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An analysis of the content-neutrality approach in European audiovisual market regulation. The case of potential harmful content for minors

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ABSTRACT

Boundaries set between legacy audiovisual and digital content services are blurring nowadays. However, the legal framework applicable to those services is still rather different to such an extent it is recognized as divergent, particularly regarding the liability regime of the service providers. Among the examples of these distinct regimes, the protection for minors with access to potentially harmful content regarding their moral and mental growth is used in the paper to analyse the lack of coherence in the legal treatment of audiovisual content, in the EU in particular. From the analysis, the paper concludes that the Digital Services Act, as the latest step in the evolution of the legal framework for the digital services in the EU still seems unable to restore the required level of coherence and level the playing field for audiovisual content. and, therefore, lacks content-neutrality from the perspective of technology used for the distribution of content. Therefore, the paper foresees that more legislative initiatives will be needed to avoid the negative effects of the difficulties of existing audiovisual legislative framework enforcement and perceived lack of trust in law.

Key words: *digital services regulation, audiovisual regulation, neutrality, content-neutrality, technology-neutrality European audiovisual market, Digital Single Market, liability intermediaries, AVSMD, DSA, harmful content, minors*

INTRODUCTION

The offer of new digital services for content provision has rapidly widened and those services have integrated into the modern lifestyle adopted by the majority of the population (Harvey, 2019) with the effect that boundaries traditionally set between legacy -conventional- audiovisual broadcasting and digital content services are blurring nowadays.

In the welfare state model, in developed countries, technological development has been matched by the creation of a legal framework that enhances investors' trust, so they increase and develop the market (Bergh y Henrekson, 2011).

Both coherence and consistency are desirable to generate a level playing field that contributes to the creation of a stable, certain and fair regulatory framework. This allows investors to have confidence in it and therefore favours economic growth. As Zak and Knack (2001) state: "trust is higher in "fair" societies" which leads to more output and investment. Thus, lack of coherence and fairness among different legal frameworks could have negative effects on the performance of companies providing services in the increasingly digital audiovisual market.

Precisely, this can be case with the detailed legal framework applicable to those services, since it is still different and, worst, it can even be foreseen as divergent. To this regard, the European

Regulators Group Authorities (ERGA) in its Position Paper on the Digital Services Act² (2020) underlines that audiovisual services and digital services often provide similar services to citizens from a techno-economic perspective, and that they are perceived by the same citizens as similar services.

That is the reason why society at large would also expect a similar framework with respect to regulatory rights, obligations and limits to both type of services. This is what ERGA defines as the “content-neutrality” approach, that is, if a user receives a similar type of content, the regulatory framework should be the same, regardless of the technical or economic way the content is provided by a particular company or organization to the user.

The existing divergence in the two legal frameworks for audiovisual and digital content is obvious from the analysis of the legal provisions applicable and the degree of liability of providers, especially in the EU. The audiovisual providers are subject to the Audiovisual Services Directive -AVSD³ - (an evolution from the previous Television without Frontiers Directive⁴), while digital services are subject to the Digital Services Act⁵ (an evolution from the previous eCommerce Directive⁶). This is a too usual situation since, “research and policy are lagging behind the development of technology” (Milosavljević, 2015) in the field of digital services. We can add to this affirmation that regulation is lagging the development of business models.

But from the user point of view, currently, the digital services providing audiovisual content by digital platforms are not distinguishable for the customer from the traditional broadcasting audiovisual services (Mac Síthigh, 2020). Even the AVMSD points out to that issue in Recital 4:

(4) Video-sharing platform services provide audiovisual content which is increasingly accessed by the general public, in particular by young people. This is also true with regard to social media services, which have become an important medium to share information and to entertain and educate, including by providing access to programmes and user-generated videos. Those social media services need to be included in the scope of Directive 2010/13/EU because they compete for the same audiences and revenues as audiovisual media services. Furthermore, they also have a considerable impact in that they facilitate the possibility for users to shape and influence the opinions of other users. Therefore, in

² Position Paper on the Digital Services Act, ERGA 2020

³ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018

⁴ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)

⁵ Proposal for a regulation of the European Parliament and of the Council on a Single Market for digital services (Digital Services Act) and amending Directive 2000/31/EC

The DSA text is still pending approval by the EU Council by the time this paper was written. After the informal political agreement achieved on 23rd April among the Parliament and the Council, some Members of the European Parliament pushed back the text as they considered some unexpected and non-agreed changes were added -the Recital 28 widening the stay-down clause and the Recital 29 regarding cross-border take-down orders of illegal content for online gambling websites-. Currently, several possible scenarios are open and the final approval depends on the decision of the French presidency. If they go ahead with the COREPER vote, it could be two different versions approved (one by the Parliament and another different text by the Council-COREPER) which could delay the adoption for months (as the process would have to be redone). On the other hand, the French presidency could do nothing and let the Czech presidency begin. What is certain is that a delay for DSA final text approval is guaranteed.

⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

order to protect minors from harmful content and all citizens from incitement to hatred, violence and terrorism, those services should be covered by Directive 2010/13/EU to the extent that they meet the definition of a video-sharing platform service.

Though there were relatively early calls for regulating “new forms of media concentration including legacy media, new media and search engines” (Schulz, 2008), legal framework evolution has not been complete or systematic but some gaps and incoherencies remain. In fact, differences are particularly relevant regarding the liability regime of audiovisual and digital online service providers over the content service provided. While the audiovisual framework for liability and responsibility relies on the concept of “editorial responsibility / control” set in the AVSD, the digital online services framework depends on the concept of “actual / effective knowledge” of the provider as defined in the eCommerce Directive. To this regard, Labo and Tambini (2015) state, “the regulatory framework for these gatekeepers and their distributing and selecting activities has not been fully established” and calls for “monitoring of new elements that are not relevant to the existing legal and regulatory framework for media plurality but are relevant to the objectives that lie behind these instruments”. On the other hand, Mansell (2014) underlines that, despite this, there are only sporadic policy measures that “do not amount to a coherent basis for on-going assessment of the need for regulatory oversight of whether the strategies of gatekeepers are inconsistent with public values” (Mansell, 2014).

On the contrary, partial and “self-regulation” measures have been the default option for dealing with new gatekeepers, according to Milosavljević (2015).

