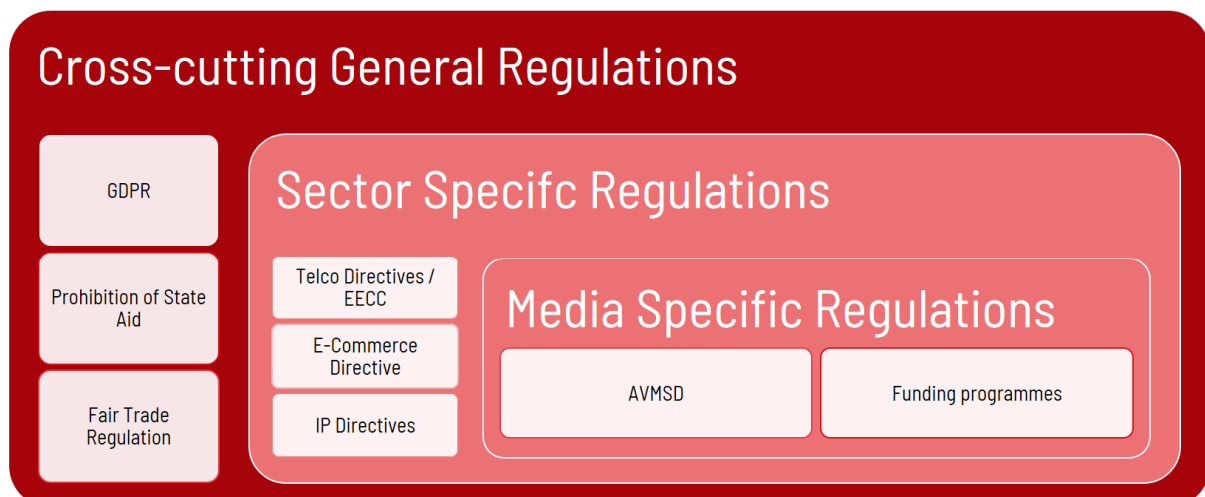
In advance of Germany's presidency of the European Council in the second half of 2020, the Leibniz Institute for Media Research | Hans-Bredow-Institut (HBI) is preparing a number of reports and investigative studies intended to serve as a basis for discussions for the EU Media Conference in July 2020 and the subsequent Focus Sessions. The aim of the HBI investigations is to identify opportunities for medium- and long-term improvement regarding the coherence of the European legislation regulating information and communication. The current legal order is a multi-level system, consisting of standards at EU, German national and federal state level. These are supplemented by provisions from international law, and also self-regulatory standards. Given the structural transformations in public and personal information and communication, the current regulations in this area (which derive from path dependencies that in some cases are decades old) are repeatedly the subject of fundamental debates regarding their coherence, congruence, suitability for current requirements and fitness for the future.

This report is aimed at providing a systematic mapping of substantive law giving rise to the current regulations at European level, describing in overview form the body of secondary law relevant for the current EU media order from the perspective of audiovisual offerings, and analysing the individual legal instruments from a comparative governance perspective, thereby illustrating dependencies, overlaps, structural differences and possible conflicts. This also includes possible interfacing and spillover effects of legal instruments from other areas, whose provisions are (also) felt in the media area and which thus *de facto* have an influence on the media order.

## 2. Relevant legislative acts

The identification of relevant legal instruments was conducted via a comprehensive review of the legislation and literature. While the media-specific EU legal framework is well known and provides key directions for the current EU media order, it is overlaid – in a figurative sense – by a wide variety of further sectoral and general legal instruments which also cover companies in the media and communications sectors.

Fig. 1 Regulatory tiers in the EU media order, with examples





Identification of the legal instruments to be examined in this regard was initially undertaken via a review of jurisprudential overview works on media regulation, of commentaries on media-specific laws and of their references to other legislation, and also on the basis of the practically relevant regulations named by stakeholders in the stakeholder surveys conducted in spring 2020. As a result, some 61 currently valid and planned EU legal instruments were identified; since many of these legislative acts are amending or revoking Directives and Regulations, the analyses touched on a total of 116 legal instruments of the EU (see Annex 1).

### 3. Analytical method: coherence as the focus of consideration

The coherence of policy activities or legal specifications at the EU level has long been an area of study in the political sciences and in comparative law. The methods which have been developed to research policy coherence and convergence or divergence in the law are, however, primarily aimed at comparing nation-states regarding their transposition of European Law provisions (Beaumont 2000). The focus is on how similar or dissimilar the transposition of EU law into the Member States appears, in order to learn something about the degree of EU-internal harmonisation and, ultimately, about the impact of EU specifications on the creation of standardised national legal frameworks. However, in this analysis the primary focus is on mapping and comparing the many legal specifications which are valid in parallel on the same level and which have been passed by the same legislative body; as a result, the goal of a consistent EU legal framework from the perspective of media and communication law is placed in the forefront of the analysis. Homogeneity as a form of expression of coherence is an idea with a long-established history, particularly in discussions of philosophy and the philosophy of law (Rescher 1973). Key expectations of coherence in this regard are, on the one hand, the consistency of existing law, and on the other consistency of comprehensiveness, i.e. of completeness and particularly of inferential unity (Bracker 2002: 171 ff.). While these requirements can be transferred to bodies of law, they were and are intended primarily in reference to legal and juridical argumentation. In this study, by contrast, the emphasis is primarily on the view of legal specifications as instruments of governance (Dose 2008). Here, too, it is a condition of a legitimate legal order that individual legal specifications do not contradict one another (Berteau 2005). This acknowledges the fact that establishing a coherent legal framework becomes an ever more demanding condition as the individual legal norms come to serve multiple and various protective purposes (Weinrib 1988; McGarry 2013). Still, coherence is also seen as a meta-goal of legal frameworks, since incoherence, contradiction, fragmentation or decoupling may coalesce into “unreadability”, in the sense of an inability to assess the legal framework (Raz 1992).

The Treaty on the Functioning of the European Union sets out a principle of consistency as an explicit normative goal for the policies and activities of EU organs, in Art. 7 TFEU. The principle, to be understood as a binding legal instruction, describes the goal of a “consistent realisation of goals and harmonious resolution of goal conflicts in the interests of ‘substantial coherence’” (Ruffert 2016; own translation), at least in those areas where the EU acts in a coordinating capacity. This multi-dimensional imperative (Schmidt-Abmann 2015: 92) also explicitly operates horizontally, i.e. the goal is not only the internal homogeneity of individual legislative acts, but also





the absence of conflicts between legislation across different areas: the EU organs must “have regard in their general and in their legislative actions to the meaningful coherence of each individual act with what is already in place” (Schorkopf 2020: margin number 12; own translation). However, a subjective right to a coherent EU media policy does not follow from Art. 7 TFEU: the principle in the form of a legal imperative is only justiciable to a limited extent, and the EU organs have clear leeway for the exercise of judgement in their decision-making (“margin of appreciation” or “Beurteilungsfreiraum”, Schorkopf 2020: margin number 14). It is also accepted that coherence may diminish by pursuing various goals, particularly if legitimate conflicting rights need to be reconciled (Hoebink 2004; Picciotto 2005). The base threshold of giving consideration to this imperative is reached where an EU organ does not even attempt to pass a coherent measure that is consistent with existing specifications. However, until now legal science has devised only insufficient methods to formalise or measure coherence.

Legal coherence analyses can be guided by sectoral governance studies, as is occurring to some extent in the political sciences under the concept of “horizontal policy coherence” (Lenschow, Bocquillon & Carafa 2018: 323). Here, the policy activities of an actor are analysed across various sectors, in order to be able to make comprehensive statements as to the substantive homogeneity of the different measures (Nilsson et al. 2020). This perspective coincides with the jurisprudential understanding of output-related coherence, insofar as the comparative analysis of multiple legislative acts is concerned. Since individual bodies of law are aimed at one or more particular social issues and stand separately both in time and in terms of their argumentation, they are not specifically matched to one another as a systematic matter of course. Therefore, a task falls to the legislator to enable the individual elements of the legal order “to appear as parts of a contradiction-free, ordered whole which is internally coherent” (Basedow 2016: 5, own translation; Bumke 2016). In some instances, this is also described as “horizontal consistency” (Crawford/Caruthers 2013: 2). However, this goal has not yet become established as a method with consistent specifications and criteria capable of being operationalised. This may partly be due to the fact that the complexity of parallel, overlapping and convoluted sets of rules has only increased significantly in recent years, and that cross-sectoral analyses of different legislative acts has not yet become the focus of legal studies – at least, not systematically.

Basically, a horizontal coherence analysis is aimed at developing analytical dimensions to examine the legal systematics, the legal points of reference as well as the notions of their scope of application, their regulatory purposes and the chosen regulatory instruments, in order to identify structural commonalities, differences and contradictions, together with possible systematic areas of conflict. With regard to the legislative acts of the EU that are under consideration here, further analytical levels need to be included, looking at the leeway at Member State level on the implementation side, assessing designated cooperation mechanisms at the procedural level and also taking into account any regulatory impact assessments and planned evaluation measures with regard to possible duties for optimisation of the European legislator (cf. Drechsler 2019: 194 f.).





Table 1: Analytic dimensions for the coherence analysis

<b>Substantive dimensions of analysis</b>	<b>Procedural dimensions of analysis</b>
▶ Regulatory purpose(s)	▶ Leeway for transposition in the Member States
▶ Material scope of application, services included and their criteria, areas of overlap and distinctions	▶ Cooperation obligations/mechanisms
▶ Territorial scope, particularly the country of origin principle, exceptions or target market principle	▶ Impact assessment / evaluation
▶ Regulatory approach	
▶ Governance structure / implementation	

In a first step, the legislative acts identified were examined using these analytical dimensions, with the analysis being conducted to varying depths depending on the centrality of the media relevance of each act concerned: For Directives and Regulations with a central and direct relevance to media and communications (see Fig. 1 “media-specific regulations”), analyses were undertaken in the dimensions of the material scope of application (and exceptions to that), territorial scope of application, the regulatory purpose(s), the leeway for implementation in the Member States, the regulatory approaches, the legal principles and the respectively established governance structure and intended evaluations, together with previously conducted communications-related impact assessments. For sector-specific regulations that show relevance for the media either indirectly or in individual sections, the analysis for these areas was undertaken in the dimensions of scope of application, the regulatory purpose(s), the legal principles, regulatory approaches as well as evaluations and impact assessments. For general or media-“remote” Directives and Regulations, the relevant individual norms were included in the analysis where they have an impact on information- and communications-relevant services and content. The focus of these analyses was on the dimensions of scope of application, the regulatory purpose(s), the legal principles and evaluations and impact assessments.





Table 2: Analysis matrix

<b>Analytic dimensions</b>	<b>Media-specific rules</b>	<b>Sector-specific rules</b>	<b>General rules</b>
<i>Scope of assessment</i>	<i>Full legal instrument</i>	<i>Sections</i>	<i>Individual rule(s)</i>
▶ Regulatory purpose(s), resp. purpose(s) of protection	☑	☑	☑
▶ Material scope of application, services included and their points of contact, areas of overlap and delimitations	☑	☑	☑
▶ Territorial scope of application, particularly the establishment principle, exceptions or marketplace principle	☑	☑	☑
▶ Regulatory approach	☑	☑	
▶ Governance structure / Implementation	☑		
▶ Leeway for implementation in the Member States	☑		
▶ Cooperation obligations / mechanisms	☑		
▶ Impact Assessment / evaluation	☑	☑	☑

Using this approach, as part of the overall investigation four media-related full analyses, 18 sector-related partial analyses and 32 short analyses were carried out (see Annex 1). The following remarks are aggregated statements on the basis of the individual analyses (Section 4) and drawing on the comparative overall view, having regard to the aspects of coherence set out above (Section 5).

## 4. Analysis of the regulatory framework

As set out above, the individual sets of rules in EU secondary law can be broadly categorised, from the perspective of audiovisual providers affected by the regulations, into three regulatory spheres: at their heart is the specific regulatory framework for audiovisual media services (4.1), which is framed by the more general sector-specific legal framework for all information and communications services (4.2). Beyond this, there is the general legal framework of the EU with a variety of specifications from varied areas of the law which regularly also applies to the activities of media service providers (4.3). Below, the report offers a short inventory of the relevant legal



instruments in these three concentric areas, in order to illustrate the substantive bases and the objects studied in the coherence analysis undertaken in Section 5.

#### 4.1. Media-specific legal instruments

The scope and content of the EU legal instruments in the media sector are characterised by the legislative competencies of the European organs, as deriving from European primary law, i.e. the European Treaties: the guarantee of a free internal market for services – which include audiovisual media services – is the starting-point of all media policy measures; additionally, the EU legislators regularly make reference to the protection of human rights relating to information and communications in Art. 10 (1) ECHR and the (limited) possibilities for their statutory restriction in Art. 10 (2) ECHR as the grounds for harmonising legal instruments in this area. Since media services are also cultural assets, for which the EU has only (limited) supporting competences<sup>1</sup>, the focus at the heart of European media policy is on guaranteeing an EU-wide internal market for audiovisual media and their providers in which an homogenous legal framework is established for the production and distribution of services and content and where fair competition prevails.

The cornerstone of the media law framework at EU level is the **Audiovisual Media Services Directive** (AVMSD)<sup>2</sup>, which primarily sets out specifications in relation to media content. The purposes pursued in it concern harmonisation of specifications in the areas of qualitative and quantitative advertising law, protection of human dignity and minors, accessibility, short news reports of public events, promotion of European works and the independence of regulatory bodies. The specifications in the Directive are regularly<sup>3</sup> not applicable directly, but require transposition into national law by the individual Member States. To clarify which national law a provider is subject to, the Directive contains provisions for determining jurisdiction. These are based on the country of origin principle, which assumes that generally the respective national law of the Member State in which a provider is established applies. For better agreement and cooperation between the Member States in enforcing the implemented AVMSD specifications, the Directive makes provision for the establishment of a European Regulators Group for Audiovisual Media Services (ERGA). The AVMSD does not contain direct specifications for ensuring media diversity, but the recitals include basic pronouncements on the value of media pluralism in the audiovisual internal market.

Alongside the structuring framework of the AVMSD sit individual legislative acts containing **legal provisions regarding specific media content**, for instance in the area of the depiction of child

<sup>1</sup> Article 167 TFEU; previously Article 151 TEU.

<sup>2</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1–24, as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 March 2018 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in order to take account of changing market circumstances, OJ L 303, 28.11.2018, p. 69–92.

<sup>3</sup> Exceptionally, individual provisions of the Directive may be directly applicable if they safeguard the legal position of legal entities and have not been transposed or not fully transposed in a Member State; see ECJ Case 152/84, ECR 1986, pp. 723 f. – "Marshall".



sexual abuse.<sup>4</sup> The proposed Regulation on preventing the dissemination of terrorist content online<sup>5</sup> is also part of these content-related specific rules providing special requirements for dealing with unlawful content.

Further media-specific legal instruments are primarily those establishing funding programmes for European media productions (particularly the **Creative Europe MEDIA Sub-Programme**<sup>6</sup>) and media-specific exemptions, notably in the area of state aid rules<sup>7</sup>. However, these do not constitute direct media content-specific rules for media providers.

