

Beihang University, Beijing, 27.9.2018

Internet Regulation in the EU: Current Trends

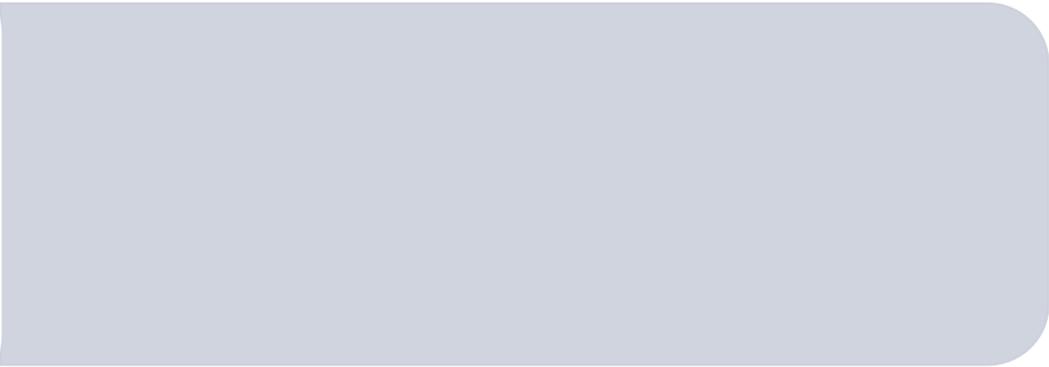
Prof. Dr. Alexander Peukert
Goethe University Frankfurt am Main
a.peukert@jur.uni-frankfurt.de

1. Introduction: the EU

- Art 1 [TEU](#): By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.
- Art 5 (1) TEU: The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
 - → A multi-level, federal system:

1. Introduction: the EU

- → A multi-level, federal system:



28 EU
Member
States

- Further federal fragmentation, e.g. Germany

1. Introduction: the EU

- → A multi-level, federal system:

EU

- Supranational lawmaking power

28 EU
Member
States

- Further federal fragmentation, e.g. Germany

1. Introduction: the EU

- The establishment of the internal market as one of the objectives of the EU (Art. 3 no. 3 TEU):
 - The Union shall establish an **internal market**.
 - From 27 national markets to one EU market.
 - It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a **highly competitive social market economy**, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

1. Introduction: the EU

- Art 288 Treaty on the Functioning of the EU ([TFEU](#)): To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
 - A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
 - One single law for the EU
 - A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
 - Harmonization of 28 national laws
 - Minimum harmonization and full harmonization

2. Introduction: Internet Regulation

“Perhaps the most important question in ten years’ time won’t be if a society uses the Internet, but which version of it they use.”

Eric Schmidt/Jared Cohen, *The New Digital Age*, 2012, p. 126

2. Introduction: Internet Regulation

- Layers of Internet architecture and of regulation (Yochai Benkler)
 - Physical infrastructure layer
 - Network neutrality in the EU
 - Logical infrastructure layer
 - Content layer
 - Electronic commerce contract law
 - Liability of internet intermediaries (in particular for IP infringements)
 - Further content related regulations

2. Introduction: Internet Regulation

- The Agenda of the current EU Commission with regard to the “Digital Single Market” (“Digital Agenda”):
 - Digitise European Industry
 - Invest in network technologies
 - Advance in digital science and infrastructures
 - **Build a European data economy**
 - **Improve connectivity and access**

3. Network Neutrality

- [Regulation 2015/2120](#) laying down measures concerning open internet access
 - Art. 3(3): Providers of internet access services shall **treat all traffic equally**, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.

3. Network Neutrality

- [Regulation 2015/2120](#) laying down measures concerning open internet access
 - Exceptions to network neutrality only for
 - “Reasonable traffic management measures”, which shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic
 - Measures to comply with Union law
 - Measures to reserve the integrity and security of the network, prevent impending network congestion
 - “Special services” other than internet access services which are optimised for specific content
 - But: Such services shall not be to the detriment of the availability or general quality of internet access services for end-users.

4. E-Commerce Contract Law

- 9.12.2015: Two proposals for directives
 - on certain aspects concerning contracts for the **online and other distance sales of goods** ([2015/288 \(COD\)](#))
 - on certain aspects concerning contracts for the **supply of digital content** ([2015/287 \(COD\)](#))
 - But: Traditionally, contract law has been structured along the lines of rights and obligations, not along the objects of a contract.

