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# **Netflix and the Chilling Effect: European Regulation of Audiovisual Content in the Age of Streaming**

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**NB: This essay was drafted and finalised prior to the formal adoption of the amended AVMSD.**

## INTRODUCTION

In 2004, the final episode of the sitcom *Friends* was watched by 8.6 million viewers in the United Kingdom.<sup>1</sup> This represented nearly 15 per cent of the country's population simultaneously watching an hour of television at 9pm on a Friday evening.<sup>2</sup> In 2018, the show is the most streamed program across all video on demand (VOD) services in the UK, viewed twice as often as its nearest rival.<sup>3</sup> The enduring popularity of the programme across decades and content delivery platforms is indicative of media convergence, with content no longer locked to a single medium. The European Commission understands convergence to be 'the progressive merger of traditional broadcast and internet services'.<sup>4</sup> Today, consumers of all ages can access media content from a range of traditional broadcasters, new streaming entrants, and even user generated content on a number of different devices.

It is against this backdrop that the Audio Visual Media Services Directive (AVMSD) has been the subject of criticism and efforts for reform. Initially designed in an era where television was the only mass audio visual media platform, the AVMSD's previous attempts to regulate VOD services were criticised by old and new media services alike as ineffective.

This essay will critically analyse the current AVMSD and the recently proposed amendments, assessing the Directive's efficacy in the digital era. The first part of this paper will outline the law as it currently stands, and identify how the proposed reforms will alter this framework. The second part of this essay will consider how the federal structure of EU media regulation has created regulatory arbitrage opportunities that have enabled the dissemination hate speech, using television coverage of the situation in Ukraine as a case study. It will also examine the proposed reforms to the AVMSD and consider their impact to effectively regulate online vilification. The third part of this essay will examine how the protection of minor provisions in the AVMSD are ineffective given the disparate national regulation of

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<sup>1</sup> BBC News, 'Friends Finale Draws Record 8.6m' (29 May 2004)

<<http://news.bbc.co.uk/2/hi/entertainment/3757901.stm>> accessed 4 October 2018.

<sup>2</sup> Office for National Statistics (UK), 'Population of the United Kingdom (UK) from mid 2004 to mid 2014, by Age Group (in 1,000)' (*Statista*, 2018) <<https://www.statista.com/statistics/281208/population-of-the-united-kingdom-uk-by-age-group/>> accessed 4 October 2018.

<sup>3</sup> Ian Youngs, 'Friends is the UK's Most Popular Subscription Streaming Show' (*BBC News*, 9 August 2018) <<https://www.bbc.com/news/entertainment-arts-45095819>> accessed 4 October 2018; Donald Clarke, 'If Netflix has Changed TV, why is 'Friends' Still So Popular?' <<https://www.irishtimes.com/culture/if-netflix-has-changed-tv-why-is-friends-still-so-popular-1.3597194>> accessed 4 October 2018.

<sup>4</sup> European Commission, 'Convergence' <<https://ec.europa.eu/digital-single-market/en/media-convergence>> accessed 7 October 2018.

harmful content. This part will also examine the AVMSD's difficulty in regulating harmful content as children continue to consume increasing amounts of content online.

# I REGULATION OF HATE SPEECH AND CONTENT HARMFUL TO MINORS IN THE EUROPEAN UNION

## A Origins of the AVMSD

New communications technologies have always inspired concern among governments and regulators. The printing press inspired a wave of burdensome requirements, such as UK laws imposing strict licensing requirements or Star Chamber orders inflicting harsh punishments on the ‘insubordinate’ printers.<sup>5</sup> Over time, the regulation of the press liberalised and now operates largely free from state regulation, instead subject to only the general laws of each Member State as well as self-regulation mechanisms. However, broadcasting technologies do not operate free from the confines of specific regulation. Based on the limited electromagnetic spectrum available and the dubious claims that television has a greater impact upon the populace than other media formats, broadcasting has remained subject to regulation.<sup>6</sup> This has included specific rules regarding the protection of minors and the prevention of hate speech.

Since its inception, the development of European media law has primarily been the product of Boil Banov’s dual concerns of legal competition and technological convergence. Television broadcasting emerged from the national competence confines of cultural policy as national barriers were no match for technological developments. Television stations began to broadcast with ranges wide enough to cross national borders, and televisions were capable of receiving these signals. It was inevitable a European media market began to emerge.<sup>7</sup>

Banov’s concerns of technological advances and differing national policies impeding the European project has always been at the heart of European media policy, and was the impetus for the original Television Without Frontiers Directive (TWFD) in 1970s.<sup>8</sup> The TWFD’s proposed solution to technological developments and competing national legal frameworks was an eminently reasonable one, that ‘sought to balance the interests of the broadcasting industry, the consumers and the Member States by combining harmonisation with the

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<sup>5</sup> See for example William Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765–69) vol 4, ch 19.