## 4.2. Sector-specific legal framework

The EU has closely accompanied the technological, economic and social development of forms of electronic information and communication on the regulatory side at the latest since the start of the 1990s, including via the continuous further development of the corresponding legal regulatory frameworks. On the one hand, corresponding offerings are continually appearing as forms of services, which are particularly supported by the European Treaties. Given this background, sets of rules have come about which have as their subject the provision of electronically provided or electronically disseminated services, with the e-Commerce Directive at the heart of these. The ICT-specific legal frameworks in contract law, intellectual property law and consumer law also belong to this category. On the other hand, electronically disseminated communications content is reliant on the technical infrastructure which transmits the information in the form of electric oscillations or bitstreams. Accordingly, the overall legal framework also notably includes the legislation in telecommunications law, as a primarily sector-specific competition law. Beyond this, the EU regulatory framework contains content specifications operating partly across different services, notably in the area of illegal depictions and expressions.

### 4.2.1. E-commerce and electronic services law

One of the directives which remains of key relevance in the ICT sector is the **e-Commerce Directive**, containing fundamental rules for the provision of electronic services. When adopting this Directive, too, the EU legislators were primarily concerned to create a harmonised area of law via which a minimum standard for the free provision of in this case (commercial) electronic services in the digital internal market is to be ensured. The recitals also make reference to the protection of basic rights relating to information and communications from Art. 10 ECHR, and to the limits on those freedoms. Areas which the e-Commerce Directive harmonises are the principle excluding prior authorisation and the possibility of concluding legally valid contracts in dis-

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<sup>4</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse, sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, p. 1-14, corrected by OJ L 018, 21.1.2012, p. 7.

<sup>5</sup> Proposal for a Regulation of the European Parliament and of the Council on the prevention of the dissemination of terrorist content online, COM/2018/640 final.

<sup>6</sup> Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe programme (2014-2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC, OJ L 347, 20.12.2013, p. 221-237.

<sup>7</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocols - Protocol annexed to the Treaty establishing the European Community - Protocol on the system of public broadcasting in the Member States, Official Journal No C 340, 10.11.1997, p. 0109, as last amended by Article 1(4)(b) H, para. 28 Protocol No. 1 to the Treaty of Lisbon of 13.12.07, OJ No. C 340, 10.11.1997, p. 0109. OJ C 306, 17.12.2007, p. 163.



tance selling, provider-related information and transparency obligations for commercial communications and for contracting, issues relating to resolving disputes and to legal protection, as well as liability privileges in relation to user-provided content in the case of technical intermediary services. The Directive also provides clarification of applicable national laws, similarly starting out from the country of origin principle.

The Directive, adopted in 2000, has come under pressure in recent years in respect of more recent forms of services, particularly with regard to the question of the suitability for current requirements of the liability privileges for intermediaries and platforms. Against this background, the European Commission is planning to modernise the e-Commerce Directive as part of a “Digital Service Act” (DSA). Current recommendations suggest at best cautious changes to the established principles in this area<sup>8</sup>, while conversely others see the DSA as an opportunity to address previously overlooked areas of regulation, such as strengthened transparency requirements for algorithm-based procedures (selection, prioritisation, recommendations etc.), better incorporation of obligations to safeguard freedom of expression and sharing of information, and more innovative forms of handling disputes in the context of content and account deletions by private providers. As part of the announcement of the “Digital Service Act Package” by the new European Commission, the plans were described with new and revised rules to improve the functioning of the internal market for digital services through increasing and harmonising the responsibilities of online platforms and information service providers and strengthening supervision of the content policy of the platforms in the European Union. The consultation running in early summer 2020 also cites diversity risks on platforms as an “emerging topic”.

Tax law, too, is facing new challenges in view of cross-border digital services. Classical corporation tax law always assumes established corporations whose profits are taxed in the place where the value is created, and consequently company earnings can be assigned to a particular country. With non-physical services offered EU-wide and with providers from outside the EU, traditional approaches to taxation are coming up against their limits. The aim of the **Proposal for a Digital Services Tax Directive** (DST Directive)<sup>9</sup> is to create a chargeable event for revenues from the provision of digital services, at a rate of 3%. Tax is to be levied on revenues originating from online display advertising, from multi-sided platforms to arrange services and from the transfer of collected online user data. The place of taxation is deemed to be the location of the end-device used by the user. The new tax liability is to apply for companies who turn over more than EUR 50 million within the EU and EUR 750 million worldwide.

#### 4.2.2. Telecommunications law

The **European Electronic Communications Code (EECC)** to be implemented by 20 December 2020<sup>10</sup> replaces the package of Directives last amended in 2009 in EU telecommunications law<sup>11</sup>

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<sup>8</sup> Cf. Draft Report with recommendations to the Commission on Digital Services Act: Improving the functioning of the Single Market (2020/2018(INL)), [https://www.europarl.europa.eu/doceo/document/IMCO-PR-648474\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/IMCO-PR-648474_EN.pdf)

<sup>9</sup> Proposal for a Council Directive on the common system of digital taxation on revenues resulting from the provision of certain digital services, COM/2018/0148 final - 2018/073.

<sup>10</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), OJ L 321, 17.12.2018, p. 36-214, corrected by OJ L 334, 27.12.2019, p. 164.

<sup>11</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, pp.





- with the exception of the e-Privacy Directive<sup>12</sup> (see below). The aim of both the old and the new legal framework for telecommunications is harmonising the national legal frameworks for electronic communications networks and services, associated facilities and services and parts of end-facilities. Following the full liberalisation of the formerly state-controlled telecommunications networks, the Directives and Regulations are aimed at improved regulation of the markets to ensure increased competition, at realising the internal market for electronic communication and, increasingly, at improved consumer protection and user rights.

The European statutory framework for telecommunications concerns the regulation of electronic communications networks and services, including specifications on the allocation of frequencies and numbers together with cross-country frequency coordinations, specifications on rights of way for establishing and expanding telecommunications networks, provisions for network access and for shared use of network components and facilities, provisions on the security

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33-50; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108, 24.4.2002, pp. 33-50. Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), OJ L 108, 24.4.2002, pp. 21-32, all amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 April 2009 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108, 24.4.2002, pp. 7-20. Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and Directive 2002/20/EC on the authorisation of electronic communications networks and services, OJ L 108, 24.4.2009, p. 21-32. OJ L 337, 18.12.2009, p. 37-69; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51-77; amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 March 2009 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51-77; amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 March 2009 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2009, p. 51-77. Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 108, 24.4.2009, p. 51-77. Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337, 18.12.2009, p. 1-10, repealed by Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 on the harmonisation of the laws of the Member States relating to electronic communications networks and services, OJ L 337, 18.12.2009, p. 1-10. Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, OJ L 321, 17.12.2018, p. 1-35; Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communication networks within the Union, OJ L 172, 30.6.2012, p. 10-35, amended by Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EU) No 531/2012 as regards rules for wholesale roaming markets, OJ L 147, 9.6.2017, p. 1-8; Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks, OJ L 155, 23.5.2014, p. 1-14.

<sup>12</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37-47, as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 June 2009 on privacy and electronic communications Directive 2009/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ L 337, 18.12.2009, p. 11-36.





and integrity of networks and services, and specifications on the standardisation and interoperability of networks, services and associated facilities, including digital TV services. To implement the various provisions, European telecommunications law envisages a series of procedures, including the monitoring of dominant telecommunications companies, procedures to analyse and define relevant markets and procedures for resolving disputes between companies.

The relevance of the statutory framework for telecommunications for the audiovisual sector is high: while European telecommunications law excludes applicability to transmitted content, providers are necessarily reliant on infrastructural services and networks to provide an audiovisual media service, and to offer general information society services. They need a transport layer to convey their own content to those using it and, where applicable, to receive back requests from them, and that layer consists of software-based telecommunications services and hardware-based telecommunications networks. Content-related services and their users are reliant on access to and usability of the underlying transport layers and networks as channels for distribution and, where applicable, feedback channels.

Accordingly, issues and decisions in telecommunications law relating to frequency management, must-carry provisions, network neutrality, interoperability, specifications on availability and minimum quality of networks and services, the unbundling of vertically integrated services and, lastly, the scope of the intended consumer rights protection show direct and indirect links to the activities to provide and disseminate information society services and to the options for receiving and using such services on the side of the user.

In addition to such forms of interlacing where telecommunications regulation influences the possibility and form of information society service provision, there are also instances of services which due to their nature may potentially fall directly under the provisions of the telecommunications law framework (see below).

#### *4.2.3. Contract -and consumer protection-related specifications in the media sector*

In addition to the general legislative framework for consumer protection (see below), in recent years the EU has also adopted legal instruments relating specifically to electronically supplied or electronically disseminated services.

The **Digital Content Directive** (DCD)<sup>13</sup> adopted in May 2019, to be implemented by 1 July 2021, is aimed at harmonising the framework under contract law for the provision of digital content or digital services. Its focus is on ensuring a high level of consumer protection, in order to make cross-border conclusion of contracts more legally assured and to reduce the higher transaction costs which have existed to date. As a Directive governing contract law, the specifications here link to contracts on the basis of which entrepreneurs provide digital content or digital services to consumers. The decisive aspect is not payment, as the quid pro quo or the remuneration can also be provided through the making available of personal data. As such, the majority of media offerings and digital platforms fall under the scope of the Directive (see below). The requirements of the DCD thus become contract-related provisions which these providers too must respect, regardless of the technology used for provision or transmission. This may be software, apps and

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<sup>13</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22.5.2019, p. 1-27, corrected by OJ L 305, 26.11.2019, p. 62.





content made available by media providers via those means, such as videos, audio files, music, games or e-publications. In addition, the Directive covers services such as cloud computing, hosting, social media and software as a service. Under the DCD, digital content is according to contract if it conforms to the statements of the contract concerning the description, quantity and quality, functionality, compatibility, interoperability and other features, and is “fit for any particular purpose for which the consumer requires it”. The burden of proof that digital content or a digital service is as agreed lies with the provider. On this point, the DCD sets out requirements which are not always easy to interpret for media services and which differ from the provision of purely journalistic services. A further relevant circumstance regarding the DCD is the fact that it is a Directive which follows the approach of so-called maximum harmonisation, i.e. the EU legislators are obligating the Member States to implement the specifications precisely, without the leeway over transposition of normal Directives, for instance with regard to stricter or more lenient national statutory specifications.

Particularly with a view to freedom of movement within the EU, the **Portability Regulation**<sup>14</sup> was adopted, aimed at ensuring the citizens can enjoy unhindered access to online content services EU-wide if they are temporarily residing in a country other than the one where they usually live. To that end, the relevant providers are obligated to make corresponding access available to their customers, including from other EU countries, with the same scope of function and without additional charges.

Similarly dedicated to consumer protection is the **Geo-blocking Regulation**<sup>15</sup>, under which the EU aims to prevent circumstances where users are unjustly discriminated against when making online purchases, for instance on the basis of their nationality, their place of residence or their place of establishment in the EU. Under its provisions, for example, blocking or restricting customer access to user interfaces such as internet pages or apps, and discriminatory terms and conditions or payment demands are not permitted. Web page redirections to country-specific portals or shops are regularly only permitted with explicit consent, and digital content must be available EU-wide (particularly software, apps, web hosting); in addition, providers must offer at least one free means of payment. For services supplied electronically comprising the provision of copyright-protected works, the Regulation applies only to a limited degree: for instance, it allows providers to operate different service conditions (prices, payment terms, delivery terms) for content offered via downloads or streaming. Information-related - e.g. journalistic - services not containing copyright-protected images or works are not covered by this exemption. Here, the provisions of the Geo-Blocking Regulation continue to apply in principle. Providers of live-streams and media libraries operated by public broadcasting companies may also freely decide to what extent they wish to follow the requirements of the Regulation.

Plans and proposals by the EU to establish regulatory framing in the area of **algorithm-based decisions** generally or specifically to the media, for instance in the form of a General Algorithm Reg-

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<sup>14</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, OJ L 168, 30.6.2017, p. 1-11.

<sup>15</sup> Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I, 2.3.2018, pp. 1-15.





ulation, have not yet found expression in the form of draft Directives or Regulations. These proposals are connected with the current discussions regarding the possibilities and limits of “artificial intelligence” systems and the associated risks (to fundamental rights), depending on the domain concerned.<sup>16</sup> Given the AI systems already in use, in many cases with media producers, publishing houses and intermediaries, further developments in this area can have significant impact on media practice and public communication.

#### 4.2.4. *Special provisions under competition law*

The recent Regulation on promoting fairness and transparency for business users of online intermediation services (**P2B Regulation**)<sup>17</sup> is an instrument under which the EU is giving consideration to the major importance of platforms and intermediaries for the visibility and dissemination of services. With regard to competency, the EU is invoking the contribution to ensuring the smooth functioning of the EU internal market. The Regulation, taking effect on 21 July 2020, applies to online intermediation services and online search engines, with the aid of which business users of the platform offer their products and services to end-consumers. The Regulation sets out provisions in this area aimed at ensuring transparency, fairness and effective options for remedy for business users, notably via requirements concerning general terms and conditions as well as information obligations towards business users, and the disclosure of the criteria for selection and ranking when displaying search results. From the viewpoint of media services providers, the P2B Regulation is mainly relevant because it obliges the intermediaries to disclose the basis for their ranking, to make clear possible differentiated treatment and to explain the access to (platform and user) data. The parameter-related descriptions for this are to be worded in plain and intelligible language. For intermediary services, in the event of disputes the Regulation provides rules for the establishment of internal complaints procedures and for the option of out-of-court dispute resolution; for search engines, these rules do not apply. The specifications of the P2B Regulation extend into an area of media policy which has long been a subject of debate: the question of the transparency of selection and ranking logics for intermediaries, in order to exclude intentional or targeted discrimination against particular content or providers, which could impact negatively on media diversity. In this area, the Regulation introduces – albeit from the perspective of contract law and competition law, and not with regard to the individual’s freedom of information or to media diversity<sup>18</sup> – a provision which could establish the corresponding transparency. All the more notable is the fact that the perspective of media diversity did not play a role of any kind as part of the legislative process.

#### 4.2.5. *Specifications regarding intellectual property rights*

Through the processing, creation, publication and dissemination of content subject to copyright and to neighbouring rights, the copyright framework plays a key role in the EU communication order. The legal framework, comprising a raft of individual measures, enables holders and exploi-

<sup>16</sup> See European Commission, White Paper “On Artificial Intelligence – A European approach to excellence and trust” of 19.2.2020, COM(2020) 65 final, [https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020\\_de.pdf](https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_de.pdf)

<sup>17</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediary services, OJ L 186, 11.7.2019, p. 57-79.

<sup>18</sup> See Schwartmann/Hermann/Mühlenbeck, “Transparenz bei Medienintermediären”, 2020, p. 95.





ters of intellectual property rights of protected works to exploit exclusivity rights for the commercial licensing of content, specifies the protection periods for such exploitations, and makes provisions for key limitations to copyright.

The aim of the key 2001 **InfoSoc Directive**<sup>19</sup> was to adapt the law governing intangible assets to the consequences of digitalisation, online communication and increasing media convergence. The Directive harmonises the right of reproduction, the right of communication to the public and the right of distribution in accordance with the WIPO treaties. Further areas of focus were determining restrictions on copyright and the conditions and scopes if they are introduced by Member States into national copyright laws. In addition, it set a framework for permitted circumvention of technical protection measures, with the precise shaping being left to the Member States.

