The protection of minors in the European Union Audiovisual Media Services Directive

A forward-looking analysis of the proposals by the European Commission and Parliament

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Introduction

In recent years, a new so-called digital world appeared and has created serious competitors to traditional media services. Indeed, many viewers have moved to other portable devices such as 3G mobile phones and tablets to watch audiovisual (AV) content. Even though traditional television (TV) content accounts still for a significant share of the average daily viewing time, new types of content, such as short videos or user-generated content, offer different attractive opportunities to users in order to share AV experiences.

The use of new technologies and, in particular, the Internet is a good thing and should be supported. It provides quick access to a large amount of information, boosts freedom of expression, freedom to communicate with people around the world, to share things with them and so on. However, an important fact in this new digital age is that the younger generation is the first public to be touched by this revolution. Indeed, new technologies are ubiquitous in younger’s everyday lives. A study has shown for instance that a majority of children aged 12-15 now go online using laptops, mobile phone, and tablets. Adding to the fact that a majority of children live in a household with a tablet computer, children have free access to content platforms which include social networks (e.g. Facebook, Twitter), AV and music platforms (e.g. Spotify, Netflix), video-sharing platforms such as YouTube and so on. Though, the younger generations also benefit from all the freedoms provided by the new technologies and they may be the most active online, they also stay the most vulnerable public. Therefore, there is a real need to be sure that children are safe concerning AV content and will not come across illegal and harmful content. However, the question of protecting minors regarding AV media content put also at stake fundamental legal principles such as children’s rights and freedom of expression of adults. Indeed, on the one hand, children have rights internationally recognised by the United Nation Convention on the Rights of the Child (UNCRC) and one of them is precisely the right to be protected “from information and material injurious to his or her well-being.” On the other hand, tackling content considered as harmful to minors can have an undesirable impact on the freedom of expression of adults, who should be able to access such

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3 Idem.
4 Article 17 of the UNCRC. See also, Article 24 of the Charter of Fundamental Rights of the European Union.
content freely. Consequently, finding an adequate balance between freedom of expression of adults and the protection of minors against harmful content is a highly delicate issue.

In the European Union, the current regulatory and supervisory arrangements for the protection of minors in AV media are set out in the so-called ‘Audiovisual Media Services’ Directive, adopted for the first time in 1989 under a different name and amended for the last time in 2007. However, with the rapidly moving online AV environment, the traditional methods of regulating content as provided in the Directive are questioned. Consequently, last year, the European Commission has called for a modernisation of the Directive to adapt the current rules to the new AV media landscape. The Commission proposes, *inter alia*, to extend the material scope of the Directive to video-sharing platforms, to reinforce the promotion of European works, to stronger AV regulators, to strengthen protection of minors from advertising, to align the protection of minors for TV broadcast and on-demand services, and so on. The Commission proposes a lot of interesting changes, but not everything can be analysed during this paper.

As it has been said, the younger generation is particularly touched by the fast changing AV media landscape and the need to protect them has become an ever greater challenge. Moreover, the protection of minors against harmful and illegal AV content is considered to be one of the key issues for the European AV media policy. Therefore, this paper will focus first on the way the proposal of the Commission protects minors from harmful and illegal content in all AV media services, namely traditional broadcasting and on-demand services, but also video-sharing platform services. The analysis will be limited to editorial content. Consequently, the part concerning the protection of minors in commercial communications will not be analysed. Second, the paper will treat how the use of co- and self-regulation with regard to the protections of minors is recommended in the proposed Directive.

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7 Idem.
Methodology

The goal of this paper is to give a comparison between the proposal of the Commission amending the ‘Audiovisual Media Services’ Directive and the amendments already proposed by the different committees of the European Parliament regarding three consecutive points:

(a) The rules addressing the challenge of protection minors concerning both linear and non-linear services;
(b) The extension of the material scope of the Directive to video-sharing platforms;
(c) The Rules encouraging the use of co- and self-regulation.

The approach taken to explore this subject matter is based on an analytical research stemming from literature reviews and working documents from related European institutions.

The organisation of this paper reflects how the research was carried out. The idea was to draft the evolution of the ‘Audiovisual Media Services’ Directive.

The foundation for European Union-wide television broadcast regulation was provided by the ‘Television without Frontiers’ Directive. Therefore, the first chapter of this paper will examine this very first Directive.

However, this Directive was subject to revisions and became the ‘Audiovisual Media Services’ Directive (AVMSD). Hence, the second chapter will detail this current Directive, which is only applicable to linear and non-linear AV media services.

Today, the Directive is again subject to revision. The third chapter will thus give a brief explanation on why the current Directive needs to be reviewed. Then, the legislative proposal of the Commission will be examined, followed by a successive study on the draft report of the responsible committee of the European Parliament, on the different opinions of the other European Parliament’s committees and finally on the opinion of the Committee of the Regions. For each of them, the same procedure will be used. Every time, the three points mentioned above will successively be analysed. Moreover, in order to have an overview of the similarities and differences of the different provisions, three tables are annexed. These tables, related to each of the three points analysed in this paper, compare texts of the
provisions first as proposed by the Commission, second as amended by the parliamentary committee responsible and third as amended by one of the other European Parliament’s committees when its amendments are considered as significant.

Finally, because the ordinary legislative procedure is still in its infancy, this paper will end up with a fourth chapter which will give some recommendations regarding the proposal and all the opinions given.
Chapter 1 – The ‘Television without Frontiers’ Directive

The ‘Television without Frontiers’ Directive (TVwF), adopted in 1989 and amended in 1997, provided the primary instrument for regulating AV content in the European Union (EU).\(^{10}\)

Designed to remove barriers to interstate in TV services\(^{11}\), it is based on the idea of minimum harmonisation that established a minimum set of rules for TV programmes broadcast within the EU.\(^{12}\) The TVwF paid attention to the protection of minors. Indeed, Article 22 required Member States to take appropriate measures to ensure that broadcasters did not transmit programmes which ‘might seriously impair the physical, mental or moral development of minors’ (in absolute terms if the programmes contain pornography or gratuitous violence). Furthermore, this provision extended to other programmes which were likely to impair the physical, mental or moral development of minors, except where the time of broadcast or the use of a technical measure ensured that minors would not normally see or hear such broadcasts.\(^{13}\) This allowed a relatively unrestricted license to broadcasters during late night slots when it was reasonably expected that children would not be watching television.\(^{14}\) Article 22 also required programmes that were likely to impair the physical, mental or moral development of minors to be preceded by acoustical warnings or be identified by visual symbols throughout their duration.

Despite the existence of this kind of provision in the Directive, it can be said that the protection of young people was low on the list of priorities at that time. An example can be

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\(^{11}\) At that time, television broadcast was primarily ‘linear’, meaning simultaneous viewing of programmes, where a broadcaster transmits a signal containing a scheduled set of audiovisual programmes to anyone in the public who owns a television to receive the signal. See, V. LITTLE, “Audiovisual Media Services Directive: Europe’s modernization of broadcast services regulations”, *U. Ill. J.L. Tech. & Pol’y*, 2008, p. 226.


given by the ‘De Agostini’ case. A Swedish law forbade advertisements aimed at children under 12 years old and was thus stricter than most other national laws in Europe. The Court held that the Swedish authorities were impeded to sanction the transmission of the British broadcast in Sweden because TV broadcast that can be received in Sweden were not subjected to the Swedish law but to the origin state’s law (British law in this case). By doing that, the Court clearly indicated that the application of domestic rules, which exceeded the European minimum standards of minors and young’s people protection, must yield to the freedom of transmission. This is why some have said that the TVwF “should be understood primarily as an economical directive rather than a cultural one.”

Because Internet content was a question left unaddressed by the 1997 review and because there was a pressing need to embrace the new generation of AV media services, the Commission published its legislative proposal for a modernised TVwF on the 13th of December 2005. Therefore, the TVwF was substantially revised in 2007 and was renamed the ‘Audiovisual Services Media’ Directive.

Chapter 2 – The ‘Audiovisual Services Media’ Directive

In 2010, because the Directive has been amended several times in depth, it was repealed by the new ‘Audiovisual Media Services’ Directive (AVMSD), adopted in 2010, which codified the audiovisual regulatory framework. This Directive is currently the one that being applicable within the EU.

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15 ECJ, 9 July 1997, Konsumentombudsmannen (KO) vs De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB, Joined cases C-34/95, C-35/95 and C-36/95, ECR, 1997, I-03843.
17 ECJ, 9 July 1997, Konsumentombudsmannen (KO) vs De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB, Joined cases C-34/95, C-35/95 and C-36/95, ECR, 1997, I-03894, para. 59-62.
20 V. LITTLE, op. cit., p. 223.
The scope of the AVMSD has been extended to on-demand audiovisual media (VOD) services.\textsuperscript{23} The AVMSD makes a distinction between linear and non-linear services: “\textit{linear services are defined as analogous to television broadcasting, with scheduled content ‘pushed’ by the broadcaster to the viewer; while non-linear are ‘pulled’ by the viewer.”}\textsuperscript{24} For instance, while a viewer will have to watch a movie at a particular time and on a particular channel in which it is presented on by the linear service provider, the viewer could use Netflix and watch the same movie, but at the time and place he or she prefers. Viewers in non-linear services are assumed to have more control because they may use the multimedia according to their preferences and needs.\textsuperscript{25} For that reason, linear and non-linear services are subject to different set of rules with regard to the protection of minors.\textsuperscript{26}

\textbf{Section 1 – Rules addressing the challenge of protecting minors concerning both linear and non-linear services}

As it has been said, the AVMSD sets out a regulatory system consisting of two separate regimes to address the challenge of protecting minors concerning both linear and non-linear services. On the one hand, the protection of minors in television broadcasting is formulated in Article 27 as follows:

\begin{quote}
\textit{1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.}
\end{quote}

\begin{quote}
\textit{2. The measures provided for in paragraph 1 shall also extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.}
\end{quote}

\textsuperscript{25} E. LIEVENS, \url{https://www.ebu.ch/news/2016/02/professor-eva-lievens-speaks-on}, browsed on the 22\textsuperscript{th} of April 2017, p. 2.
\textsuperscript{26} J. METZDORF, \textit{op. cit.}, p. 88.
3. *In addition, when such programmes are broadcast in unencoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.*”

On the other hand, Article 12 establishes the regime regarding the protection of minors in the on-demand world, as follows:

“*Member States shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously 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 such on-demand audiovisual media services.*”

First of all, the common criterion retained in both provision is that the content of the service or the programme ‘might seriously impair the development of minors’. While these kinds of contents are prohibited in broadcasting services, they can only be available on-demand in such a way that minors will not normally hear or see them.27 For instance, this can be done in practice by using personal identification numbers (PIN codes), filtering systems labelling or other more sophisticated age verification systems.28 Second, linear services should not contain any content which is ‘likely to impair the physical, mental or moral development of minors’ unless if it is ensured, because of the measures put in place (selecting the time of the broadcast or by any technical measure) that minors in the area of transmission will not normally hear or see such broadcasts.29 For VOD services, those services are allowed without restrictions.

The AVMSD does not harmonise the notion of certain concepts like ‘seriously impairing’ for minors and ‘likely to impair’ the development of minors. It only gives examples of some possible ‘seriously impairing’ content in the linear environment, such as ‘pornography or gratuitous violence’.30 Therefore, it is up to the Member States that dispose

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30 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
of some margin of interpretation during the implementation of the Directive, to determine the notions, based on their national cultural backgrounds.\textsuperscript{31}

By that time, the Commission stated that “the differing degrees of regulation of content “pushed” by suppliers or “pulled” by users reflects differences in user choice and control and in the likely impact on society.”\textsuperscript{32} On the one hand, when users choose by themselves to access a website and to download a TV-show, the content is considered pulled. On the other hand, “pushed content implies delivery in the absence of a specific request by users.”\textsuperscript{33} Consequently, the less strict regime for on-demand content comes from the fact that users make a conscious choice to watch it, whereas the content of broadcast programmes is supposed to have a greater impact because it enters living rooms more spontaneously.

This justification was subject to some criticism.\textsuperscript{34} Indeed, it was argued that “the distinction between pulled and pushed content, being blurred by technological developments, undermines the justification based on user control.”\textsuperscript{35} Another commentator suggested that “the differential regulatory treatment should depend on the nature of the content rather than the service being linear or non-linear, recommending a multi-tiered framework based on ‘relevance for public opinion’.”\textsuperscript{36} The justification given by the Commission was insufficient specifically regarding minors.\textsuperscript{37} How can it be said that a child using Netflix clicking randomly on on-demand content is making a conscious choice? The justification did not seem to fit with every target public.\textsuperscript{38}
Section 2 – Rules encouraging the use of co-regulation and self-regulation

In complex sectors, such as precisely the media sector, policymakers realised that legislation traditionally created, implemented, monitored and enforced by the State itself might not be suitable to protect minors in the digital media environment in an efficient manner. Because of, inter alia, a slow legislative process and a lack of involvement of knowledgeable actors, legal rules prohibiting the exposure of minors to certain media are extremely tough to enforce. For that reason, with respect to the protection of minors against harmful new media content, alternative forms of regulation appeared to be more appropriate than traditional legislation because they are more open to the involvement of different actors in the regulatory process.

