

# Media regulation at a distance: video-sharing platforms in AVMS Directive and the future of content regulation\*

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## Abstract

This article argues that the inclusion of video-sharing platforms in the new version of Audiovisual Media Service Directive, not only extends the scope of media regulation in the EU, but also brings a fundamentally new approach to the content regulation as such. With this approach, EU recognises the inherent difference between more traditional types of media, in which the editorial rights and responsibilities lie with the media themselves, and the platformed social media, in which it is the active user, who is the originator and primary uploader of the content. Following this distinction the new regulation is systemic rather than focusing on individual pieces of content on the platforms, but also recognises the rights of the users, and legislates for more transparency. Although the latter two elements are included in the Directive in only rudimentary form, and they apply only to video content, the proper transposition of these into the national legislations of the EU member states have a real potential for improving the current state of social media governance.

## Summary

1. Context. – 2. The new version of AVMSD. – 3. What is video-sharing platform? – 4. The basic principles of VSP regulation. – 5. Conclusions.

## Keywords

Audiovisual Media Services Directive - video-sharing platforms - media regulation - content regulation - content moderation

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## **1. Context**

There is a lot of attention currently paid to the question of how to adjust the current legal framework to address the problems that came with the rise of social media. From the distribution of terroristic content, through mass production and spread of hate speech and disinformation, to the proliferation of problems connected to children well-being, all of these are the cause of great concern to many. Not that these phenomena were not present in society during the analogue media era. But the production possibilities enabled by digital technology and frictionless exchange of information through social media brought these on an entirely new level. So much so, that now there is a widespread fear that the fabric of democratic societies themselves is under threat.

There are many ideas on how to approach these problems, but very few of them, so far, were actually put into practice. The notable exception is the German Network Enforcement Law (NetzDG), that introduced the liability of social media platforms over the hate speech and other illegal content on their services.

Similar initiatives are now in different stages of preparation also in other countries. A lot of interest was generated by the UK Government's Online Harms White Paper, which should serve as a basis for future comprehensive regulation of online content. Another one that is nearing the end of the legislative process, and also is closest to Germany's NetzDG, is so-called "Avia law" in France.

These initiatives, however, do not enjoy unequivocal support. The common criticism levelled against them is that they are disproportionately oriented toward the swift removal of content without creating any safeguards toward their opportunistic enforcement by platforms. This is based on the view, that, designed as they are with strict penalties for non-compliance, these laws strongly incentivise the providers to take-down the content whenever in doubt as to its legality— an outcome that will arguably further drive out marginalised views from the digital public sphere.

In the EU, these questions should be addressed by the so-called Digital Services Act (DSA). Announced by incoming President of the EU Commission von der Leyen, and currently officially existing only as an 8 pages long idea paper, the DSA should replace the current E-Commerce Directive,<sup>1</sup> and presumably alter its liability regime for intermediaries and broaden its scope. Now, both of these changes are a matter of a lot of debating and, given the state of the preparations for this legislation, also a lot of fantastical projections from all sides.

Whatever the final result, DSA will very probably present a fundamental shift in the legal approach to online platforms regulation. The fact is, however, that it still lies in rather distant future.

But there is EU legislation currently in force, Audiovisual Media Service Directive (AVMSD), that addresses some of these problems already, and this legislation is due to be transposed into national legal systems of all EU member states very soon. It

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<sup>1</sup> Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

is a new version of the Directive which origins date back to 1989, when it dealt with TV broadcasting only. In 2010 its scope was extended to video-on-demand services, and at the end of 2018, it was widened yet again to so called video-sharing platforms (VSPs).

And it is the Directive's approach toward VSPs that may prove to be part of the regulatory solution for online content more broadly. True, this particular legislation concerns only audiovisual content, and therefore, does not cover all content on social media. With this model, however, as this article tries to explain, we are witnessing a new approach to content regulation that, if successful, can later be extended to other areas. That is why it warrants close inspection. And ideally, this should be done before the transposition of the provisions in question into national legislative frameworks.

This article will focus on the basic principles of VSP regulation in AVMSD and why some of these principles are creating a new kind of content regulation. It will also try to assess the potential of this framework in addressing two prominent issues currently present in the area of digital media governance, namely that of adequate protection of the rights and interests of the users, and the problem of transparency in content moderation.

## **2. The new version of AVMSD**

The extension of the scope of AVMSD to the regulation of video-sharing platforms, is the first time that legislation on an EU level has addressed specific content regulation on any kind of digital platform. In the context of a changing mood toward big tech, the provisions of the Directive may prove to be very influential. Either because its implementation would lead to a more satisfactory rearrangement of the current situation in the EU media environment, or because of some tough lessons learned.