<sup>6</sup> Irini Katsirea, ‘Press Regulation in an Era of Convergence: An Introduction’ (2016) 22 *Convergence: The International Journal of Research into New Media Technologies* 463, 464.

<sup>7</sup> Petra Lea Lánkos, ‘East of Eden Hotel – Soft Law Measures on Harmful Content Between Harmonisation and Diversity’ (2018) 6 *The Theory and Practice of Legislation* 113, 121.

<sup>8</sup> *ibid.*

principle of mutual recognition'.<sup>9</sup> This approach ensured that media services could continue to be carried across the continent with a minimum acceptable standard set by the Commission, without the impractical burden of complying with the varying national rules of each Member State the broadcast signal could be received in. Today, the TWFD has been amended and revised to form the current AVMSD.

## B The legal status quo

Before turning to specific case studies and analysis in parts II and III below, it is necessary to assess the general structure of the AVMSD, as it impacts the structure and enforcement mechanisms for the specific rules regarding hate speech and the protection of minors. Technological advances enable today's European media consumers to view content via digital, cable, and satellite broadcasts; catch up services; and VOD streaming services. Attempts to bring rapidly evolving technology within the ambit of the AVMSD, and the differing national regulatory regimes have created problems across the European media landscape, but particularly in relation to preventing hate speech and protecting children.

Although the AVMSD is intended to be as technology neutral as possible, the boom of VOD and streaming technologies has for the most part 'led to a complicated and increasingly incoherent regulatory landscape'.<sup>10</sup> Media convergence has broken down traditional boundaries between media platforms. Newspapers, for example, now not only offer online editions of their content but produce video content both separate to and accompanying their written output. Social networking platforms such as the Instagram app now offer longform content not only from users but also content commissioned by Instagram.<sup>11</sup> If a consumer were to witness content they believed to be hate speech or harmful to minors, technological developments and media convergence have created uncertainty about what is within the purview of the AVMSD or even a national regulator's scope.<sup>12</sup> Although the AVMSD 'was intended to create a level playing field', Banov's concerns regarding technological

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<sup>9</sup> *ibid* 122.

<sup>10</sup> Rachael Craufurd Smith, 'Determining Regulatory Competence for Audiovisual Media Services in the European Union' (2011) 3 *Journal of Media Law* 263, 282–83.

<sup>11</sup> Instagram, *Welcome to IGTV* (20 June 2018) < <https://instagram-press.com/blog/2018/06/20/welcome-to-igtv/> > accessed 10 October 2018.

<sup>12</sup> Commission, *Synopsis report of the Public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - A media framework for the 21st century* 30 September 2015.

innovations in media content delivery have made it far more difficult to prevent hate speech and protect minors.<sup>13</sup>

As noted in Recital 33 of the AVMSD, the country of origin principle is to be applied to universally to all audiovisual media service providers, be they broadcasters or VOD services.<sup>14</sup> Ensuring providers that the rules of a single Member State operate as a proverbial ‘one stop regulatory shop’ has enabled content to more easily spread across Europe. However, such diversity has undoubtedly created difficulties in the enforcement of the rules pertaining to incitement to hatred and the protection of minors.<sup>15</sup> By allowing creators to ‘vote with their feet’ and select a jurisdiction that can best accommodate their preferences, there are sizeable divides in the European media market regarding how rules are interpreted and enforced.<sup>16</sup> Although the same content can be consumed across Europe, cultural understandings of what constitutes incitement to hatred and what poses harm to minors diverges greatly between Member States.<sup>17</sup> This fragmented regulatory structure and limited scope for intervention by the EU or other Member States has created a scenario where it is difficult for the AVMSD to operate effectively in a number of key areas, including the regulation of hate speech and protection of minors.<sup>18</sup>

### C Proposed reforms to the AVMSD

It has now been nearly a decade since the last amendments to the AVMSD. Member States and the European Commission have become acutely aware that the present arrangements are insufficient regarding areas including prevention of hate speech and protecting minors. For regulators, old demarcations between what is and isn’t within their ambit have become more difficult as media convergence continues. For content producers, uncertainty regarding if they are within the scope of the AVMSD or which Member State regulates them is not conducive to innovation and the creation of more content. For the ordinary consumer, they too are unsure of what country or authority is responsible for regulating the content, what standards apply,<sup>19</sup> and even whether there is even any form of regulation for online content at all.<sup>20</sup> In

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<sup>13</sup> Rachael Craufurd Smith (n 10) 282–83.