Thus, the role of alternative regulation instruments, namely self- and co-regulation are recognised and encouraged by the AVMSD. The Directive emphasises the importance and effectiveness of such alternative regulatory methods by stating “experience has shown that both co-regulation and self-regulation instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection.” Moreover, paragraph 7 of Article 4 of the AVMSD encourages Member States to use co-regulation and self-regulation at the national level with the conditions of participation by main stakeholders and effective enforcement.

In its Recital 44 of the preamble, the Directive defines ‘self-regulation’ as “a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves.” On the one hand, this alternative instrument is flexible, there is a higher degree of expertise, and because the actors are involved in the creation process, there are greater

41 E. LIEVENS, op. cit. (note 33), p. 168.
incentives for compliance.\textsuperscript{44} On the other hand, this kind of instrument also has dark sides such as a low level of transparency, the fact that private interests are put before public interests and the lack of the effectiveness and enforceability of sanctions.\textsuperscript{45} Moreover, it requires that the actors have an organisational capacity and a relatively high degree of homogeneity.\textsuperscript{46}

In the same Recital 44 of the AVMSD, ‘co-regulation’ is defined as “creating, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the member states.”\textsuperscript{47} Being a combination of elements of State regulation and elements of self-regulation, it is considered as an attractive option by supervisory authorities “that have to live up to ever greater societal expectations of the efficiency of their supervisory activities with rapidly shrinking budgets.”\textsuperscript{48}

A widely recognised best practice of a co-regulatory arrangement for the protection of minors against harmful content is the Dutch classification system called ‘Kijkwijzer’. The purpose is to provide consumers, parents in particular, with standardised information (age recommendation as well as assigning pictograms) about whether the content of television programmes, movies shown in cinemas, DVDs, and mobile content is suitable for children and young people.\textsuperscript{49} The system was developed by the Dutch Institute for the Classification of Audiovisual Media (NICAM)\textsuperscript{50} to which content providers are affiliated. The government monitors the functioning of the system, and the supervisory role is delegated to the Dutch Regulatory Authority\textsuperscript{51}, which can regulate providers who are not affiliated to the co-regulatory body.\textsuperscript{52} Although this regime did not apply to the provision of VOD services, in 2014, the Dutch association of video-on-demand providers (VODNED) agreed with NICAM

\begin{footnotes}
\item[44] E. LIEVENS, \textit{op. cit.} (note 33), p. 170. The author gives as an example of self-regulation the code of conduct that was drawn up by a number of UK mobile phone operators in 2004.
\item[45] \textit{Idem}.
\item[48] M. DE COCK BUNING, \textit{op. cit.}, p. 10.
\item[50] NederlandsInstituut voor de Classificatievan Audiovisuele Media. More information available at \url{www.kijkwijzer.nl/nicam}.
\item[51] Commissariaat voor de Media – CvdM.
\item[52] E. LIEVENS, \textit{op. cit.} (note 33), p. 171.
\end{footnotes}

that their members undertake to use the Kijkwijzer age symbols and descriptors on the content they distribute.  

The co-regulation instrument also presents some advantages and disadvantages. First, it is supposed to create win-win situations because the instrument is expected to satisfy various interests and thereby create support for regulation. Indeed, it offers flexibility, expertise and engagement of private actors as well as legal certainty democratic guarantees and more efficient enforcement because of the involvement of a public authority. However, the need to have a good cooperation and a willingness to share information between private actors and public authorities involved, necessary for the success of co-regulatory arrangements, can be a significant challenge.  

Regarding the pro and cons of self- and co-regulation, co-regulation should be privileged. Indeed, private partners must be involved because they give a substantial expertise and make regulation more efficient. Nevertheless, the involvement of the government as a public supervisory authority is still needed, if only for the effectiveness and enforceability of sanctions. This is why a co-regulatory approach with an appropriate involvement of public authorities and an appropriate cooperation between government and private actors seems to be the best instrument to achieve the goals with regard to the protection of minors.

Section 3 – Implementation and application into national legislations

The current Directive had to be transposed by each Member States. Moreover, being a minimum harmonisation Directive, it settles the minimum standards that need to be met by the Member States and allows them to go further while implementing. For that reason, all Member States have introduced rules in relation to the protection of minors in AV media services, but the implementation of those rules can differ significantly between them.

53 M. CAPELLO (ed.), op. cit., p. 42.
55 E. LIEVENS, op. cit. (note 33), p. 171.
56 M. DE COCK BUNING, op. cit., p. 11.
57 V. REDING, European Commissioner responsible for Education and Culture, “Minors and media: towards a more effective protection”, Workshop of scientists in the field of the protection of minors on media violence, self-regulation and media literacy, Brussels, 10 September 2003, SPEECH/03/400, p. 2.
59 European Commission, First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive
Therefore, the purpose of this section is not to draw a complete comparative table of the different implementations into Member States, which could be the subject of a paper itself but is only to give some examples of implementation.

First, in most Member States, for content which is likely to impair the development of minors, TV broadcasters use watershed-based restrictions (e.g. the time at which the content is transmitted).\textsuperscript{60} They accompany them by visual means like content rating and special warnings, or by technical means which include parental control measures in order to restrict access to harmful content.\textsuperscript{61}

Moreover, as mentioned previously, the Directive does not harmonise key concepts in relation to the protection of minors. For the definition of ‘likely to impair’ the development of minors, most countries refer, for instance, to ‘violence, pornography, erotic or sexual material’.\textsuperscript{62} Poland adds to the list of potentially harmful content specific elements such as war themes or rude language.\textsuperscript{63} In most countries, there is no formal definition of ‘seriously impairing’ content. When there is one, it quotes the wording of Article 27, namely ‘pornography and gratuitous violence’.\textsuperscript{64} However, France, for instance, gives a detailed definition, establishing that content that ‘might seriously impair’ the development of minors refers to criminally illegal material such as “harmful to human dignity, including violence, sexual perversion, content degrading to the human person, child pornography, hard-core violence.”\textsuperscript{65}

Second, regarding rules for VOD services, many countries have transposed Article 12 almost verbatim in their national legislation.\textsuperscript{66} Certain countries such Italy and Greece allow therefore content ‘likely to impair’ without restriction. Nevertheless, most of the Member

\textsuperscript{60} European Parliamentary Research Service (EPRS), \textit{EU Legislation in Progress’ Briefing on the Audiovisual Media Services Directive}, 14 March 2017, PE 583.859, p. 4.

\textsuperscript{61} \textit{Idem}.

\textsuperscript{62} M. CAPELLO (ed.), \textit{op. cit.}, p. 30.

\textsuperscript{63} \textit{Idem}.


\textsuperscript{65} M. CAPELLO (ed.), \textit{op. cit.}, p. 29.

\textsuperscript{66} E. MACHET, \textit{op cit.}, p. 4.
States require VOD service providers to offer such material with some form of protection, such as PIN access codes and separate catalogues with parental control systems.\textsuperscript{67}

In respect of content which ‘might seriously impair’ the development of minors, prohibited on linear broadcasting services but allowed if available on VOD services in such a way that minors will not normally hear or see it, the majority of countries require that the providers of these services put in place some form of access restrictions.\textsuperscript{68} The trend is to privilege filtering tools, PIN codes, and other age verification systems.\textsuperscript{69}

Finally, in most European countries, regulation is often based on a shared responsibility between the industry/service providers and national regulatory authorities (or other relevant bodies) through co-and self-regulation instruments.\textsuperscript{70} An example of the co-regulatory regime installed in the Netherlands was already given previously.

In conclusion to this part, a report has shown that generally speaking “traditional players such as linear TV stations, but also VOD service providers, are fully aware of the importance of child protection measures” and therefore, “the majority of both broadcast and VOD providers have already implemented a range of protection measures, even when there is no legal obligation for them to do so.”\textsuperscript{71} This shows thus that there is a need at EU level to adapt the current Directive. It will allow avoiding excessive variation across the different Member States regarding the degree of the protection of minors and thus equilibrating again the minimum standards provided in the Directive.

**Chapter 3 – The Future ‘Audiovisual Media Services’ Directive**

As it has been said, the AVMSD governs the European Union-wide coordination of national legislation on all AV media, both traditional TV broadcasts, and VOD services.

\textsuperscript{68} M. CAPELLO (ed.), *op. cit.*, p. 35.
\textsuperscript{69} Idem.
\textsuperscript{70} Ibidem, p. 25.
However, in order to bring the Directive in line with the new realities, the European Commission has adopted a new legislative proposal amending the AVMSD.\(^{72}\)

This part will start by examining the reason why the AVMSD needed to be reviewed. Then, an analysis of the Commission proposal will be made. Finally, because the AVMSD is currently open for review and the legislative procedure is still going on, the focus will be on the proposed amendments by the European Parliament and its different committees and the Committee of the Regions.

**Section 1 – The need for a review**

Following the AVMSD, in 2011, the third Evaluation Report commissioned by the European Commission and called ‘Protecting children in the Digital World’ concluded that media was increasingly being used by minors via mobile devices, including (online) video games, and there were more and more VOD services on the Internet.\(^{73}\) Adding to that, the European Commission published in 2013 the Green Paper ‘Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values’ where the Commission invited stakeholders to share their views on the changing media landscape and borderless Internet.\(^{74}\) In this Green Paper, it is stated that “\textit{lines are blurring quickly between the familiar twentieth-century consumption patterns of linear broadcasting received by TV sets versus on-demand services delivered to computers.}”\(^{75}\) The Commission was, therefore, speaking of a converged audiovisual world understanding in the sense of a progressive merger of traditional broadcast services and the Internet.\(^{76}\)

It is then evident that the individual use of new services increasingly substitutes the habits of passive TV watching. VODs through websites like YouTube, Dailymotion and Netflix are


\(^{75}\) \textit{Ibidem}, p. 3.

\(^{76}\) \textit{Ibidem}. 
watched by million of Europeans.\textsuperscript{77} A report leading by Ofcom\textsuperscript{78} in 2015 have shown that 69\% of children having eight to eleven-year-old and 86\% of twelve to fifteen-year-olds who watch television say they watch YouTube.\textsuperscript{79} Moreover, nine to ten-year-olds in Europe, who use the Internet, declare that they started to go online, on average, from the age of seven.\textsuperscript{80} Finally, 77\% of thirteen to sixteen-year-olds and 38\% of nine to twelve-year-olds using the Internet say they have a profile on social networking site.\textsuperscript{81}

These new developments offer many new opportunities for minors, but bring some challenges regarding their protection, considering that \textit{“parents often haven difficulties in carrying out their responsibilities in relation to new technology products and services that are usually less known to them than to their children.”}\textsuperscript{82}

For that reason, in its Communication on the Digital Single Market Strategy, the Commission indicated it would review the AVMSD \textit{“with a focus on its scope and on the nature of the rules applicable to all market players, in particular measures for the promotion of European works, and the rules on protection of minors and advertising rules [emphasis added].”}\textsuperscript{83} Indeed, the Commission proposal wants to update the AVMSD to achieve a better balance of the rules applying to traditional broadcasters, VOD providers and video-sharing platforms, especially when it comes to protecting children.\textsuperscript{84} Today, the regulatory burden is

\textsuperscript{77} European Commission, Directorate-General of Communications Networks, Content & Technology, \textit{Survey and Data Gathering to support the impact assessment of a possible new legislative proposal concerning Directive 2010/13/EU (AVMSD) and in particular the provisions on the protection of Minors}, Final Report (2015) 0050, p. 17.

\textsuperscript{78} The Office of Communications is the government-approved regulatory and competition authority for the broadcasting, telecommunications and postal industries of the United Kingdom.


\textsuperscript{81} Idem.

\textsuperscript{82} European Commission, Directorate-General of Communications Networks, Content & Technology, \textit{Survey and Data Gathering to support the impact assessment of a possible new legislative proposal concerning Directive 2010/13/EU (AVMSD) and in particular the provisions on the protection of Minors}, Final Report (2015) 0050, p. 19.


much higher on TV, and because the viewers, and particularly minors, are moving from traditional TV to the online world, it is not longer justified.\textsuperscript{85}

Section 2 – The Legislative Proposal

§1. Adopted by the European Commission

On the 25th of May 2016, the European Commission has adopted its proposal revising the AVMSD.\textsuperscript{86}

Given this paper, the re-examination of the nature of the rules protecting minors will be treated. Second, the extension of the material scope to video-sharing platform services will be analysed. Finally, this part will focus on how the Commission continues to encourage the use of co-regulation and self-regulation.

\textit{A. Rules addressing the challenge of protecting minors concerning both linear and non-linear services}

As it has been said previously, there is an inconsistency with the rapid change of the AV media landscape regarding the rules protecting the minors in the current AVMSD. Indeed, the current provisions protect them more in TV and less in the online world while children watch less and less TV and more and more on-demand and online videos.\textsuperscript{87}

For that reason, the proposal provides for alignment of the standards of protection of minors for TV broadcastings and on-demand services.\textsuperscript{88} The Commission proposes to remove current Article 27 of the AVMSD (applicable to linear services only) and to maintain and apply Article 12 to programmes that may impair the physical, mental or moral development


\textsuperscript{87} See, supra.