4. E-Commerce Contract Law

- **Scope of application of the digital content proposal:**
 - Art. 1: This Directive shall apply to any contract where the supplier supplies digital content to the consumer ...
 - 'digital content' means
 - **data** which is produced and supplied **in digital form**, for example video, audio, applications, digital games and any other **software**,
 - **a service** allowing the creation, processing, storage or sharing of data **in digital form**, where such data is provided by the consumer
 - Directive would also apply to **contracts about a “durable medium”** if that has been used exclusively as carrier of digital content (e.g. CDs, DVDs)
 - Hotly debated: Should goods that incorporate digital content be regulated as goods or as digital content (or as both) in contract law?

4. E-Commerce Contract Law

- Scope of application of the digital content proposal:
 - Art. 1: This Directive shall apply to any contract where the supplier supplies digital content to the consumer ... and, in exchange, a price is to be paid **or the consumer actively provides counter-performance other than money in the form of personal data or any other data.**
 - Data as an equivalent of money!

4. E-Commerce Contract Law

- Substantive rules of the digital content proposal:
 - Obligations of the supplier of digital content, in particular as regards the **“conformity” of the content with the contract**
 - Subjective or objective standard?
 - Burden of proof with respect to the conformity with the contract shall be on the supplier (without time limit!)
 - Liability of the supplier and remedies of the consumer
 - What are the remedies if the consumer provided data as a money equivalent?
 - Termination of the contract and prohibition of further use of the data
 - Reduction of the “price”?

4. E-Commerce Contract Law

- Proposal for directive on the “modernisation of EU consumer protection rules”, 11.4.2018, [COM 2018/185](#)
 - Paid placements in online search results have to be clearly marked as such (unfair competition law)
 - Consumer contract law
 - Data as money equivalent: Digital services for which consumers do not pay money but provide personal data, such as: cloud storage, social media and email accounts are treated as contracts for which a payment is due
 - As a consequence, consumers of such services have the same right to pre-contractual information and to cancel the contract within a 14-day right of withdrawal period
 - Online marketplaces have to provide information about, inter alia:
 - the main parameters determining ranking of offers presented to the consumer as result of his search query on the online marketplace (→ transparency of algorithms!)

5. Liability of Online Service Providers

- Phase 1 (late 1990ies): Intermediaries privileged in order to foster the proliferation of the Internet
 - Directive on electronic commerce [2000/31](#)
 - Horizontal exemptions from liability for “mere conduit” (access provider), “caching”, and hosting (Art. 12-14)
 - No rule on search engines
 - No general obligation to monitor (Art. 15)

5. Liability of Online Service Providers

- Phase 2 (2000-2011): Courts implement a balanced intermediary liability
- Yes, there is a
 - notice and takedown obligation for host providers in re IP infringement (GerBGH eBay 2004)
 - and an obligation to process and mediate personality rights infringement allegations (GerBGH Blogeintrag 2011)
- But no liability for damages if automatic takedown systems are in place (GerBGH eBay 2004-2013)
- And no obligation to systematically monitor and filter all traffic for access and host providers (CJEU Scarlet and Netlog 2011/2012)
- Linking to lawful content, e.g. by search engines, is legal on the basis of an implied license (BGH Paperboy 1995, Vorschaubilder 2010, also CJEU Svensson 2014)
- Duties of care do not require human intervention → **Code is law!**

5. Liability of Online Service Providers

- Phase 3: Intensified duties of care (2011-2014)
 - CJEU [L'Oréal v eBay 2011](#)
 - EU IP law (IP Enforcement [Dir 2004/48](#)) includes a staydown obligation for host providers
 - Safe harbor provisions do not apply if intermediaries take an **active role**
 - Hosting services that foster infringements have to implement individual human control (BGH 2012 and 2013 regarding sharehosters → defendant bankrupt)

5. Liability of Online Service Providers

- Phase 4: Intermediaries as gatekeepers against IP infringements (2014-
 - Blocking orders targeting IP “pirate” websites
 - Against internet access providers
 - CJEU [UPC Telekabel 2014](#)
 - GerBGH 2016: only if an action against the direct infringer and the host provider is futile
 - Against providers of Wireless Local Area Networks (CJEU [McFadden 2016](#))