<sup>14</sup> *ibid* 263.

<sup>15</sup> See for example Case C-244/10, *Mesopotamia Broadcast and Roj TV* [2011] I-08777 Petra Lea Láncoš (n 7) 119.

<sup>16</sup> *ibid* 127.

<sup>17</sup> I Ibrus and U Rohn, ‘Sharing Killed the AVMSD Star: The Impossibility of European Audiovisual Media Regulation in the Era of the Sharing Economy’ (2016) 5 *Internet Policy Review* 1, 7.

<sup>18</sup> Petra Lea Láncoš (n 7) 127.

<sup>19</sup> Rachael Craufurd Smith (n 10) 264.

their consultation across Member States, the European Commission acknowledged that despite the immense benefits to consumers of media convergence, the current regulatory environment provided insufficient protections in areas including the prevention of hate speech and the protection of minors.<sup>21</sup>

The majority of the reforms in the proposal to amend the AVMSD raise a fundamental question of compatibility with the EU's E-Commerce Directive. The latter directive is based on the understanding that services online should be available to all, and that any licensing restrictions on the right to publish content online is unacceptably harmful to the right to freedom of expression. While the internet has undoubtedly aided in the dissemination of hate speech and content harmful to minors, the EU appears to accept the internet is beyond the confines of regulation in one regard yet wish to regulate it in a manner similar to linear television simultaneously.<sup>22</sup>

As suggested by Banov, technological innovation and divergent national regulation has necessitated reform to the AVMSD if it is to remain relevant. This part of the essay has demonstrated that the prevention of incitement to hatred and the protection of minors are two areas of AVMSD rulemaking that have been significantly impacted by the changing media landscape in Europe. The rest of this essay will seek to identify specific instances where the AVMSD has proven ill-equipped to prevent hate speech or protect minors, and assess the likely efficacy of the 2018 proposed reforms.

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<sup>20</sup> Irimi Katsirea (n 6) 464.

<sup>21</sup> Commission '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 (AVMSD Proposal)' (2016) COM 287 final.

<sup>22</sup> I Ibrus and U Rohn (n 16) 8.

## II THE REGULATION OF HATE SPEECH IN THE WEB 2.0 ERA

### A Regulatory arbitrage and the coverage of the Ukraine crisis: A case study

European media consumers are exposed to a panoply of audio visual content options originating from other Member States through a range of mediums, including terrestrial, cable, satellite and more recently internet-based services. Though the *one stop regulatory shop* approach to regulation has drastically decreased the regulatory burden and enabled the proliferation of content across the EU, it has limited the ways Member States can prevent access to content they deem harmful to the citizens.<sup>23</sup> This is a particular concern in the realm of prohibiting the incitement of hatred.

There is no harmonised view across Europe of what constitutes harmful content. As such, complaints from a Member State with a more ‘conservative’ view of what constitutes hate speech are unlikely to result in action by a more ‘liberal’ Member State where the broadcasts originate.<sup>24</sup> The circumvention procedures in art 3 of the AVMSD to suspend access to television broadcasts in the receiving Member State concerned about content they believe incites hatred is, as the European Commission acknowledges, almost completely ineffective. Indeed, ‘except for one case, the circumvention procedure has not been used in practice’.<sup>25</sup> Member States are almost powerless to protect their citizens from content they believe is likely to incite hatred, as the procedures for circumventing television broadcasts are ineffective, and there are no rules to curtail VOD services.

Critics from all sides of the political spectrum have expressed grave concern that media services have been exploited to sow civic disharmony and racial animus across the globe. One need not look further than recent Russian attempts to undermine democracies across Europe and America, or the deeply troubling use of Facebook in Myanmar to facilitate and incite ethnic cleansing.<sup>26</sup>

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<sup>23</sup> Petra Lea Láncoš (n 7) 126.

<sup>24</sup> *ibid* 127.

<sup>25</sup> Commission, ‘Staff Working Document: Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities Brussels’ (2016) 168 SWD final 102, 167.

<sup>26</sup> See for example Jane Mayer, ‘How Russia Helped Swing the Election for Trump’ (*The New Yorker*, 1 October 2018) <<https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump>> accessed 15 October 2018.