\textsuperscript{88} Proposal, p. 5.
of minors (harmful content) which are whether broadcast by TV broadcasters or provided by on-demand media services providers.\textsuperscript{89}

Article 12 will be moved to Chapter III of the Directive, entitled ‘Provisions applicable to Audiovisual Media Services’, and replaced by the following:

“Member States shall take appropriate measures to ensure that programmes provided by audiovisual 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, such as encryption and effective parental controls.”

The Commission reproduces Article 12 as it stands and renders it applicable to linear and non-linear service providers. Nevertheless, the Commission also gives an adaptation of Article 12 by adding that the measures taken may include selecting the time of the broadcast or age verification tools.\textsuperscript{90} Moreover, it adds an entirely new paragraph which deals with the most harmful content. In the current Directive, the most harmful content, defined as content which ‘might seriously impair the physical, mental or moral development of minors’, cannot be included in any linear broadcast programmes and can only be made available on-demand in such a way that minors will not normally hear or see it. Now, such content shall be subject to the strictest measures. Therefore, the revised Article 12 strengthens on the one hand obligations for on-demand services and on the other hand, increases flexibility for TV broadcasters who cannot make programmes which ‘might seriously impair the physical, mental or moral development of minors’ available today.

Then, the AVMSD was a minimum harmonisation Directive\textsuperscript{91}, which allowed Member States to impose higher standards in respect of all fields coordinated by the

\textsuperscript{89} Proposal, p. 12.
\textsuperscript{90} Cf. Article 12 of the AVMSD.
\textsuperscript{91} Recognised by Article 4, 1. of the AVMSD.
Directive. It can be pointed out that the Commission chooses to keep that minimum harmonisation with regard, *inter alia*, to Article 12.\textsuperscript{92} Member States remain therefore free to require media service providers to comply with more detailed or stricter rules.

Lastly, the Commission requires that common content descriptors are developed by the industry because age ratings without additional explanations on this rating do not always give sufficient information to parents.\textsuperscript{93} Hence, the proposal is going further and encourages co-regulation on content descriptors which provide adequate information to viewers about the possible harmful nature of the content.\textsuperscript{94} Linked to Article 4, paragraph 7\textsuperscript{95}, Article 6a specifies that “*the Commission and ERGA shall encourage media service providers to exchange best practices on co-regulatory systems across the Union. Where appropriate, the Commission shall facilitate the development of Union codes of conduct.*” The Commission seems to state that it will be able to define by itself a code of conduct if the co-regulation does not pay off.\textsuperscript{96} Moreover, the word ‘appropriate’ disturbs because it can be interpreted in a broadly way.

In conclusion, the proposal as expected provides for alignment of the standards of protection of minors for TV broadcastings and on-demand services. However, in fact, the revised Article 12 does not have a real impact on the linear service providers. Indeed, under the current Directive, they already have an obligation to ensure that children will not hear or see programmes which may impair their physical, mental or moral development. Moreover, as it has been said, whereas the most harmful content cannot be included in programmes now, linear service providers can submit it to the strictest measures in view of the proposal. The revised Article 12 has a real impact on the non-linear service providers. Under the proposal, they have indeed more obligations: the most harmful content shall be subject to the strictest measures, while now their obligation is to ensure that minors will not normally hear or see it. Moreover, whereas content which may impair their physical development can be allowed without restriction, they will have to take measures so that minors will not normally hear or see them.

\textsuperscript{92} Article 4, 1. of the Proposal.
\textsuperscript{93} European Commission, *Press release: Commission updates EU audiovisual rules and presents targeted approach to online platforms*, Brussels, 25 May 2016, MEMO/16/1895, p. 3; Recital 9 of the Proposal.
\textsuperscript{94} Article 6a of the Proposal.
\textsuperscript{95} See, infra.
At first sight, because the revised Article 12 increases the obligations of the on-demand service providers and aligns the standards of protection of minors for AV media service providers while enabling Member States to adopt stricter rules, the revised provision can be appreciated.

B. Extension of the material scope of the AVMSD to video-sharing platforms

As a result of the rapid technological developments expanding the types of services and experiences\(^ {97}\), the Commission decided to go beyond traditional TV broadcasts and on-demand services and extend, for certain aspects, the scope of the Directive to video-sharing platforms (e.g. YouTube, Dailymotion). The Commission justifies this extension because “platforms play an increasingly important role in determining how and what content will be accessed and viewed.”\(^ {98}\)

First, the new proposal defines a video-sharing platform as “a commercial service addressed to the public which meets the following requirements:

(i) the service consists of the storage of a large amount of programmes or user-generated videos, for which the video-sharing platform provider does not have editorial responsibility;

(ii) the organisation of the stored content is determined by the provider of the service including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing;

(iii) the principal purpose of the service or a dissociable section thereof is devoted to providing programmes and user-generated videos to the general public, in order to inform, entertain or educate;

(iv) the service is made available by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC\(^ {99}\).”\(^ {100}\)

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\(^{97}\) Cf., Recital 26 of the Proposal.

\(^{98}\) European Commission, Directorate-General of Communications Networks, Content & Technology, Survey and Data Gathering to support the impact assessment of a possible new legislative proposal concerning Directive 2010/13/EU (AVMSD) and in particular the provisions on the protection of Minors, Final Report (2015) 0050, p. 27.

\(^{99}\) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (‘Framework Directive’), \(OJ\), L 108, 24 April 2002, pp. 33-50. Article 2(a): "electronic communications network" means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that
The Commission has already stated that as a general rule, social media services (e.g., Facebook, Twitter) would not be considered to offer video-sharing platform services because they “do not have as a principal purpose the provision of programmes or user-generated videos to the public.” However, with the evolution of social media services, they may meet all of the characteristics of video-sharing platforms and thus may fall within the scope of the Directive. Moreover, newspaper websites remain outside the Directive as well as any occasional use of videos in websites, blogs.

It can be noticed that doubts regarding the workability of the definition of video-sharing platform service have already been issued. The concept of ‘editorial responsibility’ in relation to content uploaded to video-sharing platforms seems to be declining in relevance and a clarification of this notion would help to identify whether “the actions taken by an online service provider which appears to be a VSP actually could amount to exercising editorial responsibility.”

Second, the extension of the material scope of the Directive to video-sharing platforms is limited. Indeed, as it is established in Article 28a, inserted in the new Chapter IXa ‘Provision applicable to video-sharing platform services’, “Member States shall ensure that video-sharing platform providers take appropriate measures to:

(a) protect minors from content which may impair their physical, mental or moral development;

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they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.”


103 However, standalone parts of newspaper websites which feature AV programme or user-generated videos will be considered as video-sharing platforms.


(b) protect all citizens from content containing incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin.”

Then, the same article provides an exhaustive list of possible measures ensuring such protection including, *inter alia*, (a) defining and applying the concepts of ‘incitement to violence or hatred’ and ‘harmful to minors’ in the terms and conditions of the video-sharing platform providers in accordance with Articles 6 and 12 respectively; (b) creating mechanisms enabling users to report or flag problematic content to video-sharing platform providers and enabling providers to explain to users the effect of such action; (c) creating age verification and parental control systems for content harmful to minors; and (d) creating mechanisms enabling users to rate video-sharing platform content.\textsuperscript{107} Recital 29 of the preamble explains these further, stating that “in light of the nature of the providers’ involvement with content stored on video-sharing platforms, those appropriate measures should relate to the organisation of the content and not to the content as such.”

Member States are encouraged to ensure that the providers adopt the above measures through appropriate co-regulatory codes of conducts, as provided for in Article 4, paragraph 7.\textsuperscript{108} Moreover, “the Commission and ERGA shall encourage video-sharing platform providers to exchange best practices on co-regulatory systems across the Union”\textsuperscript{109} and “where appropriate, the Commission shall facilitate the development of Union codes of conduct.”\textsuperscript{110} The Commission gives a clearer provision regarding the development of Union codes of conduct.\textsuperscript{111} Indeed, it states that it is up to the video-sharing platform providers to submit draft Union codes and amendments to existing Union codes to the Commission.\textsuperscript{112} Then, as it is settled in Article 4, paragraph 7, ERGA could be requested to give an opinion on the drafts, amendments or extensions of the codes of conduct.\textsuperscript{113} Finally, “the Commission may give appropriate publicity to those codes of conduct.”\textsuperscript{114} In order to have a real impact in practice, the publication of those codes seems primordial. Therefore, it would have been better if the

\textsuperscript{107} Article 28a, 2. of the Proposal.
\textsuperscript{108} Recital 30, para. 1 and Article 28a, 3. of the Proposal.
\textsuperscript{109} Article 28a, 7. of the Proposal.
\textsuperscript{110} Idem.
\textsuperscript{111} In comparison with Article 4, 7. and Article 6a of the Proposal.
\textsuperscript{112} Article 28a, 8. of the Proposal.
\textsuperscript{113} Idem.
\textsuperscript{114} Idem.
Commission uses ‘shall publish’ instead of ‘may give publicity’ and thus render the publication of the codes mandatory and not just facultative.

Third, the rules concerning video-sharing platforms provide for maximum harmonisation. Consequently, Member States cannot impose measures that are stricter than those listed in Article 28a.\textsuperscript{115}

Fourth, it is relevant to point out that the proposal intends to complement the e-Commerce Directive.\textsuperscript{116} The e-Commerce Directive sets up an Internal Market framework for electronic commerce and establishes harmonised rules on issues such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers.\textsuperscript{117} Services such as video-sharing platform services, which do not have editorial responsibility for the content that they store but which organise that content, are subject to the e-Commerce Directive, as they constitute information society services.\textsuperscript{118} It can be found in Article 14 of the e-Commerce Directive that “online intermediaries that provide ‘hosting’ services (i.e., storing information provided by the recipient of the service) are not liable for illegal information that they host (subject to certain conditions).” Furthermore, Article 15 prohibits Member States from imposing a general obligation on online intermediaries to monitor the information which they transmit or store or a general obligation to actively seek facts or circumstances indicating illegal activity. Thereupon, there is a clear link between these two provisions and the proposed rules applicable to video-sharing platforms in the new Commission proposal. This is why the Commission has been careful to specify first that “Members States continue to be bound by the rules of the e-Commerce Directive.”\textsuperscript{119} Then, the Commission justified the consistency with the e-Commerce Directive by drawing a distinction between the proposed liability of video-sharing platforms for the organisation of the content and the responsibility of online intermediaries (under the e-Commerce Directive) for ‘content as such’.\textsuperscript{120}

\textsuperscript{115} Recital 30, para. 2 and Article 28a, 4. of the Proposal.
\textsuperscript{116} Recital 27 of the Proposal.
\textsuperscript{118} Recital 18 and Article 2(a) of the e-Commerce Directive.
\textsuperscript{119} Proposal, p. 13.
\textsuperscript{120} M. COLE, K. COATES and J. BOUDET, \textit{op. cit.}, Cf., Recital 29 of the Proposal.
At this point, criticism has already been raised saying that “despite the Commission’s attempts to distinguish between organisation of content and the content itself, the Proposal may not provide sufficient legal certainty regarding liability for video-sharing platforms.”\textsuperscript{121} For instance, if video-sharing platforms are required to implement ‘parental control systems with respect to content which may impair the physical, mental or moral development of minors’\textsuperscript{122}, they will likely have to look at the content itself to determine whether specific content may be harmful to minors (such that parental controls should be implemented).\textsuperscript{123} Therefore, in practice, difficulties may come from the distinction that has to be made between the organisation of content and the content itself.\textsuperscript{124}

Finally, because video-sharing platforms often have a global dimension, the Commission proposes to target those with a secondary establishment in the Union. The Commission justified it explaining that “if the material scope is extended without including platforms established outside the EU, either in total or specifically for the protection of minors on other on-line and emerging audio-visual services, some of the biggest players (currently) would not be regulated, e.g. YouTube.”\textsuperscript{125} As a result, Recital 32 of the preamble makes clear that the same rules must apply to video-sharing platform providers which are not established in a Member State in order to safeguard the effectiveness of the measures to protect minors and citizens set out in the Directive and to ensure a level playing field in as far as those providers have either a parent company or a subsidiary, established in a Member State or where those providers are part of a group and another entity of that group is set up in a Member State. Article 28b determines in which Member State those providers should be deemed to have been established.

To conclude, it is relevant to stress that, indeed, the proposed Directive extends its material scope to video-sharing platforms. However, this extension is partial and covers only measures concerning, on the one hand, the protection of minors from viewing harmful content and, on the other hand, the protection of all citizens from content incitement to hatred. Moreover, it can be noticed from what has been said that the measures that have to be taken

\begin{itemize}
\item \textsuperscript{121} M. COLE, K. COATES and J. BOUDET, \textit{op. cit.}
\item \textsuperscript{122} As it is established under Article 28a, 2(e) of the Proposal.
\item \textsuperscript{123} M. COLE, K. COATES and J. BOUDET, \textit{op. cit.}
\item \textsuperscript{124} Idem.
\item \textsuperscript{125} European Commission, Directorate-General of Communications Networks, Content & Technology, \textit{Survey and Data Gathering to support the impact assessment of a possible new legislative proposal concerning Directive 2010/13/EU (AVMSD) and in particular the provisions on the protection of Minors}, Final Report (2015) 0050, p. 30.
\end{itemize}
by the video-sharing platform providers are lighter in term of obligation than the ones that must be taken by TV broadcasters and VOD service providers. This justifies the will of the Commission to provide two distinct provisions.