From the broader perspective, the approach that the new AVMSD takes is in line with the ideas voiced by many of those thinking and writing about the potential content regulation on platforms.

Its approach to content regulation is systemic rather than focusing on individual pieces of content on the platform, it recognises the rights of the users, including explicitly mentioning the protection of freedom of expression of those that upload content, and it legislates for transparency.

And it is these three elements of VSP regulation that this article is primarily focusing on. On the systemic approach because it is an entirely new element in the EU media regulation. On the latter two elements, rights of the users and transparency, because, while fairly rudimentary in their phrasing in the Directive, these may prove to be crucial in the development of a new approach to content regulation on digital platforms. Indeed, to achieve this, it would take a certain regulatory angle to interpret the provisions of the Directive. This article is looking at the VSP regulation in AVMSD precisely from this perspective. It tries to highlight those parts that, if given priority by legislators in the member states, may help in improving the current workings of the media environment in digital space.

### 3. What is video-sharing platform?

The inclusion of video-sharing platforms into the scope of AVMSD has been debated. From its introduction, the Directive has laid down the regulation for audiovisual media with a clearly defined editorial control over the content they were providing. With video-sharing platforms, however, things are markedly different.

As defined by AVMSD, video-sharing platform is a service devoted to the provision of programmes and user-generated videos for which its provider does not have editorial responsibility, but which the provider is organising – automatically or otherwise. This disconnection between the provider and editorial responsibilities is a clear sign that with this type of service, we are not dealing with media in the traditional sense. The ultimate example of such a service is Google’s YouTube, where the provision of videos is its primary function.<sup>2</sup> But AVMSD also introduces regulation for services which character may not be that clear-cut.

The Directive’s definition introduces two alternative criteria on which the legal recognition of VSP hinges – that the provision of audiovisual content<sup>3</sup> is either the principal purpose of the service (or of its dissociable section – Facebook Watch would be a good example) or its essential functionality. While the former, as was already stated, is fairly uncontroversial and clearly points to prototypical VSPs like YouTube, it is the latter that will bear the most scrutiny in borderline cases.

From the beginning, one of the most controversial questions was whether VSP regulation in AVMSD would also cover video content on social media. Not only does the notion not appear in the first draft proposal by the Commission, but one of the (later deleted) recitals explicitly excluded it.<sup>4</sup>

This approach betrays a very cautious stance initially taken by the Commission towards the regulation of social media in general. Its co-legislators were not as timid, and the final version is bolder in its wording.<sup>5</sup>

This does not mean, however, that the extent to which social media providers fall

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<sup>2</sup> Other examples would be Vimeo, or French service Dailymotion.

<sup>3</sup> This is, of course, a gross simplification for the sake of readability. The whole paragraph reads: «video-sharing platform service’ means a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing».

<sup>4</sup> The wording of the recital 3 of the proposal: «Social media services are not included, except if they provide a service that falls under the definition of a video-sharing platform». 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».

<sup>5</sup> 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 Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

within AVMSD has clear boundaries. The interlocutors during the legislative process understood that this is not the case,<sup>6</sup> and obliged the Commission in consultation with the responsible member states' authorities gathered in the Contact Committee to prepare guidelines to help to clarify the definition.<sup>7</sup>

### **4. The basic principles of VSP regulation**

The main aim of this article is to examine the principles that make an AVMSD approach to VSP regulation novel. There are of course other principles, that will shape the implementation and, later on, practical application of the VSP regulation – like country of origin principle or minimum harmonisation regime – but as they do not constitute a conceptual change, but are rather a continuation of the older media regulation paradigm, we won't deal with them here.

So, the principles that are employed in media regulation on the EU level for the first time are:<sup>8</sup> a) a systemic approach; b) transparency; c) the active user as a regulatory actor. Now they will be discussed in turn.

#### **4.1. A systemic approach**

Content regulation on media platforms is a widely discussed topic nowadays. Until fairly recently the consensus seemed to have converged on the idea that, from a legal perspective, social media are mere communication intermediaries and, as such, do not possess any substantial editorial powers and, therefore, should not hold editorial responsibility for the content they carry. Starting with the famous Section 230 of the US Communication Decency Act, followed in the EU by the provisions of E-Commerce Directive, this notion seemed to be firmly established in the law of democratic countries.

However, the strong impact of these platforms on society and the fact that the editorial influence the platform providers exercise over the content posted by their users is not negligible, have prompted many to question the validity of these liability exemptions, mainly for potentially dangerous content like hate speech or so-called terrorist content.<sup>9</sup>

Still, the content on the platforms is mainly created by their users and not the platforms themselves. When it comes to editorial competences of the platform providers,

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<sup>6</sup> Recital 3b in the [General Approach of the Council of the EU](#), adopted May 2017 in *eur-lex.europa.eu*.

