Negotiating new audiovisual rules to Video Sharing Platforms: proposals for a Responsive Governance Model of speech online

Hate Speech & Platform Regulation: Enforcement of laws – ITM webinar, 24 November 2020

Krisztina Rozgonyi, University of Vienna
Regulating online media intermediaries – an ongoing regulatory experiment in the European Union (EU)

| Audiovisual Media Services Directive (AVMSD) | • Amendments adopted on 14 November 2018  
• New regime extending the scope of audiovisual media regulation to Video Sharing Platform Providers (VSPPs) and Social Media Service Providers (SMSPs) on  
• protection of minors against harmful content online,  
• combating hate speech and  
• public provocation to commit terrorist offences on the internet. |
The state of affairs in the EU transposing the Amended AVMSD

Transposition deadline:
19th Sept 2020 (but COVID-crisis)

Uneven picture: only 4 countries completed
- Denmark
- UK
- Germany
- Sweden

Tensions across Europe: re-nationalisation of speechregulation vs AVMSD implementation – France is an exemplary case in point
Legislative pressure on online platforms in Europe

### Parallel proceedings at European and national level – tipping points

#### EU 2018:
- Hate speech and protection of minors – the extension of material scope of the Audiovisual Media Services Directive to Video Sharing Platforms and Social Media

#### EU 2018:
- The copyright reform process – new Copyright Directive (upload filters)

#### EU MSs/national initiatives 2018-2020:

- **Germany:** NetzDG - Jan 2018; FB (WhatsUp) Kartellamt decision - Feb 2019; FB 2millionEUR fine - July 2019; revision of the NetzDG – since March 2020;
- **UK:** UK Online Harms White Paper April 2019;
- **France:** Govt Report on SM accountability May 2019; ‘Avia law’ on illegal hate speech online March 2020 but partly quashed by the Constitutional Court in July 2020;
- **Austria:** KoPI-G - Draft of the Communications Platform Act published on measures to protect users on communications platforms – to be enacted in Dec 2020.
At a crossroad: the policy objectives of the Amended AVMSD and the Country-of-Origin principle

All major VSPs and SMSPs – including Facebook, YouTube – fall under the jurisdiction of the Republic of Ireland

Country-of-Origin principle – **paradoxical consequence:** the most nationally-sensitive speech matters will be (almost) exclusively dealt by the Irish authorities

**Regulatory dysfunctionality of the Country-of-Origin principle:**

- most acute problems and potential solutions for such cases (Wagner, 2014);
- incompatibility of the principle with sharing media practices ultimately contributing to media concentration (Ibrus & Rohn, 2016);
- specifically in Ireland: *Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems* (Case C-311/18, “Schrems II”).
Illegal hate speech

“any form of speech that calls publicly for inciting to violence or hatred directed against a group of persons or a member of a group defined by reference of sex, race, colour, religion, descent or national or ethnic origin, or condiment, denial or trivialisation of crimes of genocide, crimes against humanity and war crimes”

(EU Fundamental Charter Art. 21 and the Council Framework Decision 2008/913/JHA)
Case in point: regulating hate speech in audiovisual media services across Europe (2)

<table>
<thead>
<tr>
<th>Ireland as the champion of the Country-of-Origin principle vis-a-vis VSPs</th>
<th>The scope of audiovisual media regulation on incitement to hatred in the EU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scope of media regulation on incitement to hatred (illegal hate speech)</td>
<td>Frequency of occurrence</td>
</tr>
<tr>
<td>Race / Colour</td>
<td>Most common ground</td>
</tr>
<tr>
<td>Gender / Sex / Sexual orientation</td>
<td>Most common ground</td>
</tr>
<tr>
<td>Religion / Belief</td>
<td>Most common ground but with differing significance</td>
</tr>
<tr>
<td>Disability</td>
<td>Common ground</td>
</tr>
<tr>
<td>Nationality</td>
<td>Most common ground</td>
</tr>
<tr>
<td>Ethnicity</td>
<td>Common ground</td>
</tr>
<tr>
<td>Philosophic view</td>
<td>Infrequent</td>
</tr>
<tr>
<td>Age</td>
<td>Infrequent</td>
</tr>
<tr>
<td>Genocide denial (including the Holocaust)</td>
<td>Infrequent (but prevalent in criminal laws)</td>
</tr>
<tr>
<td>Violence / Brutality</td>
<td>Infrequent</td>
</tr>
<tr>
<td>Political views</td>
<td>Infrequent</td>
</tr>
</tbody>
</table>
Looking forward: A Responsive Governing Model to regulation

(I.) Principles of intervention and standards applicable;

(II.) the outline of a new (co-)regulatory regime;

(III.) organisational and operational aspects.

A new *mutual enforcement mechanism* to mitigate the dysfunctions of the Country-of-Origin principle (Article 14(3) of the AVMSD)
Outlining the Responsive Governing Model (1)

Key pillars

i. The shapes of the Code(s) of Conduct
   – Who designs? Duty of care? What level of accountability?

ii. Monitoring
    – What capacities do NRAs need? What level of cooperation?

iii. Enforcement
     – What role to the judiciary? Regulatory sandboxes?
       Who to enforce and to what effect?

iv. Organisational and operational aspects
    – Regulatory capacity?
Outlining the Responsive Governing Model (2)

<table>
<thead>
<tr>
<th>Union level</th>
<th>Union Code of Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>VSPPs and SMPPs European representatives</td>
<td>Other industry representatives</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Member State level</th>
<th>National Code of Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>National judicial review on individual cases</td>
<td>National Stakeholders</td>
</tr>
<tr>
<td><strong>NRA oversight</strong></td>
<td></td>
</tr>
</tbody>
</table>

No superiority

(based on the principles of subsidiarity and proportionality)
Outlining the Responsive Governing Model (3)

Legal dimensions
1. Jurisdiction and applicable standards (FoE)
2. “Duty to explanation” frameworks
3. Common and shared monitoring tools

Policy aspects
1. Ethical/professional standards re: editorial decisions
2. Impact assessment of self-regulatory actions
3. Interactive forums of dispute settlement

A new generation of national regulators is to emerge
a. Skills and competencies
b. Organisational aspects
c. Next level of inter- and supranational cooperation
Some reminders

a
Legal safeguards on freedom of expression and of the media

b
Private censorship – general monitoring powers

c
‘Privatisation’ of law enforcement to online platforms