5. Liability of Online Service Providers

- Phase 4: Intermediaries as gatekeepers against IP infringements (2014-
 - From indirect to direct liability
 - CJEU [Google Spain 2014](#) (“**Right to be forgotten**”):
 - A search engine operator is the responsible “controller” of data processing activities
 - It is therefore obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages, published by third parties and containing information relating to that person, also the publication in itself is lawful.
 - As a rule, the rights of the data subject override not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information
 - → Search engine has to balance all rights and interests

5. Liability of Online Service Providers

- Phase 4: Intermediaries as gatekeepers against IP infringements (2014-
 - From indirect to direct liability
 - CJEU [GS Media 2016](#): Posting hyperlinks for profit to illegal content is a “communication to the public” and thus an infringement of copyright unless the presumption can be rebutted that the person posting the link had knowledge of the illegality of the content
 - Are search engines directly liable for © infringement and thus for damages?
 - No: GerBGH 2017

5. Liability of Online Service Providers

- Phase 4: Intermediaries as gatekeepers against IP infringements (2014-
 - From indirect to direct liability: Pending Directive © Digital Single Market ([2016/280/COD](#)): European Parliament Position on Art. 13
 - “Online content sharing service providers perform an act of communication to the public.”
 - Perhaps this is already so: Reference to the CJEU by the GerBGH, 13.9.2018 YouTube
 - “They shall therefore conclude fair and appropriate licensing agreements with right holders.”
 - Reverse compulsory license: UGC platforms HAVE to take a license
 - → Transformation of open UGC platforms into fully licensed content providers (outlets)

5. Liability of Online Service Providers

- Phase 4: Intermediaries as gatekeepers against IP infringements (2014-
 - Prohibition of certain technologies used to communicate works to the public
 - CJEU [Stichting Brein/Ziggo 2017](#): Providing a BitTorrent sharing platform with a search engine is a “communication to the public” and thus direct © infringement
 - CJEU [Stichting Brein/Wullems 2017](#): The sale (!) of a media player (hardware) with pre-installed add-ons to access and watch pirated films is a “communication to the public” and thus direct © infringement

6. Further content regulation

- EU in general: Communication “Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms”, 28.9.2017, [COM\(2017\) 555](#)
- Proposal for a regulation on preventing the dissemination of terrorist content online, 12.9.2018, [COM\(2018\) 640](#)
 - Hosting service providers shall
 - take **proactive measures** to protect their services against the dissemination of terrorist content
 - **remove** terrorist content or disable access to it **within one hour** from receipt of a removal order

6. Further content regulation

- Amendment of the audiovisual media services Directive, [2016/151 \(COD\)](#)
 - Provisions on Video Sharing Platform Services regarding their obligations
 - Against “hate speech” and other criminal speech
 - In Germany: [Network Enforcement Act of 2017](#)

6. Further content regulation

- Amendment of the audiovisual media services Directive, [2016/151 \(COD\)](#)
 - Provisions on Video Sharing Platform Services regarding their obligations
 - Regarding the transparency of sponsored content and regarding the protection of minors
 - No ex ante upload filters required

6. Further content regulation

- Germany: Proposal for a new media law (“Medienstaatsvertrag”) 2018
 - Regulation of “media platforms” (eg Amazon Prime):
 - Non-discriminatory access and ranking
 - Transparency of ranking algorithms
 - Regulation of “media intermediaries” (search engines, social media, UGC platforms):
 - Transparency of access and ranking rules and algorithms
 - Non-discrimination of journalistic content
 - Requirement to specifically label social bots

7. Summary

- Summary:
 - Juridification of online transactions (contract law)
 - Transformation of OSPs:
 - from intermediaries/host providers to gatekeepers that have to make sure that only lawful content is available.

7. Summary

- Compare this with the U.S. approach:
 - © cannot be used to prohibit technologies as such ([SCOTUS MGM v. Grokster 2005](#))
 - “The Internet and other **interactive** computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity ... It is the policy of the United States ... to promote the continued development of the Internet and other **interactive** computer services and other **interactive** media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other **interactive** computer services, unfettered by Federal or State regulation.” ([Google v. Equustek Solutions, N.D. Cal., 2.11.2017](#))
 - “the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate’” ([SCOTUS Matal v. Tam 2017](#))