

NEGOTIATING NEW AUDIOVISUAL RULES FOR VIDEO SHARING PLATFORMS: PROPOSALS FOR A RESPONSIVE GOVERNANCE MODEL OF SPEECH ONLINE

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Abstract

There is a unique upcoming policy momentum in European audiovisual media policy. This is the implementation of the new rules on Video Sharing Platform Providers (VSPs) with regard to the protection of minors against harmful content and of all users against incitement to violence and hatred. However, the application of the Country-of-Origin principle, the basic tenet of the Audiovisual Media Services Directive and audiovisual media regulation across the European Union, will inherently interfere with the stated policy aim of levelling the playing field vis-à-vis VSPs. This paper assesses the potential consequences of such regulatory dysfunctions in the context of hate speech regulation effective throughout Europe. It argues that Responsive Governance Model-type co-regulation could address and mitigate the loss of normative diversity, and outlines a blueprint for this. At stake is the (further) fragmentation of the internet. Hence, it is important and urgent to find adequate regulatory responses to ensure pluralistic and diverse media markets in Europe.

Key words: accountability; digital platforms; AVMSD; hate speech; protection of minors; national media regulators.

NEGOCIACIÓ D'UN NOU MARC NORMATIU PER A LES PLATAFORMES AUDIOVISUALS D'ÚS COMPARTIT: PROPOSTES PER A UN MODEL DE GOVERNANÇA RESPONSABLE DE LA LLIBERTAT D'EXPRESSIÓ EN LÍNIA

Resum

Hi ha un impuls polític inèdit i progressiu en la política europea de mitjans audiovisuals. Es tracta de la implementació de noves regles sobre els proveïdors de plataformes audiovisuals de compartició de vídeos (VSP) pel que fa a la protecció dels menors contra contingut nociu i de tota la ciutadania contra la incitació a la violència i l'odi. Tanmateix, l'aplicació del principi del país d'origen, el principi bàsic de la Directiva de serveis de comunicació audiovisual i la regulació de mitjans audiovisuals a tota la Unió Europea, interferirà intrínsecament amb l'objectiu polític declarat d'equilibrar el terreny de joc davant les plataformes VSP. Aquest article avalua les conseqüències potencials d'aquestes disfuncions normatives en el context de la regulació eficaç dels discursos de l'odi a tot Europa. Argumenta que la coregulació del model de governança responsable podria abordar i mitigar la pèrdua de diversitat normativa i esbossa un pla per aconseguir-ho. Està en joc la (major) fragmentació d'Internet. Per tant, és important i urgent trobar propostes normatives adequades a Europa per garantir mercats audiovisuals pluralistes i diversos.

Paraules clau: rendició de comptes; plataformes digitals; AVMSD; discurs de l'odi; protecció de menors; reguladors nacionals de mitjans de comunicació.

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Despite the many early warnings (Bárd & Bayer, 2016), proposed alternatives (van der Noll et al., 2015; Flew, 2018) and severe criticisms (Barata Mir, 2018), the biggest audiovisual media regulatory experiment in the European Union (EU) is under way. Amendments to the Audiovisual Media Services Directive (Amended AVMSD)¹ extended the scope of audiovisual media regulation to Video Sharing Platform Providers (VSPs) and to some extent to Social Media Service Providers (SMSPs),² which needed to be transposed into 28³ national laws by 19 September 2020 with a coordinated approach. Within this revision, European policy-makers reacted to the increasing penetration of powerful global online platforms and retreated from border-breaking liberalisation towards more protective regulation (Broughton Micova, 2019).

The new rules were passed after an incremental growth in political pressure calling for regulatory intervention at EU level with regard to the liability of online intermediaries – including VSPs – for copyright infringements⁴ and preventing the dissemination of speech-related terrorist content online,⁵ in parallel with an overall shift in the policy discourse from intermediary liability to intermediary responsibility (Frosio & Husovec, 2020). In this climate, European policy-makers were eager to see “results” in eliminating “harm online” and adopted the amendments to the AVMSD. This move, back in 2018, seemed courageous to many; today critical voices are arguing for stricter regulations against the abuse of opinion power by social media platforms as political actors in their own right (Helberger, 2020).

The Amended AVMSD encompasses a broad range of delicate content regulation matters involving VSPs, including the protection of minors against harmful content and of users in general from incitement to violence or hatred. However, it is far from clear now how the combined application of these requirements and the Country-of-Origin principle would ensure that Europe’s historical and cultural diversity, as embodied in national media laws and regulations, was duly respected and reflected in audiovisual media regulation vis-à-vis digital platforms. Against this background, this paper investigates the impact of regulating VSPs for Europe as a whole and proposes a potential regulatory model that is responsive to national legal differences, thus moving on from the dichotomy of “to regulate or not to regulate”. The focus lies in conceptualising the necessary involvement of National Regulatory Authorities (NRAs) in the EU who are to provide regulatory oversight and represent public scrutiny in the scheme (Kuklis, 2018).

The state of affairs in the EU: transposing the Amended AVMSD

At the time of writing this paper, the implementation of the Amended AVMSD is under way across the EU and the adoption of final national legal acts⁶ is close. According to reports, only four countries finished the process on time⁷ despite the European Commission’s efforts to bring about a harmonised transposition⁸. In Denmark, the new rules have been in force since 1 July 2020, subsequently implemented in 12 ministerial orders as well (in force since 15 September)⁹. The UK transposed the Amended AVMSD despite Brexit,

1 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities PE/33/2018/REV/1 OJ L 303, 28.11.2018, p. 69–92

2 “...a social media service should be covered if the provision of programmes and user-generated videos constitutes an essential functionality of that service.” Preamble (4) and (5) of the Amended AVMSD.