One particularly trenchant example that exposed inadequacies in the AVMSD is the response across former Soviet States to Russian propaganda broadcasts related to the crisis in the Ukraine.<sup>27</sup> Concerns raised regarding pro-Russian networks broadcasting into EU Member States Latvia and Lithuania were addressed by local courts and regulators in a manner dismissive of international instruments including the AVMSD. This created a situation where ‘there was a lack of solid grounds for stopping, blocking, and banning programs emanating from Russian media’.<sup>28</sup>

In 2014-2015, a Lithuanian Administrative Court approved several requests from the national regulator to suspend the broadcasting of certain shows on Russian channels that were licensed and regulated in the United Kingdom.<sup>29</sup> These shows contained content that fomented hatred and justified violence against residents of Ukraine, encouraged military intervention in the region by Russia, and alleged that the mass murder of Ukrainians by the Soviet Union in 1932–33 was fabricated.<sup>30</sup> On other occasions the Lithuanian regulator did attempt to rely on derogation procedures in art 3(2) of the AVMSD, though these were relied upon only when they became practicable. As the AVMSD requires a 12 month period over which violations took place, and a negotiation period with a Member State (the UK — where no editorial control is exercised over the content), the AVMSD procedures appear largely to provide too little, too late in terms of recourse.<sup>31</sup>

The situation in neighbouring Member State Latvia is largely the same, where Russian language broadcasts promoted war and military conflict in the region, and ‘included incitement to hatred and intentionally misleading information undermining the territorial integrity of Latvia’.<sup>32</sup> Latvia’s regulatory body drew from the experience of Lithuania, also

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<sup>27</sup> Organization for Security and Co-operation in Europe quoted in Bethany Bell, ‘Propaganda “Alive and Well” Amid Ukraine Crisis’ (*BBC News*, 27 November 2014) <<https://www.bbc.com/news/blogs-eu-30225268>> accessed 18 October 2018.

<sup>28</sup> Andrei G Richter, ‘Legal Response to Propaganda Broadcasts Related to Crisis in and Around Ukraine, 2014–2015’ (2015) 9 *International Journal of Communication* 3125, 3125.

<sup>29</sup> Vilnius District Administrative Court ruling on case No I-7585- 208/2014 (7 April 2014) Vilnius District Court; Vilnius Regional Administrative Court ruling on case No I-6199- 484/2015 (9 January 2015) Vilnius Regional Court.

<sup>30</sup> Andrei G Richter (n 27) 3127–29.

<sup>31</sup> Dunja Mijatović, ‘Propaganda and Freedom of the Media’ (The Representative on Freedom of the Media Organization for Security and Co-operation in Europe, 2015)

<<https://www.osce.org/fom/203926?download=true>> accessed 22 October 2018.

<sup>32</sup> Andrei G Richter (n 27) 3130.

opting to use local enforcement tools rather than wait for the European Commission through AVMSD channels.<sup>33</sup>

These examples exemplify the accurate critique that the AVMSD's rules on the prohibition on the incitement of hatred are fundamentally flawed. In this situation the AVMSD was limited only to the regulation of television broadcasts despite the countless other internet-based platforms enabling the dissemination of hate speech. Further, Member States were required to follow a slow process and engage with the UK, who acts as a puppet headquarters for many of the channels, while all editorial control remains outside the reach of the European Union back in Russia. Jonathan Swift remarked in 1710 that 'falsehood flies, and the truth comes limping after it'.<sup>34</sup> More than 300 years on, the speed at which falsehoods can now fly mean AVMSD rules to prevent incitement of hatred are sorely lacking.

## B Could a reformed AVMSD effectively regulate vilification online?

The 2018 proposed reforms to the AVMSD affect the incitement to hatred rules in two key ways. First, amending the definition of non-linear audio visual media services to cast a wider net, likely meaning social networking services with video as part of their *essential functionality* will fall within the ambit. Second, broadening the art 3 provisions so that Member States can suspend access to all forms of audio visual media available to their citizens. While undoubtedly aimed at ridding the online audio visual landscape of the swathes of vilifying speech published each day, the AVMSD reforms do not appear to provide workable solutions, and may in fact hinder their aims.

AVMSD reforms relating to non-linear audio visual media services are among the most contentious proposals set out by the Commission. These focus on efforts to bring video streaming and social media platforms clearly within the ambit of the AVMSD and the rules relating to the incitement to hatred. Platforms such as YouTube, and even Facebook (after internal company edicts altered the platform's algorithm to promote video content above text and images) are interpenetrated between content from professionals and ordinary users.<sup>35</sup> Content on these platforms is for the most part governed by a libertarian ethos that permeates

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<sup>33</sup> *ibid.*

<sup>34</sup> Jonathan Swift, 'The Examiner No 14 – 9 November 1710' (*Our Civilisation*, 13 September 2018) <<https://www.ourcivilisation.com/smartboard/shop/swift/examiner/chap14.htm>> accessed 2 November 2018.