The most recent reform of EU copyright law came about in the Digital Single Market Directive (**DSM Directive**)<sup>20</sup>, which modernises the InfoSoc Directive in a number of areas. The Directive, adopted in April 2019 in the face of considerable protests (“Save the Internet”), must be implemented into national law by mid-2021. The focus of this Directive is the statutory permission for text and data mining (TDM), collective licensing for works of visual art in the public domain, establishing neighbouring rights for press publishers, along with IP-related contract law and the responsibility of online content-sharing service providers. In this regard, of particular relevance for public communication are the provisions in Art. 15, which introduces a new related right for press publishers, and Art. 17, which sets out specifications on licensing obligations and on the liability of platforms with user-generated content for making copyright-protected online content accessible.

The aim of the **SatCab Directive**<sup>21</sup> is the harmonisation of national copyright with regard to cross-border broadcasting via cable or satellite. Through this Directive, the freedom to provide services guaranteed in the EU Treaty within the entire internal market of EU Member States is intended to be realised for cross-border broadcasting. To that end, the Directive sets out the corresponding legal conditions intended to make it easier for satellite and cable network operators to acquire the necessary broadcasting rights. In addition, the Directive adopts as a standard the country of origin principle and certain restrictions of the principle of contractual freedom, intended to clarify intellectual property rights and related rights licencing. Despite the specific wording, the new **Online-SatCab Directive**<sup>22</sup> is not solely limited to online dissemination. The aim of the Directive

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<sup>19</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10-19, last amended by Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92-125.

<sup>20</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92-125, as corrected by OJ L 259, 10.10.2019, p. 86.

<sup>21</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15-21, amended by Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, OJ L 130, 17.5.2019, p. 82-91.

<sup>22</sup> Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, OJ L 130, 17.5.2019, p. 82-91, as corrected by OJ L 296, 15.11.2019, p. 63.



is to promote cross-border dissemination of European television and radio programmes, including via IP networks. The regulatory subjects which it addresses extend to three main areas, namely - taking the country of origin principle into account - the online dissemination of certain types of TV and radio programmes in other EU Member States by the broadcasting companies themselves, the retransmission of TV and radio programmes from Member States by third parties (whereby, to simplify the acquisition of rights by network and platform operators, mandatory collective management of rights is applicable) and, lastly, the transmission of programmes using "direct injection", for which the principle applies that this is only a single instance of a public communication.

The **Collective Rights Management Directive (CRM Directive)**<sup>23</sup> is aimed at coordinating national regulations relating to organisations taking up the activity of collective management of copyrights and related rights, the modalities of their internal mode of operation and the supervision of these organisations. In particular, the Directive sets out requirements of organisations for collective cross-border rights management, which was previously regularly exercised by national monopolies. For licensees wanting to offer a service EU-wide, it was possible to significantly simplify and shorten the in some cases complex national licensing procedures; this allows for significantly easier EU market entry for new online music and streaming services.

### 4.3. General specifications with relevance for the media sector

In addition to the media-specific legal legislative acts, which in part react to current technical and digital developments, at its "margins" the EU communications order also comprises the general specifications in quite different areas of law, which alongside many other areas of life and situations also find application to media services and activities.

#### 4.3.1. Data protection-related specifications from the GDPR

The **General Data Protection Regulation**<sup>24</sup> is one of the most well-known legal acts of the EU. From the date of its application, the Regulation sets the legal framework for data protection Europe-wide and introduces mandatory principles and obligations for data controllers. The protective purpose of the Regulation is to uphold the fundamental rights and fundamental freedoms of natural persons, particularly their right to the protection of personal data (Art. 8 (1) Charter of Fundamental Rights).<sup>25</sup> The GDPR's material scope is drawn conceivably broadly, and includes "the processing of personal data wholly or partly by automated means and (...) the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system." Exempted from the scope of application are purely private data processing operations. For data processing, the GDPR starts from a principle ban with permit reservation: the controller may only process personal data where he can invoke a specific legal permission. The controller is subject to high demands when it comes to informing users

<sup>23</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and on the multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72-98.

<sup>24</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (basic data protection regulation), OJ L 119, 4.5.2016, p. 1-88, as corrected by OJ L 314, 22.11.2016, p. 72 and OJ L 127, 23.5.2018, p. 2.

<sup>25</sup> For the legal debate on the protected property in the DSGVO see Veil, "Die Datenschutz-Grundverordnung: des Kaisers neue Kleider", NVwZ 2018, 686 et seq.





about the processing operations, obtaining a users' consent, privacy-friendly design and documentation of the processing procedures used, and when it comes to offering procedures to implement user rights, such as the right to be informed and the right to erasure.

With regard to the broad scope of the GDPR, it becomes clear that data processing by providers of audiovisual media is also covered by the regulation. Art. 85 GDPR makes a sector-specific provision for data processing particularly for journalistic purposes. Under it, Member States are to reconcile the right to protection of personal data with the rights of freedom of expression and information; in national legislation, they may make provisions in this area for exemptions from certain chapters and articles of the GDPR. The GDPR here delegates the guarantee of freedoms of communication to the EU Member States, which have made use of the clause in quite different ways in some instances (see below).

Further specifications on privacy are set out in the **ePrivacy Directive**<sup>26</sup> – particularly in those areas where it was extended by the so-called **Cookie Directive**<sup>27</sup> 2009. For electronic communication networks and services, the Directive remains applicable, while for information society services the GDPR is intended to be definitive – until adoption of the planned **ePrivacy Regulation**. The relationship between the GDPR and the ePrivacy Directive is complex in detail and contentious.<sup>28</sup> To establish coherence of the two sets of rules, the EU legislators are proposing to review the ePrivacy Directive (see GDPR recital 173). Previous drafts of the ePrivacy Regulation have partly been criticised for a lack of coherence with the GDPR as well as massive direct and indirect consequences for the media sector.

#### 4.3.2. General state aid rules

The general state aid rules of the EU start from the assumption that the use of state funds to support or subsidise particular branches of industry or individual companies has detrimental effects on competition. To that extent, state aid is basically forbidden under Article 107 TFEU. However, there are exceptions to this prohibition, which a Member State must notify to the European Commission prior to its commencement.<sup>29</sup> According to Art. 107 (3) TFEU, exceptions can be made, amongst other things, for “aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest” or for “aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest”. For the media sector, these specifications become relevant

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<sup>26</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37-47, as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 June 2009 on privacy and electronic communications Directive 2009/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on consumer protection cooperation, OJ L 337, 18.12.2009, p. 11-36.

<sup>27</sup> Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on consumer protection cooperation, OJ L 337, 18.12.2009, p. 11-36, as corrected by OJ L 241, 10.9.2013, p. 9 and OJ L 162, 23.6.2017, p. 56.

<sup>28</sup> Kühling/Raab in Kühling/Buchner, DS-GVO BDSG, 2nd edition 2018, Art. 95 marginal 10.

<sup>29</sup> S. Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9-29.





where a Member State is wishing to support companies in the media sector, for instance in production-related subsidies for films or games. In addition, Art. 106 (2) TFEU is relevant since, for example, the contributory financing of public broadcasting comes under the exemption of “services of general economic interest”.

#### 4.3.3. General advertising law and advertising rules from other areas

The **Tobacco Advertising Directive**<sup>30</sup> has made provisions for restrictions for tobacco advertising and sponsorship in the Member States since 2005. Under it, tobacco advertising is to be restricted to specialist tobacco trade publications. Advertising for tobacco products is otherwise prohibited in the press, in information society services and in broadcasting. The **EU Food Information for Consumers Regulation (EU FIC)**<sup>31</sup> imposes requirements for the labelling, advertising and sale of foods via distance selling. The **Medicinal Products Directive (MPD)**<sup>32</sup> provides for bans on non-licensed medicinal products or products for which a prescription is required, and sets out specifications for the content of freely available medicinal products; for veterinary medicines, the **Veterinary Medicinal Products Directive**<sup>28</sup> operates similarly, and for medicated feed the **Medicated Feed Regulation**<sup>29</sup>. The **Medical Devices Regulation**<sup>30</sup> contains requirements for the depiction and advertising of medical products.

#### 4.3.4. General consumer protection law

In addition to the media-specific consumer protection legislation (see above), the general provisions of EU consumer protection law are applicable. These also include rules for distance selling contracts, which particularly in the area of digital media are concluded online. Under the **Consumer Rights Directive (CRD)** in 2011, the EU set out clear specifications for distance selling and online retail. In the EU area, the CRD is intended to ensure largely consistent consumer protection, since cross-border trade had proven difficult given the previously varying national cancellation periods. The main areas of focus in the Directive are a Europe-wide standard cancellation period of 14 days, fundamental contractual information requirements for consumer contracts,

<sup>30</sup> Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 152, 20.6.2003, p. 16-19, corrected by OJ L 067, 5.3.2004, p. 34.

<sup>31</sup> Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers and amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, OJ L 304, 22.11.2011, pp. 18-63.

<sup>32</sup> Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311, 28.11.2001, p. 67-128, as last amended by Regulation (EU) 2019/1243 of the European Parliament and of the Council of 20 June 2019 adapting a number of legal acts providing for the use of regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union, OJ L 198, 25.7.2019, p. 241-344.

<sup>28</sup> Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC, OJ L 4, 7.1.2019, p. 43-167, as corrected by OJ L 163, 20.6.2019, p. 112.

<sup>29</sup> Regulation (EU) 2019/4 of the European Parliament and of the Council of 11 December 2018 on the manufacture, placing on the market and use of medicated feed, amending Regulation (EC) No 183/2005 of the European Parliament and of the Council and repealing Council Directive 90/167/EEC, OJ L 4, 7.1.2019, p. 1-23, as corrected by OJ L 162, 19.6.2019, p. 28.

<sup>30</sup> Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 concerning medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC, OJ L 117, 5.5.2017, p. 1-175, corrected by OJ L 117, 3.5.2019, p. 9 (2017/745) and OJ L 334, 27.12.2019, p. 165 (2017/745).





extensive standardisation of the law for distance selling contracts, a revision of the right to rescind for consumer contracts, and the establishment of standard European models for cancellation rights notices, obligations on the retailer to confirm a contract and, lastly, acceptance of the costs of shipping, delivery, dispatch and returns by retailers where the consumer was not correctly informed.

Alongside this, the **Price Indication Directive**<sup>31</sup> is applicable, which is aimed at standardising the legal provisions including an obligation to give the selling price and the basic price, which is fundamentally applicable regardless of the distribution method. In the event of disputes between providers and consumers, the Directive lays down rules for comprehensive alternative dispute resolution bodies for all disputes as part of the contractual obligations between consumers and enterprises, through alternative dispute resolution in consumer affairs (**ADR Directive**)<sup>32</sup>. For this, Member States may either have recourse to existing independent dispute resolution bodies and adapt their area of competence accordingly, or may establish new bodies. On the basis of the Regulation on online dispute resolution for consumer disputes (**Regulation on consumer ODR**)<sup>33</sup>, the EU has created its own, EU-funded platform for online dispute resolution, via which a central point of contact for out-of-court settlements arising from online legal transactions has been created for consumers and entrepreneurs. For this, the respective consumers and entrepreneurs wanting to resolve their dispute via an out-of-court settlement are to submit their complaint using an online form. The platform then forwards the process to the alternative dispute resolution bodies to be designated by the Member States. If no agreement is reached between the parties after 30 days, the complaint is not proceeded with further. The two legal instruments are legislative instruments which are closely connected with one another and which are intended to improve the options for EU consumers in asserting their rights in respect of traders in goods or services in an alternative and out-of-court dispute resolution procedure more easily, more cheaply, more quickly and more fairly.

#### 4.3.5. *General competition law and antitrust law*

The aim of the Directive on unfair commercial practices (**UCP Directive**)<sup>34</sup> is to strengthen the internal market by improving consumer protection, whilst also simultaneously protecting the general interest in undistorted competition. It applies exclusively to advertising and marketing activities of companies that are aimed at consumers. The Directive aims to ensure that the consumer makes an informed purchase decision for a product or a service, free of external and internal pressures. At the heart of the Directive is the general clause of Art. 5(2), which determines a commercial practice as unfair if it is contrary to the requirements of professional diligence and

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<sup>31</sup> Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ No L 080, 18.03.1998, p. 27-31.

<sup>32</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18.6.2013, p. 63-79

<sup>33</sup> Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumers disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165, 18.6.2013, p. 1-12.

<sup>34</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), OJ L 149, 11.6.2005, p. 22-39, as corrected by OJ L 253, 25.9.2009, p. 18.





if it materially distorts or is likely to materially distort the economic behaviour with regard to the average consumer. The general clause is supplemented with exemplary instances which describe misleading and aggressive commercial practices. In addition, the Directive contains an Annex of 30 commercial practices which are unfair under all circumstances (the so-called “black-list”). In their commercial activities, audiovisual services and information society services must similarly conform to these specifications under these general rules on fairness. This also and particularly applies to advertising communications: the **Directive on misleading and comparative advertising**<sup>35</sup> aims to define conditions for permitted comparative advertising and to protect market actors from the detrimental effects of misleading advertising. Through this, it should be ensured that truthful advertising or marketing statements are made in commercial activities among companies.

In addition to the general rules under competition law, specifications under antitrust law also find application to media services and their providers. A general antitrust prohibition derives from Art. 101 TFEU et seqq., where the European Commission is responsible for their enforcement. The **Antitrust Regulation**<sup>36</sup> governs the European Commission’s procedures in implementing European antitrust law; in the block exemption regulations, legal exemptions from the scope of application of antitrust law are provided. Certain patterns of behaviour may be found under this to be in breach of antitrust law, meaning that subsequently an instruction to cease and desist may be issued or remedial measures may be imposed. The Regulation is aimed at protecting against any distortion of competition in the EU’s internal market. The **Merger Regulation (MR)**<sup>37</sup> governs the European Commission’s responsibility, competencies and procedures in the control of European mergers. The Commission has jurisdiction if the companies involved achieve specified turnover thresholds. If that is not the case, the responsibility sits with the national antitrust authorities. The goal of a preventive check on company mergers by an antitrust authority lies in preventing permanent deterioration of the market structure by companies dominating the market. EU antitrust law is supplemented by the **Antitrust Damages Directive (ADD)**<sup>38</sup>, which makes it easier for those harmed by cartels to assert claims for damages. The technical developments coming about through digitalisation, which are also relevant to information and communication, represent an area of the economy which presents a challenge to existing EU antitrust law. Data-driven platforms and intermediaries with strong market positions have been a focus of attention for the Commission for a long time, including several antitrust proceedings against Google (Google Search; Android; Google AdSense), and a current complaint against Apple by Spotify. For the current term of the present European Commission, a reform of the EU antitrust and merger control law is envisaged. Germany has similarly announced reform proposals during the period of its

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<sup>35</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376, 27.12.2006, p. 21-27.

<sup>36</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25, as last amended by Council Regulation (EC) No 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, OJ L 148, 11.6.2009, p. 1-4.

<sup>37</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (“EC Merger Regulation”), OJ L 24, 29.1.2004, p. 1-22.

<sup>38</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1-19.



Council presidency, against the background of the “Kommission Wettbewerbsrecht 4.0” (“Commission on Competition Law 4.0”) report<sup>39</sup>.