3 Despite Brexit, the UK transposed the Amended AVMSD

4 Copyright in the Digital Single Market - Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)).

5 See the “Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on preventing the dissemination of terrorist content online” in 2018 (COM/2018/640 final).

6 The deadline for transposition expired on 19 September 2020 but was delayed due to the COVID-19 crisis affecting the process.

7 See the transposition database carried out by the European Audiovisual Observatory; available at <https://www.obs.coe.int/en/web/observatoire/avmsd-tracking>; accessed on 18 November 2020.

8 See the “Communication from the Commission Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive 2020/C 223/02; C/2020/4322”; OJ C 223, 7.7.2020, p. 3–9.

9 See the Act amending the Radio and Television Act and the Film Act (Lov om ændring af lov om radio- og fjernsynsvirksomhed og lov om film); available at https://www.ft.dk/ripdf/samling/20191/lovforslag/1108/20191_1108_som_vedtaget.pdf; accessed on 18

though the UK's transposition process is to be interpreted within the context of broader policy considerations about online harm¹⁰. Germany agreed to implement legislation at both state and federal level, with extensive regulation of VSPs with regard to transparency requirements on freedom from discrimination in the provision of access to media content¹¹. Lately, Sweden has also adopted the necessary amendments to the Radio and Television Act and went beyond minimum harmonisation with the introduction of stricter rules on audiovisual commercial communications (advertising, product placement and sponsorship) for VSPs.¹²

However, the EU-wide transposition process is uneven and, in many cases, ran into national policy considerations and legislative intervention concerning the regulation of online intermediaries beyond audiovisual media content. The first attempts at the re-nationalisation of speech regulation were made in Germany back in 2017¹³ and updates were proposed recently,¹⁴ holding social media platforms responsible for combating online speech deemed illegal under domestic law. Next, France adopted laws in 2018 to combat dis(mis)information online¹⁵ and then in 2020 combating hate speech online¹⁶ (although these were recently declared unconstitutional¹⁷). Austria has proposed new legislation in 2020 for the protection of users against hatred on the internet.¹⁸ In all cases Member States introduced statutory requirements on intermediaries by (better) enforcing existing criminal code norms on hate speech or imposing new obligations on eliminating the spread of "fake news". This trend was also followed by many other countries beyond the boundaries of the EU with a global effect of standardless policies and inconsistent enforcement (Kaye, 2019).

The tensions between Member States' aspirations for re-nationalised speech regulation and the need to harmonise legislation according to the Amended AVMSD resulted in a rather conflictive and somewhat chaotic situation. France is a case in point, since the government's approach to regulating social networks challenged the tenets of the AVMSD and proposed the replacement of the Country-of-Origin principle by the "Country-of-Destination" approach.¹⁹ The conceptual, even political, arguments went well beyond the usual controversies between national versus EU policy aims and it is foreseeable that these battles will continue. Hence, it is of the utmost importance to know which regulatory models governing VSPs will prevail and whether they will mitigate or further aggravate tensions.

At a crossroad: the policy objectives of the Amended AVMSD and the Country-of-Origin principle

The Amended AVMSD focused on *the protection of minors* against harmful content online, *combating hate speech* and public provocation to commit *terrorist offences* on the internet. The amended rules extended the

November 2020.

10 It was proposed that VSPs would be overseen by the UK NRA (Ofcom) along with the Advertising Standards Authority as co-regulator in charge of advertising. See the UK's Online Harms White Paper proposing regulation of online platforms in April 2019; available at <https://www.gov.uk/government/consultations/online-harms-white-paper>; accessed on 10 September 2020.

11 The revision of the Interstate Media Treaty (Medienstaatsvertrag), the relevant legal instrument to transpose the Amended AVMSD to national law, started early in 2019 and the draft new rules were published in December 2019. See the "Staatsvertrag zur Modernisierung der Medienordnung in Deutschland – Entwurf – Beschlussfassung der Konferenz der Regierungschefinnen und Regierungschefs der Länder vom 5. Dezember 2019"; available at https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/ModStV_MStV_und_JMStV_2019-12-05_MPK.pdf; accessed on 11 August 2020.

12 See the Draft amendments to the Radio and Television Act (2010:696); available at <https://www.regeringen.se/4a6796/contentassets/60afe9a915c741a0a3cb6009bc61de03/en-moderniserad-radio--och-tv-lag-.pdf>; accessed on 18 November 2020.

13 Germany adopted in 2017 the Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG) on setting reporting and removal requirements on social networks with regards to unlawful content.

14 See "Entwurf eines Gesetzes zur Änderung des Netzwerkdurchsetzungsgesetzes (NetzDG) (BT-Drs. 19/18792)"; available at <https://dip21.bundestag.de/dip21/btd/19/177/1917741.pdf>; accessed on 19 November 2020.

15 France passed a new law (LOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information) at the end of 2018 on the removal of "fake news" during election campaigns.

16 See the French "Avia law" [Loi n° 2020-766 du 24 juin 2020 visant à lutter contre les contenus haineux sur internet](https://www.legifrance.gouv.fr/eli/loi/2020/6/24/2018-1202).

17 See the decision of the French constitutional court [Décision n° 2020-801 DC du 18 juin 2020](https://www.legifrance.gouv.fr/eli/decision/2020/6/18/2020-801-DC).

18 See the draft "Hass-im-Netz-Bekämpfungsgesetz – HiNBG" against hate speech online and the draft "Bundesgesetz über Maßnahmen zum Schutz der Nutzer auf Kommunikationsplattformen" on measures to protect users on communications platforms; both draft laws should be enacted in December 2020.