Arguably, the differences in the content provision treatment appear clearer when we compare the legal provisions envisaged for protecting minors from exposure to potentially harmful content for their healthy development. The fact that there are uncontroversial elements in this provision (there is almost unanimous support of child protection) allows us to concentrate the analysis on why (or why not) there are different legal provisions, establishing different levels of liability for providers of very similar services in the users mindset.

The Directive underlines the relevancy of this issue, especially regarding fundamental rights and minors’ protection from harmful contents:

(45) There are new challenges, in particular in connection with video-sharing platforms, on which users, particularly minors, increasingly consume audiovisual content. In this context, harmful content and hate speech provided on video-sharing platform services have increasingly given rise to concern. In order to protect minors and the general public from such content, it is necessary to set out proportionate rules on those matters.

(51) When taking the appropriate measures to protect minors from harmful content and to protect the general public from content containing incitement to violence, hatred and terrorism in accordance with Directive 2010/13/EU, the applicable fundamental rights, as laid down in the Charter, should be carefully balanced. That concerns, in particular and as the case may be, the right to respect for private and family life and the protection of personal data, the freedom of expression and information, the freedom to conduct a business, the prohibition of discrimination and the rights of the child.

However, despite the evidence showing both kinds of services are equivalent, the explicit acknowledge about their substitutability and their social impact, nowadays consensus is far from being reached concerning legal liability and enforcement mechanisms of legal obligations.

Given this, the objective of this paper is to analyse if there are significant differences in the legal framework or in the enforcement mechanisms for those close substitutes (new digital vs

traditional audiovisual content provision services) that could lead to unjustified and undesirable discriminations and therefore, lack of fairness of the legal framework.

The present liability regime in conventional and digital audiovisual services relies on quite different approaches regarding legal frameworks.

From here, the paper investigates which are the main differences between the liability regime of the audiovisual services providers (AVMSD) and the digital content services providers (Digital Services Act and eCommerce Directive) and whether the new legislation in the DSA will contribute to reduce or enlarge the differences between the liability regime in audiovisual and digital services frameworks. Finally, the paper examines which other possible approaches could be considered in order to increase the convergence and coherence of both legal frameworks.

These research questions assume that the AVMSD will not be modified and will remain in force for the foreseeable future. We include the provisions envisaged for the Digital Service Act. Additionally, in order to limit the scope of the analysis, we will focus mainly on the provisions aimed at avoiding minors' access to potentially harmful content for their mental and moral development, and, from here the responsibility and liability regime of the audiovisual and digital service providers.

In order to achieve this, this paper presents six main parts. After this introduction, the next section details the methodology used for the systematic review of the literature and building the analysis. The following sections describe the different legal provisions in the EU for the audiovisual services and for the digital services comparing them. Afterwards, the paper discusses other approaches in other geographical areas (USA, New Zealand, China) before the last section on conclusions.

METHODOLOGY

Audiovisual services' regulation started developing many decades ago, whilst audiovisual digital services started much more recently (Youtube was born in 2005 and Netflix as an "on demand" service in 2007) so, there is not so much regulatory track record regarding these later services. It was necessary for broadband technology to expand significantly, due to wide geographical scope and price reduction, to improve the quality of sound and image services through the internet with satisfactory quality level. Only then audiovisual digital services were able to compete with traditional broadcasting audiovisual services.

Consequently, scientific literature concerning liability arising from these digital services providers is scarce, specifically dealing with this paper subject dealing with minors' protection from access to potentially harmful content. Because of this reason a meta-analysis methodology (McKenzie et alia, 2022) was discarded for this investigation, because there was not wide enough research corpus, and an alternative synthesis method was chosen: a systematic literature review (Thomas et alia, O'Mara et alia, 2015).

Moreover, the subject of this paper is more appropriate for a qualitative evidence research aimed to understand the policy makers goals and their experience in designing and implementing different legal frameworks for the kind of services studied in different countries with different legal models. In order to do that, a systematic review was performed.

Lastly, results synthesis of this systematic review concerning previous qualitative investigations has been done by applying the PRISMA⁷ methodology (Page, Moher, 2017).

For the systematic literature review a bibliometric analysis, using both SCOPUS and Google Scholar databases, has been done. Given that Google Scholar does not allow for filtering topics nor type of source, the same keywords were used in both SCOPUS and Google Scholar.

This search was complemented with the revision of webpages of the most relevant institutions for the audiovisual and digital services regulations, such as ERGA⁸, the European Parliament, the European Council and the European Commission, OFCOM⁹ and the Digital.gov Office from USA.

Additionally, the systematic review of literature was completed by other specialized bibliographical sources, such as the Information and Communication Technology Law Journal, Telecommunications Policy and Telematics and Informatics and Digital Policy, Regulation and Governance.

At the first stage the aim of the search was to find any comparative analysis between the level of responsibility in the traditional audiovisual services and the digital services legal framework. Therefore, the first choice for the key words in Scopus included the words (with the Boolean operator “and”): “audiovisual”, “responsibility”, “directive”, “digital”, “liability”, “intermediaries” and excluded “intellectual property” to avoid literature beyond the scope. The result for that search was 0 documents found in Scopus database. That result is an evidence of the lack of comparative analysis between both legal framework, as mentioned before.

In order to widen the search scope, two parallel new search exercises were performed. On the one hand, the search aimed to analyze the audiovisual responsibility regime and on the other, the search regarding the digital services liability regime.

A new search in Scopus was aimed to find the keywords “audiovisual and responsibility and directive”. The result was four documents included in the subjects of social science, engineering and medicine. The latter was discarded (because out of the scope of our analysis) so we had three documents. After excluding the ones beyond the scope of the analysis (because they related to hate speech and commercial communications, we found one document for analysis (Montagnani, 2018). Besides this process we added other documents individually selected from the database of the European Union institutions (for the legal provisions in force, the AVMSD), and other from ERGA, referenced along the paper where needed.

On the other hand, we searched in Scopus the following keywords with the Boolean operator “and”: audiovisual, liability, intermediaries, digital, excluding (with the Boolean operator “not”), “intellectual property”. The result of the search left 11 documents. Once manually left aside the 5 out of the scope¹⁰ there were six documents to be analyzed.