<sup>7</sup> See [Digital Single Market – AVMSD Contact Committee](#), in *ec.europa.eu*.

<sup>8</sup> There are new also on the EU member state level. But for two of them, the systemic approach and transparency, one can argue that some elements of those already appear in German NetzDG, hence this more precise qualification.

<sup>9</sup> In the EU, the main attention is now aimed at announced Digital Services Act that will supposedly focus also on these matters.

those are manifested in the organisation of the content rather than its production.<sup>10</sup> Therefore, there is a difference between the editorial influence exercised by social media providers and the older types of media such as broadcasting, so it is only logical for regulation to follow this distinction.

The AVMSD explicitly recognises this in its recital 48 (first sentence): «In light of the nature of the providers' involvement with the content provided on video-sharing platform services, 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».

This recital is of vital importance for the interpretation of the measures laid down for VSPs in the Directive. In contrast to audiovisual media services, i.e. broadcasting and on-demand services, the protected areas enumerated in art. 28b(1), as well as measures listed in art. 28b(3), should not be aimed at the content itself, but only its distribution. Although one might have some difficulty imagining this in practice, the major consequence should be that while broadcasters are objectively responsible for every single piece of content that appears on their broadcasts, VSPs should only be responsible for its systemic treatment. This is, after all, the general approach taken by the NetzDG,<sup>11</sup> and also that proposed in other prominent initiatives.<sup>12</sup> Furthermore, this is arguably the only approach that can accommodate AVMSD provisions with those of the E-Commerce Directive. As no other part of the document mentions this, the first sentence of recital 48 may be considered an important limit on the legislation of new measures in member states during the transposition phase. This is enhanced by the fact that the provisions for VSPs are in a minimum harmonisation regime, which means that member states may choose to impose measures that are more detailed or even stricter than the ones in the Directive.

## **4.2. Transparency**

Transparency is often cited as a key issue in the governance of digital platforms. One cannot devise any meaningful policy or legal action or assess whether such a thing is indeed even needed, when regulators, researchers, activists, users and practically all others are kept in the dark with regard to how platforms work. And although the AVMSD does not go all the way in this regard, transparency has a prominent role in the Directive and has the potential to be a crucial piece of the regulatory puzzle.

In this regard, two instances of transparency requirements in the Directive are relevant. The first is seeking to increase transparency in the decision processes within the platforms themselves; the second is connected to co-regulation.

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<sup>10</sup> Although VSPs can have their own productions e.g YouTube Originals.

<sup>11</sup> See [the English translation in \*bmjv.de\*](#).

<sup>12</sup> See: Creating a French framework to make social media platforms more accountable: Acting in France with a European vision, Interim mission report, “Regulation of social networks – Facebook experiment”, 2019; Online Harms White Paper, 2019; OFCOM: Addressing harmful online content, 2018.

### 4.2.1. Transparency and content moderation

According to art. 28b(3)(i): «establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints to the video-sharing platform provider in relation to the implementation of the measures referred to in points (d) to (h)».

As this is the only provision directly concerned with transparency on the decision processes about the content within VSPs in AVMSD, it is crucial to put it in the proper context.

First of all, we have to note that the transparency obligation out in art. 28b (3)(i) serves both the user who complained and the user against whose content the complaint was directed. From a plain reading, it may be more straightforward to understand this provision as only to enhance the position of the complainant, but such an interpretation would not fulfil the whole scope established in this provision. The transparency aimed at tools helping users to notify the platform about potential wrongdoing is already covered by art. 28b(3)(d),<sup>13</sup> and art. 28b(3)(e)<sup>14</sup>. In contrast to that, to be transparent about 'handling and resolution' of complaints should mean ensuring that all those that are impacted by the decision have the opportunity to understand it. And as independent regulators will have to assess this measure according to art. 28b (5)<sup>15</sup>, it follows that they should be able to obtain this information too. It may be that not all the information should be available to everyone, be it for privacy, or some other relevant reasons. In such cases, however, there should still be mechanisms in place, that would ensure that transparency is achieved without unnecessary disclosure of sensitive information. This provision is thus potentially a useful tool in protecting the rights of users. Especially in the case of users who are actively uploading content, this is something that is conspicuously missing in online platforms today. The user whose content is taken down by platform provider usually receives only a generic explanation of the reasons why it happened. Considering the prevalence of online communication via online platforms, and the impact on speech rights that these kinds of decisions have, this is woefully inadequate.