<sup>35</sup> Erin Griffith, *Facebook's New Mission: Video Will Bring Us Together* (Wired, 11 March 2017) <<https://www.wired.com/story/facebooks-new-mission-video-will-bring-us-together/>> accessed 10 October 2018.

Silicon Valley, where ‘anything goes’.<sup>36</sup> Amateurs and professionals alike compete for the attention of users able to draw from an infinite well of content, incentivising the polemic, the puerile and the profane. As such, hate speech is without a doubt rife on these platforms.

However, planned amendments to the AVMSD to impose greater obligations of digital platforms is a double edged sword. Reducing the amount of speech inciting hatred on these platforms will fundamentally alter the grand bargain between the EU and online platforms since the introduction of the eCommerce Directive, in particular the hosting safe harbour provisions in art 14. By imposing a significant regulatory burden on digital platforms hosting audio visual media in a manner that is any way organised, searchable, or monetised, the EU may undermine its own aims.

Platforms such as Facebook and YouTube are popular in ways no national or local alternative would be because of their size. Network effects mean the international scope and laissez-faire approach to gatekeeping are part of the reason social networking and online content platforms have become a highly concentrated market with just a few players.<sup>37</sup> The imposition of onerous obligations to monitor all content across platforms with billions of active users monthly creates three fundamental risks to values Banov highlights as critical to all AVMSD reforms.

The first is to those concerned about the spread of incitement to hatred on these platforms, as it is possible some platforms may completely extricate themselves from the EU and thus obligations under the AVMSD. This will impede attempts to regulate vilification and is likely to harm investment in the EU from the technology industry. The second is to media plurality. Much like the General Data Protection Regulation, the proposed amendments put a significant regulatory burden on all digital platforms, regardless of size. This enables the largest players in the market to further maintain their dominant position by being the only companies that can afford to comply with the AVMSD’s rules regarding the prevention of content that incites hatred.<sup>38</sup> The third risk is to media independence. Onerous obligations to remove content that has been identified as potentially inciting hatred may result in platforms being overly cautious and removing content that may not violate art 6 of the AVMSD.

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<sup>36</sup> Irimi Katsirea (n 6) 465.

<sup>37</sup> I Ibrus and U Rohn (n 16) 5.

<sup>38</sup> Daisuke Wakabayashi and Adam Satariano, *How Facebook and Google Could Benefit from the GDPR, Europe’s New Privacy Law* (New York Times, 23 April 2018) <<https://www.nytimes.com/2018/04/23/technology/privacy-regulation-facebook-google.html>> accessed 15 October 2018.

YouTube's apparent willingness to remove potentially copyright infringing content without adequate review has been heavily criticised as an overcautious response for fear of litigation.<sup>39</sup> The world's largest video streaming and social networking platforms removing content robust, controversial, or offensive content that is unlikely to constitute actual hate speech curtails free expression and participation in democratic society in its most popular forum.

Technological advances have enabled audio visual content to be accessed across the EU at the click of a button. Banov's proposition that the law must keep pace with technology is correct, and it is clear the AVMSD in its current form provides insufficient protections against the dissemination of content that incites hatred. However, the proposed changes to the Directive are more likely to harm the EU's other aims of media pluralism, independence and economic activity, than it is to prevent hate speech online.

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<sup>39</sup> Russel Brandom, *YouTube's Complaint System is Pissing Off its Biggest Users* (The Verge, 1 February 2016) <<https://www.theverge.com/2016/2/1/10887120/youtube-complaint-takedown-copyright-community>> accessed 15 October 2018.