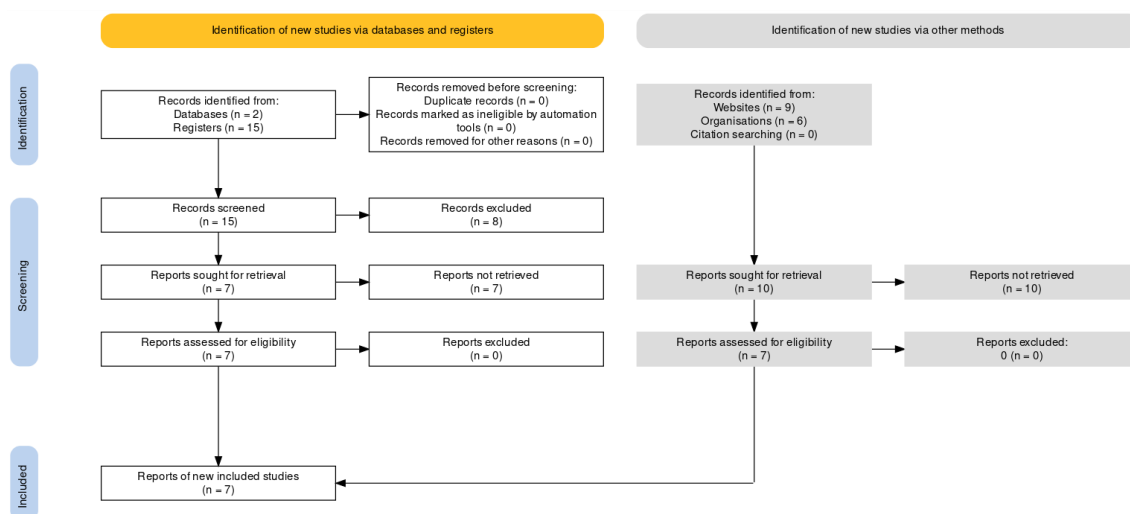
After having analyzed the available documents in the ongoing process of the Digital Service Act in the European institutions (Commission, Parliament and Council), we finally looked for any reference to digital regulation in China to complement the overview over alternatives models of regulation of the digital services.

⁷ Preferred Reporting Items for Systematic Reviews and Meta-Analyses

⁸ European Regulators Group for Audiovisual Media Services

⁹ Office of Communications of the United Kingdom Government

¹⁰ Documents regarding free speech, commercial communications, child pornography, or coregulation were eliminated because they are beyond the scope of the current analysis.



As a general observation regarding the collection of previous research, it can be underlined how, during the first years of the selected period, analysis about audiovisual services regulation is predominant and while in the recent years focus has moved to digital services. That pattern is coherent with the evolution of the legal framework: firstly, concentrated in the revision of the AVMSD and then focused on digital services and the eCommerce Directive revision in last years. Besides, it has also been noted the majority of literature deals with one or the other subject as separate topics, but there is a scarcity of analysis looking for relationships between both issues (audiovisual broadcasting and audiovisual digital services) jointly. In fact, all the literature found with the described systematic review dealt with one of the two issues (traditional audiovisual or digital services providing audiovisual but no one was founded making any comparison).

POTENTIALLY HARMFUL CONTENT FOR MINORS

Our analysis will focus on potentially harmful content for minors because it is a subject considered specially useful to analyse potential incoherence between both legal frameworks (the one applying to audiovisual services and the one to digital service providers -namely platforms-). Reasons are discussed below.

Firstly, because minors' protection from anything that could damage their mental or moral development is a supreme universal good. It is a recognized Fundamental Human Right¹¹, which means this topic is characterized by general recognition and it could be expected it will be protected by regulators at a global level, without considerable differences or discussion amongst countries. In fact, minors' protection in the digital scenario has been a concerning subject also for policymakers from the beginning of the digital era (O'Neill, 2013) and it can be observed that there is minors' protection regulation in almost every country. Therefore, focusing on that issue we will avoid the analysis of different frameworks dealing with concepts and definition of rights that can vary widely between countries (that would be the case if the focus would have been issues such as sexism, sexual orientation discrimination, hate or terrorism speech, fake news,

¹¹ Article 329 of the Convention on the Rights of the Child, United Nations, 1989

etc). Avoiding such differences, choosing a widely common aim and scope, we can reach more consistent conclusions when comparing between different countries.

Some author (O'Neill, 2013) has already underlined the importance of these approaches "Such questions now pose significant practical and ethical dilemmas for policy makers and other stakeholders involved in internet governance. It especially highlights the question of responsibility for protection of minors online and calls into question whether the current model of shared responsibility is working." In this regard, the author reminded us of policy maker efforts, specifically Neelie Kroes Vice President for the Digital Agenda, in 2011 to convene a coalition of the CEOs of leading internet companies operating in Europe in order to take action on specific measures designed to enhance online child safety. The CEO Coalition identified some solutions in support of better safety for children (labelling of content, etc) but they did not consider age verification, or mechanisms to manage underage use as it is the case, for instance, in China. Fundamentally, the author underlines how "online safety and welfare of children has long been recognised as a shared responsibility" among all stakeholders: policy makers but private companies and parents, too.

Secondly, it is interesting to look at potentially harmful contents for minors because they are in principle legal contents that can be legally distributed, although certainly potentially harmful if they reach minors. This means that in most developed countries there is no general prohibition for their distribution, but that distribution is prohibited only for minors. Given that, regulation analysis is a good method to observe not only the legal provisions characteristics but the quality of the law enforcement mechanisms as well. In this specific case, measures more elaborated than hardly sophisticated banning content distribution (which could be the case for illicit contents) should be implemented. Take down enforcement measures are not applicable in this context as they are for illegal content (such as Intellectual Property Rights violations, terrorism, child abuse, etc.). In this case, enforcement should guarantee simultaneously the availability of these contents for adults who wish to access them and the non-availability of access for minors (for example, by applying age verification mechanisms). These measures are more complex to apply in comparison to the simple take down ones applying to illicit content.