By implementing art. 28b(3)(i) in a certain focused way, the situation just outlined may change. For this, however, it is important to bear in mind both the aim and potential importance of this provision in the exercise of human rights online.

Every online platform has a more or less elaborate moderation system that aims to protect users from potential online harm. In a relatively short time, these systems have evolved from "Feel bad? Take it down" approach to an ultra-detailed set of rules on

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<sup>13</sup> By which the provider should be responsible for «establishing and operating transparent and user-friendly mechanisms for users of a video-sharing platform to report or flag to the video-sharing platform provider concerned the content referred to in paragraph 1 provided on its platform».

<sup>14</sup> By which the provider should be responsible for «establishing and operating systems through which video-sharing platform providers explain to users of video-sharing platforms what effect has been given to the reporting and flagging».

<sup>15</sup> «Member States shall entrust the assessment of those measures to the national regulatory authorities or bodies».

a level to which no media regulatory body currently operates.<sup>16</sup> The reason for this is that, while analysts and ultimately decision-making personnel at a regulatory body do have at least some discretion when assessing the content in question, content moderators at platforms do not. The platforms want their rules to be applied consistently across all jurisdictions, and this is arguably not achievable, on the scale the biggest platforms currently operate, without detailed and strictly enforced rules.

This also means, however, that the decision on whether particular content is in line with the platform's rules often hinges on a distinction so minute that it might not be recognisable to anybody without proper training. Not that the user, under current circumstances, would be able to find out. The platforms are simply not making their rules available down to such details.

Typically, what a user can see in the Terms of Service are rules that go into far less depth on what behaviour and what kind of content is prohibited on the platform.<sup>17</sup> But the application of these general rules and their interpretations created during the process, are what counts in reality, and these are hidden from plain view.

This is not to say that these rules are entirely arbitrary. Major platforms like Facebook and YouTube have billions of users with all sorts of cultural backgrounds, so finding one set of rules that fits all circumstances is nearly impossible. The rules need to address new situations and, therefore, continuously evolve.<sup>18</sup> Even the processes that lead to these incremental changes may be quite elaborate.<sup>19</sup>

Platforms also recently increased their transparency in various content moderation statistics like the number of complaints and take-downs.<sup>20</sup> But here we have to state, that, although commendable, these initiatives have their limits, as there is no way to independently verify the published data.<sup>21</sup>

Even more importantly, all this does not change the fact that, when it comes to content moderation, there is almost no transparency in the underlying processes or their outcomes.

There are several reasons why platforms are not being open in this regard. The fact is that, until very recently,<sup>22</sup> the platforms have not been pushed to be transparent about their content moderation by any kind of legal obligation. Therefore, many reasons why they have not done so may fall under the umbrella of simple convenience. But

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<sup>16</sup> K. Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, in *Harvard Law Review*, 131, 2018, 1631.

<sup>17</sup> The name may differ from platform to platform, Facebook, e.g. call its rules Community Standards.

<sup>18</sup> There are, of course, all sorts of problems with this approach, from the inconsistent application, through the lack of clarity about the motivations behind the rules, to absolute lack of accountability. But we have to bear in mind, that this is still the area of platforms' own discretion. The question of protecting users' rights online is discussed in section 3.4. of this article.

<sup>19</sup> Facebook's "mini-legislative session" where rules on content are created is described in D. Kaye, *Speech Police, The Global Struggle to Govern the Internet*, New York, 2019, 53-58.

<sup>20</sup> R. Gorwa – A.T. Garton, *Democratic Transparency in the Platform Society*, in N. Persily – J. Tucker (eds.), *Social Media and Democracy: The State of the Field*, Cambridge, forthcoming.

<sup>21</sup> On verification of data, see section 4.2.3 of this paper.

<sup>22</sup> "NetzDG", or so-called "Avia Law" in France have introduced substantial transparency obligations for platforms.

there is one argument, often made by platforms, that claims broader regulatory implications. This is the argument that, when shown all the details of decision-making processes in content moderation, the nefarious actors may be able to game them.<sup>23</sup> Researchers, however, tend to dispute this claim, contending that the risks are widely overstated. As Ben Wagner writes, there is an overriding interest in greater transparency of large private intermediaries, and, similarly to what has already been stated about privacy and other concerns in relation to art 28b(3)(i), «the information does not need to be such that it enables the manipulation of the system».<sup>24</sup>

In relation to AVMSD we have to distinguish the general content moderation, outlined in basic tenets above, from the handling of the complaints.

Arguably, all complaints procedures will involve content moderation at some point. However, not all aspects of content moderation are connected to complaints and certainly not all moderation is triggered by them.