#### 4.3.6. General intellectual property rules

In addition to general competition law, the general specifications of EU copyright are applicable, insofar as media offerings disseminate or make accessible copyright-relevant content. The European copyright comprises a variety of individual Directives, concerned *inter alia* with the inclusion of new types of work<sup>40</sup> or exploitation rights<sup>41</sup> in the scope of application, with new forms of remuneration<sup>42</sup>, with protection periods<sup>43</sup>, with the treatment of orphan works<sup>44</sup> and with specifications for better legal enforcement<sup>45</sup>.

#### 4.3.7. Specifications from the area of protection of (trade) secrets

The **Trade Secrets Directive**<sup>46</sup> guarantees a Europe-wide minimum protection of trade secrets. It aims at protecting companies from disclosure of secrets and economic espionage and, thus, supporting cross-border innovations in the European internal market. Under its specifications, companies are better placed to take action against unauthorised acquisition, use or disclosure of trade secrets and to obtain compensation. In addition to the legal definition of a trade secret, the Directive sets out a variety of circumstances for prohibitions or permissions, permission of reverse engineering (the independent discovery or creation and the observation, examination, dismantling or testing of products), claims by the secret-holder and the legal regulation of whistleblowing for the first time. Companies must adopt demonstrable confidentiality measures to acquire legal protection. Under the Directive, investigative journalism in the area of trade secrets is strengthened and, for the first time, explicit rules for the protection of whistleblowers are established. Thus while the Directive provides for measures and legal remedies which may consist of preventing the disclosure of information in order to protect trade secrets, the exercise of the right to freedom of expression and freedom of information may not be restricted in any instance, particularly with regard to investigative journalism and protection of journalistic sources. People who make misconduct public thereby gain greater legal security.

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<sup>39</sup> BMWi (Ed.) (2019), A New Competition Framework for the Digital Economy, Report by the Commission ‘Competition Law 4.0’ September 2019.

<sup>40</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20-28, amended by Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92-125.

<sup>41</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, 27.12.2006, pp. 28-35.

<sup>42</sup> Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, pp. 32-36.

<sup>43</sup> Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11.10.2011, p. 1-5, corrected by corrigendum, OJ L 117, 27.4.2013, p. 23.

<sup>44</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5-12.

<sup>45</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p. 45-86, corrected by OJ L 195, 2.6.2004, p. 16.

<sup>46</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157, 15.6.2016, p. 1-18.



The **Whistleblower Directive**<sup>47</sup> is similarly concerned with ensuring improved protection of whistleblowers who notify infringements of EU law specifically. The background to the Directive is that the current protection of whistleblowers in the Member States is not regulated consistently. The discovery of infringements of EU law often has a cross-border dimension, meaning that inadequate protection in individual states can also have consequences for other Member States and the Union as a whole. The protective goal of the Directive is effective protection for whistleblowers, and thus ensuring freedom of expression and media freedoms under Art. 11 of the Charter of Fundamental Rights. The Directive sees whistleblowers as an important source of information for journalists and in particular for investigative journalism, in order that the latter can fulfil its role as a watchdog in democratic society. Effective protection of whistleblowers against reprisals can increase the security of (potential) whistleblowers, thereby making it easier to raise alarms with the media. Key content of the Directive, which is to be implemented by 17 December 2021, is the obligation to establish internal whistleblowing systems within enterprises, external whistleblowing systems for the authorities, protection of whistleblowers against retaliation measures and the obligation to introduce sanctions for employers. Under this, private companies with over 50 employees or more than EUR 10 million turnover per annum and all public-sector legal entities are obligated to establish an internal whistleblowing system. However, protection of whistleblowers is only guaranteed if they are reporting infringements against certain areas of EU law, including public procurement, financial services, prevention of money laundering and financing of terrorism, environmental protection, public health, consumer protection as well as data protection and IT security. In addition, whistleblowers are only protected when making disclosures to the media where they have previously passed on information on infringements to internal and external reporting systems without result, and had sufficient grounds to assume that the reported information was truthful.

Overall, there is a conflict here between the Trade Secrets Directive and the Whistleblower Directive. Where disclosure of secrets to the media under the Trade Secrets Directive is in principle possible and protected, following a balancing test of the competing interests, such behaviour does not fall into the specially protected area under the Whistleblower Directive, unless internal and external reporting systems have previously been engaged through notification, without result. That said, the Whistleblower Directive does contain an opening clause for less restrictive national law.

Aspects of protection of secrets - for journalists - and protection of whistleblowers are also affected by current legislative procedures in the area of improving cross-border investigations under criminal law: under the **e-Evidence Regulation**<sup>48</sup> currently under discussion in the EU parliamentary committees, investigating authorities are to be empowered to demand user-related data from electronic communications services in the sense of the EEC and from information society services on a cross-border basis. The providers would be required to comply with such a request for disclosure of information, which in addition to messenger service providers can also be directed expressly to social networks, online marketplaces or providers of (cloud) hosting services, without there being an independent examination of competence or a right of veto for the

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<sup>47</sup> Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report infringements of Union law, OJ L 305, 26.11.2019, p. 17-56.

<sup>48</sup> Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final.







EU Member State. Moreover, this is independent from the punishability of the action in question in the state in which the accused lives or where the provider has its registered office. Given this background, journalist associations – amongst others – have warned of the dangers that corresponding legal production orders represent for journalism and protection of journalistic sources.

#### 4.4. Preliminary conclusion: regulatory diversity for information and communication services

The European regulatory framework for media consists of a variety of media- and sector-specific rules which are initially self-contained and sit alongside one another. The central goal of most legal instruments is the completion of the internal market, in part accompanied by further protective aims such as consumer protection, protection of minors, protection of (intellectual) property or – to some extent – freedom of expression and freedom of the media. It is noticeable how, over time, ever more concrete phenomena or new areas of concern have become the focus of EU digital policy, and have been addressed with new regulatory instruments. In addition, it has become apparent how much general legal specifications by their nature also find application to media-specific circumstances and activities. The deep mediatization of society, under which media-supplied communication and information is *de facto* a part of daily life in all areas of our lives, is increasingly leading to a blurring of specific media regulation and to the increasing relevance of general areas of the law.

### 5. Comparative analysis from a coherence perspective

#### 5.1. General observations

A full overview of the EU regulatory framework from the perspective of creatives working in the media sector initially reveals how complex the legal provisions, how diverse their sources in law and how different the underlying areas of the law actually are. In addition to the set of quite varied obligations and requirements for the provision of services, there is also, as a specific aspect of the EU legislation, the – in some cases different – transposition and arrangements of exceptions and use of opening clauses in the individual Member States. General points for attention from a governance perspective are the following:

- There are a large number of relevant legal provisions and legislative acts. The various sets of rules show various scopes for implementation and implementation measures, by reason of their nature (Directive, Regulation) and the requirements, exemptions and delegations contained in them. That said, not all articles contain specific obligations for coherence and coordination in relation to their implementation and application.
- Knowing and acting on the legal specifications in a multi-level system, as well as monitoring reforms, amendments and relevant jurisprudence is a full-time task which only some part of those targeted by the rules can manage systematically. With regard to the possibility of complying with legal specifications, this circumstance appears to be a particular challenge for actors newly entering the market and having their background in other sector-specific legal frameworks, or lacking sufficient resources for compliance in such complex legal environments. The high diversity of service providers in the media sector thus threatens to break up





into groups which either commit the necessary resources and are able to implement the provisions, or which fail on that point. Where non-compliance leads in the medium-term to service closures, there is a risk that the complexity of the EU legislative framework can itself have a detrimental effect on diversity.

- In particular, studying the material scopes of the media- and sector-specific provisions over time highlights the development that the EU legislator has substantially expanded the scopes to a significant extent in some cases. Originally devised only for conventional television, the “Television Without Frontiers” Directive of 1989 went on to be extended to newer forms of audiovisual services: in 1997 teleshopping was included, and as part of the 2007 amendment certain non-linear forms of services (“on-demand audiovisual media services”), and most recently video-sharing platform services were incorporated into the scope of the Directive, while radio services remain exempted. The material scope of the EU Telco framework has most recently also taken in OTT services (so-called “number-independent interpersonal communications services”).
- The expansion of the material scopes and the introduction of (often graduated) requirements for various types of service occurs constantly as a reaction to identified changes in markets and market players and/or technological advances. As such, the inclusion of new forms of offerings or services is primarily phenomenon-related. Both the definitions and also the creation of new, service-specific requirements are mostly based on certain perceived problems, not on the basis of the structural safeguarding of abstract purposes of protection. As a result, fundamental questions repeatedly arise regarding the material scopes of various legal instruments, their overlaps and coherence in how they are implemented in the Member States (see below).
- When including new forms of offerings and services, existing rules are additionally applied to these services on a regular basis, often in a graduated manner. New service-specific provisions and obligations regularly follow traditional regulatory approaches. In areas of regulation where the legislators are reliant on acceptance by and active participation of those targeted by the rules, the EU rules establish co-regulatory approaches. With regard to further new regulatory initiatives, there is scant evidence of regulatory innovation - at least, in view of the provisions in the legislative acts. This is particularly problematic in those areas where the original legal framework was developed for services whose individual or social function was clearly identifiable. New convergent and hybrid services which are capable of combining a range of different communication options, information needs and forms of transmission and forms of content in a single overall offer can, by contrast, fulfil very different functions. The simple inclusion of such new forms of offerings and services in existing legal instruments with conventional regulatory approaches must inevitably lead to a situation where this functional ambivalence appears not to be considered, or at least not always comprehensively included.
- Particularly with regard to the media- and sector-specific rules, it becomes clear that the service-specific regulation of information, communication and media services is taking place in regulatory vertically silos. In view of the convergence of the forms of services, this is leading to a potential parallel application of different sector-specific requirements for one



and the same service (or delimitable parts thereof). In such instances, providers see themselves as being faced with quite different systems of rules with different regulatory purposes, reporting requirements, responsibilities and regulatory cultures. In those places where the EU legislators have attempted a horizontal graduation (for example, with regard to the horizontal approaches in infrastructure regulation on the one hand, and in content-related regulation on the other), convergence developments are leading to these “tiers” being breached, for instance with the inclusion of OTT services in the telecommunications framework.

- The Directives and Regulations introduced to harmonise the digital internal market frequently exhibit vague legal terms, both in the definition of the material scope and in the individual situations, which through their vagueness can potentially lead to contrary effects during transposition, implementation and interpretation by the Member States. Exemption rules and opening clauses operate as a counter-vector to coherence across Member States. A further fanning-out of the media order “at the margins” comes about through European and national jurisprudence, through specifications and codices under self-regulation and co-regulation, and through the activities of the European Council. Establishing coherence in such a multilateral, multi-level system thus appears to be an extremely complex undertaking, which may require new forms of procedural cooperation.
- It is only recently that the EU legislators have increasingly chose to use Regulations as a legal instrument in the information and communication sector. Theoretically, this allows for a higher degree of harmonisation to be achieved, since a Regulation is directly applicable in all Member States and thus creates a common legal framework. Despite this, in practice – through the (many) opening clauses, through deviating interpretation and practices in application by the national bodies competent for supervision or enforcement and under their potentially divergent regulatory cultures – it is possible for significantly different legislative frameworks, interpretations and enforcement measures to be formed in the Member States, which in terms of a level of harmonisation barely move beyond that of a Directive with leeway over implementation.

## 5.2. Dependencies and restrictions on scopes of application

A closer analysis of the material scopes of relevant EU rules shows that most of the legislative acts have not come about in a vacuum, but do indeed describe their relationship to other existing sets of rules, for instance by reference to definitions in other legal instruments in the definition of terms or in the material scope of application, to clarification of falling outside the specifications from other sets of rules or to the express superimposition of specific provisions in other Directives or Regulations (see Annex 2 – Service types and their definitions in the media sector).

It is noticeable that the scopes of application of the relevant legal instruments exhibit a wide range of different designations and definitions, which in some cases cannot always be clearly delineated and which overlap in part. Forms of overlaps are not excluded structurally, in view of the different legal areas and contexts of the circumstances covered by the scope of application, and are thus not automatically incoherent. However, it becomes clear from this overview that the EU legislators are making links to wholly different criteria and features in the individual definitions of services:



- The only overarching conceptual feature is that of the “service”. With regard to the freedom to provide services and the completion of the European internal market, using a “service” as the starting point is inherent in the system. Associated with the use of the service concept is the assumption that the offerings covered are regularly commercial offerings. Purely private offerings should not and cannot be covered by any of the definitions of services. The boundary areas between purely private and purely commercial offerings are extensive, however, and even the requirement for supply of services for consideration has been interpreted very broadly by the ECJ<sup>49</sup>, with the result that the reference to “services” is associated with a fundamental legal uncertainty for many providers based on non-typical re- or cross-financing models.
- With services transferred electronically, technical connection points exist for the definition of services. But in view of the explicit aim of the EU of drafting regulations which as far as possible are neutral with regard to the technology, references to technical aspects necessarily remain as abstract as possible. In the list of definitions, various references are found as to the type and manner of technical provision or transmission of specific service categories. One half of the definitions take transmission via electronic communications networks in the sense of the Telecommunications Framework Directive (AVMSD: audiovisual media service, video-sharing platform service) or of the EEC (electronic communications services) as the criterion. Conversely, the e-Commerce Directive and other legal instruments (DSM Directive: Art. 15, 16, 17; GDPR: Art. 8; Draft P2B Regulation: online intermediation services) refer to the definition of “information society services” in the Transparency Directive (or Notification Directive)<sup>50</sup>. The definition there is based on a service “provided by electronic means”, by which it means that “the service is sent initially and received at its destination by means of electronic equipment for the processing (...) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means”. In addition to this, there are other service definitions which follow neither of these two points of reference: a digital service, in the sense of the DCD, is one “that allows the consumer to create, process, store or access data in digital form”. The Geo-Blocking Regulation views “electronically supplied services” as ones “delivered over the internet or an electronic network” and which are “impossible to ensure in the absence of information technology”. The Portability Regulation, in referring to “online content services”, means services “that a provider lawfully provides....online”. The proposed P2B Regulation, in referring to “online search engines”, speaks only of a “digital service”. The concept of “online” is not explained more fully anywhere. Particularly in these latter examples, it becomes apparent that the EU legislators are not using opportunities for systematic references which might contribute to a more coherent definition of services.
- In some instances, the definitions contain references back to the (main) purpose of a service, for instance in the definitions of audiovisual media services and video-sharing platform services in the AVMSD or the online content-sharing service providers in Art. 16 of the DSM Directive. Linking to the purposes of services is not without risk, because the provider itself

<sup>49</sup> ECJ C-157/99, Smits, para. 50, 52-58; ECJ C-281/06, Jundt, para. 33; EuGH C-339/15, Vanderborght, para. 36.