As to the scope of these kinds of contents, it should be considered that our analysis in this paper will refer only to those contents who are clearly potentially harmful for children, such as sexually explicit content, but the conclusions could probably be extended to other areas such as gambling, tabaco or alcohol advertising that are considered potentially harmful too and so, require restrictions of some kind. In fact, the AVMSD will consider, at the same level, any potentially harmful content for minors' development:

(29) Similarly, Member States should be encouraged to ensure that self- and co-regulatory codes of conduct are used to effectively reduce the exposure of children and minors to audiovisual commercial communications for alcoholic beverages. Certain self- or co-regulatory systems exist at Union and national level in order to market alcoholic beverages responsibly, including in audiovisual commercial communications. Those systems should be further encouraged, in particular those aiming at ensuring that responsible drinking messages accompany audiovisual commercial communications for alcoholic beverages.

(30) It is important that minors are effectively protected from exposure to audiovisual commercial communications relating to the promotion of gambling. In this context, several self- or co-regulatory systems exist at Union and national level for the promotion of responsible gambling, including in audiovisual commercial communications.

.../...

Article 1. (e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages; (f) audiovisual commercial communications for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited; (g) audiovisual commercial communications shall not cause physical, mental or moral detriment to minors;

ANALYSIS OF RESPONSIBILITY IN AUDIOVISUAL SERVICES ANALYSIS

Traditionally, law has established certain limits over the media in order to avoid any group to have a significant power in controlling or shaping public opinion. Milosavljević (Milosavljević, 2015) reminds us how this reason was used to regulate broadcasters (a necessary limited number of competitors due to a limited amount of radio spectrum available, which is an essential element for broadcasting so they could become gatekeepers in their market) whilst newspapers had self-regulation privileges due to the non-existence of entry barriers and so they were not considered as gatekeepers with significant market power in any case.

This is the consideration lying behind the AVMSD, imposing obligations (Article 1 AVMSD, 2010) on broadcasting and on demand services (mainly based on radiospectrum technology until 2000s) because they define programmes “under editorial responsibility”.

Therefore, the AVMSD provisions underlie the sharp difference between audiovisual services in the sense of the Directive (traditional broadcasting and on demand services on IP networks¹²) and other services (digital services, for example), even if they include some audio and video digital formats (like video-sharing platform services). As discussed below, the latter are not considered “audiovisual media services” in the sense of the Directive and so, they are not subject to the same responsibility regime and they will be analysed later.

There are a number of articles of the Directive set those differences very clearly. In particular, Article 1 states that (emphasis added by the authors):

1. For the purposes of this Directive, the following definitions shall apply:

(a) ‘audiovisual media service’ means:

(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

(ii) audiovisual commercial communication;

From this departing point, in 2018 there is a shift in the fundamentals of the AVMSD in the context of the revision process. As Mac Síthig states (Mac Síthig, 2020), for the first time the

¹² Different from web services that are considered “digital services” in the sense of the eCommerce Directive

European Directive set some legal obligations on video-sharing platforms too (though still refuses to recognise them as audiovisual services). See Recital 45:

(45) There are new challenges, in particular in connection with video-sharing platforms, on which users, particularly minors, increasingly consume audiovisual content. In this context, harmful content and hate speech provided on video-sharing platform services have increasingly given rise to concern. In order to protect minors and the general public from such content, it is necessary to set out proportionate rules on those matters.

Although they are exempt from most editorial responsibility for the content they provide through their platforms, as stated in Recitals 47 and 48

(47) A significant share of the content provided on video-sharing platform services is not under the editorial responsibility of the video-sharing platform provider. However, those providers typically determine the organisation of the content, namely programmes, user-generated videos and audiovisual commercial communications, including by automatic means or algorithms. Therefore, those providers should be required to take appropriate measures to protect minors from content that may impair their physical, mental or moral development.

(48) 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. The requirements in this regard as set out in Directive 2010/13/EU should therefore apply without prejudice to Articles 12 to 14 of Directive 2000/31/EC, which provide for an exemption from liability for illegal information transmitted, or automatically, intermediately and temporarily stored, or stored by certain providers of information society services. When providing services covered by Articles 12 to 14 of Directive 2000/31/EC, those requirements should also apply without prejudice to Article 15 of that Directive, which precludes general obligations to monitor such information and to actively seek facts or circumstances indicating illegal activity from being imposed on those providers, without however concerning monitoring obligations in specific cases and, in particular, without affecting orders by national authorities in accordance with national law.

The same author comments on how, even though at this moment there is not a complete revision on responsibility exemptions for these platforms, it is the first time they are subject to certain regulations. The revised scope of the AVMSD included a new category of audiovisual services in the Article 1, (aa) (services provided by user generated video content platforms) but excluding them from the definition of audiovisual services and clearly stating a difference: platforms have no editorial responsibility on the contents shared by users on their platform. This can be derived from Recital 3 and 4 (emphasis added):

(3) Directive 2010/13/EU should remain applicable only to those services the principal purpose of which is the provision of programmes in order to inform, entertain or educate.

.../...a provider can constitute audiovisual media services in themselves, even if they are offered on a video-sharing platform which is characterised by the absence of editorial responsibility. In such cases, it will fall to the providers with editorial responsibility to comply with Directive 2010/13/EU.

(4) Video-sharing platform services provide audiovisual content which is increasingly accessed by the general public, in particular by young people. This is also true with regard to social media services, which have become an important medium to share information and to entertain and educate, including by providing access to programmes and user-generated videos. Those social media services need to be included in the scope of Directive 2010/13/EU because they compete for the same audiences and revenues as audiovisual media services. Furthermore, they also have a considerable impact in that they facilitate the possibility for users to shape and influence the opinions of other users. Therefore, in order to protect minors from harmful content and all citizens from incitement to hatred, violence and

terrorism, those services should be covered by Directive 2010/13/EU to the extent that they meet the definition of a video-sharing platform service.