As we have already seen, the AVMSD transparency requirement in art. 28b(3)(i) covers, prima facie, only content moderation attached to complaints. The two other relevant provisions in question (art. 28b (3)(d) and (e)) are also concerned, broadly speaking, only with reporting content by users and platforms' dealing with reporting potentially harmful content. Now the question is whether the procedures and decisions that deal with the similar application of platforms' content standards, but taken on the platform's own initiative, are outside of the scope of AVMSD. Moreover, practically speaking, are these two types of decisions even dissociable?

As the VSP regulation is concerned only with video content, it may be, that the providers could separate content moderation on video and other content, and then provide information only about the former. The question of whether they could legitimately, and meaningfully, separate information on content moderation exercised when handling complaints, and when acting on their own initiative, is another matter.

Of course, there are various interpretations possible, but the role of legislators in Member States during the transposition phase should be to find the one most closely aligned with the ideal of full realisation of users' rights on online platforms. For this, it is crucial that the users have certainty regarding the limits to their behaviour and behaviour of others on the platform. Because only then can they make informed decisions and take actions when they feel mistreated. With transparency, in other words, they would possess a necessary, although not by any means sufficient, tool to defend their rights online.

### **4.2.2. Transparency and co-regulation**

The new version of the AVMSD has a strong focus on self- and co-regulatory solutions. Almost every major theme in the AVMSD has these alternative regulatory arrangements mentioned as an acceptable or even preferred solution. And the VSP

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<sup>23</sup> N. Suzor, *Lawless: The Secret Rules that Govern our Digital Lives*, Cambridge, 2019, 16.

<sup>24</sup> B. Wagner, *Free Expression? – Dominant Information Intermediaries as Arbiters of Internet Speech*, in M. Moore – D. Tambini (eds.), *Digital Dominance: Implications and Risks*, Oxford, 2018, 232.

regulation is not an exception.

Before we turn to transparency requirements for co-regulatory mechanisms in VSP regulation, it is useful to briefly discuss what the co-regulation in this context might actually mean.

There are no legally binding definitions of either self- or co-regulation. Especially on the European level, however, there is a number of documents describing them, including the definitions for the purposes of the Interinstitutional Agreement on Better Law-Making from 2003,<sup>25</sup> and, most importantly from the perspective of this article, their characterisation in recital 14 of the Directive itself.<sup>26</sup>

Of course, neither self-regulation nor co-regulation can be seen as solutions to every regulatory problem. Although positive aspects are widely recognised, it also has to be stressed that what matters in the end, is the actual exercise. And there are examples when alternative approaches to regulation brought questionable outcomes.<sup>27</sup>

Also, the extent to which different areas of regulation are prone to either self- or co-regulation vary. In this regard, however, the regulatory model taken by the Directive seems to be a good fit for co-regulation.

As we have already seen, the regulatory model for VSPs in AVMSD constitutes only a systemic oversight of content-moderating measures, giving to VSP providers a strong regulatory role. From this perspective then, it seems that self-regulatory part of the co-regulation mechanism is already written into the Directive.

Here lies a conceptual problem, however. In the traditional sense, the self-regulatory body should have an industry-wide relevance<sup>28</sup>, but the rules in the Directive aim at individual providers, and currently, there is no industry-wide initiative that could be considered self-regulatory in this traditional sense. True, Facebook has created an option for its Oversight Board project to become one. But this would mean that other social

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<sup>25</sup> Interinstitutional agreement on better law-making, OJ C 321, 31.12.2003.

<sup>26</sup> Recital 14 of AVMSD: «Self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations and associations to adopt common guidelines amongst themselves and for themselves. They are responsible for developing, monitoring and enforcing compliance with those guidelines. Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislative, judicial and administrative mechanisms in place and its useful contribution to the achievement of the objectives of Directive 2010/13/EU. However, while self-regulation might be a complementary method of implementing certain provisions of Directive 2010/13/EU, it should not constitute a substitute for the obligations of the national legislator. Co-regulation provides, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. In co-regulation, the regulatory role is shared between stakeholders and the government or the national regulatory authorities or bodies. The role of the relevant public authorities includes recognition of the co-regulatory scheme, auditing of its processes and funding of the scheme. Co-regulation should allow for the possibility of state intervention in the event of its objectives not being met. Without prejudice to the formal obligations of the Member States regarding transposition, Directive 2010/13/EU encourages the use of self- and co-regulation. This should neither oblige Member States to set up self- or co-regulation regimes, or both, nor disrupt or jeopardise current co-regulation initiatives which are already in place in Member States and which are functioning effectively».