### III CONTENT REGULATION AND THE AVMSD: PROTECTION OF MINORS

#### A A common market without common morals

A key underlying objective of the AVMSD and the European Union project generally is to promote creation and dissemination of European works. However, cultural mores are not homogenous among Member States. This has created what some Member States believe to be a major impediment to the protection of minors within their territory.<sup>40</sup> As a result of inconsistent interpretation of the AVMSD, the country of origin principle, and ineffective circumvention remedies, there is concern that children are being exposed to harmful content.<sup>41</sup>

The problem of regulatory arbitrage identified in relation to different understandings of what constitute incitement to hatred are just as applicable to the protection of minors. Although the AVMSD rules set out a baseline ban ‘any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence’.<sup>42</sup> The terms in this prohibition are not defined, granting each jurisdiction the power to interpret what constitutes harm to minors based on their own socio-cultural norms.<sup>43</sup> This makes determining harm a country and context specific endeavour. Member States have diverse views on what representations violence, nudity, strong language and even marketing material can be harmful to the development of minors.<sup>44</sup>

The disparate views of what constitutes harmful content, combined with the country of origin principle underlying the AVMSD creates situations where content may be broadcast into a Member State with more ‘conservative’ opinions on protecting the development of children. The disputes between Scandinavian countries and the United Kingdom regarding advertising during children’s programming and the advertising of alcohol (which is banned outright in Sweden) exemplify the divide across the continent.<sup>45</sup> However, the United Kingdom has been

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<sup>40</sup> Synopsis report of the Public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - A media framework for the 21st century 6 July - 30 September 2015.

<sup>41</sup> Petra Lea Láncos (n 7) 127.

<sup>42</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (AVMSD) [2010] OJ L 95, arts 12, 27.

<sup>43</sup> Rachael Craufurd Smith (n 10) 271–72.

<sup>44</sup> Petra Lea Láncos (n 7) 115.

<sup>45</sup> See for example Case C-34/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB* [1997] ECR I-3843; Amandine Garde, ‘Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interests of ... Commercial Operators?’ (2011) *International Journal of Children’s Rights* 149, 165–69.

able to rely on the country of origin principle. The UK's more 'liberal' attitude to what children should be exposed to in terms of advertising, and what can generally be marketed on television means they are not in contravention of the AVMSD. This divergence of moral norms in each Member State has created competition between legal orders, and in the view of morally 'conservative' nations, opportunities for regulatory arbitrage.<sup>46</sup> The restrictive circumstances in which circumvention procedures can be adopted mean that these Member States can do little to prevent content they believe to be morally harmful from being accessed in their territory.

The proposed reforms to the AVMSD do not amend the provisions in regards to the protection of minors via linear broadcasts. Indeed, in consultations regarding AVMSD reform it became clear to the Commission there was limited scope for change as there was 'no clear consensus among stakeholders on commercial communications, protection of minors or the promotion of European works'.<sup>47</sup> This decision echoed previous reform proposals from the European Parliament to include examples of content harmful to minors in the AVMSD, which was rejected by both the Council and Commission.<sup>48</sup> Soft law mechanisms such as codes of practice and the like are the only real avenue of harmonising interpretation of what constitutes content harmful to minors across Member States.<sup>49</sup>

The protection of minor rules in the AVMSD are a balancing act, between the free movement of media services across the Union and the protection of minors from harmful content. As the AVMSD sets only a minimum standard of protection for minors, Member States have been free to impose more 'conservative' requirements on broadcasters. However, as Banov notes, technologies have continued to develop, making content from other more 'liberal' Member States more accessible across Europe. Given the divergent views of what likely to harm minors, there is limited scope for any reforms to the AVMSD to satisfy Member States who wish to shield younger audiences from content that is acceptable in other Member States.

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<sup>46</sup> Floris de Witte, 'Sex, drugs and EU law' (2013) 50 *Common Market Law Review* 1545; Petra Lea Láncoš (n 7) 118.

<sup>47</sup> Commission, '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 (AVMSD Proposal)' COM (2016) 287 final 6.

<sup>48</sup> Francisco Javier Cabrera Blázquez, Maja Cappello, and Sophie Valais, 'The Protection of Minors in a Converged Media Environment' [2015] *IRIS plus* 28; Petra Lea Láncoš (n 7) 123.

<sup>49</sup> *ibid* 117.

## B Minors online: a major regulatory headache

By early 2017, web users streamed over 100,000 years of content on YouTube every day,<sup>50</sup> with streaming video accounting for almost 90% of consumer internet traffic.<sup>51</sup> These figures indicative of the dramatic increase in audio-visual media consumption in recent years, particularly among minors. Currently the AVMSD delineates between two forms of content it deems are of concern to the physical, mental or moral development of minors. The first is that might which *might seriously impair* minors, such as pornography and gratuitous violence. This content is prohibited outright on broadcast television and non-linear services are obligated to use technical measures capable of impeding minors from accessing this content. Broadcasters must also consider the second category of regulated content, programmes *likely to impair* minors must use time watersheds or technical measures so ‘that minors in the area of transmission will not normally hear or see such broadcasts’.<sup>52</sup> The proposed reforms to the AVMSD amend the provisions removing the bifurcations between linear and non-linear services, as well as seriously impairing and other impairing content.<sup>53</sup> Though amended to better align obligations across the various content sources, and to impose a content rating and reporting scheme on video sharing sites, both the current and proposed AVMSD provisions are unlikely to make a better protect minors online, despite ambitious regulatory expectations.<sup>54</sup>