And in the Article 1 of the consolidated version of the AVMSD this difference can be observed in a new section aa:

1. For the purposes of this Directive, the following definitions shall apply:

(a) 'audiovisual media service' means:

(i) 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 a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, to the general public, 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; such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

(ii) audiovisual commercial communication;

(aa) '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;

The same AVMSD even refers specifically to the goal of minors' protection as one of video sharing platforms' obligations, but always subject to a lighter regime of the digital services providers as they were considered "mere conduit" (Milosavljević, 2015), which can be verified with the continuous reference to the eCommerce Directive, see Article 28b (emphasis added):

Article 28b

1. Without prejudice to Articles 12 to 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect:

(a) minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development in accordance with Article 6a(1);

This article refers to the exemption of liability of intermediaries in the eCommerce Directive, as stated in the first paragraph of its Article 12:

"Section 4: Liability of intermediary service providers

Article 12

"Mere conduit"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission”

And, in the same article, paragraphs 3 and 4 prioritizing soft law tools (co regulation) and always linked to the softer e-Commerce Directive provisions:

3. For the purposes of paragraphs 1 and 2, the appropriate measures shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content as well as the general public interest. Member States shall ensure that all video-sharing platform providers under their jurisdiction apply such measures. Those measures shall be practicable and proportionate, taking into account the size of the video-sharing platform service and the nature of the service that is provided. Those measures shall not lead to any ex-ante control measures or upload-filtering of content which do not comply with Article 15 of Directive 2000/31/EC.

.../...

4. For the purposes of the implementation of the measures referred to in paragraphs 1 and 3 of this Article, Member States shall encourage the use of co-regulation as provided for in Article 4a(1).

Therefore, we can say that in general, the tendency in the EU has been not to regulate digital services (Montagnani & Trapova, 2018) even if they are hardly distinguishable from the traditional audiovisual services. Maybe this is the reason why the AVMSD mentions them though subject to a different regime.

We can also say that, that the legal framework toughens in the AVSMD revision but continues avoiding establishing editorial responsibility for digital providers in a comparable way to the one existing for the traditional audiovisual services.

It should be noted that this approach is nowadays being revised by some authors. For example, Hermes (Hermes, 2022) states that platforms have been tremendously positive for innovation and consumer welfare, but they also cause negative externalities and they should be regulated. Same author states that as soon as a platform grows obtains infrastructural properties and is perceived by its users as essential (no viable alternative exists to enjoy a specific service) then that platform should fall under regulation because it has obtained a significant power and exhibits a significant magnitude of potential damage.

In any case, the AVSMD creates a lighter regulatory status for digital providers in audiovisual services and it has important limitations because the Directive includes platforms but excludes other digital services from which, potentially harmful content can be as easily shared and accessed by minors. This is the case of social media (Facebook, Twitter, TikTok, etc.) or instant messaging services (Whatsapp, Telegram, etc.), see Recital 6 of the AVMSD as a main example:

(6) Where a dissociable section of a service constitutes a video-sharing platform service for the purposes of Directive 2010/13/EU, only that section should be covered by that Directive, and only as regards programmes and user-generated videos. Video clips embedded in the editorial content of electronic versions of newspapers and magazines and animated images such as GIFs should not be covered by Directive 2010/13/EU. The definition of a video-sharing platform service should not cover non-economic activities, such as the provision of audiovisual content on private websites and non-commercial communities of interest.

Additionally, given that the country-of-origin principle applies in the AVMSD (the scope is limited to physically established service providers in the country) and digital platforms services provide

content at a global level without borders affecting the service, particularly inside the European Single Market, the legal authorities capability to guarantee enforcement of those obligations is very limited. On the one hand, those platforms not established in the EU will be out of the scope of the AVMSD while on the other, even if the platform is established inside the EU, there are strong incentives for the platform to choose the country ruled by the regulator with the lightest approach to platforms, following the behaviour named as forum shopping as Warner states (Warner, 2014). That situation triggers a down auction competition dynamic amongst authorities trying to offer the laxest regime in order to attract investment of those platforms who are in the process of choosing a country to establish themselves. Everything contributes to a situation whereby, individuality leads to favouring a reduction of platforms' responsibility on the content they distribute and relaxing enforcement. See Recital 44 AVMSD (emphasis added):

(44) The video-sharing platform providers covered by Directive 2010/13/EU provide information society services within the meaning of Directive 2000/31/EC of the European Parliament and of the Council (3). Those providers are consequently subject to the provisions on the internal market set out in that Directive, if they are established in a Member State. It is appropriate to ensure that the same rules also apply to video-sharing platform providers which are not established in a Member State with a view to safeguarding the effectiveness of the measures to protect minors and the general public set out in Directive 2010/13/EU and ensuring as much as possible a level playing field, in so far as those providers have either a parent undertaking or a subsidiary undertaking which is established in a Member State or where those providers are part of a group and another undertaking of that group is established in a Member State. Therefore, the definitions set out in Directive 2010/13/EU should be principles-based and should ensure that it is not possible for an undertaking to exclude itself from the scope of that Directive by creating a group structure containing multiple layers of undertakings established inside or outside the Union. "

Even more, in contradiction with the tech-economic convergence between different kind of services, the 2018 AVMSD revision strengthened the attitude to traditional audiovisual services' editorial liability (those subject to editorial responsibility: broadcasting and on demand services) regarding their responsibility to protect minors, specifically mentioning technical mechanisms to ensure its effectiveness (for example, by using age verification tools) and so, widening the status difference between traditional (broadcasting and on demand services) and digital services provided by platforms. See Recital 20 and Article 6a of the AVMSD (emphasis added):

Recital (20) The appropriate measures for the protection of minors applicable to television broadcasting services should also apply to on-demand audiovisual media services. That should increase the level of protection. The minimum harmonisation approach allows Member States to develop a higher degree of protection for content which may impair the physical, mental or moral development of minors. The most harmful content, which may impair the physical, mental or moral development of minors, but is not necessarily a criminal offence, should be subject to the strictest measures such as encryption and effective parental controls, without prejudice to the adoption of stricter measures by Member States.

.../...

'Article 6a 1. Member States shall take appropriate measures to ensure that audiovisual media services provided by media service providers under their jurisdiction which may impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see them. Such measures may include selecting the time of the broadcast, age verification tools or other technical measures. They shall be proportionate to the potential harm of the programme. The most harmful content, such as gratuitous violence and pornography, shall be subject to the strictest measures.