<sup>27</sup> See, e.g., the situation around [UK's co-regulatory scheme for on-demand audiovisual services in ofcom.org](#)

<sup>28</sup> This also what AVMSD states in recital 14.

platforms would join the initiative, and such a thing is not expected anytime soon. One can argue, however, that all VSP services, and more generally social media, constitute a market, or at least a playing field, of its own. It doesn't resemble the environments that are traditionally governed by self and co-regulatory arrangements, with many players navigating the same environment. So, it may be that in this area, and arguably, there will be others like this in the near future, we should change our perspective.

Also, the statutory regulation, as opposed to self or co-regulation, typically entails a more direct exercise of regulatory powers than in those alternative regulatory arrangements. But when, for example, BAI stated in its contribution to Irish Government's consultation, that they are not foreseeing a co-regulation for the implementation of VSP rules in the Directive, they also said, that they are not foreseeing to regulate the VSPs directly. So, what kind of approach is being taken here?

The crucial criterion to distinguish between statutory, self- or co-regulatory arrangement would need to be found somewhere else. And the best solution would probably revolve around the question, who is making the rules.

The Directive calls the rulebooks for these alternative regulatory arrangements "codes of conduct". And it is the procedure for creating those that makes the most sense focusing on when trying to distinguish co-regulation from statutory one. Systems for VSP regulation where the codes of conduct are created by self-regulatory bodies (or, at least, the self-regulatory bodies have a meaningful role during their creation), and which systemic application is overseen by state regulatory bodies, can be called co-regulation. Those that are both created and overseen by state regulatory bodies, in line with BAI's ideas, would best be seen as statutory regulation.

With this somewhat longer caveat lets now focus on what are the Directive requirements for transparency in co-regulatory mechanisms.

In its art. 4a(1)(c) the Directive puts a transparency requirement into the core of co-regulatory schemes. Although it is not obligatory to apply measures laid down in the Directive via these mechanisms, as has been already noted, the call for co-regulation is very prominent throughout the Directive, and especially so in the art. 28b dealing with VSPs.

If a member state chooses to establish co-regulatory mechanisms for VSPs, its intrinsic aspect should be the «regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at».<sup>29</sup>

Now, how far these requirements may go, is up for debate. They may probably range from minimalistic ones, like self-reporting obligations, to extensive requirements that would involve regulatory audits.<sup>30</sup>

As we already mentioned, there are no self-regulatory or co-regulatory systems in

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<sup>29</sup> Art. 4a(1)(c).

<sup>30</sup> The calls for audit competencies for regulators are becoming commonplace, e.g. B. Wagner – C. Ferro, *Report on the Governance of Digitisation, Enabling Digital Rights and Governance*, forthcoming; K. Rozgonyi, *Holding digital platforms accountable: what role to public scrutiny? – A blueprint for audiovisual media policy intervention*, ICA 2019 Post-conference, Building Bridges Between Scholarship and Advocacy for Digital Media Policy, 2019; *Creating a French framework to make social media platforms more accountable: Acting in France with a European vision*, Interim mission report, "Regulation of social networks – Facebook

place in the area of VSPs, so it is difficult to say what is their potential in terms of transparency. Any legislator that is serious about making the digital space more transparent, however, should probably aim at something close to the latter end of the transparency spectrum.

### **4.2.3. Transparency and data verification**

It is one thing to oblige the platform providers to disclose certain data to the regulator, and another to have the ability to ensure that those data fulfil certain criteria in terms of their quality and completeness. To rely solely on the platforms in this regard, as is currently the case, will not be sufficient in the future, especially with AVMSD in force, as we are now moving from pure self-regulation, or, better, non-regulation, towards legally binding rules that call for actionable accountability.

The potential models through which the data can be verified for regulatory purposes vary. It may be that the future media regulators tasked with VSP regulation will also be endowed with data verification competencies alongside those regarding transparency. But while the latter are competencies exercised by some media regulators even today, the situation is entirely different with the former ones.

Data verification is a distinct process that requires specialised expertise. While media regulators currently do have at least some experience with transparency, when dealing with transparency reports by their regulatees in various areas, they usually do not deal with data verification.

Also, data processing in whatever form carries a risk of exposure that might lead to mishandling or even outright abuses of data. And the security concerns are even greater when we consider that media regulators are not the only authorities that would need reliable data from the platforms to exercise their powers. The same would arguably apply to data protection authorities, competition authorities and quite a few others.