The first impediment is one likely to make all efforts to regulate non-linear content nigh impossible, the inherent characteristics of web-based video content platforms. The sheer volume of content available, and the breadth of platforms it is available across make it make the prospect of being able to effectively regulate content online exceedingly difficult. In addition to this, minors across Europe are technologically savvy and have ever increasing access to devices capable of accessing audio visual content, such as tablets and smartphones. The ease at which content can be accessed has ‘created a setting where exposure has become

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<sup>50</sup> Cristos Goodrow, ‘You Know What’s Cool? A Billion Hours’ (*YouTube Official Blog*, 27 February 2017) <<https://youtube.googleblog.com/2017/02/you-know-whats-cool-billion-hours.html>> accessed 19 October 2018.

<sup>51</sup> Commission, ‘Revision of the Audiovisual Media Services Directive (AVMSD)’ (2018) <<https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd>> 4 October 2018.

<sup>52</sup> AVMSD (n 42) art 27(1)-(2).

<sup>53</sup> AVMSD Proposal (n 47) art 12.

<sup>54</sup> Oliver C Füg, ‘The Challenge of Double Graduation: The Protection of Minors against Developmentally Harmful Content in the Legal Orders of Denmark, Germany and Greece’ (2012) 4 *Journal of Media Law* 253, 273.

far more likely even for those who do not actively seek it'.<sup>55</sup> This problem is further exasperated by the limitations of parental supervisions. A lack of technical competence on the part of parental supervision, coupled with the ease in which minors can access content (in or outside of the home), has made it easier than ever for a minor to be exposed to harmful content. In this way, the current AVMSD has been ineffective in its aim of protecting minors from harmful audio visual content.

In many ways, the concerns regarding the proposed reforms to the AVMSD regarding incitement to hatred are equally applicable to the rules governing protection of minors discussed above. There are risks in amending the bargain between safe harbour protections for video sharing platforms and the EU's aims regarding free expression, media plurality and independence. These include the aforementioned risk that platforms will extricate themselves from the jurisdiction of the EU, harming economic development and technological innovation in the Union. The risk to media plurality is also significant. The current dominant video platforms in Europe are so dominant at this point that the imposition of additional obligations to review and analyse video content may further increase barriers to market entry. Finally, as noted above regarding incitement to hatred, relying on technical measures to weed out harmful content may lead to overly cautious regulation and removal of allegedly harmful content by video sharing platforms. YouTube's AI algorithms to determine the age appropriateness of content has been heavily criticised,<sup>56</sup> to the point that YouTube channels are now making humorous videos trying to guess the arbitrariness of the rating system.<sup>57</sup> Indeed it seems that both the proposed reforms to the AVMSD and the current Directive are inadequate to effectively protect minors from harmful content online, as they are either 'too broad and over-inclusive to be pertinent in their respective objectives, or ... too narrow in respect of this dynamic market'.<sup>58</sup> Both situations have dissatisfied stakeholders on both sides of the issue, and have resulted in legal uncertainty within the still rapidly evolving market.<sup>59</sup>

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<sup>55</sup> *ibid* 253–54.

<sup>56</sup> See for example Sapna Maheshwari, 'On YouTube Kids, Startling Videos Slip Past Filters' (The New York Times, 4 November 2017) <<https://www.nytimes.com/2017/11/04/business/media/youtube-kids-paw-patrol.html>> accessed 18 October 2018.

<sup>57</sup> Funhaus, 'BUSH VS GORE - YouTube Court Ep 1' (*YouTube*, 6 October 2018) <<https://www.youtube.com/watch?v=yBQua4hbZAs>> accessed 7 October 2018.

<sup>58</sup> Ingrid Lambrecht and others, 'Platforms and Commercial Communications Aimed at Children: A Playground Under Legislative Reform?' (2018) 32 *International Review of Law, Computers & Technology* 58, 60.

<sup>59</sup> *ibid*.