ANALYSIS OF LIABILITY IN AUDIOVISUAL DIGITAL SERVICES (PLATFORMS)

It should be noted that some authors like Coche (Coche, 2018) criticize the more flexible approach and the “case by case” approach adopted by the Commission to control digital platforms’ content. This has fragmented the legal framework, both soft and hard law, setting wide differences depending on the type of content (illegal infringement of intellectual property rights, hate speech, terrorism, etc.) and has generated confusion as to how the AVMSD and the eCommerce Directive interact respect to liability. In particular Coche even remarks how that “light touch” regulatory framework based on co-regulation and self-regulation induces a “privatized enforcement phenomenon” as human rights¹³ are guaranteed by the “Terms and Conditions” unilaterally defined by private companies that have no incentive to satisfy public interest criteria. There are authors like Sartor (Sartor, 2018) who states how platforms, regarding liability on the contents they distribute, could be in the middle of a conflict of interests between public and their private interest. In particular, O’Neill clearly underlines how technological measures adopted by these platforms to protect minors have failed (O’Neill, 2013) so they are not satisfying public interest (protecting minors).

In the same line, more recently Hermes’ view is also related to this topic (Hermes, 2022) as he argues that platforms work on their own benefit, regardless of social priorities or public interests. This can be related to the Streel and Husovec findings (Streel and Husovec, 2020) that depict how most conflicts in the Court of Justice of the European Union regarding the eCommerce Directive have been related to Intellectual Property Rights protection, which are private rights and the topics where the European Commission has worked more intensively from a legal point of view (for example, developing guidance on notice and take down procedures). On the other hand, reinforced guidance or enforcement of measures in liability matter, preventing violation of fundamental rights (de Streel mentions specifically freedom of speech, but again, this can be extended by analogy to minors’ protection) has hardly been attended to. These differences suggest how the legal framework development could be oriented not to meet public interests, but to meet private ones at least predominantly.

Bearing both issues in mind we can conclude that excessive orientation towards soft regulation when dealing with potentially harmful content control measures obligations for digital platforms has led to a fragmented legal framework, suffering from lack of coherence and that has misdirected development towards private interests that do not necessarily match with public ones.

This adds up to enforcement problems mentioned earlier derived from the definition of the territorial jurisdiction as defined in the AVMS and the forum shopping phenomenon

In this context, there is not a guarantee for reaching a satisfactory minors’ protection from potentially harmful content access. In fact, some authors consider it sub-optimal (Skolkay, 2020).

NEXT FUTURE: THE DIGITAL SERVICES ACT

The next step in regulation concerning minors’ access to digital content is the Digital Services Act, which is currently being processed and pending for the final text to be issued. The document

¹³ Coche refers to freedom of speech against enforcement of measures against phenomena such as hate speech and terrorism propaganda, but this is applicable to harmful content for minors by analogy

published by the European Commission in December 2021 has been analysed, as well as the one passed through the European Parliament that has been modified in the trilogue process.

In general, the DSA implies a significant improvement concerning liability regime for digital intermediaries' obligations that could cause systemic risks (see Recital 58). Those digital intermediaries could act as gatekeepers (Recital 12 in the European Parliament proposal). The European authorities have very clearly set the goal: "what is illegal offline should also be illegal online", bearing in mind that legal certainty and coherence are the basis for the European Single Market development. See Recital 16:

"The legal certainty provided by the horizontal framework of conditional exemptions from liability for providers of intermediary services.....has allowed many novel services to emerge and scale-up across the internal market. That framework should therefore be preserved... and for reasons of clarity, consistency, predictability, accessibility and coherence, that framework should be incorporated in this Regulation. "

The DSA even mentions explicitly in Recital 91 the need to ensure coherence of the new digital regulation with respect to other legal frameworks inside the EU, like the audiovisual regulation.

However, mentions to minors' protection from potentially harmful content are scarce along the DSA. Moreover, the new law leaves digital platforms to voluntarily set the mechanisms for this protection (Terms and Conditions¹⁴, conduct codes¹⁵) going back to "privatized enforcement" (Coche, 2018), even though the European legislator recognizes this option's weakness, see Recital 70:

"The effectiveness of the codes of conduct should be regularly assessed. Unlike legislation, codes of conduct are not subject to democratic scrutiny and their compliance with fundamental rights is not subject to judicial review. "

The absence of a tougher and statutory regime is particularly relevant because the European Regulators Group for Audiovisual Services supported a different proposal specifically for that issue. ERGA's Position paper about the DSA (ERGA, 2020) already underlines how necessary it is to maintain a regulation that preserves European values, including minors' protection. Moreover, ERGA argues how illegal content should be distinguished from potentially harmful ones, setting various kinds of obligations but always defining some proactive obligations for the digital intermediaries (for example, obligation to adopt the necessary measures to ensure the protection is effectively achieved). That paper even states explicitly the age verification measures to protect minors from potentially harmful content and the possibility of setting liability and sanctions in case measures adopted would not be satisfactory.

Although the text of the proposal was passed through the European Parliament for the DSA, it omitted mentions to age verification requirements to access adult content.

De Streel and Husovec (de Streel & Husovec, 2022) have recommended too that sectorial regulation must be revised and improved in terms of coherency and enforcement.

¹⁴ Recital 58 "content that is incompatible with their terms and conditions...The decision as to the choice of measures should remain with the very large online platform"

¹⁵ Recital 69

On the contrary, It is acutely noticeable how, the DSA works hard to ensure there are no business owners that can carry out illegal sales in the Single Market through eCommerce platforms. See for example Article 22 “Traceability of traders” defining obligations for platforms to get information about traders or, otherwise, suspend the provision of its services¹⁶ whilst measures to protect Fundamental Rights such as minors’ protection are inadequately drafted and they are left to measures defined by the platforms individually to determine codes of conduct. And that measures after setting in Recital 3 that children interest should be a primary consideration. See Recital 3:

“Responsible and diligent behaviour by providers of intermediary services....”the best interest of the child should be a primary consideration...”).