19 See the French government's proposal in May 2019 for the regulation of social networks; available at https://www.numerique.gouv.fr/uploads/Regulation-of-social-networks_Mission-report_ENG.pdf; accessed on 10 September 2020.

scope of audiovisual regulation to VSPs and SMSPs and introduced a new statutory enforcement mechanism both at Member State and EU level (Table 1).

Table 1: New rules applicable to VSPs and SMSPs as enshrined in the Amended AVMSD.

Addressees of regulation	Video-sharing Service Providers - VSPs (Art. 1. (da)) and Social Media Service Providers SMSPs (Preamble 4, 5)
Objects of regulation	1. incitement to hatred (Art. 28b (1) b and c); 2. protection of minors (Art. 28b (1) a); 3. public provocation to commit a terrorist offence (Art. 28b (1) c); 4. non-appropriate audiovisual commercial communications (Art. 28b (2)).
Regulatory requirements	a. amendments to service terms and conditions with regard to 1-2-3 (Art. 28b (3 a)); b. amendments to service terms and conditions with regard to 4 (Art. 28b (3 b)); c. provision of user functionality with regard to 4 (Art. 28b (3 c)); d. provision of user reporting and flagging with regard to 1-2-3 (Art. 28b (3 d)) as well as due explanation (Art. 28b (3 e)); e. provision of age verification system to users with regard to 2 (Art. 28b (3 f)); f. provision of a content rating system to users with regard to 1-2-3 (Art. 28b (3 g)); g. provision of a parental control system to users with regard to 2 (Art. 28b (3 h)); h. users' complaint handling and resolution with regard to a.-g. (Art. 28b (3 i)); i. users' awareness-raising with regard to a.-h. (Art. 28b (3 j)).
Regulatory process	i. National level: statutory co-regulation with the involvement of the main stakeholders in the Member States and national regulatory authority or body - NRAs (Art. 4a (1)), based on national level Codes of Conduct (Art. 4a (1a)); ii. EU level: self-regulation with the involvement of the main stakeholders at Union level, based on EU-level Codes of Conduct (Art. 4a (2)).
Regulatory supervision	i. Up-to-date records of VSPs at the national level (Preamble 7); ii. Assessment of the appropriateness of measures 1-2-3-4 taken by VSPs by NRAs (Art. 28b (5)) based on Country-of-Origin principle (Art. 28a (1-4)); iii. Out-of-court redress mechanisms for the settlement of disputes between users and VSPs (Art. 28b (7)); iv. Court oversight of disputes between users and VSPs (Art. 28b (8)).

According to the new provisions, VSPs and SMSPs will have to comply with a series of obligations in the regulated areas, eliminate exposure of minors to harm and ensure that users are not exposed to unlawful content. These duties should be assumed mostly through private control, overseen by a national regulator and based on robust transparency rules via legislation (Kuklis, 2019). The applicable law to assess the appropriateness of the measures taken by VSPs and SMSPs will be that of the country of establishment, according to the Country-of-Origin principle and the NRA mandated accordingly,²⁰ Since the major VSPs and SMSPs – including Facebook, YouTube and Twitter – were all incorporated in Ireland for their European operations, the Irish NRA will have to monitor compliance with the regulatory framework.

The Country-of-Origin principle has been one of the pivotal instruments establishing a European pro-competitive media order since 1989, incorporated in the main EU-specific legal document in the field of broadcasting, the Television Without Frontiers Directive. This principle ensured not only the free movement

²⁰ See Article 4a (3) Amended AVMSD.

of trans-border television signals emerging and competing for European broadcast services but also a certain level of competition among national regulations and regulators. Moreover, it assured an ascendancy of democratic and socio-cultural objectives across Europe (Michalis, 2014). However, what has been a profound and decade-long well-functioning regulatory concept for television broadcast-type media services is facing the reality of VSPs' operations which are less concerned about local markets or country-specifics but smooth pan-Europe operations and centralised management, fiscal and regulatory functions. Thus, the application of the Country-of-Origin principle has a *paradoxical consequence* in that the most nationally-sensitive speech matters will be (almost) exclusively dealt with by the Irish authorities (Barata, 2020) and defined purely according to Irish legal standards and socio-cultural norms. This effect is clearly at odds with the re-nationalisation trends of speech regulation discussed earlier.

Some Member States, such as France, criticised the inefficiency of the principle applied to online intermediaries and put forward proposals for overruling it and replacing it by the “destination-country” principle, making VSPs responsible to the Member State where breaches of rules and damage occurred.²¹ Previously, scholars also warned about the incompatibility of the principle with sharing media practices, ultimately contributing to media concentration, while eliminating the EU's media policy tradition on pluralism (Ibrus & Rohn, 2016) part of the broader Digital Single Market (DSM). Moreover, the malfunctioning of the Country-of-Origin principle had resulted in a detrimental outcome in other policy areas, such as data protection. The EU's General Data Protection Regulation,²² which was supposed to provide a clear, meaningful EU-wide standard to enforce the privacy and personal data protection of citizens, failed as a consequence of the application of the Country-of-Origin principle. In that case, the Irish regulator, the Data Protection Commission of Ireland, was also in charge of regulatory oversight of most non-EU Big Tech companies, including internet intermediaries, such as Facebook, Twitter or Google. However, the Irish authority was the “weak link” in enforcing data protection “for Europe” and failed to provide effective remedies for EU citizens against breaches of data protection laws by the Big Tech companies.²³ As a consequence, the entire EU-US data transfer scheme (“Privacy Shield”) was invalidated by the Court of Justice of the European Union.²⁴

The preceding failures on applying the Country-of-Origin principle to non-compatible policy contexts should have alarmed EU policy-makers about the consequences of such shortcomings. Scholars who revisited the principle also identified the most acute problems and developed pragmatic, limited-potential solutions for such cases (Wagner, 2014). Yet, this aspect was not salient during the policy debates on the Amended AVMSD and only a few comments were made about changing the status quo.²⁵ This said, the ongoing transposition phase exposed the role of Ireland as *de facto* regulator “for Europe” with regard to audiovisual media services disseminated across Europe by the VSPs. Against this background, we need to further assess the foreseeable impact of the new rules. The case of regulating hate speech will be examined with the aim of locating acute stresses in the regulatory system and identifying potential mitigations.