<sup>50</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1-15.





primarily has control of the purpose, through the design of the service. Alternatively (for instance, if the provider does not intend to see a particular purpose being covered by the provision of its service), an objective assessment can be used to determine the purpose. For the providers concerned, legal uncertainties arise particularly if a larger number of users are using the service provided for other, possibly legally relevant purposes which were neither intended nor envisaged by the provider. In such instances, where an offering only falls under a more restrictive legal framework due to the realities of how it is used, the providers have no influence over the determination of purpose. That makes purpose-related criteria in definitions of services into indirect gateways potentially in the direction of a more restrictive framework of liability, but also of further content and organisational requirements. With regard to hybrid services, too, the purpose-related approach is challenged, since such offerings make determination of focus more difficult, if not impossible. Other definitions do not link to the purpose as a criterion of individual service types, but directly to their enabling of particular forms of use on the user's part (DCD: digital services; Portability Regulation: online content service; P2B Regulation: online intermediation service, online search engine). This appears, at least from the viewpoint of the addressee, as a more transparent choice, because a duty of proof applies in practice to the provider in showing which potential uses the services theoretically makes possible. The purposes for which users *de facto* employ the service plays no part in this. The risk of being drawn into a scope of application through particular uses is thereby excluded.

- A further criterion used by some of the definitions of services is that of the group of addressees of the relevant services. While some rules specifically refer to the general public as potential addressees for the service provision (AVMSD: audiovisual media service, video-sharing platform service), other definitions conversely specify the individual user as recipient of the service (EC Directive/GDPR/DSM Directive: information society services). Other services, in turn, are geared to a “finite number of persons” (EECC: Interpersonal communications services) or specifically to the “subscriber” (Portability Regulation: online content service). In the DSM Directive, “online content-sharing service providers” (Art. 2 (6)) are used “to store and give the public access to a large amount of copyright-protected works or other protected subject matter”.
- By including in some cases highly specific newer services, this can lead to unintended overlaps given the convergent service types in practice: for example, the e-Commerce Directive excludes “television services” from its scope of application, since these would not be supplied as on-demand. However, the amended AVMSD now also includes video-sharing platform services which, while they offer publicly accessible audiovisual media content, only transmit this on-demand. As a result, services which originally fell under the scope of application of the e-Commerce Directive additionally come under the scope of application of the AVMSD.
- Ultimately, some of the definitions also contain content-related points of connection, such as the type or design of the content provided as part of the service. Audiovisual media services accordingly comprise “broadcasts for information, entertainment or education”, while video-sharing platform services contain “broadcasts or user-generated videos”.





Overall, the picture of definitions of services is a poorly structured one. Whereas in some instances several legislative acts at least refer to a more general service type and the corresponding definition, others use entirely autonomous descriptions of services for their scope of application. Only some of the definitions reference the basic definition of the technical-infrastructure level in the telecommunications framework. In addition, in some cases one finds references to Directives which have ceased to have effect or have been replaced. As a result, there are a relatively large number of different definitions of services, which are only systematically interlaced in part and which sometimes open up partly identical scopes of application, and partly parallel scopes of application which are independent of one another. The rules for exceptions are generally global, and one finds only isolated instances of clear delineation rules and especially detailed rules regarding the relationship of one set of rules to other bodies of law (e.g. the DCD).

Particularly noteworthy are the abstract descriptions in (more recent) Directives and Regulations which address a very concrete phenomenon, such as the rules in the AVMSD on video-sharing platform services, the number-independent interpersonal communications services in the EECC or the online content services in the Portability Regulation. The online intermediation services in the planned P2B Regulation similarly demonstrate this. Through the intention of using forms of words which are open for the future, a degree of linguistic abstraction comes about which cannot systematically exclude undesirable side effects.

Moreover, in addition to parallel applicability, the large number of different definitions of services leads to considerable uncertainties in terms of classification and thus legal uncertainties, particularly with regard to hybrid and combined services. With highly convergent types of offerings, which may fall simultaneously under a number of the service definitions outlined, the current challenges of these scopes of application existing alongside one another can be seen most clearly:

- Where combined services place e.g. constantly changing openly accessible audiovisual posts with private messages and private posts into a e.g. chronological order, such as on social networks or micro-blogging services, the object being studied - the “service” - would need to be restricted to the individual content in order to make a classification into the various services. Personalised feeds would accordingly not be one service, but a rapid sequence of different individual services. Something which appears complex but feasible in principle, from the provider viewpoint, in order to classify services necessarily leads to greater confusion from the user viewpoint, since - within one user interface and in one and the same presentation of elements there - various services are found, for which different legal frameworks apply. A similar situation may pertain for search results when using search engines, where barely identifiable personalised search results for users alternate with generally available lists of results and content.
- A structurally similar dilemma presents for electronic communications services, via which - in addition to texts and audio posts - audiovisual content is distributed to large groups of recipients in some cases; for example, the group size on the messenger app “Telegram” is limited to 100,000 participants. The fact that more restrictive requirements are to apply for a small local web-TV provider with 1000 viewers than for a larger group chat in which poten-



tially opinion-forming content is similarly shared argues against the existence of a particularly coherent media order, given the declared EU aim of creating a “level playing field” for the audiovisual sector.

Lastly, the overview also shows occurrences of specific incoherences:

- For instance, Art. 1 of the Copyright Directive as amended via the DSM Directive states that the Directive leaves intact and in no way affects the rules laid down in the e-Commerce Directive, but then expressly amends them in Art. 17(3) for the scope of application of the DSM Directive.
- Art. 1(3) Geo-Blocking Regulation excludes applicability to activities under Art. 2(2) of the Services in the Internal Market Directive; these include “audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting”. In Art. 4 Geo-Blocking Regulation, electronically supplied services are excluded from the scope of application of the individual regulation when “the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form”. The backgrounds to both exemptions are copyright concessions to the territorial licensing of audiovisual content, although it remains unclear why in two different places a sectoral exemption was specified where in practice, they cover the same scope.
- Concrete rules stating the relations between different sets of rules can similarly produce uncertainties. Where Art. 1(7) Geo-Blocking Regulation states the (subsidiary) application of the Services in the Internal Market Directive, it is either an obsolete clarification or - in the event that the Geo-Blocking Regulation is not applicable - a significant external expansion of the scope of application of Art. 20(2) Services in the Internal Market Directive.

### 5.3. Analysis of the regulatory aims

Fundamentally, the regulatory aims and protective aims under the EU legislative framework are taken as the aims and values of the EU, and with regard to the media order notably Art. 2 TEU to protect pluralism, and Art. 3(3) TEU to protect the internal market and cultural and linguistic diversity. As Chapter 4 shows, it is particularly the completion of the (digital) internal market and fair competition which is the focus of legislation (not just media-relevant legislation) - with the exception of the GDPR, which is primarily aimed at ensuring protection of fundamental rights, and in that area particularly data protection. In some cases, further purposes of protection are cited, and above all consumer protection is frequently adduced in deriving the necessity for legislation, for instance in telecommunications law, but also in legislative acts relating to contract law and, indirectly, consumer protection, such as the DCD, the Portability Regulation or the Geo-Blocking Regulation. Here, it again appears that an internal market-related perspective is decisive in determining the purposes of protection, this time from the consumer’s viewpoint. Less frequently, information and communication freedoms are directly in focus: relevant references, in particular to Art. 10 ECHR and Art. 11 of the Charter of Fundamental Rights, are cited but do not appear to be the central aim, but rather a further purpose alongside achieving a barrier-free digital internal market, such as in the e-Commerce Directive.



It is apparent here that internal market-related goals and goals for successful public communication often complement one another well: the goal of a free flow of information and communication – at least within the EU – is in accord with and is promoted by situations of fair competition, statutory rights and obligations moving in the same direction, comparable opportunities of legal protection and comparable opportunities for market access and network access. By the same token, some specifications under consumer law, such as the Geo-Blocking Regulation (under which no discrimination for online purchases is allowed) and the Portability Regulation (which aims to achieve freedom of movement and barrier-free access to online content), are in accord with the goal of the digital internal market. Media freedoms such as barrier-free access to content within the EU similarly appear to be moving in the same direction as the goal of a digital internal market.

However, there are areas where the protective aims of individual legal instruments – and more so the substantial provisions building on them – can conflict with media freedoms. For example, since the GDPR is aimed at protecting personal data and other rights and freedoms, i.e. protection of individual fundamental rights, but as a Regulation it simultaneously has a direct horizontal influence on the media order, it is possible to discern conflicts with the free flow of information. The Geo-Blocking Regulation, for instance, envisages cross-border use of online content as a goal of the digital internal market; enabling this non-discrimination, however, requires consistent identification of the end-devices used, which would not accord with the principle of strict purpose limitation set out in data protection law.<sup>51</sup> Furthermore, content-specific bans constitute a direct restriction on information and communication freedoms, for instance in the area of child sexual abuse material or terrorist content. Here, the protective aim is not completing the digital internal market, but ensuring protection of victims as well as maintaining public safety and order. This can lead to conflicting goals, for instance with regard to the obligations on platforms, which find themselves subject to parallel rules exhibiting different, and not always coherent purposes of protection (see below). Given the diversity of purposes of protection, the overlap of legal instruments operating vertically and horizontally and the overlapping and partially interlaced material scopes of application, instances arise for service providers where different systems of rules with conflicting protective aims are simultaneously applicable, for instance in the area of different rules on transparency due to specifications from the e-Commerce Directive, the AVMSD and the P2B Regulation.

#### 5.4. Analysis of the territorial scopes of application

The fact that digitalisation of services challenges EU law, including with regard to the territorial scope of application and the question of the respectively applicable law, is obvious, given the geographically unlimited and cross-border provision of services. In legislative practice, in view of the lack of specific provisions under primary law in the TEU, two fundamentally different principles are taken as the starting-point, which each have advantages and disadvantages: the country of origin principle on the one hand, and the country of destination principle (or: host country principle) on the other. The country of origin principle starts from the principle that the national law to be applied is that of the respective EU Member State in which the addressee targeted by the

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<sup>51</sup> Majcher (2018), E-Commerce in the EU: Searching for coherence of data protection and competition law in the context of Geo-Blocking, *Columbia Journal of European Law*, Volume 24, Issue 3, 577–595.





rules is established. Conversely, the country of destination principle assumes that the national laws to be applied are those of the country to which the service offering of a regulated addressee is targeted.

For service providers established in an EU Member State, the country of origin principle has the advantage that the provider is required to respect exclusively “own” national law. As a result, it is relatively easy for providers to assess and respect the rules applicable to them, to monitor new developments in the law and to contest legal disputes before local courts. It is precisely this possibility to provide cross-border, Europe-wide services under one national legal framework which can be a key positive aspect during market entry for new and small providers. Conversely, the country of destination principle has the advantage from the service’s user perspective that they can use the service under the law of their respective place of residence. In cross-border matters, the provider is required to respect the law of the destination country. Where a service is offered in several or even all EU Member States, the country of destination principle comes up against “the limits of its capacity”.<sup>52</sup> Having regard to the challenges of the country of destination principle, particularly in cross-border situations relating to multiple EU states, the country of origin principle appears to be the better, at least more implementable solution. However, this presumes two key things: firstly, the country of origin principle can achieve regulatory advantages particularly where the national legal provisions are largely harmonised and a comparable level of protection is achieved from a fundamental rights perspective; the effectiveness of the country of origin principle is directly associated with the reach and scope of comparable legal frameworks in all Member States. Only being required to comply with one national legal order is a key *instrument* for achieving the internal market. This shows the interlaced relation between the country of origin principle with the goal of the completion of the internal market. Secondly, the efficiency of the country of destination principle is dependent on homogeneity of legal enforcement. Even with comparable national legal frameworks, in a second stage it is the pressure for enforcement in the respective country where a provider is established that determines the degree of provider compliance and the extent of the guarantee of actually equivalent (legal) standards of protection; and part of that pressure for enforcement is the effectiveness of cross-border cooperation between enforcement authorities. If either of the two preconditions is not met, the country of origin principle loses its regulatory advantages to a significant extent - the phenomenon of forum shopping can arise, where a provider establishes deliberately in states with minimum requirements and/or poor pressure for enforcement. It plays into the hands of forum shopping that there are barely any structural incentives for the responsible regulatory overseer to engage with infringements of the law by its own national providers where these are only perceived as legal infringements in one or more other states. Particularly in such cases, the choice of the country of origin principle appears to structurally favour the business interests of the service providers - at the expense of the legal position of the recipients and users, but also at the expense of the internal market.

In the legislative acts and areas of law analysed here, the EU legislators are following both the different principles, and in part there are also relevant exceptions to the respectively stated principle in the practice of national transposition of the rules. An overview:

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<sup>52</sup> Drexler, in Münchener Kommentar zum BGB, “Internationales Lauterkeitsrecht”, 7th edition 2018, recital no. 22.





- As a preliminary observation - for providers who are not established in the EU, the country of destination principle generally applies, in the absence of national applicability (and enforcement in one of the EU Member States). To that extent, the following overview describes the conflict-of-law rules for cross-border situations where the service provider is established in a different EU Member State to the user or consumer or contractual partner.
- The AVMSD can look back on a long tradition when it comes to the country of origin principle. Its predecessor, the Television Directive of 1989, had already set out the “state of transmission principle”. In the current AVMS Directive, amended in 2018, the legislators have again retained the “country-of-origin principle” for the areas harmonised under the Directive, but - as previously - continue to provide for exemptions from this principle. Thus, a Member State can, in exceptional cases, adopt time-limited measures against audiovisual media service providers established in another Member State, if this provider has repeatedly and clearly given an incitement to violence or hatred or has issued a public call to commit a criminal act of terrorism and represents a serious and grave risk of impairment to public safety. Even then, however, the national regulatory body overseeing the service provider must first engage the responsible supervisory body in the matter, and consult with the responsible Member State and the European Commission. In supervisory practice, the exemptions from the country of origin principle in the AVMSD have barely played any role to date, given these high bars. With a view to the possible disadvantages of the country of origin principle, the restrictive requirements placed on exemptions heighten the risk of forum shopping. During the recent discussions to amend the legislation, in view of this there were isolated attempts to call the country of origin principle generally into question. The clarification of the choice of law in the amended AVMSD can be considered positive. In its amended form, the Directive sets out a number of criteria for instances where a provider has multiple establishments with different focuses of activity; this had previously led to problems of assignment in some cases.
- The e-Commerce Directive also specifies the country of origin principle as its basis. It too makes provision for exemptions in exceptional instances; although the conditions for these exemptions differ from those in the AVMSD. Under the e-Commerce Directive, a Member State may adopt measures against a specific provider in another EU country if this is necessary for certain reasons (protection of public order, health or safety, consumer protection), if the service represents a serious and grave danger of impairment of these goals and if the planned measures are proportionate. In this case the State intending to impose the measure is solely required to “notify” the responsible Member State and the Commission beforehand. In urgent cases, the need for prior notification can be waived entirely, however. Moreover, the e-Commerce Directive excludes specific areas from the establishment principle, including copyright, the free choice of jurisdiction for contractual parties and contractual obligations in respect of consumer contracts. In determining the law to be applied to a service, difficulties arise particularly in cases where a service provider has establishments in several Member States or is undertaking (electronic) service-related activities. Mention should also be made of the fact that Art. 1(4) of the e-Commerce Directive states that the Directive “does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts”.