Besides, digital platforms decide whether some content violates their terms or conditions or not. See Recital 26:

“providers should act where they are in the best place to do so”

The European Parliament has added some general references on the Commission proposal version trying to avoid any discrimination in the case of measures adopted for the protection of fundamental rights such as freedom of speech or information. See Amendment for Recital 38, (Parliament proposal in bold type)¹⁷:

*“Whilst the freedom of contract of providers of intermediary services should in principle be respected, it is appropriate to set certain rules on the content, application and enforcement of the terms and conditions of those providers in the interests of **protecting fundamental rights, in particular freedom of expression and of information**, transparency, the protection of recipients of the service and the avoidance of **discriminatory**, unfair or arbitrary outcomes. **In particular, it is important to ensure that terms and conditions are drafted in a clear and unambiguous language in line with applicable Union and national law. The terms and conditions should include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making, human review, as well as on the right to terminate the use of the service. Providers of intermediary services should also provide recipients of services with a concise and easily readable summary of the main***

¹⁶ Where the online platform obtains indications that any item of information referred to in paragraph 1 obtained from the trader concerned is inaccurate or incomplete, that platform shall request the trader to correct the information in so far as necessary to ensure that all information is accurate and complete, without delay or within the time period set by Union and national law.

Where the trader fails to correct or complete that information, the online platform shall suspend the provision of its service to the trader until the request is complied with.

¹⁷ Amendment for recital 38 (Parliament proposal in bold type) Whilst the freedom of contract of providers of intermediary services should in principle be respected, it is appropriate to set certain rules on the content, application and enforcement of the terms and conditions of those providers in the interests of protecting fundamental rights, in particular freedom of expression and of information, transparency, the protection of recipients of the service and the avoidance of discriminatory, unfair or arbitrary outcomes. In particular, it is important to ensure that terms and conditions are drafted in a clear and unambiguous language in line with applicable Union and national law. The terms and conditions should include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making, human review, as well as on the right to terminate the use of the service. Providers of intermediary services should also provide recipients of services with a concise and easily readable summary of the main elements of the terms and conditions, including the remedies available, using, where appropriate graphical elements, such as icons.

elements of the terms and conditions, including the remedies available, using, where appropriate graphical elements, such as icons.”

DISCUSSION AND ALTERNATIVE MODELS

What Coche remarked on the audiovisual regulation could be applied to the regulation of digital services in the EU as well: legal development is following a path of privatization enforcement.

Nevertheless, in general, it would be reasonable to think that regulators, no matter the geographical area, had a clear prioritized list of the relevance of their objectives before drafting regulation. Perhaps, protecting human rights (minors’ protection, freedom of speech, dignity, lack of discrimination, hate speech, etc.) should be more important than protecting other rights that affect economic rights (i.e., Intellectual Property Rights) or other events that might have negative consequences solely if they reach a significant magnitude (right of information and fake news) of the population.

Consequently, it could be expected that tougher measure obligations (banning or suspending an activity) would be reserved for the most important goods to protect and the lighter measure (self-regulation) obligations for the less important. Moreover, that the enforcement efforts made by authorities (judicial or administrative ones) should be proportional according to the relevance for society. By doing so, the legal framework and the implementation would lead to a coherent and trustworthy framework, regardless of the kind of digital intermediary (traditional audiovisual provider or digital provider) and oriented to set the “private enforcement” (heavily reliant on due diligence and criteria set by private companies, and exclusive ex post control measures) only for the less prioritized goals.

In other words, we should hope for stronger measures (firstly, statutory measures – no self-regulation- and secondly, enforcement set by authorities –not the intermediaries-) to be selected and applied to the most important goals from the social point of view, like the protection of Human Rights (including minors’ rights).

On the contrary, DSA shows a major concern for protecting economic activity than it does for Human Rights. An example of this is how Recital 39b of the European Parliament’s proposal¹⁸ sets out obligations to avoid illegal commerce through eCommerce platforms. The platform is obliged to identify, guarantee traceability of business users and illegal activity detection and communication to the authorities, and the possibility of sanctions for the digital intermediary in case of non-compliance.

This is not the case when we observe minors’ protection obligations in the DSA from them accessing contents without the level of maturity needed to be exposed to, for example sexually explicit contents that depict an extremely distorted and violent vision of sexual activities and

¹⁸ See European Parliament Amendment for a new Recital 39b. ***“Amendment (39b) To ensure an efficient and adequate application of the obligation on traceability of business users, ...the intermediary service providers covered should carry out due diligence checks prior to the use of their service to verify the reliability of the information provided by the business user concerned, in particular by using freely accessible official online databases or online interfaces, such as national trade registers or by requesting the business user concerned to provide trustworthy supporting documents, such as copies of identity documents, certified bank statements, company certificates and trade register certificates. They may also use other sources, available for use at a distance, which offer a similar degree of reliability for the purpose of complying with this obligation.*”**

very sexist women images that can be negative for the minors' moral development. In that case there is no specific requirements for platforms to limit the access of this content, no mentions of measures of age verification obligations. There is not even a mention of potentially harmful content (the text only refers to illegal content) and it is left up to the platform to make decisions on how to proceed according to their Terms and Conditions. See Article 41a

(41a) Providers of hosting services should act upon notices without undue delay, taking into account the type of illegal content that is being notified and the urgency of taking action. The provider of hosting services should inform the individual or entity notifying the specific content of its decision without undue delay after taking a decision whether to act upon the notice or not.

To conclude, the DSA is a significant improvement in the process of digital services regulation, but it pays limited attention to ensure the defence of minors' rights online.

Nevertheless, outside the European Union, some countries have explored ways of increasing the liability of digital services providers, be it horizontal regulation regulating for different type of contents (New Zealand) or vertical regulations specifically designed for any specific type of content (USA).

Beginning with the latter, the USA has been historically prone to set liability exemption for digital intermediaries. It has happened since the Communications Decency Act of 1996 although there is a notable exception: liability for Intellectual Property Rights violations established in the Digital Millennium Act in 1998, specifically in relation to the creation of the "notice and take down" mechanism.

As Glenster¹⁹ pointed out, "In the US regulation regarding digital issues is only adopted to respond to a concrete issue. .../... The US' approach stems from their view of small government, where interference in the private market should only be when absolutely necessary. Glenster states that "Americans generally place more faith in their commercial sector than in public authorities. There is especially a strong mistrust of the Federal Government." That behavior contrasts with the European one where individuals trust their governments and wait for them to have a precautionary approach, that is, regulating ex ante to protect Human Rights. Following Glenster criteria, DSA text seems to be nearer to the USA model of regulation than to the traditional European one.