21 Ibid., 23.

22 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 the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

23 See the “Open letter to the European Data Protection Authorities, the European Data Protection Board, the European Commission and the European Parliament” on 25 May 2020 by Maximilian Schrems on behalf of the European Centre for Digital Rights; available at https://noyb.eu/sites/default/files/2020-05/Open%20Letter_noyb_GDPR.pdf; accessed on 11 August 2020.

24 See the judgement on 16 July 2020 of the Court of Justice of the EU in *Data Protection Commissioner v Facebook Ireland Limited, Maximilian Schrems* (Case C-311/18, “*Schrems II*”); available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=228677&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9745404>; accessed on 30 September 2020.

25 “5 Member States and 5 Regulators asked for a move to a different approach, whereby providers would have to comply with some rules (e.g. on the protection of European works) of the countries where they deliver their services”. See synopsis report of the public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - A media framework for the 21st century, p. 7; available at <https://ec.europa.eu/digital-single-market/en/news/report-public-consultation-review-audiovisual-media-services-directive-avmsd>; accessed on 16 September 2020.

Case in point: regulating hate speech in audiovisual media services across Europe

EU citizens reported various limitations in engaging with public discourses on the internet and specifically on social media because of “(...) hate speech, threats or abuse directed against people active on social media” whereby “(...) these experiences made them hesitant to engage in online debates” (European Commission, 2016a: 50). The AVMSD and other key legal instruments²⁶ required Member States early on to ensure that audiovisual media services provided under their jurisdiction do not contain any incitement to hatred or disseminate it across borders.²⁷ *Illegal hate speech* was defined according to the EU Fundamental Charter²⁸ and the Council Decision of 2008²⁹ as “any form of speech that calls publicly for inciting to violence or hatred directed against a group of persons or a member of a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin,³⁰ or the condonement, denial or trivialisation of crimes of genocide, crimes against humanity and war crimes”.³¹ (It is to be noted that the EU-wide self-regulatory instrument on countering illegal hate speech online [European Commission, 2016b] also referred to the same legal sources.) However, none of the provisions specified any further standards on the merits of such regulations but left the matter to law enforcement, applying national norms and measures.

The Amended AVMSD extended the scope of these requirements to VSPs, who need to take appropriate measures to protect the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred. The question of whether any uploaded audiovisual content circulating across Europe is illegal will only be decided according to the law of Ireland. YouTube users in Sweden or in Malta can only hope that the Irish authorities would do a “good enough job” and not let them be exposed to cruel or hate-inciting moving images that are hurtful in their context. This is not a reassuring situation from a policy perspective. It also suggests that the multiple sensitive historical, cultural and societal divergences across Europe embodied in national hate speech laws, regulations and corresponding jurisprudence were left unattended when the regulatory concept was designed for the VSPs.

A good illustration of what is at stake is an overview of the *different substance of illegal hate speech* implemented in the relevant media laws across the EU (Table 2). This comparative analysis exhibits the variety and diversity of definitions of the roots and forms of hatred.³² The multiplicity of definitions according to which audiovisual media content would incite hatred explicitly reflects Europe’s diverse traumas and manifold historical vulnerabilities.

26 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce” - ECD).

27 The most relevant provisions in this regard are Article 6 of the AVMSD and Article 3(2) and 3(4)(i) of the ECD. Article 6 of the AVMSD requires the Member States to ensure that audiovisual media services provided under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality. Under Article 3(2) and 3(4)(i) of the ECD, Member States may restrict the provision of cross-border information society services if it is necessary for the fight against incitement to hatred on the grounds of race, sex, religion or nationality.

28 Charter of Fundamental Rights of the European Union, 2012/C 326/02, OJ C 326, 26.10.2012, p. 391–407.

29 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law OJ L 328, 6.12.2008, p. 55–58.

30 See Article 21 of the Charter referring to sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation; as well as any discrimination on grounds of nationality.

31 See Article 1 of the Council Framework Decision.

32 The comparative legal research used sources as indicated for the compilation of national transposition measures by the EU, the EPRA national law compilation, and the unofficial translation made at the University of Luxembourg. The “Comparative study on legislation sanctioning hate speech and discrimination in the member states of the European Union” by NU DISCRIMINARE (2014) and the European Parliament Study “The European legal framework on hate speech, blasphemy and its interaction with freedom of expression” by Policy Department C (2015) were also consulted for identification of the relevant legal sources.

Table 2: Outline of the scope of media regulation on incitement to hatred in the EU.