- The framework under competition law is based on the country of destination principle, particularly with regard to the consequences of an infringing action, with the sales market firstly being considered to identify the destination market. One special aspect, which is also of relevance to the media, arises in cases under competition law where the unfairness follows from an infringement of applicable laws. Here the two principles collide: for instance, an infringement against rules regulating media content – such as the rules on protection of minors – where the country of origin principle is taken as the basis for enforcement also becomes the reason for the existence of a breach of competition rules where the country of destination principle is applied. Competition rules thereby move infringements of regulations where the country of origin principle applies into a regulatory framework based on the country of destination principle.
- The EU framework on copyright similarly starts from the country of destination principle: the country of protection principle is fundamental in copyright law, and states that the rights-holder holds legal protection in the territory for which he holds the copyright or exploitation rights. The copyright-holder is to be enabled to assert his rights under the jurisdiction of the respective country of protection. The challenge in this with digitally distributed works is the possible separation of the place of an infringing act, the country the service is provided from and the country where the relevant file is being received or shown.
- The new data protection framework, as set out in the GDPR, is characterised by the aspect of direct applicability of the GDPR. There are initially no problems of conflict of law here, since the specifications of the GDPR apply consistently EU-wide. However, questions of applicable law arise above all over the question of the territorially responsible body tasked with upholding the law, and over the question as to which national data protection law is applicable to controllers, insofar as opening clause-related deviations and clarifications arise from this. In relation to the responsibility of data protection authorities, the GDPR fundamentally assumes a country of origin principle, with the registered office of the main establishment accordingly determining, in relation to data protection, in which establishment the decisions regarding the purposes and resources for processing personal data are mainly taken with binding effect. Only if no main establishment can be identified does the supervisory authority in the respective place of data processing remain responsible. Through the separation of data processing-related decisions in the GDPR on the one hand and, for instance, programme-related decisions in the AVMSD on the other, it is therefore possible that different outcomes may occur when determining a main establishment. Accordingly, there can be a divergence of applicable national legal orders with regard to the GDPR and AVMSD.

Through general and sector-specific horizontal rules which follow the country of destination principle and media-specific and sector-specific vertical rules starting from the country of origin principle, heightened requirements come about for media providers in identifying the respectively applicable national legislative framework. Due to the separation of the applicable principles, this can result in situations where for one and the same service, depending on the area of the law, different national state law is applicable, for instance with regard to media content requirements of the AVMSD and contractual, media use-related specifications of the DCD or of the Portability Regulation (see Chapter 5.6.3 on spillover effects such as this).





Overall, the regulatory choice of one of the two principles does not always appear to be derived systematically, and the problems arising from overlapping scopes of application with different choice-of-law principles are not sufficiently illuminated. What is needed here is a more systematic approach for the legislative choice between the country of origin and the country of destination principle. This includes not just theoretical considerations relating to regulatory aims and requirements, but also taking account of sector-relevant exceptions and considerations deriving from regulatory impact assessments. A further loose end – aside from the AVMSD amendment – looks to be the lack of guidelines on interpretation over issues of applicable law in cases where a provider has multiple localised points of contact in Member States.

## 5.5. The phenomenon and relevance of spill-over effects from non-media areas

The overview of media-relevant European legislation has shown that it is not only media-specific Directives and Regulations that make up the current corpus of EU media regulation, but that media service providers are additionally confronted with the wider sector-specific regulations and with rules originating from other areas of law. It is these sets of rules, which are not targeted primarily on public communication, which may have – partly unintended – impact on the information and communication sector. In what follows, the intention is to use illustrative areas to demonstrate how markedly such spillover effects present themselves as incoherences in the EU media order.

### 5.5.1 *Video-sharing and the liability privileges of the e-Commerce Directive*

The new set of rules under the Copyright Directive, as amended by the DSM Directive, on the responsibility of platforms for unlawful content uploaded by third parties reveals such spillover effects between the DSM Directive, the e-Commerce Directive and the AVMSD. Particularly when it comes to the regulatory approach, the e-Commerce Directive differs markedly from the AVMSD and the DSM Directive. The e-Commerce Directive introduced a liability privilege for (hosting) platforms horizontally and across sectors, in order to enable the development and functional capability of online services. As this regulatory approach is aimed at encouraging the development of online services in the European digital internal market and at realising freedom of communication, this can be considered “structure-oriented”. Conversely, the recently introduced new rules in the AVMSD and the DSM Directive look to be mainly “phenomenon-oriented” and operate solely vertically. There are differences, particularly regarding the direct protective aims (see above). The necessity for a problem-oriented regulatory approach with additional obligations for online services can be traced back to the growing importance of the role of platforms.

The existence of horizontal and, more recently, vertical special requirements is now leading to overlapping obligations which look to be detrimental for a coherent media order. Platforms need to respect different, partly contradictory legal specifications. For instance, the liability privilege under the e-Commerce Directive can in principle apply to a platform’s overall offering, but the platform must respect the specific requirements of the DSM Directive for copyright-protected works and/or the content requirements of the AVMSD for audiovisual content on video-sharing platforms, for instance in the area of protection of minors.



Ambiguities regarding the material scope of application of such obligations cause legal uncertainty within the EU legal framework, for instance with regard to definitions of terms. In the absence of an EU-wide definition of “hate speech”, from the provider perspective it remains unclear which legal specifications are applicable to which content. Thus, Holocaust denial is an illegal statement in Germany and Austria, but not in other EU states. Platforms from the USA may orient themselves to interpretations of hate speech in US law, where such utterances often still fall under the scope of protection of freedom of expression. A similar situation applies to combating “terrorist content”, where there is no defined and consistent definition of the term for that purpose. Such ambiguities mean that platforms are in the difficult position of simultaneously respecting requirements for freedom of expression for their users and obligations to take down certain content. Where the failure to delete unlawful content is subject to legal sanction, strong incentives come about under corresponding legal frameworks for the platforms concerned to also delete questionable or borderline forms of user expression. It therefore cannot be ruled out that, where the legal circumstances are unclear, platforms may become proactive in controlling and taking down content out of a concern for possible sanctions, and potentially remove opinion which is frequently legally protected from a structural viewpoint. Moreover, platforms as private actors are made responsible on the one hand for monitoring, preventing and detecting unlawful content, while on the other the general consensus rejects private influence being exerted over public communication. This leads systematically to contradictions.

Furthermore, the interpretation of the liability privileges in the AVMSD and DSM Directive appears contrary to Art. 14 and 15 e-Commerce Directive. In particular, the absence of a concrete, consistent scope of application in relation to who is taken to be the “host provider” or “platform” causes uncertainty. This is partly due to the fact that the role of the platforms has evolved from a largely passive transmission role to more active forms of content selection and prioritisation. A more content-related form of selection and organisation can, however, also be considered as a trap-door for more restrictive requirements regarding the obligations for oversight in relation to possible unlawful content. Even failing to adopt effective measures at an infrastructural level to remove unlawful content could constitute grounds for invoking responsibilities for host providers. The resulting *de facto* expectation of certain monitoring measures of all content is in conflict with the general ban on an obligation on platforms for monitoring as envisaged in Art. 15 e-Commerce Directive. The current issue here consists in not being able to tease out from which point in time vertical legal provisions *de facto* imply or have as their consequence a “general monitoring”, or whether a procedure for monitoring delimitable content parts of the platform does not breach this ban and appears justified.

The changing role of host providers and/or platforms can also be demonstrated by the following example: the AVMSD is introducing new obligations for video-sharing platform (VSP) services, under which enforcement-like power structures come about on the service provider side, including e.g. in the protection of minors or in combating terrorism. This is prompting criticism that the video-sharing platforms are playing an increasingly relevant role in determining the limits of freedom of expression as protected in fundamental law. The framework of opportunities for expression-related exercise of fundamental rights is thus increasingly being set by private actors - not just out of their own desire, which can also be the case (“private ordering”), but as part of implementing legal requirements.





Aside from the different approaches to regulation, the partly differing transpositions in the Member States in determining what a “host provider”, a “platform” or a “VSP” is similarly demonstrating incoherences in implementing the EU specifications, which transports the problems of the applicability of the liability rules to the level of the scopes of application in the nation-states and amplifies them there.

### 5.5.2 *Data protection privileges (only) in journalism*

The aim of the GDPR is the protection of the personal data of EU citizens and EU-wide harmonisation of data protection law, along with securing further fundamental rights and freedoms (see above). Although the GDPR, as an EU Regulation, is directly applicable and makes no provision for leeway in implementation like with Directives, it does contain a number of opening clauses. These opening clauses enable the Member States to further specify special provisions through national legislation or to introduce rules going further than the Regulation in limited areas. A prominent example of such delegation of scope for implementation is Art. 85 GDPR, which obliges Member States to reconcile the right to the protection of personal data with the right to freedom of expression and information, including processing for “journalistic purposes”. Measures in national legislation are intended to define exceptions and deviations here which are needed to reconcile data protection and freedom of expression and information. While the GDPR harmonises data protection law EU-wide, this may give rise to contradictions and legal uncertainties over data processing by media or journalists, but also over non-journalistic statements, where the Member States define media privileges and exceptions in the area of freedom of expression differently.

Other purposes of data processing, including by media providers, are not covered by this sectoral exemption, however. The specifications of the GDPR apply to that extent without restriction for any forms of usage statistics, customer and subscription management, forms of direct marketing or the initiating of behavioural targeting for advertising for a specific media service. The extent to which forms of media-related personalisation and the related processing of personal data to improve recommender systems fall under the aforementioned media privilege is the subject of debate amongst legal experts.<sup>53</sup> In addition, companies providing relevant services as part of refinancing the costs of journalistic outlets, for instance in the area of online advertising, are also affected by the provisions of the GDPR – in some cases, quite sensitively. Thus, the GDPR is highly relevant for the communication sector, even outside of data processing for journalistic purposes.

Particularly with regard to the definition of terms as to who qualifies as a “journalist” or which activities are for “journalistic purposes”, different approaches are evident in some instances in the Member States. For instance, it is not guaranteed that an “amateur journalist” or “citizen journalist” in every Member State is similarly covered by the media privileges under the national data protection laws or their exemptions. A resulting incoherence in the (non-)applicability of GDPR specifications can thus have considerable consequences for the free exercise of journalistic activities. But it is not only for journalists that there is a danger of a spillover effect where Member States fail to give adequate regard to Art. 85 GDPR. In the digital space, where people make use

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<sup>53</sup> Cf. Eskens (2019), A right to reset your user profile and more: GDPR-rights for personalized news consumers, *International Data Privacy Law*, Volume 9, Issue 3, August 2019, Pages 153-172.



of their freedom of expression, there is a conflict between freedom of expression and data protection. Accordingly, broad interpretation over implementation of Art. 85 GDPR is vital in order to protect freedom of expression against abuse of data protection. While privileges for conventional media and journalists under data protection law have regularly been introduced into national law, the Member States are further obligated with regard to freedom of expression and information to ensure free public and individual communication. Art. 85 GDPR does indeed accord particular protection to media and journalists in their activities, but alongside this it is possible that data processing by individuals may arise as part of the exercise of their own freedom of expression, and this is not covered by a narrow understanding of the term journalistic purposes: Art. 85(1) GDPR is not restricted to journalistic purposes. Thus, given the vague exemption in Art. 85 GDPR and the delegation of its implementation to individual Member States, the GDPR threatens to overprint legal frameworks and practices deriving from case law in the area of protection of personality rights and general rights of expression and *de facto* to render them without force. Thus, in the non-journalistic field and in the boundary areas of newer journalism-like offerings, the GDPR can have chilling effects.

One issue associated with conventional protection of personality rights concerns the right to revoke consent granted under data protection law. Many media organisations, particularly in the television and film industry, are reliant on written permissions from actors and collaborators. Given that consent can be revoked at any time, according to the GDPR, this could lead to problems for production and media companies if, for example, an actor later withdraws his consent. Such questions are not generally addressed in law under the national legislative frameworks. Such practical challenges for media creatives and the sectors associated with them were not adequately thought through when the GDPR was adopted. Additionally, it is evident that not only Directives, but equally opening clauses in Regulations which leave scope for national implementation measures threaten to cause legal uncertainties at a structural level, and thus weaken the harmonising effects of EU rules.

## 5.6. Evaluation specifications and culture

At the start of the work on a new legislative proposal or a new initiative, the European Commission first conducts an impact assessment to evaluate the possible effects of various regulatory options on the economy, society and the environment (see Chapter 5.8.). At all times, this process is guided by the Better Regulation Guidelines.<sup>54</sup> These are aimed at open and transparent decision-making, engagement of the public and stakeholders in the whole process of shaping policy and proposing laws in the form of public consultations, ensuring proposals are evidence-based, and minimising administrative expenditures.

Since the entire life cycle of a legislative act is the focus of this process, in addition to ex-ante assessments the guidelines also give consideration to interim assessments, ex-post evaluations and fitness checks. Such investigations aim to arrive at reliable findings as to how relevant, effective and economical a regulation actually is, following introduction and implementation. Using REFIT analyses, the EU also systematically assesses and examines legislation and undertakes

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<sup>54</sup> [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en)



amendments and improvements as necessary in order to adapt legal regulations to new economic, technical or social developments. The REFIT programme also serves to identify incoherences and regulatory loopholes.

Such evaluation measures are not only important in maintaining economic competitiveness and supporting growth, but the EU legislators are also subject here (to a limited extent) to obligations for optimisation, particularly in those areas where the regulatory area is relevant to fundamental rights. These not only include freedom of expression and protection of personal data, but equally protection of other fundamental rights. Examination shows that the legal instruments analysed generally contain revision clauses (see Annex 3 - Evaluation and Reporting Obligations in Individual Legal Instruments).

The legal instruments analysed exhibit in equal parts one-off specifications for review at a given time, and obligations for regular review and reporting at designated intervals. This can fundamentally ensure that incoherences between different legal instruments or in the application of one or more sets of rules are identified. The disadvantage of one-off evaluations is that legal instruments added at a later time which amend concepts, overprint individual provisions or have spillover potential are then no longer systematically included in the assessment and the review of practice. In this regard, the European Commission's REFIT analyses, undertaken since 2015, may help; however, the corresponding mandate expired in October 2019.<sup>60</sup>

It is noticeable that only the smaller part of the review clauses provides for specific requirements concerning the evaluation procedure and the criteria to be assessed there. In those places where such specifications are made, it appears that the focus is primarily on economic aspects. Possible and observable effects on fundamental rights are not the focus of the specified review, or only at the margins. Moreover, none of the review clauses stipulate that the evaluation is to be undertaken by outside bodies; although in some cases the explicit involvement of committees of experts is provided for (see Draft P2B Regulation). A legal obligation to publish the findings of the review is the exception rather than the rule.

There are notable instances where a legal instrument, despite far-reaching changes, extensions or adaptations of the status quo, does not contain a review clause. For instance, the Copyright Directive, where far-reaching changes were recently introduced via the new neighbouring rights for press publishers and the specifications for text and data mining, makes no provision for a fundamental review. The one-off review contained there applies solely to the new Art. 17, which introduces licensing and monitoring obligations for platforms with user-generated content.

## 5.7. Analysis of Impact Assessments

The area of media regulation is one which is also, indeed particularly, relevant to fundamental law: providers and media creatives are entitled with freedom of expression and freedom of communication, the guarantee of ownership and corporate freedom, and also EU contractual freedoms such as service freedom. On the user side, freedom of information and freedom of expression, along with the right to privacy, are key areas of focus. To better understand whether and to what extent the EU legislators are undertaking the complex balancing assessments of purpose

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<sup>60</sup> The "Fit for Future Platform" (F4F), which is intended to succeed REFIT, is currently taking up its work and can establish appropriate initiatives, if necessary; see [https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly/fit-future-platform-f4f\\_en](https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly/fit-future-platform-f4f_en)







of protection and fundamental rights that exist in some cases when creating new sets of rules or modernising existing sets of rules with relevance for the media sector, an analysis was made of the respective impact assessments. The focus of this analysis was on whether and to what extent potential consequences of provisions for public and individual communication and the relevance for the information- and communications-related exercise of fundamental rights were identified in the assessments, and how these were taken into account in the possible deliberations.