To mitigate both of these concerns, i.e. the lack of expertise and security risks involved, it may be worth examining the possibility of keeping transparency and data verification on the one hand, and regulation on the other, as two separate processes. The former could be exercised by a single authority, where both the expertise and security measures could concentrate on the task of gathering verified data, and the regulatory functions could stay more or less as they are now with sector-specific regulators. These authorities then would be provided with the data within their legal competence, to a legally-specified extent for a legally-specified purpose, by the newly established data transparency/verification authority.<sup>31</sup>

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experiment”, 2019; M. Vermeulen, *Online Content: to regulate or not to regulate – is that the question?*, APC Issue Paper, 2019.

<sup>31</sup> B. Wagner – L. Kuklis, *Disinformation, data verification and social media*, LSE Media Blog, 2020.

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### 4.3. The active user as a regulatory actor

The exercise of traditional (i.e. pre-digital platforms era) media regulation meant finding a proper balance between two competing sets of rights and values, those of freedom of the media and informational rights of public on the one hand, and other public interests, like protection of human dignity, privacy or democratic order represented by the regulator, on the other. The media themselves were the bearers of freedom of media/expression, they had sole editorial responsibility for their content, and they alone decided who can speak on their behalf or through them.

With the advent of social media, the situation has changed. Now there is an active user who is the main creator and publisher. It is of course factually not entirely right to say that platforms have no editorial control over it but, legally, it almost stands, as both US and EU law to a large extent exempt them from liability over the content.

Up until now, however, the user has had very few enforceable protections when it came to his freedom of expression or other informational rights. True, the UN Human Rights Council declared that human rights jurisdiction also extends fully into the digital environment,<sup>32</sup> but without enforceable legal instruments and taking into account protections of platforms from liability, this was of little practical use.

In the EU, increasingly cases are appearing in which courts are forcing platforms to take down or even restore the content in recognition and application of user rights in the online environment. But this only highlights the need for a systemic solution. There needs to be a system that will shield platforms from liability where it will hinder their legitimate use and endanger their users' rights, but it has to have its limits where preventable harm to individuals or society occurs on a massive scale.

So, the nexus of rights and values in the media environment, that in the past had two sharply defined poles, now takes the shape of a triangle, which the new AVMSD recognises in rather unequivocal terms.

#### 4.3.1. Active user in AVMSD

In the first sentence of art. 28b(3), the AVMSD establishes the points to consider when determining individual measures of VSP regulation: «For the purposes of paragraphs 1 and 2, appropriate measures shall be determined in light of the (1) nature of the content in question, (2) the harm it may cause, (3) the characteristics of the category of persons to be protected as well as (4) the rights and legitimate interests at stake, including (5) those of the video-sharing platform providers and the (6) users having created or uploaded the content as well as (7) the general public interest».

Several of these are sufficiently self-explanatory, but some point towards a deeper meaning that may open a new way of looking at the governance of digital space.

Numbers (5), (6), (7) all point to the interests and values that need to be taken into ac-

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<sup>32</sup> UN Human Rights Council, [Resolution: The promotion, protection and enjoyment of human rights on the Internet](#), A/HRC/20/L.13, 29 June 2012 [draft] in [undocs.org](#) (adopted on 5 July 2012).

count when determining individual measures for VSP platforms.<sup>33</sup> Interestingly, users that are to be protected by those measures are not mentioned as direct actors in this regulatory model. Their interest is included in (3), and partly in (1) and (2), and definitely in general public interest consideration (7), but they are not included as a special regulatory actor. This approach, however, is entirely warranted.

Media regulation is not, and never has been, about protecting the individual interests of the members of the audience. Of course, those interests are implicitly anticipated by media regulation and may often coincide with the regulatory ones. However, media regulation, in contrast to other legal frameworks like consumer protection or various civil law remedies, is there primarily to look after wider societal interests rather than those of an individual nature. It is therefore understandable that, when it comes to VSP regulation, the approach is systemic and not individual.<sup>34</sup>

With the user “having created or uploaded the content” (6) (an active user), however, the situation is different. As it is an active user whose creative force is behind the content shared on digital platforms, there is a need for redistribution of rights and responsibilities previously reserved only for media.

So far, the regulatory approach focused predominantly on taking down illegal or harmful content from the platforms via different instruments. From a soft approach like EU’s Code of Conduct on Hate Speech, through a rather hard one like the proposed Regulation Combatting the Dissemination of Terrorist Content Online, to proper national legislation like NetzDG, all of these strongly push for its content removal. What they have further in common is the absence of any safeguarding mechanism for protection of freedom of expression of the users. The incentives for the platforms are thus strongly stacked on the side of removal, and it is much easier for providers to err in that direction than against it.

To recognise an active user as a regulatory actor means to rebalance those incentives. If a human rights approach to the regulation of online space is to be taken seriously,<sup>35</sup> the regulation also needs to pay attention to what is happening to legitimate content on the platforms, not only to the harmful one.