**C. Rules encouraging the use of co-regulation and self-regulation**

Following what was already established in the AVMSD, the proposal recommends in the fields coordinated by the Directive the use of co- and self-regulation instrument. This is not a surprise because, as it was said previously, “such regimes are deemed to be broadly accepted by the main stakeholders and provide for effective enforcement.”

Therefore, the Commission amends paragraph 7 of the current Article 4 in this following way:

“*Member States shall encourage co-regulation and self-regulation through codes of conduct adopted at national level in the fields coordinated by this directive to the extent permitted by their legal systems. Those codes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned. The codes of conduct shall clearly and unambiguously set out their objectives. They shall provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at. They shall provide for effective enforcement, including when appropriate effective and proportionate sanctions.*

*Draft Union codes of conduct referred to in Articles 6a (3), 9(2) and 9(4) and amendments or extensions to existing Union codes of conduct shall be submitted to the Commission by the signatories of these codes.*

*The Commission may ask ERGA to give an opinion on the drafts, amendments or extensions of those codes. The Commission may publish those codes as appropriate.*

Hence, the Commission goes a step further. Indeed, the current Directive provides that Member States shall encourage co-regulation and/or self-regulatory regimes at national level,

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126 Proposal, p. 5.
whereas the proposal establishes that the encouragement of co-regulation and self-regulation shall be done through the adoption of codes of conduct adopted at national level. The choice of the Commission is far from insignificant because “codes of conduct play a role of paramount importance in initiatives taken to protect minors against harmful content.”\textsuperscript{127} Those codes can be useful as long as certain safeguards are put in place.\textsuperscript{128} This is why the Commission already specifies some minimum guidelines regarding the adoption of those codes like the fact that they ‘shall provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives’. Codes of conduct\textsuperscript{129} may, for instance, be industry initiated with a certain degree of government involvement such as for the government approval of industry-initiated codes of conduct.\textsuperscript{130}

This new Article also highlights the role of the European Regulators Group for Audiovisual Media Services (ERGA). ERGA, bringing together the high-level representatives of national independent regulatory authorities in the field of AV services, was established by the Commission on the 3\textsuperscript{rd} February 2014.\textsuperscript{131} The objectives of the Group were primarily to advise the Commission on the implementation of the AVMSD and facilitate cooperation between the regulatory bodies in the EU.\textsuperscript{132}

With the proposal, the role of ERGA is reinforced. Indeed, the Commission gives it more tasks in order to advise and assist the Commission in consistent implement of the Directive in all Member States.\textsuperscript{133} In this provision, it can be noticed that ERGA could be asked to give an opinion on the drafts, amendments or extensions of the Union codes of conduct. Moreover, in the explanatory memorandum of the proposal, the Commission states that it would facilitate, with ERGA’s support, the coordination of codes of conduct at EU level.\textsuperscript{134}

\textsuperscript{128} Idem.
\textsuperscript{129} For instance, the Australian regulatory model is an effective example of media co-regulation. Cf., A. WRIGHT, Australia’s Co-Regulatory Scheme for Internet Content, Council of Europe Steering Committee on the Mass Media, Strasbourg, 17 October 2000, available at http://www.humanrights.coe.int/media/events/2000/hearing/wright.doc.
\textsuperscript{130} E. LIEVENS, J. DUMORTIER and P. S. RYAN, op. cit., p. 145.
\textsuperscript{133} Proposal, p. 12. Cf., Recitals 5 and 35 to 37 of the Proposal.
\textsuperscript{134} Proposal, p. 13.
This revised provision provides, therefore, on the one hand, the adoption of codes of conduct at national level in the fields coordinated by this Directive. On the other hand, the provision also stresses that Union codes of conduct shall be adopted or amended/extended in case they have already been adopted in regard with, *inter alia*, information that must be provided by AV media service providers to viewers about content which may impair the physical, mental or moral development of minors. Indeed, such codes have strongly been promoted within the EU since the advent of the new digital world. However, regarding those Union codes, the provision is difficult to interpret. First, it states that those codes ‘shall be submitted to the Commission by the signatories of these codes.’ Who are the signatories exactly? No further information about it is given. Moreover, the Commission establishes that it may publish those codes as appropriate. Therefore, there is no obligation to release those codes which is regrettable. The point of drafting Union codes is that they will be known within the EU. Moreover, again what does ‘appropriate’ refer to and when will it be 'appropriate' to publish them?


Because the act will be adopted under the ordinary legislative procedure, the proposal of the Commission was subsequently passed on to the Council and the Parliament. The Parliament will deliver a position at first reading, but before that, the Committee on Culture and Education (CULT committee) was named as the parliamentary committee responsible, along with any other committees which were asked for an opinion. The committee responsible and four other European Parliament committees have therefore proposed amendments to the Commission’s proposal. Moreover, in this procedure, the Committee of the Regions took the initiative to give an opinion on the Commission proposal.

This part will thus focus, in a comparable way with the proposal of the Commission, on the draft report of the CULT committee first, then on the four committees of the European

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136 Article 294 of the Treaty on the Functioning of the European Union (TFEU).
138 Articles 301 to 307 of the TFEU.
Parliament that participated by giving an opinion and finally on the opinion of the Committee of the Regions.

A. Committee on Culture and Education: draft report

On the 15th of September 2016, the CULT committee adopted its draft report on the Commission proposal for amending the AVMS Directive.\(^{139}\)

In the explanatory statement of the draft report, the Rapporteurs remind that the European Parliament, and in particular the CULT committee which has exclusive competence in the matter, called several times for such revision because “the emergence of new service providers as well as changes in consumer behaviour have blurred the lines between traditional and on-demand services.”\(^{140}\) Therefore, the Commission’s initiative in proposing a review is welcomed by the CULT committee.

Generally speaking, the draft radically changes the proposal. Indeed, the above subsections dedicated on Article 12 (linear and non-linear services), on Article 28a (video-sharing platform services) and Article 4, paragraph 7 (co- and self-regulation and codes of conduct) cannot be found in the draft report of the CULT committee. The explanation given is that they want to establish a genuine level playing field with the same degree of protection for all citizens as well as for minors.\(^{141}\) According to them, the new Directive must take into account the drastic changes in consumer behaviour and content consumption and therefore “the same minimum requirements should be established for all audiovisual services (i.e. audiovisual media services as well as sponsored user-generated videos or user-generated videos).”\(^{142}\) In order to align the provisions of these services, Chapter I has been entirely restructured. Seven new articles have been introduced.


\(^{140}\) Draft Report, p. 72.

\(^{141}\) Ibidem, p. 27.

\(^{142}\) Ibidem, p. 73.
First, Articles 6a, 12 and 28a of the proposal relating to the protection of minors are merged in one article and made applicable to all services. The Rapporteurs thus insert a new Article 2 where it is established that:

“1. Without prejudice to Articles 14 and 15 of Directive 2000/31/EC, Member States shall ensure that media service providers and video-sharing platform providers under their jurisdiction take appropriate measures to:

(b) protect minors from programmes or user-generated videos which may impair their physical, mental or moral development. Such content shall only be made available in such a way as to ensure that minors will not normally hear or see it. Such measures may include selecting the time of their availability, age verification tools or other technical measures.

2. What constitutes an appropriate measure for the purposes of paragraph 1 shall be determined in light of the nature of the content in question, shall be proportionate to the potential 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 providers and the users having created and/or uploaded the content as well as the public interest and respect communicative freedoms. Providers shall provide sufficient information to viewers about such content, preferably using a system of descriptors indicating the nature of the content.

(...)”

The first point of Article 2 refers to what can be found in the revised Article 12 by the Commission. With the CULT committee draft report, video-sharing platform providers must protect minors in the same way as media service providers. Therefore, the obligation to provide sufficient information to viewers about the possible harmful nature of the content (preferably using a system of descriptor indicating the nature of the content) that is only established for media service providers in the revised Directive is also applicable to video-sharing platform providers. In comparison with what is set up in the proposal, the obligations of the video-sharing platform providers relating to the protection of minors are much more high in the draft report.
For both media service and video-sharing platform providers, the committee encourages co-regulation as provided for in Article -2f, paragraph 3 and 4.

The committee does not forget to highlight the link with the e-Commerce Directive. Indeed, the proposed Article 2 starts by stating ‘without prejudice to Articles 14 and 15 of Directive 2000/31/EC.’ Moreover, the third paragraph of Article 2 provides that when Member States adopt the appropriate measure to protect minors, they shall respect the conditions set by applicable Union law, in particular Articles 14 and 15 of the e-Commerce Directive. Finally, the CULT Committee goes even a step further by bringing an important amendment. It recognises the primacy of the Directive over the e-Commerce Directive by establishing that “Directive 2000/31/EC shall apply unless otherwise provided for in this Directive. In the event of a conflict between a provision of Directive 2000/31/EC and a provision of this Directive, the provisions of this Directive shall prevail, unless otherwise provided for in this Directive.”

Second, the CULT Committee introduces a new Article -2f to “ensure that the same procedural rules apply on co-and self-regulation as well as to streamline the establishment of codes of conduct.” The provision applicable to all media services merges what can be found in Article 4, paragraph 7 and in Articles 6a and 28a of the proposal. Indeed, paragraphs 3 and 4 of the new Article -2f are successively a reproduction of the first subparagraph of Article 4, paragraph 7 of the proposal and the third paragraph of Article 6a and the seventh paragraph of Article 28a of the proposed Directive.

Amendments are brought though. The CULT Committee provides that “in co-operation with the Member States, the Commission shall facilitate the development of Union codes of conduct in consultation with media service providers and video-sharing platform providers

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143 Article 28a as proposed by the Commission starts with the same statement.
144 As it is written in Article 28a, 5. of the Proposal.
146 Draft Report, p. 36.
147 “3. Member States shall encourage co- and self-regulation through codes of conduct adopted at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. Those codes shall be broadly accepted by stakeholders in the Member States concerned. The codes of conduct shall clearly and unambiguously set out their objectives. They shall provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at. They shall provide for effective enforcement, including when appropriate effective and proportionate sanctions.”
148 “The Commission and ERGA shall encourage media service providers and video-sharing platform providers to exchange best practices on co-regulatory systems across the Union.”
Draft Union codes of conduct and amendments or extensions to existing Union codes of conduct shall be submitted to the Commission by the signatories of these codes. The contact committee established pursuant Article 29 shall decide on the drafts, amendments or extensions of those codes. The Commission shall publish those codes.”

At least it is a clearer provision. Apart from still using the word ‘appropriate’, the provision gives more information. Indeed, it establishes that the development of Union codes shall be done by the Commission, which will cooperate with the Member States and consult with media service providers. Moreover, while the proposal states that Commission may publish those codes as appropriate, here the committee provides that those codes will be published in any case.

The CULT Committee believes that in order to safeguard the prerogatives of Member States, ERGA should be an advisory and consultative body without any decision-making powers. Consequently, the CULT Committee proposes to establish a ‘contact committee’ to which more competences should be given.

However, more importantly, the committee does not support the proposal for full harmonisation in the form of co- and self-regulation for video-sharing platforms entirely. Hence, a minimum harmonisation level is created and “in case a Member State has proven that any code of conduct does not work effectively, it remains free to enact laws on the matter concerned.”

That being said, some remarks can be made regarding the draft report of the CULT committee. First, the CULT committee decides to keep the minimum harmonisation regarding the provision protecting minors. Member States shall, therefore, remain free to require media service providers and video-sharing platform providers to comply with more detailed or

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150 In comparison with Articles 4, 7.; 6a and 28a of the Proposal.
151 And the problem that may cause when using this word, see supra.
152 Draft Report, p. 74.
154 Draft Report, p. 73.
155 Idem. Cf., Article -2f, 6. of the Draft Report : “If a national independent regulatory body concludes that any code of conduct or parts of it have proven to be not effective enough the Member State of this regulatory body remains free to require media service providers and video-sharing platform providers under their jurisdiction to comply with more detailed or stricter rules in compliance with Union law and in respect of communicative freedoms. Such legislation has to be reported to the Commission without delay.”
stricter rules.\textsuperscript{156} It differs from the proposal of the Commission that establishes maximum harmonisation regarding the obligation of video-sharing platform providers.

Second, it can be noticed that nothing is said about the most harmful content, such as gratuitous violence and pornography.\textsuperscript{157} In the proposal, this kind of content shall be subject to the strictest rules (such as encryption and effective parental controls) by media service providers.\textsuperscript{158} No reference to the most harmful content is made in the draft report. Is it on purpose that the Rapporteurs deleted it? Should gratuitous violence and pornography be treated just like content that may impair the physical, mental or moral development of minors and not anymore as the most harmful content? The question must be stressed.