Scope of media regulation on incitement to hatred (illegal hate speech)	Frequency of occurrence
Race / Skin colour	Most common ground
Gender / Sex / Sexual orientation	Most common ground
Religion/Belief	Most common ground but with differing significance
Disability	Common ground
Nationality	Most common ground
Ethnicity	Common ground
Philosophic view	Infrequent
Age	Infrequent
Genocide denial (including the Holocaust)	Infrequent (but prevalent in criminal laws)
Violence/Brutality	Infrequent
Political views	Infrequent
Education	Infrequent
Family/Marital status	Infrequent
Language	Infrequent
Property	Infrequent
Trade Union membership	Infrequent
Social/Birth status	Infrequent
Health condition	Infrequent
Genetic heritage / Native identity	Infrequent
Anti-Semitism and xenophobia	Infrequent
Embracement of totalitarian regimes	Infrequent
Morals	Infrequent

This example also underlines why combating hate speech is a matter of democracy and media pluralism in Europe and the motives for safeguarding these fundamental values are built on a robust regulatory construct. NRAs, alongside the judiciary, applied national hate speech norms to audiovisual media services, and they were equipped with a wide range of applicable sanctions (Council of Europe, 2017). NRAs could set fines but also order the suspension of the reception of linear media services or prohibit access to non-linear ones up to six months in cases of manifest, serious and grave violations of the law.³³ (Nonetheless, in certain hypersensitive political situations, conflicts over jurisdiction and enforcement occurred.³⁴) Moreover, the NRAs' regulatory toolkit was complemented by positive measures aimed at promoting diversity and pluralism and the creation of an enabling environment for freedom of expression.³⁵ Overall, European NRAs were dealing with a broad range of hate speech and their intervention options stretched well beyond restrictions on illegal speech. Within this complex and multifaceted framework there was no easy or straightforward answer to providing a clear set of criteria applied by the regulatory bodies in hate speech cases (ARTICLE 19, 2018). Moreover, in the online context, the drawing of the boundaries between illegal hate speech falling under the scope of the Amended AVMSD and harmful content which is toxic for public discourse would require an even more reflective approach to regulation. Moreover, the realisation of what media pluralism and diversity

³³ The legal definitions of the types of violation also varied, referring to “explicit and serious”; “clear, important and serious”; “clear, serious and flagrant” and “gross and repeated”.

³⁴ The best examples were the Lithuanian and Latvian cases against Russian broadcasters in 2015 and later in 2019. The retransmission of their services was suspended due to incitement to hatred. See the European Commission's decisions; available at <https://ec.europa.eu/digital-single-market/en/news/latvias-decision-suspend-broadcast-russian-language-channel-rossiya-rtr-complies-eu-law>; accessed on 16 September 2020.

³⁵ According to Article 10 of the European Convention on Human Rights (The Convention for the Protection of Human Rights and Fundamental Freedoms ETS No.005, Rome, 1950).

should entail within the dynamic relationship between traditional media, VSPs and users (Helberger, 2018) will pose new challenges for NRAs. This truly European context is the background to the new regulatory regime vis-a-vis VSPs which introduced the Country-of-Origin principle and put the burden of responding to the needs of governing speech regulation on the Irish media regulator.

Ireland as the champion of the Country-of-Origin principle vis-a-vis VSPs

Ireland took on this challenge. In 2019, the Irish government launched a public consultation on the “Regulation of Harmful Content and the Implementation of the Revised Audiovisual Media Services Directive”, whereby the Irish NRA, the Broadcasting Authority of Ireland (BAI), proposed the introduction of new statutory regulation for online videos and harmful online content to be accomplished through the “(...) introduction of a single, comprehensive regulatory scheme and regulator”.³⁶ The BAI further proposed that the new regulator should “(...) have regard to the wider objectives of content and services that serve citizens – ensuring Diversity and Plurality, the promotion of Freedom of Expression, sustaining and enhancing democratic discourse, and facilitating linguistic and cultural diversity”.³⁷ More importantly, the BAI noted that “(...) most of Europe’s largest providers of video-sharing platform services, such as YouTube and Facebook, are based in Ireland and will be regulated in this country for their European activities”, which “(...) should be implemented through legislation and statutory codes”.³⁸ Based upon the consultation process, the Irish government proposed a new law to regulate harmful online content.³⁹ The draft Online Safety Media Regulation Bill 2019 followed the concept of a single regulator and sought the establishment of a new multi-person Media Commission, including an Online Safety Commissioner, with the dissolution of the BAI. The new Media Commission should be in charge of implementing audiovisual media regulation towards VSPs and SMSPs *for Europe*.

The current Irish NRA (the BAI) acknowledged its greater responsibility towards the entirety of Europe⁴⁰ and admitted that “(...) the new rules in the Directive mean that other Member States may have had their ability to impose regulatory rules and sanctions on VSP Providers established outside their Member State *weakened*”.⁴¹ Nevertheless, little mitigation was offered other than “(...) *thresholds should apply* to the mediation system given the EU-wide scale of the regulation of VSPs”.⁴²

The new Irish NRA will have to ensure that no audiovisual media content is shared on VSP platforms inciting hatred *anywhere in Europe*. But the question remains: who will assess the impact of such content on users based in Italy, Romania or any country other than Ireland and how will this be done? At this moment, the Irish draft Bill⁴³ only refers to “(...) harmful online content” which includes “materials which it is a criminal offence to disseminate under Irish [or Union law]”, including content “(...) containing or comprising incitement to violence or hatred”, implying, that “(...) the wording of this category would also incorporate any future changes to criminal law in this area, making it adaptable and futureproof”.⁴⁴ Nevertheless, *this concept*

36 See: “BAI publishes submission on the regulation of harmful online content / implementation of new Audiovisual Media Services Directive” on 24 June 2019; available at <https://www.bai.ie/en/bai-publishes-submission-on-regulation-of-harmful-online-content-implementation-of-new-audiovisual-media-services-directive>; accessed on 11 August 2020.

37 Ibid.

38 Ibid.

39 Online Safety Media Regulation Bill 2019 – General Scheme; available at <https://www.gov.ie/en/consultation/430d0-regulation-of-harmful-online-content-and-the-implementation-of-the-revised-audiovisual-media-services-directive> accessed on 8 September 2020.