Allowing private companies to provide non-linear content in Europe without significant regulatory oversight has created an unacceptable lack of accountability and willingness to accept responsibility by platforms.<sup>60</sup> Article 28a in the proposed reformed AVMSD intends to remedy this situation by placing a co-regulatory structure in place between national authorities and video sharing platforms. This would include user reporting and rating mechanisms, age verification, and parental controls.<sup>61</sup> A system of national co-regulatory frameworks appears to rely on an incorrect supposition that most non-linear content is accessed via local services. The vast bulk of streaming video originates from global platforms such as YouTube and Netflix.<sup>62</sup>

What constitutes content harmful to minors varies across Europe. Some nations are far more concerned about violence than they are sexual content, others have an inverse view.<sup>63</sup> The federal structure of audio visual media regulation, may create an obligation for platforms operating across the EU to comply with varied classification and age rating obligations across 28 jurisdictions. This comparatively high administrative burden again is likely to undermine the EU's aims regarding free expression, media plurality and independence in the ways highlighted above.<sup>64</sup> Co-regulatory efforts are undoubtedly a more effective option than nations or the EU imposing 'vertical – top-down – control mechanisms', which are ill-suited to the rapid innovations occurring in the online content industry.<sup>65</sup> Commercial actors have an incentive to better protect minors from harmful content, with pressure mounting from parents, governments and regulators that existing frameworks have failed to keep pace with technology.<sup>66</sup> This incentivises involvement from all stakeholders to create practical regulatory frameworks, and incentivises other actors within the system to also abide by the rules.<sup>67</sup> Such a co-regulatory framework cannot exist at the Member State level as proposed

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<sup>60</sup> Madeleine de Cock, 'Towards a Future-Proof Framework for the Protection of Minors in European Audiovisual Media' (2014) 10 Utrecht Law Review 9, 27.

<sup>61</sup> AVMSD Proposal (n 47) art 28a(2).

<sup>62</sup> Sandvine, *The Global Internet Phenomena Report October 2018* (2 October 2018) <<https://www.sandvine.com/hubfs/downloads/phenomena/2018-phenomena-report.pdf>> accessed 17 October 2018.

<sup>63</sup> Sophie Valais, *Comparative Tables on the Protection of Minors in Audiovisual Media Services* (IRIS bonus, European Audiovisual Observatory 2015).

<sup>64</sup> Madeleine de Cock (n 55) 14.

<sup>65</sup> *ibid.*

<sup>66</sup> Commission, 'Green Paper: Promoting a European framework for corporate social responsibility, DG for Employment and Social Affairs 19 July 2001' COM (2001) 366 final.

<sup>67</sup> Madeleine de Cock (n 55) 26–27.

by the current reforms and must instead operate at a European level.<sup>68</sup> The current proposals to regulate online streaming platforms with a set of 28 diffuse national co-regulatory schemes appears likely to only further exasperate the current difficulties of regulating content on the web. Further, it seems to contradict the country of origin principle, a fundamental tenet of the AVMSD.

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<sup>68</sup> Commission, 'Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values 24 April 2013' COM (2013) 231 final.

## CONCLUSION

Boil Banov's supposition that laws and rules must keep pace with technology is by no means a novel thought. Writing in 1816, Thomas Jefferson opined that 'laws and institutions must go hand in hand with the progress of the human mind'.<sup>69</sup> This essay has demonstrated that the AVMSD in its current form is not fit for purpose as the amount of content European consumers watch is streamed online.

In relation to the rules against the incitement of hatred, the AVMSD has enabled malicious actors to use regulatory arbitrage and weak enforcement mechanisms to spread hate speech and even encourage war. This is inimical to the European Union's foundational aim to promote peace across the continent. Divergent regulatory approaches across Europe have also created dissatisfaction among Member States with more paternalist views of children. The country of origin principle at the heart of AVMSD dramatically limits the ability of Member States the dissemination of content they deem harmful to minors within their territory if it has been uploaded or broadcasted from another jurisdiction.

Proposed reforms to the AVMSD that seek to respond to the concerns raised by new web technologies appear unlikely to make a significant impact on the prevention of hate speech or content harmful to minors online. European regulators appear to have attempted to focus on attempting to prevent the dissemination of hate speech and content harmful to minors in a way that undermines free expression, media pluralism, and media independence. Banov is correct in his view that the proposed AVMSD reforms have considered modern technology. However, it does not appear the Directive in its current or proposed reform is capable of effectively regulating a rapidly evolving industry that has fundamentally altered how Europeans disseminate and consume media.

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<sup>69</sup> Thomas Jefferson and J J Looney (ed), *The Papers of Thomas Jefferson: Retirement Series* (vol 10, Princeton University Press 2004), 226–27.

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