Third, another provision proposed in the revised Directive is missing. Indeed, nothing is said about the application of the provision to video-sharing platform providers which are not established in a Member State.\textsuperscript{159} Recital 32 nor Article 28b is not commented or even written in the draft report.\textsuperscript{160} It leaves open the question of the application of the provision to video-sharing platform providers that have either a parent company or a subsidiary which is established in a Member State or are part of a group and another entity of that group is set up in a Member State.

In conclusion, it is obvious that the draft report goes a step further than the proposal and seems quite bold. Whereas the video-sharing platform providers in the AV landscape have been so far excluded from the field of regulation, the CULT committee wants now to impose on them the same obligations regarding the protection of minors as for the media service providers. This will be for sure a point of contention during the vote scheduled in committee (1\textsuperscript{st} reading).\textsuperscript{161} The opinions of other committees of the Parliament may also differ from the proposal and the draft report, it is thus interesting to focus on them now.

\textsuperscript{156} Article -2f, 2. of the Draft Report.
\textsuperscript{157} See, Article 12 of the Proposal and Article -2 of the Draft Report.
\textsuperscript{158} See, Article 12 of the Proposal.
\textsuperscript{159} See, Article 28a and Recital 32 of the Proposal. See also the Draft Report.
\textsuperscript{160} See, Draft Report.
\textsuperscript{161} Own opinion developed by the author of this paper.
B. Committee on the Internal Market and Consumer Protection: opinion

On the 19\textsuperscript{th} of December 2016, the Committee on the Internal Market and Consumer Protection (IMCO committee) gave an opinion on the Commission proposal.\textsuperscript{162}

In its short justification, the IMCO committee stresses that the review of the AVMSD, in light of new technology, is an opportunity to level up, where necessary, protection of minors in the non-linear sphere.\textsuperscript{163}

The amendments of the IMCO committee, called to be taken into account by the CULT committee, are quite different from the draft report but more closely in the line of what the Commission proposed.

B.1. Rules addressing the challenge of protecting minors concerning both linear and non-linear services

Regarding Article 12 as proposed by the Commission, the IMCO committee adds two substantial elements. First, it establishes that “\textit{Member States shall take appropriate measures to ensure that programmes provided by audiovisual media service providers, which may impair the physical, mental or moral development of minors, such as advertising for alcoholic beverages or gambling, are only made available in such a way as to ensure that minors will not normally hear or see them}” [emphasis added].\textsuperscript{164} Second, the committee adds that “\textit{the most harmful content, such as gratuitous violence and pornography, shall be subject to the strictest measures, such as encryption and effective parental controls, together with the measures referred to in paragraph 1}”\textsuperscript{164} [emphasis added].”

The fact that it adds advertising for alcoholic beverages or gambling in the provision is strange because advertising for alcoholic beverages or gambling refers to AV commercial

\textsuperscript{162} Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Culture and Education on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COD (2016) 0151; hereinafter referred to as ‘IMCO Opinion’.

\textsuperscript{163} IMCO Opinion, p. 3.

\textsuperscript{164} Namely selecting the time of the broadcast, age verification tools or other technical measures.
communication within the meaning of Article 1, 1(h) of the AVMSD\textsuperscript{165} that stays unchanged. Commercial communications are subject to specific provisions distinct from the ones regulating media service providers.\textsuperscript{166} Therefore, to avoid any misunderstandings and because commercial communications are already settled in another Article, the amendment of the IMCO committee regarding this particular point should not be taken into account.

Another amendment is that the Chapter VIII, entitled ‘Protection of minors in Television Broadcasting’, deleted by the Commission in its proposal, is restored by the IMCO committee because, in its mind, Article 27 of the AVMSD contains important measures with regard to the protection of minors in television broadcasting.\textsuperscript{167}

In this regard, the IMCO opinion differs substantially from the proposal. The IMCO committee wants to maintain two distinct provisions applicable to television broadcasters on the one hand and to non-linear service providers on the other hand. In its opinion, the current Article 27 should be maintained and should continue to apply only to linear service providers. Article 12, applicable to non-linear service providers, is amended in such a way that the obligations of those providers are more consistent with the ones of the linear service providers. For that reason, the opinion of the IMCO committee should be appreciated. Indeed, the desire of the committee to maintain Article 27 is understandable because actually the measures established against television broadcasters are important and justified in the context of the protection of minors. One of the primary objectives of the revision is to take into account new realities related to the Digital world and to align the standards of protection of minors regarding non-linear service providers.\textsuperscript{168} The desire is to avoid the current situation that same contents can be subject to more lenient rules because it is a non-linear service provider that provides the services to the viewer.\textsuperscript{169} The IMCO opinion reflects well that idea by maintaining the standards of protection of minors as established for the linear service providers and by re-equilibrating the standards of protection imposed on non-linear service providers.

\textsuperscript{165} “audiovisual commercial communication’ means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement.”

\textsuperscript{166} Article 9 of the Proposal.

\textsuperscript{167} IMCO Opinion, p. 51.

\textsuperscript{168} See, supra.

\textsuperscript{169} E. LIEVENS, https://www.ebu.ch/news/2016/02/professor-eva-lievens-speaks-on, browsed on the 22\textsuperscript{th} of April 2017, p. 3.
providers. Besides, this allows avoiding a step backward with regard to the most harmful content as settled for the television broadcasters.

Finally, Article 6a that encourages co-regulation on content descriptors is given a new paragraph by the IMCO committee. It adds that “the Commission shall encourage Member States to develop media literacy as a future-proof tool to develop the capability of children to understand the difference between content and commercial communications.”\textsuperscript{170} It justifies this amendment by the fact that “children watch a lot of content that might not be originally directed to them.”\textsuperscript{171} Consequently, it is necessary to enhance media literacy which constitutes a good future-proof tool in order to develop children’ capabilities to understand the difference between content and commercial communications.\textsuperscript{172} In recent years, one of the new techniques developed by advertisers is to attempt to conceal the intent of an ad.\textsuperscript{173} It is more efficient because once the consumers ‘guards’ are down because they do not recognise the advertising as advertising, they will be more open to persuasive arguments about the product.\textsuperscript{174} It is already acknowledged that “younger children often do no understand the persuasive intent of advertisements”\textsuperscript{175} and now, it is said that “even older children probably have difficulty understanding the intent of newer marking techniques that blur the line between commercial and programme content.”\textsuperscript{176} Therefore, it is evident that there is a need to develop the capability of children to understand the difference between content and commercial communication. Enhancing media literacy\textsuperscript{177} will help individuals to have a critical approach to media and marketing communications.\textsuperscript{178}

Although this amendment has been well thought, perhaps it would make more sense to insert this amendment directly in the provision regarding AV commercial communications.\textsuperscript{179} Moreover, even though the amendment of the IMCO committee is in a way justified in view of what has been said previously, it has to be pointed that it comes totally out of left field and

\textsuperscript{170} Article 6a, 2a of the IMCO Opinion.
\textsuperscript{171} IMCO Opinion, p. 37.
\textsuperscript{172} Idem.
\textsuperscript{175} S. L. CALVERT, op. cit., p. 206.
\textsuperscript{176} Idem.
\textsuperscript{177} Cf., B. ŠRAMOVÁ, “Media literacy and Marketing Consumerism Focused on Children”, 141 Procedia - Social and Behavioral Sciences, 2014, pp. 1025-1030.
\textsuperscript{178} B. ŠRAMOVÁ, “Marketing And Media Communications Targeted To Children As Consumers”, 191 Procedia - Social and Behavioral Sciences, 2015, p. 1526.
\textsuperscript{179} Article 9 of the AVMSD.
lacks consistency. It would have helped to find a reference in the preamble of the Directive, but no explanation is given in any Recitals about it. This amendment is coming out of the blue and is hard to interpret. Furthermore, because of the vagueness of the provision, it may not have a real impact/influence in practice.

The other amendment regarding Article 6a is that the IMCO committee states in the last paragraph that “the Commission, together with the ERGA, is encouraged to develop Union codes of conduct.”\textsuperscript{180} So the Commission shall do it in any case and not just ‘where appropriate’ as established in the proposal. Because of what has been said concerning the interpretation of the word ‘appropriate’, its removal by the committee is appreciated.

To conclude this part, not a lot of amendments should be taken into account.\textsuperscript{181} AV commercial communications and editorial content should continue to be distinctly treated to avoid confusions. However, the IMCO opinion is interesting on one point regarding the rules addressing the challenge of protecting minors in both linear and non-linear services. Indeed, as the proposed Article 12 by the Commission does not have a real impact on the linear service providers, it may be a good idea to maintain Article 27 and raises the standards of the non-linear service providers.

**B.2. Extension of the material scope of the AVMSD to video-sharing platforms**

First, the amendment brought to Article 28a touches more the form of the provision than the content in itself. For instance, the committee proposes to start the second paragraph with the exhaustive list of possible measures ensuring the protection established in the first paragraph.\textsuperscript{182} The appreciation of what constitute an appropriate measure is placed in a new paragraph\textsuperscript{183} right after the one that lists the possible measures.

However, regarding the content, the IMCO committee adds in the first paragraph that Member States shall encourage and ensure that video-sharing platform providers take appropriate measures to “limit the exposure of children to advertising of unhealthy foods and

\textsuperscript{180} Article 6a, 3. of the IMCO Opinion.
\textsuperscript{181} Own opinion developed by the author of this paper.
\textsuperscript{182} Article 28a, 2. of the IMCO Opinion.
\textsuperscript{183} Article 28a, 2a. of the IMCO Opinion.
broaden the meaning of the concept of ‘video-sharing platform providers’. It establishes that “video-sharing platform provider’ should be understood in the broadest sense of the term, so as to include linear service providers and platforms for the retransmission of audiovisual media services, regardless of the technical means used for retransmission, such as cable, satellite or internet.”\(^{191}\)

However, the IMCO committee changes the proposition of the Commission to target video-sharing platforms with a secondary establishment in the Union. The amendment provides that:

\(^{184}\) Article 28, 1(ba) of the IMCO Opinion.
\(^{185}\) Article 28, 1(b) of the IMCO Opinion: “protect all citizens from content containing incitement to violence, or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion or belief, disability, descent or national or ethnic or social origin, genetic features, language, political or any other opinion, membership of a national minority, property, birth, age or sexual orientation.”

\(^{186}\) Article 28, 1(a) of the IMCO Opinion: “protect all minors from content which may impair their physical and mental development.”


\(^{188}\) Article 28a, 5. of the IMCO Opinion.

\(^{189}\) Cf., Article 28a, 1. and 2., subparagraph 2 and para. 5. of the IMCO Opinion.

\(^{190}\) Recital 32 of the IMCO Opinion.

\(^{191}\) Last sentence of Recital 32 of the IMCO Opinion.
“1. Member States shall ensure that video-sharing platform providers
(a) which are not established on their territory, but which have either a parent company or a
subsidiary that is established on their territory or which are part of a group and another
entity of that group is established on their territory,

(b) which are established in another Member State but target audiences on their territory, are
deemed to be established on their territory for the purposes of Article 3(1) of Directive
2000/31/EEC.

(...) 

For the purposes of applying the second subparagraph, where there are several subsidiaries
each of which are established in different Member States, or where there are several other
entities of the group each of which are established in different Member States, they shall be
deemed to have been established in the Member State where the majority of the workforce
operates [emphasis added].

2. Member States shall communicate to the Commission a list of the video-sharing platform
providers established on their territory and the criteria, set out in Article 3(1) of Directive
2000/31/EC and in paragraph 1, on which their jurisdiction is based. They shall update the
list regularly. The Commission shall ensure that the competent independent regulatory
authorities have access to this information.”

While the Commission establishes in the proposal that “the Member States concerned shall
ensure that the provider designates in which of these Member States it shall be deemed to
have been established”193, the committee uses the criteria of the localisation of the majority
workforce to determine where the platform is set up. It justifies it because “giving video-
sharing platforms the ability to choose the Member State in which they are deemed to be
established under this directive would be disproportionate as it would allow forum-shopping
practices.”194 According to the committee, the criterion of the localisation of the majority

192 Article 28b of the IMCO Opinion.
193 Article 28b, 1., subparagraph 3 of the Proposal.
194 IMCO Opinion, p. 56.
workforce is clearer and more reliable.  

The committee finally inserts a last paragraph to Article 28b of the proposal. Indeed, it states that if there is a disagreement between Member States in the determination of the competent Member States for the purpose of this Directive, Member States shall bring the matter to the Commission’s attention without undue delay and “the Commission may request the ERGA to provide an opinion on the matter within 15 working days of receipt of the request.” The same way it is provided for the other AV media services, the Commission should be able to act in order to determine which Member State has jurisdiction.

B.3. Rules encouraging the use of co-regulation and self-regulation

While the Commission provides a full harmonisation in the form of co-and self-regulatory codes of conduct, the IMCO committee states that “Member States shall encourage co-regulation and/or self-regulatory regimes, for example through codes of conduct adopted at national level (...) [emphasis added].” Therefore, according to the IMCO Committee, the adoption of codes of conduct is not an obligation but only an example of what Member States can do. Member States thus stay free to encourage co- and self-regulation in the way they want.

In the same vein, the committee settles that “Draft Union codes of conduct referred to in Articles 6a (3), 9(2) and 9(4) and amendments or extensions to existing Union codes of conduct shall be submitted to the Commission by the signatories of these codes for information” Adding ‘for information’ really disturbs. At first sight, it appears that the signatories do not have to submit the codes of conduct. In other words, it seems that if they send the codes to the Commission, it will be appreciated, but if they do not, it will not be a problem either.