And AVMSD is the first legal instrument making it clear, that it is also the interests of uploading users that must be taken into account when regulating content on online platforms.

As with transparency, also here one cannot say that AVMSD provisions regarding the protection of users from infringement on their rights are sufficient. Far from it. However, the inclusion of interests of the active user as a legal condition for the implementation of the measures required of platforms by the Directive creates the way through

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<sup>33</sup> In it not entirely clear from the wording of the Directive what “determined” in this instance means. Does it only mean “put into binding legislation”, or should it cover also the actual application of those measures? But as it probably would not make sense to take listed interests into account when devising legislation but not when applying it, I would interpret it, certainly in this article, that the principles are valid in both cases.

<sup>34</sup> See also recital 48 of AVMSD.

<sup>35</sup> D. Kaye, *A Human Rights Approach to Platform Content Regulation*, Report of the U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35, 2018.

which the rights of users can be enforced in a much stronger way than it has been until now. Now it is up to policymakers in the member states to use it.

### 4.3.2. Proportionality and balancing

If the new rights of active users are fully recognised, it will have a profound impact on the way the fundamental communication rights are exercised online.

The established legal approach of courts and other institutions when resolving conflicts in media environment, is to use so called principle of proportionality to ensure that basic communication rights and freedoms, like the freedom of speech and right to information, are protected.

The principle of proportionality is one of the basic legal principles of EU law.<sup>36</sup> Its role is to ensure that all rights, values and interests are given due consideration and no action of the state is taken beyond what is necessary when in conflict with them.<sup>37</sup> It has also a strong structural dimension that, over time, became a standardised tool for courts and even regulators to resolve these conflicts, called the proportionality test.

The most common version of the test has three steps: suitability, necessity and proportionality in a strict sense.<sup>38</sup> During the first step, it is examined whether the measure in question is suitable to achieve its stated goal. The second step is there to examine whether or not there might be another measure available that would cause less or no damage to the rights or interests with which the measure in question conflicts.

If the answers to first and second steps are satisfactory, meaning that the measure at hand is indeed suitable and necessary to achieve its stated goal, the test moves to its third phase: proportionality in the strict sense. In this stage, the rights and interests in conflict are balanced.

The balancing exercise is based on the premise that fundamental rights are not absolute and have a different weight under different circumstances. It is through the balancing that the authorities determine what is the actual weight of the rights in conflict and which one should, under given circumstances, get precedence.

We already discussed the changing nature of the nexus of rights that comes with the inclusion of an active user into the media environment. And it is the balancing exercise, where this shift from media/regulator dichotomy to user/platform/regulator triangle will be most visibly manifested, as there will often be yet another right or interest to take into account.

In regulating traditional media, the proportionality principle has, explicitly or implicitly, been used for a long time. Now there is a new challenge ahead of policymakers, regulatory authorities, and courts, to apply it in the new “triangle-shaped” regulatory environment. In addition, the new systemic approach is based on the premise that the first line of regulation are VSPs themselves, so, by “regulatory” extension, they will

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<sup>36</sup> P. Craig – G. de Búrca, *EU Law*, Oxford, 2015, 545.

<sup>37</sup> Recital 51 is specifically referring to balancing of rights in this sense.

<sup>38</sup> R. Alexy, *A Theory of Constitutional Rights*, New York, 2010.

have to play their role, as well.<sup>39</sup>

## **5. Conclusions**

The regulation of VSPs in AVMSD is the new element of EU media regulatory framework. Not only that this is the first time that audiovisual content on the digital media will be regulated, but also the means to do so are novel.

This is caused equally by structural elements of the digital services that are subject of this regulation, and also by the limits the current legal framework, represented in the EU by E-Commerce Directive, puts on the regulation of content on the online intermediaries.

Because of this, the approach of the AVMSD is systemic, with setting out the measures for the treatment of problematic content, rather than focusing on the individual pieces of the content themselves.

This article describes this new systemic approach and the roles of VSP providers and regulators within it, while also highlights the structural changes in the regulatory environment that moves from traditional media/regulator dichotomy to media/user/regulator triangle. These changes, however, also require that the interests of the active user, who is the main source behind creating and uploading content, are fully taken into account by legally recognising his or her rights and by providing him or her with information on the functioning of the platforms through the introduction of transparency obligations.

Both of these elements are present in the new version of AVMSD, although only in a rudimentary form. However, as this chapter argues, their impact can be considerable if they are given due priority during the transposition phase by national legislators.

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<sup>39</sup> See e.g. European Law Journal, Special Issue: Internet and human rights law, Volume 25, Issue 2, March 2019.