40 “Ireland is responsible for regulating the video-sharing platform services based in Ireland for the entirety of Europe. Most of Europe’s largest providers of video-sharing platform services – such as Facebook, Google and Twitter – are based in Ireland. Ireland’s responsibility under the Directive in respect of video-sharing platform services is, therefore, greater than any other EU Member State.” - See “BAI publishes submission on the regulation of harmful online content / implementation of new Audiovisual Media Services Directive” on 24 June 2019, p. 12; available at <https://www.bai.ie/en/bai-publishes-submission-on-regulation-of-harmful-online-content-implementation-of-new-audiovisual-media-services-directive>; accessed on 17 September 2020.

41 Ibid., p. 42

42 See “Q. 16 and e. Mediation–Video Sharing Platform Services - Thematic Analysis - Public Consultation on the Regulation of Harmful Online Content and the Transposition of the Audiovisual”; available at <https://www.gov.ie/en/consultation/430d0-regulation-of-harmful-online-content-and-the-implementation-of-the-revised-audiovisual-media-services-directive>; accessed on 8 September 2020.

43 Ibid., 66.

44 Ibid., 66., Part 4 – Online Safety; Head 49A – Categories of harmful online content.

fails to respond to any misgivings stemming from the pan-EU effect of its application. Despite the warnings about potential fragmentation of national character,⁴⁵ no mitigation mechanisms for this dysfunctionality of the Country-of-Origin principle⁴⁶ have been proposed yet. In other words, there are absolutely *no legal safeguards* incorporated in the legal scheme addressing the deficiencies of differing hate speech standards *or any regulatory response* to the multiple forms and changing nature of incitement to hatred *across Europe*.

Looking forward: A Responsive Governing Model to regulation

The previous discussion on the contradictions among EU policy aims and regulatory principles demonstrates the emerging confusion, and even potential conflict, in the implementation of the new rules applicable to VSPs. Perhaps surprisingly, the derogatory measures, which enabled to some extent the mitigation of such conflicts in the case of linear audiovisual media services, were not extended to VSPs.⁴⁷ Therefore, European NRAs are in a situation today whereby the most sensitive area of content regulation was to be restricted to the norms and standards of the Republic of Ireland and a single NRA, the new Irish Media Commission, was expected to oversee all major VSPs operating across EU markets and enforce regulations affecting all-EU users. This situation implies *per se* the emergence of clashes between legal traditions and historical or cultural differences under the new regulatory scheme. Recently, the European Commission announced plans to harmonise a set of specific, binding and proportionate obligations, specifying the different responsibilities in particular for online platform services to keep users safe from illegal content and protect their fundamental rights online. The proposed upcoming Digital Services Act package⁴⁸ should provide for transparency and greater regulatory oversight of online platforms.⁴⁹ One of the most prominent problems the proposed new regulation aims to tackle was the online dissemination of illegal content such as hate speech by laying down clearer, more stringent, harmonised rules. The legislative package was put to the public during the summer of 2020 and awaits adoption by the European Commission. Although the new rules would most probably re-arrange the legal and regulatory scene of online speech governance again in Europe, it will take some time, and audiovisual content will still remain within the AVMSD regulatory framework. Therefore, it seems inevitable at this stage that the Irish implementation will reflect the conflictive outcome of neglecting the regulatory diversity of Europe and attend to potential mitigation methods. It is arguable that an EU-wide agreed regulatory scheme could serve as the baseline for future legislation.

The legal basis for this concept would build upon a new *mutual enforcement mechanism*, a possible solution to mitigate the dysfunctions of the Country-of-Origin principle (Wagner, 2014). This instrument would take advantage of the mutual enforcement clause in Article 14(3) of the AVMSD and ensure respect for certain specified rules in targeted countries beyond those of Ireland. According to this concept, a *Responsive Governing Model* will have to address the all-digital and transforming media environment based on a broad range of shared fundamental features, such as (i) the *principles of intervention and applicable standards*; (ii) the *outline of the new regulatory regime*; and (iii) the *organisational and operational aspects* thereof. The following deliberations are to inform the process of an emerging governing model for VSPs.

I The underlying principles of regulation and applicable standards

International and European human rights standards should set the baseline for the Responsive Governing Model. The content-based regulations introduced by the Amended AVMSD for VSPs touch first and foremost upon the right to *freedom of expression* as foreseen by international⁵⁰ and more specifically European⁵¹ and

45 See the “Summary of the virtual workshop on the regulatory framework for online safety, 18 June 2020 - Fragmentation of regulation across the EU”; available at <https://www.gov.ie/en/consultation/430d0-regulation-of-harmful-online-content-and-the-implementation-of-the-revised-audiovisual-media-services-directive>; accessed on 9 September 2020.

46 *Ibid.*, 66., Part 4 – Head 50A – Online safety codes.

47 See Article 3(2) of Directive 2010/13/EU (AVMSD).

48 See the initiative for the “Digital Services Act – deepening the internal market and clarifying responsibilities for digital services” published on 2 June 2020; available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>; accessed on 18 September 2020.