Finally, it is stated that the Commission shall publish, and may raise awareness on, those

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195 Idem.
196 Article 28b, 2a of the IMCO Opinion.
197 Article 3 of the AVMSD; Article 3 of the Proposal.
198 IMCO Opinion, p. 57.
199 Article 4, 7., subparagraph 1 of the IMCO Opinion.
200 Article 4, 7., subparagraph 2 of the IMCO Opinion.
codes as appropriate.\textsuperscript{201} If the word ‘appropriate’ was not welcomed, what can be said about this amendment stating that ‘the Commission may raise awareness on’? This amendment leads to too many questions: raise awareness on what, of whom?

The amendments brought by the IMCO committee are too vague and lead to too many questions of interpretation. Therefore, they should not be taken into account in the future discussions.

\textit{C. Committee on Legal Affairs: opinion}

The opinion of the Committee on Legal Affairs (JURI committee) on the Commission proposal was given to the CULT committee on the 16\textsuperscript{th} of January 2017.\textsuperscript{202}

The JURI committee also points out in its short justification that media convergence calls for the re-examination of the scope of application of the AVMSD, as well as of the nature of the rules applicable to all market players, including, \textit{inter alia}, the rules on the protection of minors.\textsuperscript{203} For this purpose, the committee stresses that the primary objectives of the proposal are centred on three main problematic issues, and the first one is precisely the protection of minors and consumers on video-sharing platforms.\textsuperscript{204}

Generally speaking, the opinion of the JURI committee is in accordance with the Commission proposal. Moreover, the JURI Committee does not amend Article 4, paragraph 7 as revised by the Commission. Therefore, no subsection will be dedicated to it. The focus will only be on the two distinct provisions applicable to media service providers on the one hand and video-sharing platform providers on the other hand.

\textsuperscript{201} Article 4, 7., subparagraph 3, last sentence of the IMCO Opinion.
\textsuperscript{202} Opinion of the Committee on Legal Affairs for the Committee on Culture and Education on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COD (2016) 0151; hereinafter referred to as ‘JURI Opinion’.
\textsuperscript{203} JURI Opinion, p. 3.
\textsuperscript{204} Idem.
C.1. Rules addressing the challenge of protecting minors concerning both linear and non-linear services

The only amendment brought to Article 12 is another example of what could constitute the most harmful content. Indeed, next to gratuitous violence and pornography, the JURI committee adds ‘incitement to terrorism’. Compared to the more traditional forms of communication, terrorist use of the Internet has been gaining in popularity in recent years because of its relative anonymity and its wide availability. Incitement to terrorism in media services is thus a sensitive subject that needs to be taken into account. However, it is known that “there is widespread uncertainty about what constitutes the incitement of terrorism in the European Union.” Because it does not refer to a clarified legal standard, this amendment could lead to some abuses when it comes to the interpretation of this concept by Member States. Moreover, there is a general provision stating that AV media services shall not contain “any incitement to violence or hatred directed against a group of persons or a member of such a group (...).” Incitement to terrorism falls within the concept of incitement to violence or hatred. Therefore, it is not necessary to add ‘incitement to terrorism’ in this provision.

Besides, the committee brings one amendment to Article 6a. Instead of encouraging media service providers to exchange best practices on co-regulatory systems as established in the proposal, the Commission and ERGA shall support media service providers in exchanging them. Therefore, the role of the Commission and ERGA is reinforced. Rather than just encourage, they must play a supportive role.

207 Article 6 of the Proposal. Moreover, the JURI committee amends it in the following way: “Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to violence, terrorist acts or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, ethnic or social origin, language, religion, belief, opinion, disability, age or sexual orientation [emphasis added].”
208 Article 6a, 3. of the JURI Opinion.
C.2. Extension of the material scope of the AVMSD to video-sharing platforms

Regarding the first provision applicable to video-sharing platform services, no significant amendments are brought as well.

In the first paragraph of Article 28a, it is stated that “the Commission and Member States shall ensure that video-sharing platform providers take appropriate measures [emphasis added].” The addition of the Commission in this paragraph seems inappropriate though. Member States are better placed to ensure that video-sharing platform providers under their jurisdiction take appropriate measures. The frontier between what Member States have to do and what the Commission has to do should stay clear.

In the same vein of what the committee added in Article 12, the first measure proposed in the exhaustive list of possible measure ensuring the protection is modified in the following way:

“Defining and applying in the terms and conditions of the video-sharing platform providers the concepts of incitement to the commission of terrorist acts or any other form of violence or hatred as referred to in point (b) of paragraph 1 and of content which may impair the physical, mental or moral development of minors, in accordance with Articles 6 and 12 respectively [emphasis added].”

Regarding Article 28b, the JURI committee follows the idea of the IMCO committee and modifies in the same way the criteria used to determine where the platform is established. The localisation of the majority workforce is also justified as being a precise and reliable criterion.

Moreover, the JURI committee also adds a new paragraph to Article 28b establishing that “where, in applying paragraph 1, the Member States concerned do not agree on which Member State has jurisdiction, they shall bring the matter to the Commission's attention.

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209 Article 28a, 2(a) of the JURI Opinion.
210 Where there are several subsidiaries each of which are established in different Member States, or where there are several other entities of the group each of which are established in different Member States. See, Article 28b, 1., subparagraph 3 of the JURI Opinion.
211 Cf., JURI Opinion, p. 34.
without undue delay. The Commission may request the ERGA to provide an opinion on the matter within 15 working days from the submission of the Commission's request.”212 It can be noticed that it is the same paragraph added by the IMCO committee in its opinion. As well, the justification given is the same as the one provided by the IMCO committee.213

D. Committee on the Environment, Public Health and Food Safety: opinion

On the 1st of February 2017, the CULT committee received the opinion of the Committee on the Environment, Public Health and Food Safety (ENVI committee).214

In its short justification, the ENVI committee specifically highlights that the two first primary objectives of the proposal are to enhance the protection of minors and consumers in general and to ensure a level playing field between linear, non-linear services and video-sharing platforms.215

Again, the committee follows the framework proposed by the Commission in its proposal. The ENVI committee also does not amend Article 4, paragraph 7 as revised by the Commission. Therefore, no subsection will be dedicated to it. The focus will only be on the two distinct provisions applicable to media service providers and video-sharing platform providers.

D.1. Rules addressing the challenge of protecting minors concerning both linear and non-linear services

Although few amendments are brought to Article 12, they are significant. The ENVI committee states first that “Member States shall take all necessary measures to ensure that programmes provided by audiovisual media service providers under their jurisdiction, which may impair the physical, mental or moral development of minors are only made available in

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212 Article 28b, 2a of the JURI Opinion.
213 Cf., JURI Opinion, p. 34.
214 Opinion of the Committee on the Environment, Public health and Food safety for the Committee on Culture and Education on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COD (2016) 0151; hereinafter referred to as ‘ENVI Opinion’.
215 ENVI Opinion, p. 3.
such a way as to ensure that minors will not hear or see them [emphasis added] (…).” 216

The ENVI committee changes, therefore, the ‘appropriate measures’ to ‘all necessary measures’. The term ‘appropriate’ is more subject to interpretation than the term ‘necessary’. Therefore, the change is appreciable. Moreover, it can be noticed that the committee deletes the word ‘normally’ in the sentence ‘minors will not normally hear or see them’, as set out in Article 12 of the proposal. Again, because the term ‘normally’ could leave a margin of appreciation, it should thus be removed.

Finally, the committee adds that “the Commission and the ERGA shall develop technical standards to this effect and ensure an effective implementing mechanism.” 217

Regarding Article 6a, the committee is going further than the Commission. First, the ENVI committee provides that the information given to viewers must be clear information about content which may damage or disturb minors and, in particular, impair their physical, mental or moral development. By adding content that may damage or disturb to the one that may impair the physical, mental or moral development of minors, the committee wants to establish on media providers an obligation more constraining in order to protect minors.

Second, this information must be given “prior to and during programmes as well as before and after any interruption to programmes.” The committee is the first one to indicate when the information must be provided. With this indication, the provision is more powerful but also becomes a bigger burden on providers.

Third, the obligation is enlarged not only to AV media service providers but also to video-sharing platform providers. 218

Finally, the committee amends the last sentence of the last paragraph of Article 6a in the following way:

216 Article 12 of the ENVI Opinion.
217 Article 12, subparagraph 1, last sentence of ENVI Opinion.
218 See, infra.
“(…) Where necessary, the Commission and the ERGA shall develop and promote the adoption of Union codes of conduct.”

Therefore, the development of Union codes of conduct is not only on the Commission but also on the ERGA, and it must be done ‘where necessary’ and not ‘where appropriate’. Although the word ‘necessary’ can also lead to some questions, at least with this amendment, the Commission and the ERGA have to develop Union codes of conduct and not just facilitate the development of those. The obligation is thus clearer.

**D.2. Extension of the material scope of the AVMSD to video-sharing platforms**

To stay logical with the amendment in Article 12, the ENVI committee amends the first paragraph of Article 28a in the following way:

“1. Without prejudice to Articles 14 and 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers take all necessary measures to: (...)[emphasis added].”

However, the most significant amendment to Article 28a is the addition of a new paragraph stating that “Member States shall take appropriate measures to ensure that programmes provided by video-sharing platform 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 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, such as encryption and effective parental controls.”

The ENVI committee makes a reproduction of Article 12 of the proposal which applies to

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219 Article 28, 1a of the ENVI Opinion.
media services providers. It establishes, therefore, the same rules to video-sharing platform providers. By doing that, the committee aims “to strengthen protection of minors with the context of video-sharing platforms.”

As the ENVI committee clearly wants to ensure the same level of protection of minors in all media services (linear, non-linear services and video-sharing platforms), it reproduces also what it wrote in Article 12, namely that “the Commission and the ERGA shall develop technical standards to this effect and ensure an effective implementing mechanism.” This is also why it can be found in paragraph 7 of Article 28a that “where necessary, the Commission and the ERGA shall develop and promote the adoption of Union codes of conduct.”

Finally, the objective of the ENVI committee to ensure the same level of protection of minors in all media services justifies why it also renders Article 6a applicable to video-sharing platform services.

To conclude, it can be noticed that the will of the ENVI committee is quite similar to the CULT committee. The only difference resides in the fact that the ENVI committee maintains two distinct provisions applicable on the one hand to media service providers and one the other hand to video-sharing platform providers while the CULT committee gathers everything in one Article that applies to both.

**E. Committee on Civil Liberties, Justice and Home Affairs: opinion**

The Committee on Civil Liberties, Justice and Home Affairs (LIBE committee) is the last committee to have given its opinion on the 3rd of February 2017.

The LIBE committee proposes to approach the review in a slightly different way than the others. Indeed, having read its short justification, what is blindingly obvious is the will of the committee to strengthen the fundamental rights-related provisions. Because it has been

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220 ENVI Opinion, p. 22.
221 Article 28a, 2., subparagraph 2, introductory part of the ENVI Opinion.
222 Opinion on Civil Liberties, Justice and Home Affairs for the Committee on Culture and Education on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COD (2016) 0151; hereinafter referred to as ‘LIBE Opinion’.
shown that the protection of minors can be used as a ground to restrict the diffusion of AV content that aims at combatting discrimination based on gender or sexual orientation, the committee believes that it is of utmost importance to ensure that measures implemented by Member States to protect minors are necessary and proportionate and fully respect the obligations of the Charter of Fundamental Rights.\textsuperscript{223} Respecting fundamental rights is a recurring idea that can be found all along the opinion.

However, the LIBE committee follows the same structure as the Commission in its proposal. Therefore, the three previous subsections will be analysed.

**E.1. Rules addressing the challenge of protecting minors concerning both linear and non-linear services**

The committee brought three amendments to Article 12. First, it settles that appropriate measures shall be taken to ensure that ‘programmes which may impair the physical or mental development of minors’ are only available in such a way as to ensure that minors will not normally hear or see them.\textsuperscript{224} The word ‘moral’ is thus removed. The justification given is that ‘moral’ is an ambiguous term which can be understood differently in the Member States.\textsuperscript{225}

Second, it settles that in addition to being proportionate to the potential harm of the programmes, measures taken shall not lead to any additional processing of personal data and be without prejudice to Article 8 of Regulation (EU) 2016/679\textsuperscript{226}.\textsuperscript{227} The reference to the new Data Protection Regulation may be appreciable. Indeed, the collection and further processing of children’s data could be used to adopt age verification mechanisms.\textsuperscript{228}

Third, without surprise with what has been said previously, the committee reminds that Member States shall ensure that the measures taken to protect minors are "necessary and

\textsuperscript{223} LIBE Opinion, p. 4. Cf., for example, Recital 30a of the LIBE Opinion.
\textsuperscript{224} Article 12, subparagraph 1 of the LIBE Opinion.
\textsuperscript{225} LIBE Opinion, p. 8.
\textsuperscript{227} Article 12, subparagraph 2, last sentence of the LIBE Opinion.
\textsuperscript{228} Report of the Committee on Civil Liberties, Justice and Home Affairs on a comprehensive approach on personal data protection in the European Union, A7-0244/2011, p. 10.
proportionate and fully respect the obligation set out in the Charter, in particular those set out in Title III and Article 52 thereof."