Impact Assessments (IA) or Regulatory Impact Assessments (RIA) are undertaken systematically by the Commission, to examine whether measures are necessary and what effects the proposed legislation would have. The IA is carried out before the Commission adopts a proposal for a new legal provision. Fundamentally, the assessments are prepared for initiatives where significant economic, social or environmental effects can be anticipated. These include legislative proposals, non-legislative initiatives (e.g. funding programmes) as well as implementing acts and delegated acts. An IA report regularly includes a description of the anticipated economic, social and environmental consequences, particularly with regard to SMEs and competition. Additionally, drawing on the inclusion of opinions gathered from the consultation, it explains which stakeholder groups are affected by the respective measure, and how. The assessments are conducted on the basis of the principles of subsidiarity and proportionality, with the Commission being guided here by the “Better Regulation Guidelines”<sup>61</sup>

- The focus in the IA reports is - as with the evaluations - on the economic, social and environmental impacts. Consequences for fundamental and human rights are only analysed “when-ever relevant”.<sup>62</sup> This can be the case particularly if the EU is intending to adopt measures to protect the individual from interventions into fundamental rights or if fundamental rights are part of the definition of the issue. The effects of new legislative provisions on fundamental rights is made dependent on whether they are part of the issue or of the policy context. The consequence is that fundamental rights and the media freedoms contained therein, particularly the freedom of information and freedom of expression (Art. 10 ECHR, Art. 11 Charter of Fundamental Rights) are not always included in an Impact Assessment and are not systematically addressed for every new legislative proposal.
- The findings from each IA are summarised in a report. This report is checked by an independent body, the “Regulatory Scrutiny Board” and evaluated in a further opinion. This process provides for a degree of independence and objectivity in quality control. Lastly, the IA report is published together with the legislative proposal and presented to the legislative organs of the EU (Parliament and Council), as they decide on acceptance of the proposed legislative act.
- Our examination has shown here - illustrated below using selected examples - that the Commission assumes considerable discretion and a wide margin of appreciation when conducting IAs. Consideration of freedoms of information and communication, and in particular the bringing into balance of these fundamental rights with the potentially conflicting legal positions of the respective regulatory objective, is undertaken at least not systematically.

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<sup>61</sup> <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-impact-assessment.pdf>

<sup>62</sup> <https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/impact-assessments/>





- Possible spillover effects of measures in the area of public communication, such as in the area of liability rules, possible chilling effects or effects on protection of journalistic sources are not to be found, apart from individual exceptions, in the impact assessments. The focus is primarily on questions of suitability and the necessity for a legislative proposal in achieving the respectively envisaged aims of the law (generally the completion of the internal market), and less often on the consequences for the exercise of the fundamental rights of service providers or users in the area of information and communication. In those instances where deliberations are made as part of IAs, there is no evidence of a systematic measure for these considerations or of a comprehensible reconnection to dogmatic considerations in fundamental law.

#### *5.7.1. Example of video-sharing platform services in the AVMSD*

As part of the IA for the proposal to amend the AVMSD in 2016<sup>63</sup>, inadequate protection of minors and consumers when consuming videos on video-sharing platforms (“VSP”) and the absence of equal opportunity between traditional broadcasting services and on-demand services, together with weaknesses in the internal market, are defined as problems. Improving protection of minors, including through the introduction of an obligation to protect against content and hate speech on VSP which might impair or harm children, together with improving competition, are deemed general objectives. Alongside this, a public consultation on the consequences of the AVMSD was established, in which the Commission was called on to create supplementary guidelines for VSPs which would clarify the extent to which actors in the social media sector are covered by the new rules. In doing so, the right to free expression of opinion in particular is to be taken into consideration.

In the IA, the possible effects of the new rules on media freedoms are also analysed: particularly for the newly introduced obligations on VSP providers over labelling content harmful for children and adolescents and in making access to corresponding user posts more difficult, the IA flags the points of contact with the right to free expression. With regard to transparency specifications, the assessment argues that by comparison with mandatory age releases this is the more lenient means, referring in other regards to the possibility of restricting the fundamental right for the purpose of protecting minors. However, the main argument is the reference to the fact that the policy goal of effective protection of minors is already established in the predecessor Directive and is here only being continued. The question of proportionality in the narrower sense is therefore not addressed in the IA.

#### *5.7.2. Example of data protection and reporting in the GDPR*

Strengthening the fundamental right to data protection and transferring control over the data to the data subjects are set out as the main goals of the GDPR, including at the time the legislation was being proposed. The relevant fundamental right from Article 8 Charter of Fundamental Rights is assessed extensively in the IA.<sup>64</sup> The IA analysis not only illustrates the protection of

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<sup>63</sup> Commission Staff Working Document, Impact Assessment, Accompanying the document “Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities” SWD(2016) 168 final.

<sup>64</sup> Commission Staff Working Paper, Impact Assessment, accompanying the document “Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) and Directive of the European Parliament





personal data, but also notes that the GDPR influences the guarantee of other fundamental rights and freedoms. Particularly highlighted is a necessary balance between competing fundamental rights, such as freedom of expression and privacy. In that context, it also examines the extent to which protection of privacy affects freedom of expression, whereby it notably discusses on the one hand positive effects through better data protection for the person expressing an opinion, and - albeit briefly - possible chilling effects on freedom of expression from more restrictive data protection in favour of persons affected by a statement.

The IA addresses the fact that the lack of protection for journalists under the previous EU legislative framework is one of the reasons for the new regime. It contends that the definition of the term “journalistic activities” for sector-specific exemptions and relaxations of GDPR requirements in particular needs to be interpreted broadly in order to rule out too stringent restrictions on freedom of expression and freedom of reporting.

The document in preparation of the GDPR is a good example of how interlaced and conflicting fundamental rights are addressed in Impact Assessments. At the heart of the deliberations is the fundamental right or rights, the exercise of which a proposed legal instrument is intending to ensure or improve. Here, a detailed consideration is given to aspects of protection and the advantages of various policy options for protection of fundamental rights, and a systematic examination of proportionality is undertaken with regard to possible restrictions of the key fundamental right. Conflicting fundamental rights that are affected are, by contrast, only considered briefly and unsystematically, and in some instances as no more than an examination as to whether it is permitted to intervene in the conflicting fundamental rights. There is no proportionality test, or else it is limited to a comparison between the restrictions under the policy options examined. A systematic balancing of legally protected interests between the right to data protection and the freedoms of expression and communication is not found in the IA. Since, in the context of the opening clause, this is a task for the Member States, it could be argued that this was not necessary; but in that case an assessment of the real effects due to the opening and delegation to the Member States would have been appropriate.

Particularly apparent here is also the divergence between the point in time of the IA and the (much) latter adoption of the legislative act: not only have the economic, technical and social developments moved on in the intervening period, but even the regulations ultimately adopted have changed in some cases significantly from the time of the regulatory impact assessment. The clearly expressed concerns regarding privileging data processing “for journalistic purposes” under the GDPR were barely taken as a reason, in the onward procedure, to prevent divergence due to special national characteristics in the area of media privileges and their scopes of application. This circumstance is now leading at the national level to what in some cases are clear incoherencies, particularly over the definition of the term “journalistic activity” (see above). Even the exemptions outlined in Art. 85 GDPR to safeguard freedom of expression and media freedoms are mainly understood as being to protect journalists and their activities. Possibly as an unintended consequence, the GDPR is now superimposing on the whole area of legal protection of personality and one’s images in some Member States. Through to today, for example, it is not fully clear

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and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data” SEC(2012) 72 final





whether e.g. the essential exception under Section 23 (1) of the German law governing artworks and copyright matters (*Kunsturhebergesetz*) for photo reportage remains applicable at all. Since in this area the EU states weigh up freedoms of expression and reporting against personality rights and guarantees of data protection in quite different degrees, the imprecise and delegated exemption in Art. 85 GDPR ultimately results in an accepted incoherence in the protection of freedom of expression, particularly also in those areas where it is not directly professional journalists who are processing personal data.

### 5.7.3. Example of prohibiting child sexual abuse material

The Directive on combating the sexual abuse and sexual exploitation of children and child pornography is dedicated to combating these crimes and also includes possible measures to restrict corresponding online depictions, including blocking by internet service providers. Having regard to the set of fundamental rights, which here are similarly complex (Art. 7 and 8 Charter of Fundamental Rights on protection of privacy and private data, and Art. 11 Charter of Fundamental Rights and Art. 10 ECHR), an IA would need to examine in this case whether and to what extent combating crimes can be reconciled with these fundamental rights. Without any detailed assessment of the restrictions on media freedoms, it finds that the measure is fully compatible with fundamental rights, to protect and uphold the rights of children.<sup>65</sup> In respect of Art. 7 and 8 Charter of Fundamental Rights and Art. 11 Charter of Fundamental Rights and Art. 10 ECHR, it is simply noted that the provisions to strengthen law enforcement, such as the exchanging of information or blocking access to child pornography websites, were examined for their compatibility and are to be permitted. Despite the explicit reference to possible blocking even of legitimate content, a detailed appraisal and check for proportionality is not carried out. The rights of children, in the IA's view, carry more weight than the risk of possible intrusions in other fundamental rights, such as freedom of expression or privacy.

### 5.7.4. Example of balancing rights in the DSM Directive

The revised Copyright Directive aims to protect the rights of authors by supporting innovation, creativity, transparency and balanced contractual relations, and simultaneously ensuring free access by users to content and free access by citizens to information. In a comprehensive Impact Assessment<sup>66</sup>, the Commission has evaluated various policy options for achieving the goals outlined above and with regard to their effects on guaranteeing broader access to content, to exceptions in the digital and cross-border area and to creating a single market for copyrights. In addition, the effects on interest groups, the creative industry and the fundamental rights were assessed. The outcome concentrates on the introduction of protection measures to uphold copyrights whilst simultaneously ensuring broader access and broader dissemination of content.

<sup>65</sup> Commission Staff Working Paper, Summary of the Impact Assessment, accompanying document to the "Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA", SEC(2009) 356

<sup>66</sup> Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, accompanying the document "Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes", SWD(2016) 301 final



The IA concludes that the Directive has positive effects on copyright as a property right, but envisages possible impacts on legal positions in the area of freedom of information, the right to education and cultural diversity.

Here, the IA does not extensively evaluate the possible intrusions into freedom of expression and freedom of information, but explains that by reason of the compensatory measures to be provided and the balanced approach with regard to the obligations for the relevant stakeholders only limited effects on the freedom to express opinions and on freedom of information will come about. Instead, by ensuring the ability to refinance, it states that the long-term assumption is of improved possibilities of access to quality content. It is also apparent that the focus of the consideration of copyrights on the one hand and of rights of information and expression on the other lay primarily on conventional forms of professionally created or produced content. However, for the area of newer forms of mediated expression, where new communicators who do not conform to traditional media institutions are the creatives, the rules may represent stronger interventions into freedoms of expression and information and into public communication overall, which an assessment might also have been able to ward off. The brevity of the appraisal of legal consequences with regard to fundamental rights as part of an Impact Assessment running to several hundred pages suggests implicitly that only certain stakeholders were given consideration in the final deliberations.

#### *5.7.5. Example of terrorist content*

The planned Regulation on preventing the dissemination of terrorist content online aims at contributing to protecting public safety by restricting access to terrorist content. Since the proposal could impair a raft of fundamental rights, particularly the right to freedom of expression and information for all citizens, this is analysed in the IA relatively extensively.<sup>67</sup> The IA comes to the finding that with ordered deletions, but even more with automated deletions on the basis of AI, the right to information and the right to expression of opinion could be affected. In view of possible consequences such as over-blocking (the erroneous blocking or deletion of what is actually permitted content), automated instruments to take down terrorist content therefore seem more possible where “contextualisation” is not necessary. Whether algorithms are suitable to take down terrorist content without infringing fundamental rights depends on the nature of the content, which needs to be balanced against the rights in question. The erroneous automated removal of permitted content must be avoided as far as possible. Against this background, the IA envisages procedural precautions to establish a balance between measures to combat terrorist content and protection of fundamental rights. The risks for freedom of expression and information which could be caused by automated recognition tools are to be moderated through the introduction of protection measures. For example, the responsibilities of authorities for declaring content as non-permitted are to be determined, reporting obligations and public oversight introduced and automated recognition tools only used under human supervision and with checking prior to the removal. The assessment comes to the conclusion that with a complaints procedure for users and the guarantee of transparent practices by providers, proactive measures to

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<sup>67</sup> Commission Staff Working Document, Impact Assessment, accompanying the document “Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online”, SWD(2018) 408 final



remove illegal content would be appropriately balanced with the economic capacities of the providers and, simultaneously, would ensure protection of freedom of expression. However, this is less the result of an evaluation, but more the attempt to guide the potential disproportionality towards proportionality via procedural provisions – the objection of possible disproportionality in the IA cannot change anything with regard to the political will to choose the “most effective” policy option. The argument runs that deleting terrorist content is relevant for protecting life and limb, although the problem of infringing freedom of expression and information arises where the issue is one of deleting permitted content which represents no threat to life and limb. The Regulatory Scrutiny Board evaluated the IA and came to the conclusion<sup>68</sup> that the effects of the policy options on freedom of expression needed to be assessed more rigorously. The Board refers explicitly to the relevance of stakeholder concerns and their fear that legally valid content could be deleted. The IA should therefore address more specifically which technical measures are taken for automatic removal of content and what role human interventions in these systems play. The Board also criticised the fact that the IA does not adequately reflect the views of various stakeholders with regard to the various issues.<sup>69</sup>

## 5.8. Conflicts of objectives and “broken concepts”

Media regulation regularly affects a melange of various legal positions protected by fundamental rights. Due to the complexity of the applicable EU legislation and in view of their partly divergent protective aims, conflicts of objectives necessarily arise in the overall consideration of the legal framework, going beyond the conflicting legally protected interests in one specific legislative act. Moreover, it cannot be ruled out that parts of the existing legal framework and the extension of traditional regulatory approaches for new forms of offerings and services can have acquired a status, in view of more recent developments, which experts in regulatory affairs call “broken concepts”.

The term “broken concept” describes conventional regulatory approaches in the area of media governance which are challenged or even appear to be overtaken by new technical, economic or social developments. The term was coined by the Australian Communications and Media Authority, which has systematically examined its own regulatory framework with regard to such consequences of convergence (ACMA 2011). In doing so, basic assumptions and corresponding regulatory approaches were identified as overtaken, including:

- The fundamental drifting apart of legal starting-points and the observable changes in markets, technologies and user behaviours.
- Inconsistencies in the regulatory treatment of similar content which is transferred and received via various channels and end-devices.
- The clear preponderance of sets of rules and of the subsequent regulatory measures in relation to conventional media and media communication, despite the blurring of the bounda-

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<sup>68</sup> Regulatory Scrutiny Board Opinion, “Proposal for a regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online”, SEC(2018) 397 final

<sup>69</sup> Regulatory Scrutiny Board Opinion, “Proposal for a regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online”, SEC(2018) 397 final.





ries between traditionally different end-devices, offerings and business sectors. Accordingly, comparatively more obligations and higher costs of implementation are also being imposed on these providers.