49 *Ibid.*

50 The International Covenant on Civil and Political Rights (ICCPR) and other major international instruments.

51 The European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR).

EU⁵² legal instruments. The central concerns here should focus on the inevitable restrictions to illegal content online, and safeguard media freedom and pluralism. Hence, the necessary content-based regulations, either in the form of private control by the VSPs (Kettemann, 2020) or imposed by the NRAs, should be prescribed by law in a clear and straightforward manner and meet the requirement of legality. Moreover, when VSPs put in place measures protecting users from various types of harm, they should also enable appropriate reporting and mediation procedures in disputed cases. These measures should enable users to foresee the consequences of their actions and ensure legal certainty and transparency, and afford them the necessary degree of protection. The NRAs' oversight will have to focus not only on the mere provision of such tools but take the users' perspective into account to assess *de facto user experience of online safety*.⁵³

Furthermore, there is a clear risk of over-restriction and over-removal by the VSPs. To reduce legal exposure to liability for illegal content VSPs put in place largely automated methods for fast detection of such content and immediate takedown. The Code of Conduct agreed upon by the major VSPs and the European Commission back in 2016⁵⁴ in response to illegal hate speech online was a clear incentive to fast removal. Since then, adherence to the Code of Conduct has led VSPs to assess 90% of flagged content within 24 hours, 71% of the content being deemed illegal hate speech and removed. These results were applauded by EU policymakers but received severe criticism from human rights defenders. Shocking evidence was recently put forward that VSPs have repeatedly taken down content which evidenced abuse and war crimes without setting up mechanisms to ensure that the content was preserved, archived and made available to international criminal investigators (Human Rights Watch, 2020). To mitigate such risks, NRAs should verify that VSPs' detection and removal procedures are transparent and ensure they are not overly broad or biased. Moreover, content preservation mechanisms should be put in place.

The applicable hate speech standards will have to go well beyond Irish norms and reflect the policy objective of pluralism. Under the Charter on Fundamental Rights, the EU Member States are to ensure the prevalence of plurality of opinions and equal chances for voices to be heard.⁵⁵ These positive obligations should guide policies in drawing the fine line that excludes illegal hate speech and harmful content. Susan Benesch (2020) argues that a definition of “dangerous speech” is useful to society in preventing possible violence (Benesch et al., 2020). Furthermore, a careful, balanced design of hate speech detection and reaction standards should consider policies on the removal of illegal hate content and “counterspeech” perspectives.

II Outlining the *Responsive Governing Model*

The new pan-EU regulatory model should be sensitive to the impact and consequences of regulating “for Europe”. The Amended AVMSD offered a good starting point for responding to this concept. The new rules envisioned a co-regulatory scheme in line with the Principles for Better Self- and Co-regulation⁵⁶ to be put in place while implementing the requirements for VSPs. The foundations are interlinked codes of conduct on national and EU level which reflect broad acceptance by relevant stakeholders and are acknowledged by the NRA in charge (legitimacy). The codes should be subject to regular, transparent and independent monitoring and evaluation of the achievements (auditing); and provide for effective enforcement and proportionate sanctions, including the possibility of state intervention (regulatory backstop).^{57,58} The specific nature and terms of such codes were left very flexible within the set principles of openness, good faith and enforceability.⁵⁹ The figure below shows the main governance components of the anticipated co-regulatory scheme (Figure 1).

52 The Charter on Fundamental Rights of the EU and the case-law of the European Court of Justice (ECJ).

53 See also Council of Europe Recommendation CM/Rec(2018)2.

54 See the detailed overview on the Code of Conduct mechanism; available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en; accessed on 23 September 2020.

55 Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, p. 391–407.

56 See the “Principles for Better Self- and Co-regulation” published by the European Commission; available at <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/CoP%20-%20Principles%20for%20better%20self-%20and%20co-regulation.pdf>; accessed on 25 September 2020.

57 Article 4a of the Amended AVMSD.

58 Preamble 14 of the Amended AVMSD.

59 Preamble 12 of the Amended AVMSD.

Figure 1. The co-regulatory scheme of the Responsive Governance Model.

EU-wide Code(s) of Conduct					No superiority (based on the principles of subsidiarity and proportionality)
VSPs and SMSPs European representatives	Other industry representatives	European stakeholders	European Commission	ERGA	
National-level Code(s) of Conduct					
VSPs and SMSPs national representatives		National stakeholders		NRA	
Judicial review (national) of individual cases					

There are several concerns at the moment about what this concept could contribute to the meaningful regulation of VSPs. Since there are no self-regulatory or co-regulatory systems in place now but rather “solo”-regulations (Milosavljević & Micova, 2016) by private control, the first dilemma was whether VSPs would ultimately adhere to a co-regulatory mechanism at all. The self-regulation currently in place is conceptually flawed as to independent content governance and has made it impossible for this approach to act as a proxy for statutory regulation (Spielkamp, 2018). Arguably, the most vulnerable points in the co-regulatory scheme will concern *who* would be making the rules contained in the various codes and *by what procedure* (Kuklis, 2020).

Having considered these aspects and the idea of an imagined *Responsive Governance Model*, we could outline a potential blueprint which addresses the main issues, such as the (a) code(s) of conduct; (b) monitoring; (c) enforcement mechanisms; and (d) organisational and operational aspects.

a. The form of the Code(s) of Conduct

First, the procedure of adopting and amending the code(s) has to be regulated with special attention to stakeholder management both at national and EU level. The process has to provide for inclusiveness and openness, set prerequisites of representation and offer full transparency in response to stakeholders’ consultations. The relationship between EU- and national-level codes of conduct has to be stipulated clearly and concisely.

The instrument to mitigate the detrimental effects of the Country-of-Origin principle will need to be incorporated in EU- and the national-level statutory codes of conduct. These rules should ensure that illegal content is assumed and moderated by the VSPs according to the *different national legal standards* applicable to such content beyond those in Ireland. The “origins” of illegal hate speech have to be considered along with language and other contextual factors. There should be a clear distinction between illegal content subject to the co-regulatory mechanism and harmful content subject to private control. Meanwhile, the handling of users’ complaints and appeals should be guided by the utmost transparency and be subject to strict scrutiny by the NRAs, focusing on the accessibility of those mechanisms to users. Certain “duties of explanation” towards users should be incorporated into the codes. The complaint procedures’ suitability should be assessed with due regard to EU-wide users’ legitimate needs regarding language, media literacy and other differences.

b. Monitoring

There is a broad consensus among policy scholars (Bunting, 2018) and the Irish NRA that regulatory oversight should be based on statutory procedural standards and that “the regulator should principally work at a ‘macro’ level”,⁶⁰ whereby “the appropriate measures to protect minors and the general public should relate to the organisation of the content and not to the content as such”.⁶¹ Accordingly, scrutiny has to focus on the practices that VSPs employ to identify, assess and address illegal and harmful content (Ofcom, 2018).