Logically, regarding Article 6a, the committee removes the word ‘moral’ and amends the first paragraph in the following way:

“1. Member States shall ensure that audiovisual media service providers provide sufficient information to viewers about content which may impair the physical or mental development of minors. For this purpose, Member States may use a system of descriptors indicating the nature of the content of an audiovisual media service, which properly warns parents to restrict their children from watching certain programmes [emphasis added].”

This amendment explains clearly that the system of descriptors has to adequately warn parents to restrict their children from watching certain programmes. Because this helps to understand exactly what kind of system is expected, the amendment is valuable.

It can be stressed that the LIBE committee also has a pro-active attitude, but unlike the IMCO committee that introduces directly in Article 6a that Member States shall be encouraged to develop media literacy, it only refers to it in two new Recitals. Indeed, it states, *inter alia*, that further efforts are needed in the field of improving media literacy among citizens, in particular children and minors, and that Member States are encouraged to take all necessary measures to promote media education, which empowers citizens to analyse media content and to react to disinformation. By putting this into Recitals and not directly into a provision, the committee does not give to this statement any binding legal value.

In conclusion to this part, even though the committee has raised some interesting elements as the reference to the Data Protection Regulation, this will not probably be taken into account in the future discussions. Moreover, coming from the LIBE committee, the mention of the fundamental rights was quite predictable. However, given the proposal and the other opinions, those elements do not appear to be of such importance.

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229 Article 12, new subparagraph 3 of the LIBE Opinion.
230 Article 6a, 1. of the LIBE Opinion.
231 See, *supra*.
232 Recitals 8a, 8b of the LIBE Opinion.
E.2. Extension of the material scope of the AVMSD to video-sharing platforms

First of all, the committee amends the definition of video-sharing platforms services slightly by specifying that it is a service that must meet all the requirements established.\textsuperscript{233} The word ‘all’ leaves no doubt of the cumulative nature of the conditions in order to have the video-sharing platform service falling within the scope of the Directive.

Secondly, some amendments are brought to Article 28a. First, the committee states in the first paragraph that:

“1. Without prejudice to Articles 14 and 15 of Directive 2000/31/EC, the Commission and Member States shall ensure that video-sharing platform providers take appropriate measures to:
(a) protect all minors from content which may impair their physical or mental development;

(...).”

Therefore, it can be noticed that the LIBE committee acts in the same way as the JURI committee by adding that the Commission and Member States shall both ensure that video-sharing platform providers take appropriate measure. Besides, as the LIBE committee did to Article 12, it removes the word ‘moral’ in all the provision.

The amendments brought to the exhaustive list of possible measures ensuring the protection established in Article 28a are not of great importance. However, it can be pointed out that, as the committee did in Article 12, it also adds that the age verification systems “shall not lead to any additional processing personal data and shall be without prejudice to Article 8 of the new Data Protection Regulation.”\textsuperscript{234}

Strong advocate of fundamental rights, the LIBE committee provides that “the Commission shall encourage co-regulation as provided for in Article 4(7), through the adoption of guidelines ensuring that codes of conduct comply with the provisions of this Directive and

\textsuperscript{233} Article 1, 1(aa) of the LIBE Opinion.
\textsuperscript{234} Article 28a, 2., subparagraph 2 (c) of the LIBE Opinion.
fully respect the obligations set out in the Charter of Fundamental Rights, in particular Article 52 thereof.”

In the same vein, it states that “in addition to appropriate measures already taken by video-sharing platform providers, provided that any measure taken, for the purposes of this Directive, to restrict the online distribution, or otherwise making available, of illegal content to the public is in line with the Charter of Fundamental Rights, is limited to what is necessary and proportionate and is taken on the basis of a prior judicial authorisation.”

Lastly, the link with the e-Commerce Directive can also be found in Article 28a. The LIBE committee recommends in its justification that “the provisions of the e-commerce Directive are not affected by measures applying to video-sharing platform services and the audiovisual media content they are hosting.” Therefore, it found for instance necessary to include within a new Recital a reference to two judgements of the Court of Justice which refer to obligations and liability of the video-sharing platform providers. As it has been said before, Recitals have not binding legal value but help giving an interpretation to the provisions of the Directive.

Again, the amendments brought to Article 28 are not of such importance and will probably not have a real impact during the discussions.

E.3. Rules encouraging the use of co-regulation and self-regulation

The LIBE committee changes radically paragraph 7 of Article 4 simply by removing a word and replacing it by another. Indeed, the first sentence of paragraph 7 starts in its opinion stating that “the Commission shall encourage and facilitate co-regulation and self-regulation through codes of conduct (…), while in the proposal, the Commission gives this power to Member States. However, the Commission shall do it in the fields coordinated by the Directive to the extent permitted by national legal systems. After that, the codes of conduct

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235 Article 28a, 3. of the LIBE Opinion. See, Recital 26 of the LIBE Opinion.
236 Article 28a, 5. of the LIBE Opinion.
237 LIBE Opinion, p. 4.
238 See, new Recital 32a of the LIBE Opinion.
239 Own opinion developed by the author of this paper.
240 Article 4, 7., subparagraph 1 of the LIBE Opinion.
shall be approved by the national regulatory body or authority.\textsuperscript{241} As the committee gives the power to the Commission, it establishes finally that “Member States shall ensure that in the event co-regulation fails to achieve the desired level of protection, national regulatory bodies or authorities have effective enforcement powers, including through issuing binding codes of conduct and applying administrative sanctions.”\textsuperscript{242}

This is probably the best provision proposed regarding rules encouraging the use of co- and self-regulation. Indeed, it sets up a real system where all seem to have been well thought out. The codes of conduct are adopted by the Commission and broadly accepted by the main stakeholder (private actors). This allows having uniformity within the EU. The codes are then submitted to the approval of the national regulatory body/authority. Moreover, the guidelines regarding what is expected in those codes are clearer. The objectives and measures of those codes shall be clearly and unambiguously set out. A regular, transparent and independent monitoring and evaluation of the achievement of the objectives shall be provided. It also settles that ‘when appropriate, effective and proportionate sanctions are applied.’ Finally, it also takes into account the situation where ‘co-regulation fails to achieve the desired level of protection’ and provides that it is up to the national authorities to take over.

\textbf{§3. The Committee of the Regions: opinion}

On its initiative\textsuperscript{243}, the Committee of the Regions (CofR) adopted an opinion on the review of the AVMSD on the 7\textsuperscript{th} of December 2016.\textsuperscript{244}

Generally speaking, the CofR welcomes, on the one hand, the fact that the revised Directive strengthens and harmonises protection of minors and on the other hand, the fact that the proposal extends its scope of application to video-sharing platform services.\textsuperscript{245}

Even though the CofR follows the structure of the Commission, no subsections are needed because the CofR almost does not amend the provisions treated in this paper. Moreover, when amendments are done, they are practically always purely grammatical ones.

\textsuperscript{241} Idem.
\textsuperscript{242} Idem.
\textsuperscript{243} Rule 41(b)(i) of the Rules of Procedure of the Committee of the Regions.
\textsuperscript{244} Opinion of the European Committee of the Regions on the Review of the Audiovisual Media Services Directive, COR (2016) 04093; hereinafter referred to as ‘CofR Opinion’.
\textsuperscript{245} CofR Opinion, p. 1.
The CofR does not amend Article 12 which provides for alignment of the standards of protection of minors for TV broadcasting and on-demand services, neither Article 6a which encourages co-regulation on content descriptors to provide sufficient information to viewers about the possible harmful nature of the content.

Regarding Article 28a, the CofR only amends the penultimate paragraph and states that “the Commission shall facilitate the development of Union codes of conduct, particularly by drafting and publishing models of codes.”246 By doing that, it gives an example of what the Commission has to do to facilitate the elaboration of those codes.

Moreover, as Article 28a obliges video-sharing platform providers to take appropriate measures to protect minors and to prohibit content inciting hatred, the committee believes that it would be useful for the Directive’s Recitals to include some explanation of the different measures in order to ensure a uniform interpretation of the Directive by service providers and the relevant regulatory authorities.247 For this purpose, the CofR introduces a new Recital 30 where it sets, inter alia, that “age verification systems afford an appropriate level of protection, particularly when the age of the user is verified using data from identify documents that are only available for adult users, proof of age from reliable third parties or biometric data.”248

The only amendment brought to Article 4, paragraph 7 regarding the encouragement to co- and self-regulation through codes of conduct is the replacement of the verb ‘may’ by ‘shall’ in the last subparagraph. The CofR states thus that “the Commission shall ask ERGA to give an opinion on the drafts, amendments or extensions of those codes. The Commission shall publish those codes.”249 Therefore, it turns into an obligation the publication of those codes, which is a good thing.

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246 Article 28a, 7., last sentence of the CofR Opinion.
247 CofR Opinion, p. 5.
248 New Recital 30 of the CofR Opinion.
249 Article 4, 7., subparagraph 3 of the CofR Opinion.
Chapter 4 – Recommendations

Generally speaking, the proposal is generally less far-reaching than expected. The framework proposed by the draft report of the CULT committee should be followed because it is the one that takes into account the realities of today’s media convergence. Indeed, to stay in the light of rapid technological and market development, the same degree of protection of minors should be established to all services. It is already pointed out that “video viewing is now one of the earliest Internet activities carried out by young children.” Moreover, video-sharing platforms employ tools like AutoPlay, which allows switching on by default for all videos. This kind of system enables direct exposure to potentially harmful content. For instance, in 2015, the video of two US journalists being murdered was posted to Twitter and Facebook. Both social media companies quickly took down the video after 10 or 15 minutes of diffusion, however, during this lapse of time, due to the AutoPlay future, user reports suggested that thousands and thousands of people saw the video unwillingly in their news feed. No need to specify that viewing deaths without warning or preparation can cause real harm. Adding to that, children themselves identify video-sharing platforms as mostly linked with violent, pornographic and other harmful content risks.

All of these lead to say that Member States must ensure that both media service providers and video-sharing platform providers take appropriate measures to protect minors in the same way. The convergence between those services will probably become gradually more tangible in the future. It is the occasion for the European Institutions to grasp the nettle and establish a genuine level playing field between those providers.


251 Ibidem, p. 96.


253 Ibidem.

However, as it has been said previously, the CULT committee only talks about programmes or user-generated videos which may impair the physical, mental or moral development of the children. Therefore, adding to the amendment of the CULT committee, a subparagraph, also applicable to all media services, should be dedicated to the most harmful content, such as gratuitous violence and pornography, which shall be subject to the strictest measures.²⁵⁵

Regarding the definition of video-sharing platforms services, an interesting point has been raised in the contribution of the French Senate to the proposal.²⁵⁶ In the definition of video-sharing platforms, the proposal establishes one main criterion, namely the ‘storage’ function of programmes or videos generated by users.²⁵⁷ The French Senate proposes to take also into account platforms which make available users’ videos.²⁵⁸ The justification given is that the current proposed definition tends to exclude other digital platforms or intermediaries that base a significant part of their activity on the dissemination, recommendation or repossess of users' videos without storing them, like social media.²⁵⁹ Certain platform providers will have to protect minors vis-à-vis contents which may impair their physical, mental or moral development, while those same contents could be visualised without any ‘barriers’ in other easily accessible platforms.²⁶⁰ Therefore, the same rules should apply to them too.

Finally, regarding the rules encouraging the use of co-regulation and self-regulation, too many questions are left open. It is, therefore, imperative that provisions provide more specifications about the concrete adoption of the codes of conduct, in particular the Union codes of conduct. How are they going to be adopted in practice, shall the publication be mandatory? In this regard, the amendment of the LIBE committee should be used as an example.

²⁵⁵ As established in Article 12 of the Proposal.
²⁵⁷ Cf., Article 1, 1(aa) of the Proposal.
²⁵⁹ Idem.
²⁶⁰ Idem.
Conclusion

It has been a while that the AV media landscape has dramatically changed. The ‘digital world’ is not so new anymore. Therefore and because the AVMSD is the cornerstone of media regulation in the EU, the revision of the Directive has been more than well welcomed. Indeed, the convergence of traditional, linear TV and content distributed via services that are distributed via the Internet, smart TVs, mobile devices and so on has put real pressure on the European actors to modernise the current Directive. What is all common in the Commission proposal and the opinions studied it is the will to adapt the AVMSD with the technological changes and to take into account new emerging business models such as VOD and user-generated content. Moreover, what is also apparent – and defines as one of the main objectives of the revision – it is the consciousness that the review is an opportunity to level up, where necessary, protection of minors.