- Very detailed regulatory responses to new developments, increasing the complexity of the overall regulatory framework.
- The extension and adoption of conventional regulatory approaches to new, partly convergent services, which brings up questions of transferability and has legal uncertainties as its consequence.
- Unclear or distributed responsibilities with regard to legislative responses to new developments.

Several of these points can also be observed with regard to the current EU legislative framework, such as the detailed nature of regulatory responses to new phenomena, the simple extension of conventional regulatory instruments and a simultaneous absence of new regulatory approaches, different Directorates-General and their system logics as “dispersed” sources of new rules and – in the audiovisual area – clinging to graduated requirements for different services despite the goal of a “level playing field”. The analysis of the regulatory framework shows further challenged concepts here:

A conventional conflict of objectives in media regulation – which is intensifying due to current developments – is the antagonism between the need for their legislative framing on the one hand, given the media’s important social functions, and the principles of freedom and independence of media on the other. Every state intervention reduces this independence, with the result that restraint is always advisable with every form of media regulation. The closer a regulatory intervention touches on the content of media services, the more strongly it can produce lack of freedoms, and the greater its potential for abuse. In this area, digitalisation and IP networks were developments which have led to new forms of services and provider structures. The number of addressees affected by the rules has increased exponentially, while the level of (expert) knowledge about media regulation appears instead to have declined, due to entirely different backgrounds and regulatory cultures. Given this context, legal instruments appear to be particularly risk-laden where they declare certain content to be absolutely illegal and envisage technical blocking measures, establish sensitive interventions in freedom of expression using automated deletion procedures or encourage over-blocking through structural incentives. Rules which provide for such measures can be found notably in the Directive on combating the sexual abuse and sexual exploitation of children and in the planned Regulation on preventing the dissemination of terrorist content online. When the EU legislators use vague concepts in the material scope of application in these areas, it brings with it – theoretically – the possibility of creating particularly strong chilling effects here, which can extend across the width and breadth of public communication. At the level of application of the law, such rules bring – again theoretically – the risk that action will be taken against permitted, but unpopular or oppositional offerings.

The assumption that services fulfil the same purposes and functions for all users and can therefore be classified for the protective aims of regulation is also coming under pressure. Due to the potential for personalisation and individualisation of services, such services correspond in the





ideal way to freedom of information; services adapted to individual needs for information represent a very direct form of exercising this fundamental right. With regard to supra-individual, group-related or even society-related information interests, however, personalised services lead in extreme cases to forms of social division and knowledge-related segregation. Freedom of information, in respect of personalised services, stands in conflict with the supra-individual goals of freedom of expression, including the construction of shared realities, socially shared knowledge, synchronisation of public issues, social discourse and thus ultimately the public sphere. The legislative framework must take account of both sides here (individual freedom of information and public opinion-formation) and reconcile them. This is increasingly difficult, in view of the very different information needs and situations of the individual and hybrid services which combine publicly accessible information seamlessly with social graph- or profile-based individual information. In view of the limited EU competence in the area of ensuring media diversity, other cross-individual and society-related protective aims present themselves tentatively here, such as in the AVMSD with combating hate-speech or measures for rapid take-down of online terrorist propaganda.

Additional conflicts of objectives arise out of personalised media services between freedom of information on the one hand and privacy on the other. As the offered services become increasingly personalised, this is associated with increasingly encompassing observations of private media use, thematic preferences and social interactions. Here, individual information interests are opposed by goals relating to privacy and autonomy, where assumptions are made based on behaviour and personal profiles or interest profiles are created in order to make profile-based selections in providing the service. These profiles regularly follow probability-based assumptions, and can also be incorrect. In these situations, forms of algorithmic selection also appear to be an intrusion into the information- and communication-related, but also social autonomy of the users (Dreyer/Heldt 2020). The more restrictively the law pre-shapes the service's selection here, the more paternalistic the regulatory approach appears.

Amongst the concepts which are perhaps not yet "broken", albeit strongly challenged by current developments, is that of ensuring diversity. Even if this is pursued at Member State level, EU regulation is predicated on such regulation in many places. Ensuring diversity often follows the logic of representation: the opinions and attitudes present in society should be found in the composition of programmes or bundled channels. This concept runs up against fundamental limits when the object requiring ordering on the basis of viewpoints relating to diversity is not a limited number of broadcasts or programmes, but practically all content available on the internet. How this would be ordered "correctly" would presume a comprehensive concept of diversity – which does not exist. Regulation must no longer work towards creating and ensuring external media diversity; rather, diversity under multi-channel conditions primarily means ensuring (communicative) equality of opportunity. However, this equality of opportunity is different in structural terms from the Member States' competence of ensuring national (media) cultures and identities. Equality of opportunity in the form of distribution-related fairness focuses less on content and, instead, more essentially on infrastructures and gatekeeper situations. Accordingly, ensuring media diversity comes closer to sector-specific regulation of infrastructure and competition. In this area, conflicts of objectives between sector-specific technical and competition law to ensure competition on the one side and media regulation to ensure media-related attention become apparent.







Due to the interlace of (access) opportunity-related rules on media content, what has been stated previously applies here: the potential for abuse of such rules for positive or negative discrimination over certain content remains high at this level. What is more, at this level it may occur whilst being even less noticeable. Ultimately, the boundaries of the area of regulation to which the conventional understanding of media diversity relates appear blurred, given forms of hybrid services. Opinions and viewpoints presented in the media are mixed with individualised social or commercial information and communication. Current attempts to positively classify media content thus have unavoidable impact on non-media content too, particularly in the area of platforms and intermediaries which make both types of content available.

The situation is rendered more complicated as it becomes increasingly evident that content diversity and equality of opportunity do not automatically also ensure successful public discourse. The individualisation of media use and information-related trends towards segregation are leading to the necessity to engage with ensuring further, more fundamental conditions for socialisation and the public sphere. Media regulation alone is no longer able to guarantee a functioning public sphere on its own, even where it is successful. This is becoming apparent in the area of disinformation or misinformation. In those areas where the EU is taking on the fight against such phenomena, it is running into possible conflicts with the diversity-related competences of the Member States. The area of regulating disinformation appears to be rich in conflict, insofar as it involves content-related rules and the independence of the media (see above). At the structural level, it concerns the fundamental question as to which actor - state or society - has or should have sovereignty over determining what is "true" and what is "not true". With regard to the fundamental assumption that society defines its own understanding of self in democratically constituted societies, statutory rules quickly fall prey to the suspicion of tearing this fundamental principle away from society.

Taking the overall view, it can be stated that hybridisation of services, i.e. the simultaneous provision of different types of service with different individual and public functions in one and the same offering, is a development which lies underneath several of the challenges described above. The fact that barely any consideration of such complex forms of offering has been undertaken in the existing legislative framework is leading to the blurring of boundaries in what was originally an unproblematic delineation between different services and areas of law.

A further clash arises in the area of the responsibility of services that make third-party content available, in other words all platforms for user-generated content. The liability privileges of the e-Commerce Directive for mere conduit are increasingly coming under pressure where platforms exercise influence over the display, selection, filtering and prioritisation of user content. Here, the platforms are not always acting voluntarily as regards increasingly curating and prioritising content: Current and planned EU rules set strong incentives or even obligations to identify certain content or to treat it differently. As a result, originally content-agnostic platform providers are increasingly being put in a position of engaging more closely with the content and thus acting in a direction which, at least structurally, comes closer to that of an editorial selection. If strong liability privileges are simultaneously associated with these measures, the corresponding providers are pushed *de facto* into the area of (weak) content curation. The more strongly and the broader the basis on which content-related rules are applicable to these providers, the more they





slip from enjoying the current liability privileges. With this and with increasing selections by algorithms to boost prominence, the (editorial) role of platforms in the area of public communication is shifting. The concept of the “conduit” for user-generated content with these services thus increasingly looks to be at an end, conjured up by phenomenon-related regulation. New approaches in the area of platform governance are needed here: not necessarily in order to induce greater responsibility on the part of platform providers, but primarily to decouple the question of liability from the form of the expected content curation under these constellations.

Further conflicts which present themselves on examination of the relevant legal instruments, and which have already appeared elsewhere, possibly viewed from other perspectives, are:

- The monetary and epistemological (added) value of big data is also seen in the EU as a future opportunity, having regard to innovation potential, new opportunities for adding value, business models and advances in knowledge. Against this is set the individual’s right to data protection. Questions arising from the gathering and exploitation of big data primarily concern the material scope of application of the GDPR, for instance in relation to the question as to whether and to what extent “new” inference knowledge from observational data is covered, and whether user rights are available to the data subjects (including the right to be informed, the right to rectification, the right to erasure).
- In areas where EU specifications envisage technical measures to protect minors, goal conflicts also become apparent to some extent with freedom of information for adults and with data protection of children and adolescents. If obligations for age verification of under-age users are envisaged in the AVMSD for video-sharing platform services, this inevitably leads on the one hand to the processing of personal data of children and adolescents, while on the other the question arises as to how providers are to distinguish between under-age users and adults, with the result that with a general obligation for age checking the privacy rights and freedoms of information of adults may also be affected. On the other hand, the circumstance of permission for consent by persons under 16 in Art. 8 GDPR for information society services provides for consent to be obtained from the parents. Here, to implement the right to data protection of children it is not just their data, but also the data of the holder of parental responsibility and the circumstance of parental responsibility which is processed as part of the consent.
- The conflicts in objectives in the context of regulation of data protection also extend to freedom of expression and media freedom of other persons. The circumstances solved to date through balancing judgements between personality rights and reporting freedoms or freedom of expression threaten to tip against the communication freedoms under the GDPR. Differentiated protection of personality rights runs the risk here of being overprinted by rigorous data protection regulations (see above, Chapter 5.6.2).
- A classic conflict of objectives appears in the intersection between copyright and freedom of information: to guarantee the exploitation (particularly the monetary exploitation) of protected works, the EU copyright provides for measures against the making accessible of unlicensed content in the area of digital communication. Each legal hurdle in the dissemination of protected works appears to affect freedom of information. Through exceptions and ex-



emptions e.g. in the private sphere, the legislative framework is attempting to achieve a balance between the interests of rights holders and exploiters of protected works on the one hand and the information needs and rights of information of users on the other. However, this balancing necessarily has to become more complex where new rights are granted not to the copyright holders directly, but to the exploiters and holders of neighbouring rights, and where these affect the freedom of information of users. Here, the direct guarantee of the copyright interest in favour of ensuring particular business models and exploitation-related services moves to the background, and the goal conflict exists increasingly between freedom of information and protecting the capacity of certain segments of the economy for re-financing.

- In those areas where EU rules are aimed at achieving the internal market, a tangible problem arises from the circumstance that many of the addressees covered by the scopes of application come from countries outside the EU. For these, as shown above, it is primarily the country of destination principle that applies, i.e. harmonising regulations take effect structurally above all on providers who come from the internal market. The goal conflict here is that through (too) restrictive rules to harmonise the internal market, it is possible that structural advantages may come about for major players from countries outside the EU over SME providers from the EU. For example, structural effects of this kind were evident following application of the GDPR: the major providers were able to implement measures to comply with GDPR rules more efficiently than small data controllers, through scale effects and bundling of resources.

## 6. Results and future key challenges

The EU legal framework applicable to audiovisual media services and to information society services with relevance for public communication is fragmented and not fully coherent. The provisions, originating from quite varied areas of law and regulatory traditions, regularly follow an specific regulatory cultures - with system-specific own logics, regulatory approaches, different terms and notions in the scopes of application and to some extent specifications which are contrary to applicable national law.

With regard to the protective aims, the EU finds itself in a dilemma: the legislative provisions of the EU are primarily pursuing the purpose of market-related harmonisation to accomplish the internal market (Art. 26 TFEU); with regard to the subsidiarity clause, however, the EU can only regulate the most essential aspects and impose a minimum level of harmonisation. Moreover, having regard to the cultural compatibility clause, when it comes to shaping the information and communication sector, it only has limited legislative powers. The Charter of Fundamental Rights of the European Union assumed full legal effect with the entry into force of the Treaty of Lisbon, meaning that the EU organs must directly consider human rights in their legislative measures. The EU has to manage the balancing act in light of these tasks and limitations, especially in those areas where the provision and use of information and communication services not only shows direct points of contact with fundamental rights of providers and users, but simultaneously, due to their cultural relevance, also show positive and negative influencing potential for individual and public opinion-forming and political will-forming processes. In this area, the EU is 'blind in one



eye' due to its scope of legislative competences. Some activities, such as those aimed at the integrity of (EU) elections, show that the EU is cautiously attempting to intervene with regard to such societal effects (too). Here, there is a need for a discussion of principle as to how to proceed with EU legislative initiatives containing specifications that contribute to accomplishing the internal market and/or ensure European human rights and *simultaneously* exhibit culture-related aspects. The requirement for coherence may give rise to a duty to at least establish procedural measures which provide for an assessment of the consequences for public communication.

It is also noteworthy that the frequency with which the various areas of law envisage different linking points, and regularly new terminologies, in their scopes of application, which ultimately set out rules for highly phenomenon-related individual services and situations in ever more concrete special norms. The spillover effects of legislative acts outside specific media regulation into the area of media services, illustrated in numerous examples, have also shown that some part of the problems of coherence arise from the fact that while regulatory impact assessments regularly take place there, these do not systematically take into account possible intrusions into freedoms of information and communication, or do not involve these in a structured balancing appraisal with the pursued, conflicting protective aims. The Impact Assessments exhibit varying qualities in this kind of fundamental rights-focused analysis, and in some cases feel driven more by the approach of an economically-based legitimization of a particular political desire than by that of an analysis of (human) rights. Moreover, the impact assessments are conducted in some cases years before the adoption of the respective legal instrument, with the result that changes to the legal text or in market or society cannot be definitively included. Here, an additional time-point for an updated impact assessment in the event of major changes, for instance after the trilogue negotiations, would appear to be helpful and likely to ensure better coherence. It also seems advisable to introduce specific media compatibility checks with regard to possible impacts and regulatory consequences for public communication, in order to be able to provide for media-specific adaptations or exemptions in cases of more general legislation.

Overall, the trends towards detailed regulations at EU level towards full harmonisation and towards regulatory responses to current, specific phenomena make consistent regulatory concepts seem ever more important, but also more demanding in terms of preconditions. For these reasons, the instances are mounting up where EU legislative instruments from other sectors or general provisions are (also) taking effect in the area of public communication, and are being seen by some as problematic in the achievement of media policy goals.

To date, the definition of material scopes and regulatory concepts has followed the respective regulative objectives. The EU is attempting to deflect conflicts with other sets of rules through exemption provisions which are formulated *ad hoc*. The attempt to link the material scope of application to particular service types appears increasingly problematic, and not just with regard to hybrid forms of services. This is also leading to a situation where Member States are faced with the challenge during transposition of shaping the scope of application in such a way that in each case all services subject to their jurisdiction are bound by all relevant EU rules - and additionally also in such a way that they are able to implement their own national goals. Here the need for (even) more systematic procedures which work across areas of law and across Directorates-General to ensure consistency in the context of legislative procedures becomes apparent.





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**Annexes: only available in the German version of the report**