⁶⁰ See the Irish NRA’s (BAI’s) submission: Ibid. at 35., p.34.

⁶¹ Preamble 48 Amended AVMSD.

The Responsive Governance Model resides with the EU-wide cooperation of regulators within established networks such as the European Regulators Group for Audiovisual Media Services, also extending to the European Platform of Regulatory Authorities. The Digital European Toolkit laid down the contours for the operational realisation of such cooperation.⁶² However, the EU-wide approach to the macro-level regulatory supervision mechanism also needs to attend to national differences. Hence, monitoring “for Europe” would necessitate the establishment and maintenance of national registers of VSPs and SMSPs integrated in an EU-level centralised database. Furthermore, a single online complaint submission contact point, directly available to all EU citizens, should be launched by the Irish NRA and channelled towards other EU regulators.

Monitoring reports and regular evaluations of the implementation of the code(s) of conduct have to extend across Europe. There is a need for complex harm assessments and reflection on the societal and policy implications of different national and cultural characteristics. Such assessments should be open for EU-wide public debate.

c. Enforcement

The Responsive nature of the Governance Model should entail adaptation and reflexivity by design to the pace of change in VSPs’ services and operations. The notion of *cooperative responsibility*, which assesses the influence and responsibility of other stakeholders regarding VSPs, and the platforms’ architecture, which channels their influence, should be incorporated in an iterative regulatory process (Drunen, 2020). To test the resilience of such concepts, *regulatory sandboxes* should be adapted to the policy aims of the Amended AVMSD and put in place in distinct local contexts and socio-cultural settings. Lessons should be learned from proven methods in similar settings and other sectors with comparable experiences (Financial Conduct Authority, 2017). Moreover, established cooperative regulatory models involving active self- and user-ratings with a proven track record⁶³ should be incorporated.

In cases of non-compliance with the statutory code(s) of conduct, law enforcement should follow the principle of proportionality and assess impact throughout the EU. Regulatory backstop mechanisms for users’ complaints should be made available across Europe. The Irish NRA will have to optimise alternative dispute settlement procedures (including mediation and conciliation) considering the variety of usage patterns within different linguistic or cultural settings. Regulatory oversight should attend to the accessibility and affordability of such procedures for different user segments across Europe.⁶⁴

d. Organisational and operational aspects

The new era of VSP regulation will have to see a new generation of regulatory capacity which is the prerequisite to the functioning of the Responsive Governance Model. Novel skills of data protection specialists and critical understanding of the human dimensions of online participation will be essential when NRAs are recruiting (Rozgonyi, 2018). Hence, NRAs will have to invest heavily in new expertise to understand platform economics (Mansell & Steinmueller, 2020). These capacities should lead NRAs to transform and generally abandon command&control processes and monolithic institutional setups. Regulation needs to become an inherently interactive and dynamic exercise with an ongoing reflection on the social-political-economic impact of its intervention. Participation, collaboration and flexibility should form the baseline of regulatory action driven by accountability to citizens throughout the EU to ensure the credibility and legitimacy of the Model.

Conclusion

Very few policy momentums are as significant as the implementation of the Amended AVMSD. When the process started back in 2016, European policy-makers’ ambition was to level the playing field for European media outlets competing with US-based tech giants and fighting for shrinking sources of income

⁶² See the “Digital European Toolkit (DET) - Content, User Experience, Usability and Prospects: Report of the ERGA Subgroup 3” 2016; available at <https://ec.europa.eu/digital-single-market/en/avmsd-audiovisual-regulators>; accessed on 26 September 2020.

⁶³ See e.g. the NICAM activities with regards to the protection of minors.

⁶⁴ See also Council of Europe Recommendation CM/Rec(2018)2.

and increasingly fragmented audiences.⁶⁵ The new rules with regards to VSPs were enacted to realise this promise. Now the European NRAs are the protagonists and their significance should not be underestimated.

This paper assesses the potential consequences of regulatory dysfunctions in the context of hate speech regulation across Europe. The combined consequences of the Country-of-Origin principle and applying only Irish legal standards to incitement of hatred across Europe have been presented as a worst-case scenario. The paper argues that a Responsive Governance Model-type regulatory scheme could address and mitigate the loss of normative diversity and corresponding social harm. An à la carte menu for the introduction of the model is outlined. It remains to be seen how far the practical outcome will reflect these recommendations.

It is important to recognise that the experiment Europe is to undertake will have considerable impact beyond the frontiers of the EU. Failure or success will be globally assessed and reflected upon. If the new regulatory regime should prove inappropriate, the internet will continue to fragment. We have seen more and more European governments establishing jurisdiction over platform regulation and attempting to re-nationalise speech regulation. These trends signify the further deterioration of Internet Universality and are a hindrance to the free flow of information. This is the context within which we have to assess the responsibility but also the opportunity lying today with European NRAs. European users seek the protection of their rights and an adequate balancing of freedoms and restrictions in cultural, historical and social perspectives. VSPs want legal certainty and proportionate solutions to regulate their services. Now NRAs are in a position to live up to this challenge by designing and operating a regulatory system that is responsive to the needs of Europe.

⁶⁵ See the arguments of the “Explanatory Memorandum of the 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 the Member States concerning the provision of audiovisual media services in view of changing market realities” - COM/2016/0287 final - 2016/0151 (COD).

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