The Commission proposal provides that programmes broadcasted by TV broadcasters or provided by on-demand media service providers that 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. The Commission simplifies the Directive by aligning the rules on protection of children to both linear and non-linear services. The Commission extends the scope of the Directive to video-sharing platform providers which shall take measures, lighter than the ones taken by AV media service providers, to protect minors from harmful content. The Committee on Culture and Education – the parliamentary committee responsible – is going further and amends the proposal so that the same requirements regarding the protection of minors from content that may impair their physical, mental or moral development should be established for media service providers (linear and non-linear ones) and video-sharing platform providers. The Committee on the Internal Market and Consumer Protection agrees on Article 12 but renders it applicable to non-linear services. It amends the proposal by restoring Article 27, only applicable to television broadcasting, which contains important measures with regard to the protection of minors. The Committee on Legal Affairs, as well as the Committee on the Environment, Public Health and Food Safety, provide the alignment on the rights and obligations of the traditional services with those of the on-demand providers. Moreover, the Committee on the Environment, Public Health and Food Safety amends the proposal so that video-sharing platform providers shall also take measures in order that programmes 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 and see them. By strengthening protection of minors with the context of video-sharing platforms, it converges on the amendments of the Committee on Culture and Education. The last committee of the European Parliament to have given its opinion is the Committee on Civil Liberties, Justice and Home Affairs. This committee amends for the central part the proposal to make sure that measures implemented to protect minors fully respect the obligation of the Charter of Fundamental Rights. Lastly, the Committee of the Regions gave on its own initiative its opinion. It is a small opinion and almost does not amend the provisions studied in this paper, or at least not in a relevant way.

That being said, all developments were taken into account until the 24th of April 2017. Indeed, the ordinary legislative procedure is still going on. It is the beginning because once the Commission proposal was published, it was sent to the European Parliament. Then, as it has been analysed, the parliamentary committee responsible and four European Parliament committees have proposed amendments to the Commission’s proposal. This is where this paper ends but those amendments will be put to the vote, and the European Parliament will deliver a position at first reading. Then, after the conclusion of the first reading, meaning that the draft legislative resolution is adopted, the text of the proposal as approved by the European Parliament and the accompanying resolution shall be forwarded to the Council and the Commission. The Commission may alter its legislative proposal, enabling it to incorporate European Parliament amendments. At the same time, the Council has to take position, and if it does not share the view expressed by the Parliament, it can take a common position which can lead to European Parliament second reading. Anyway, without going into further details, it can already be seen that the procedure will still last for some time.

The vote on the first reading was initially scheduled on the 24th of January 2017 but is now scheduled on the 25th of April 2017. Because of the amendments of the Committee on Culture and Education, somehow followed by the amendments of the ENVI committee, all this leads to believe that discussions will probably not be so easy. In this respect, two things can be hoped. The first thing is that they will agree that today’s new technology realities do

263 Article 293(2) of the TFEU.
264 Article 294 of the TFEU.
justify that the same requirements to protect minors from content that may impair their physical, mental or moral development must be imposed on linear and non-linear service providers but also on video-sharing platform providers. The second is that the discussions will not take so much time because, after the adoption of the final Directive, Member States have to implement it into their national legislation. This will also take some time. The current Directive has not been revised since 2007, it would, therefore, be appreciable if its revision does not drag out in time.
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Annexes

Annexe 1 - Rules addressing the challenge of protecting minors concerning both linear and non-linear services

Overview of Graduated Regulation

<table>
<thead>
<tr>
<th>Content which might impair minors</th>
<th>Total ban Article 27(1)</th>
<th>Only available in a way minors will not normally hear or see such content Article 12</th>
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</thead>
<tbody>
<tr>
<td>Content which is likely to impair minors</td>
<td>No restrictions</td>
<td>Ensure that minors in the area of transmission will not normally hear or see such broadcasts through encryption or other measures. Art 27 (2),(3)</td>
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<tr>
<th>Proposal</th>
<th>Draft Report</th>
<th>IMCO Opinion</th>
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<tr>
<td>One provision: <strong>Article 12</strong></td>
<td>One (new) provision: <strong>Article 2</strong></td>
<td>Two provisions: 1) <strong>Article 27</strong> (linear services) of AVMSD maintained</td>
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<tr>
<td>“Member States shall take appropriate measures to ensure that programmes provided by audiovisual 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...”</td>
<td>“1. Without prejudice to Articles 14 and 15 of Directive 2000/31/EC, Member States shall ensure that media service providers and video-sharing platform providers under their jurisdiction take appropriate measures to: (a) protect all citizens from programmes and user-generated videos containing incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, racial or...”</td>
<td>“1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.”</td>
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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, such as encryption and effective parental controls."

2. The measures provided for in paragraph 1 shall also extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.

3. In addition, when such programmes are broadcast in unencoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.”

2) Article 12 (non-linear services)
“Member States shall take appropriate measures to ensure that programmes provided by audiovisual service providers under their jurisdiction, which may impair the physical, mental or moral development of minors, such as advertising for alcoholic beverages or gambling, 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, such as encryption and effective parental controls, together with the measures referred to in paragraph 1.”
Member States shall respect the conditions set by applicable Union law, in particular Articles 14 and 15 of Directive 2000/31/EC or Article 25 of Directive 2011/93/EU.

4. Member States shall ensure that complaint and redress mechanisms are available for the settlement of disputes between recipients of a service and media service providers or video-sharing platform providers relating to the application of the appropriate measures referred to in paragraphs 1 and 2.”

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<tr>
<th>Article 6a</th>
<th>Article -2 &amp; Article -2f</th>
<th>Article 6a</th>
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<tr>
<td>“1. Member States shall ensure that audiovisual media service providers provide sufficient information to viewers about content which may impair the physical, mental or moral development of minors. For this purpose, Member States may use a system of descriptors indicating the nature of the content of an audiovisual media service. 2. For the implementation of this Article, Member States shall encourage co-regulation. 3. The Commission and ERGA shall encourage media service providers to exchange best practices on co-regulatory systems across the Union. Where appropriate, the Commission shall facilitate the development of Union codes of conduct.”</td>
<td>Above- and below-mentioned</td>
<td>“1. Member States shall ensure that audiovisual media service providers provide sufficient information to viewers about content which may impair the physical, mental or moral development of minors. For this purpose, Member States may use a system of descriptors indicating the nature of the content of an audiovisual media service. 2. For the implementation of this Article, Member States shall encourage co-regulation. 2a. The Commission shall encourage Member States to develop media literacy as a future-proof tool to develop the capability of children to understand the difference between content and commercial communications. 3. The Commission and ERGA shall encourage media service providers to exchange best practices on co-regulatory systems across the Union. The Commission, together with the ERGA, is encouraged to develop Union codes of conduct.”</td>
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Annexe 2 - Extension of the material scope of the AVMSD to video-sharing platforms

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<th>Proposal</th>
<th>Draft Report</th>
<th>ENVI Opinion</th>
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<tr>
<td><strong>Article 28a</strong></td>
<td><strong>Article 2 &amp; Article 2f</strong></td>
<td><strong>Article 28a</strong></td>
</tr>
<tr>
<td>“1. Without prejudice to Articles 14 and 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers take appropriate measures to: (a) protect minors from content which may impair their physical, mental or moral development; (b) protect all citizens from content containing incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin. 2. What constitutes an appropriate measure for the purposes of paragraph 1 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 and/or uploaded the content as well as the public interest. Those measures shall consist of, as appropriate: (a) defining and applying in the terms and conditions of the video-sharing platform providers the concepts of incitement to violence or hatred as referred to in point (b) of paragraph 1 and of content which may impair the...”</td>
<td>Above- and below-mentioned</td>
<td>“1. Without prejudice to Articles 14 and 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers take all necessary measures to: (b) protect all citizens from content containing incitement to terrorism or to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin. (a) Member States shall take appropriate measures to ensure that programmes provided by video-sharing platform 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 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, such as encryption and effective parental controls. 2. What constitutes an appropriate measure for the purposes of paragraph 1 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...”</td>
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physical, mental or moral development of minors, in accordance with Articles 6 and 12 respectively;
(b) establishing and operating mechanisms for users of video-sharing platforms to report or flag to the video-sharing platform provider concerned the content referred to in paragraph 1 stored on its platform;
(c) establishing and operating age verification systems for users of video-sharing platforms with respect to content which may impair the physical, mental or moral development of minors;
(d) establishing and operating systems allowing users of video-sharing platforms to rate the content referred to in paragraph 1;
(e) providing for parental control systems with respect to content which may impair the physical, mental or moral development of minors;
(f) establishing and operating systems through which providers of video-sharing platforms explain to users of video-sharing platforms what effect has been given to the reporting and flagging referred to in point (b).

3. **For the purposes of the implementation of the measures** referred to in paragraphs 1 and 2, **Member States shall encourage co-regulation as provided for in Article 4(7).**

4. Member States shall establish the necessary mechanisms to assess the appropriateness of the measures referred to in paragraphs 2 and 3 taken by video-sharing platform providers. Member States shall entrust this task to the authorities designated in accordance with Article rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created and/or uploaded the content as well as the public interest.

**The Commission and the ERGA shall develop technical standards to this effect and ensure an effective implementing mechanism.** Those measures shall consist of, as appropriate: see proposal

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<td>3.</td>
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<td>6.</td>
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<td>7.</td>
<td>The Commission and ERGA shall encourage video-sharing platform providers to exchange best practices on co-regulatory systems across the Union. Where necessary, the Commission and the ERGA shall develop and promote the adoption of Union codes of conduct.</td>
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<td>8.</td>
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5. Member States shall not impose on video-sharing platform providers measures that are stricter than the measures referred to in paragraph 1 and 2. Member States shall not be precluded from imposing stricter measures with respect to illegal content. When adopting such measures, they shall respect the conditions set by applicable Union law, such as, where appropriate, those set in Articles 14 and 15 of Directive 2000/31/EC or Article 25 of Directive 2011/93/EU.

6. Member States shall ensure that complaint and redress mechanisms are available for the settlement of disputes between users and video-sharing platform providers relating to the application of the appropriate measures referred to in paragraphs 1 and 2.

7. The Commission and ERGA shall encourage video-sharing platform providers to exchange best practices on co-regulatory systems across the Union. Where appropriate, the Commission shall facilitate the development of Union codes of conduct.

8. Video-sharing platform providers or, where applicable, the organisations representing those providers in this respect shall submit to the Commission draft Union codes of conduct and amendments to existing Union codes of conduct. The Commission may request ERGA to give an opinion on the drafts, amendments or extensions of those codes of conduct. The Commission may give appropriate publicity to those codes of conduct.
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<td>7. Member States shall encourage co-regulation and self-regulation through codes of conduct adopted at national level in the fields coordinated by this Directive to the extent permitted by their legal systems.</td>
<td>“1. Member States shall, by appropriate means, ensure, within the framework of their legislation, that media service providers and video-sharing platform providers under their jurisdiction effectively comply with the provisions of this Directive.</td>
<td>“7. The Commission shall encourage and facilitate co-regulation and self-regulation through codes of conduct in the fields coordinated by this Directive to the extent permitted by national legal systems. Those codes shall be such that they are broadly accepted by the main stakeholders concerned and approved by the national regulatory body or authority. The codes of conduct shall clearly and unambiguously set out their objectives and measures. They shall provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at. They shall provide for effective and transparent enforcement, including when appropriate, effective and proportionate sanctions are applied. Member States shall ensure that in the event co-regulation fails to achieve the desired level of protection, national regulatory bodies or authorities have effective enforcement powers, including through issuing binding codes of conduct and applying administrative sanctions.</td>
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<td>Draft Union codes of conduct referred to in Articles 6a (3), 9(2) and 9(4) and amendments or extensions to existing Union codes of conduct shall be submitted to the Commission by the signatories of these codes.</td>
<td>2. Member States shall remain free to require media service providers and video-sharing platform providers under their jurisdiction to comply with more detailed or stricter rules with regard to Articles -2 to -2e, Article 7, Article 13, Article 16, Article 17, Articles 19 to 26, Articles 30 and 30a provided that such rules are in compliance with Union law and in respect of communicative freedoms.</td>
<td>Draft Union codes of conduct referred to in Articles 6a (3), 9(2) and 9(4) and amendments or extensions to existing Union codes of conduct shall be submitted to the Commission by the signatories of these codes.</td>
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<td>The Commission may ask ERGA to give an opinion on the drafts, amendments or extensions of those codes. The Commission may publish those codes as appropriate.&quot;</td>
<td>3. Member States shall encourage co- and self-regulation through codes of conduct adopted at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. Those codes shall be broadly accepted by stakeholders in the Member States concerned. The codes of conduct shall clearly and unambiguously set out their objectives. They shall provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at. They shall provide for effective enforcement, including when appropriate effective and proportionate sanctions.</td>
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The Commission may ask ERGA to
5. In co-operation with the Member States, the Commission shall facilitate the development of Union codes of conduct in consultation with media service providers and video-sharing platform providers where appropriate. Draft Union codes of conduct and amendments or extensions to existing Union codes of conduct shall be submitted to the Commission by the signatories of these codes. The contact committee established pursuant Article 29 shall decide on the drafts, amendments or extensions of those codes. The Commission shall publish those codes.

6. If a national independent regulatory body concludes that any code of conduct or parts of it have proven to be not effective enough the Member State of this regulatory body remains free to require media service providers and video-sharing platform providers under their jurisdiction to comply with more detailed or stricter rules in compliance with Union.”

give an opinion on the drafts, amendments or extensions of those codes. The Commission may publish those codes as appropriate.”