The UK also followed the USA model of no liability for digital companies with the Defamation Act of 1996 (Mac Síthigh, 2019). Nonetheless, this last approach is being revisited due to what Mac Síthigh calls "techlash", that is "new approaches to the whole question of regulating intermediaries are emerging. In particular, the present criticism of the power of technology companies – what some journalists have called a 'techlash-".

In fact, the UK shows an example of evolution in order to enhance minors' protection supported by statutory instruments. The Digital Economy Act 2017 set out that intermediaries in digital services can be requested to block access to websites not compliant with the new UK rules on age verification for sites containing sexually explicit material. The prohibition of publishing the relevant material without age verification is an obligation stronger than the requirements of EU law, both in terms of scope (including broader definition of services than the AVMSD) and enforcement and sanctions (Mac Síthigh, 2019).

¹⁹ Ms. Glenster is PhD in Law Candidate, University of Cambridge

New Zealand has also updated the liability regime, from the horizontal approach (Mac Síthigh, 2019). For several years they have been working on a project that has been partly fuelled by a specific case of sexually explicit material in private Facebook groups with remarkable press coverage. Finally, the Parliament have passed a law, the Harmful Digital Communications Act, that includes both civil (administrative) and criminal remedies designed to protect minors from accessing such potentially harmful material.

Both the UK and New Zealand examples prove how other models are possible and that we can explore other ideas in order to improve minors' protection in the digital scope.

There have been found no specific literature on the Chinese model to rule minors' protection in the audiovisual services regulation but following the Yang and Mueller analysis (Yang and Mueller, 2014) it can be said that the general tendency in China is to give the digital intermediaries the responsibility for the content provided, plus the Internet users' obligation to offer identification, including real name when they register the service, will lead to a closer situation characterized by the aspirational principle of "what is illegal offline should also be illegal online" proposed by the European Parliament. Identification of users in Internet will be not elaborated in this paper, but it seems a very interesting issue for future research.

Some authors from the academia have advised some progress in the EU too. Streel and Husovec (de Streel & Husovec, 2022) have already recommended that sectorial regulation must be revised and improved in terms of coherency and enforcement. Hermes suggests that progress should be oriented towards a more high-level and less user-centric perspective, trying to classify platforms in terms of their essentiality and the potential harm they can inflict, so that proper ex ante regulation remedies will be defined.

It is possible that the Digital Services Act project will take a step further in the creation of a European horizontal regulation for digital intermediaries' liability in some way but in general, nowadays there is not a equivalent liability regime for all kind of contents. The focus continues to be stricter on Intellectual Property Rights defence rather than minors' protection.

From authors' perspective it would be very convenient to go deeper, harmonizing the Single Digital Market to ensure a strong protection, for economic and Human Rights and for European values. The criteria should not be set by private companies' Terms and Conditions but established by a legitimate legislative power (or administrative, given the case) in any democratic society and not by the Terms and Conditions defined by a private company.

If minors' exposure to adult content and liability and obligations are set on audiovisual service providers in the traditional (offline) arena, some coherent measures should be adopted for the digital space. Following the European Parliament principle "what is illegal offline should also be illegal online", digital intermediaries should be forced to establish age verification measures²⁰ for their services too when they involve contents for adults. Until this happens, European regulation will remain incoherent. That situation is damaging trust as users perceived it as

²⁰ Technology is available to have a secure and easy to use authentication, in a similar way as strong authentication is made for digital payments. Even it could be made keeping some attributes unveiled (only disclosing if the user is over the limited age or not).

unbalanced, and even it could distort the audiovisual market with a level of investment lower than the optimal level.

CONCLUSION

As stated previously, we can describe minors' protection from harmful content situation regarding audiovisual contents as the coexistence of two regimes. On one hand, the one that applies to traditional audiovisual service providers consist of a set of clear and precise obligations to comply with protection measures in an initiative-taking and ex ante way, for example, by implementing age verification measures, parental control tools for access like passwords, etc. On the other hand, a "privatized enforcement" regime for the digital service providers has been developed, linked to the criteria set in the Terms and Conditions, unilaterally set out by the private companies, benefitting from a haven (exempted from liability) depicted in the DSA that is similar to the one previously established in the e Commerce Directive.

It should be recognized that setting aside this double standard, the EU legal framework for digital services has improved significantly due to the evolution of the definition of the geographical scope of the European regulation, now applying to all services provided to European citizens, regardless of the digital service providers' physical place of establishment. This change will notably enhance the coherence of the digital services' liability regime enforcement because every service reaching EU citizens, no matter they come from, will be treated in the same way. Nevertheless, significant differences and discrimination remain between traditional and digital services providing audiovisual contents.

Despite the proximity of those kind of services from the user point of view, the remaining differences in the legal obligations and liability regime for both kind of providers, especially regarding minors' protection obligations, are hardly understandable for citizens. This lack of level playing field creates a distorting effect in the audiovisual services markets' development and, above all, a loophole in the legal defence of European values regarding minors' protection.

The effect of divergence is not only an intellectual problem, as it could also lead to economic and social consequences. Whenever equivalent services are subject to different legal obligation regimes, the level playing field due no longer exists and discrimination amongst companies offering similar services occurs. That lack of that leveled field could incentivize the relocation of establishment of big companies as a means to elude a more restrictive legal framework, that is, a shopping-forum behaviour amongst different countries in the EU or even outside the EU. In that case, regulation could have an impact on industrial performance (and from here in employment creation) of the EU economy too.

Moreover, from a social point of view, when services perceived as similar by citizens and related to foundational rights and values are subject to asymmetrical obligations and guarantees regime, citizens can be exposed to undesired risks. The best example could be the case where parents believe their children cannot access potentially harmful content because providers are obliged to control consumers' age before accessing that type of content. That belief has a legal support in the case of audiovisual services (broadcasting services, for example), but this is not the case when the same children are accessing digital online services (from their television or their smartphone). If digital services are viewed on a television set, citizens are likely to ignore the differences between legal frameworks and therefore inadvertently might expose their

children to unexpected dangers. It can be argued that in that case citizens are underprotected, and they will misunderstand the level of protection they enjoy.

Last but not least, the Digital Service Act, that will be passed in the near future, seems unable to restore the level playing field on that issue.

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