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The evolution of EU policy towards content hosted by social network sites

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Kelly McGlynn (s2554372)
Supervisor: Dr Jan Oster
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1. Introduction

The European Commission (Commission) writes that 'the Internet carries an amount of potentially harmful or illegal content' and that 'recent political discussions in the European Union have stressed the need for urgent action and concrete solutions' (European Commission, 1996). At the time of this statement, the Internet had just 160 million users and 10 million websites worldwide (Bunting, 2020). This version of the Internet was static and facilitated limited interactions among its users, while social network sites were only beginning to emerge (OECD, 2011). In this context, the European Union (EU) adopted the E-commerce Directive (ECD) in 2000 – a legal framework for online services in the Internal Market (European Parliament and the Council of the European Union, 2000). Twenty years later, social network sites like Facebook and Twitter are making decisions over the content that they host that wield an unprecedented power to influence public conversation, democratic choice and access to information (Kaye, 2019, p. 52). One of these sites, Facebook, counting over two billion users worldwide, is even becoming 'one of the most powerful arbiters of online speech' (Klonick, 2020). In this transformed context, the legal framework adopted in 2000 is still the baseline regulatory regime applicable to social network sites and the content that they host (De Streel et al., 2020, p. 15).

This thesis examines how the EU has responded to the transforming role of social network sites by examining the evolution of its policy towards the content that they host. In this endeavour, it seeks an answer to the following research question:

What regulatory patterns underly the evolution of EU policy towards content hosted by social network sites?

In order to identify these patterns, this thesis conducted a within-case analysis and adopted a process-tracing method. It selected three case studies - the 2000 E-commerce Directive (ECD), the 2018 Audiovisual Media Services Directive (AVMSD) and the 2018 Code of Practice on Disinformation (the 2018 Code). While these cases are not the only regulatory instruments adopted by the EU that apply to content hosted by social network sites, they each represent critical junctures in the development of this policy. An in-depth examination is conducted into each of these cases before they are studied in parallel and regulatory patterns are identified. In its findings, this thesis presents two principal regulatory patterns that underly the policy evolution discussed. The first pattern illustrates how this policy has evolved by applying old frameworks to social network sites while bolstering these

frameworks with complementary measures that target specific types of materials that these sites host. This pattern was identified earlier by De Streel and Husovec more specifically in the context of the development of the ECD and by Savin, who observed this pattern in the broader context of the evolution of EU rule-making in the digital economy (De Streel & Husovec, 2020; Savin, 2019). This finding therefore confirms that this pattern can also help explain the evolution of EU policy towards content hosted by social network sites. The second pattern identified by the analysis demonstrates that the evolution of this policy has been dominated by economic rationales. The results reveal that these rationales have consistently been invoked and adapted to different goals in this policy area.

This paper will examine the development of the individual case studies in isolation before they are analysed in parallel. First, however, it will outline how it intends to build on previous scholarship and elaborate further on the method it deploys to reach its findings.

2. Literature Review

The goal of this research is to identify the regulatory patterns underlying the evolution of EU policy towards content hosted by social network sites. The existing scholarship does not offer an answer to this research question. Some investigations in this domain have examined the evolution of the individual case studies selected in this thesis. Others have offered passing commentary on the direction of this evolution without engaging with the substantive rules and relevant policies in detail. Less still have had the opportunity to examine what place the 2018 AVMSD and the 2018 Code occupy within this regime. This thesis thus has a tangible opportunity to make a timely contribution to the existing scholarship as the Commission develops a modernised regulatory framework to be debuted in the Digital Services Act (European Commission, 2020b). While this particular evolutionary process remains unexplored, it is embedded within broader narratives such as how regulatory models have responded and adapted to technological change that undermines national borders (Frydman et al., 2012; Leiser & Murray, 2016; Mandel, 2016).

The literature reviewed below falls into two overall categories. The first body of literature focuses on issues of governance that are specific to platforms, of which social networking sites are an example. The second category considers the substantive rules and policies developed by the EU.

2.1 Platform Governance

The subjects of the policy examined in this thesis, social networking sites, are a sub-category of 'platform providers', a label which describes those services that convey third-party content online along with value-added services (Bayer et al., 2019, p. 80). While these platforms are subject to external governance measures, they also practice internal governance. The 'Amsterdam school' offers insights into how users are governed through platform design (Gorwa, 2019, p. 857; Nieborg & Poell, 2018; Van Dijck et al., 2018). They have examined how public values or the public interest can be integrated into the architecture of platform companies (Helberger et al., 2018; Napoli, 2019; Parker et al., 2016; Van Dijck et al., 2018). Klonick has engaged with the development of content moderation systems specifically by Facebook and Twitter to show more substantively how the development of these systems has been influenced by public values, like American free speech norms (Klonick, 2018). Some consider this type of self-governance to be the dominant approach in the overall governance of these platforms (Gorwa, 2019). However still, the continued introduction of legislative measures alongside the elaboration of these systems of internal governance that pursue the same ends indicates that these measures overall are falling short. Measures of external governance are less often considered by scholars of platform governance. In search of a more detailed examination of such regulatory tools, this review will now consider how scholarship has interpreted the development of substantive rules and policies in this domain.

2.2 The Regulatory Landscape

The initial debate surrounding Internet content regulation in the EU reflected established values in broadcasting and communications (Halpin & Simpson, 2002, p. 286). These domains were developing towards more informal forms of governance like self- and co-regulation, according to Harrison and Woods. They identified and interpreted this trend as part of a broader drift towards a more 'commercialised environment' in which industry and regulators treat viewers as consumers rather than citizens (Harrison & Woods, 2007, pp. 107–111). These trends are also visible in the development of EU Internet policy. For example, Feeley observed in 1999 that early EU Internet policy promoted self-regulation (Feeley, 1999). Halpin and Simpson similarly observed the EU's reliance on close liaisons with a network of social and economic actors in matters of Internet content regulation in 2002 (Feeley, 1999; Halpin & Simpson, 2002). They determined that only the failure of self-regulation would bring about legal action under this context (Halpin & Simpson, 2002, p.

292). In contrast, Hancher and Larouche described initial EU regulation of electronic communications as operating under a traditional and formalistic legal paradigm. From their viewpoint, EU regulation was progressing towards a second, more integrative and cooperative paradigm (Hancher & Larouche, 2011, p. 780). Savin, on the other hand, argues that the overall paradigm for regulating the Internet remains largely unchanged and that legacy models have simply been extended to new phenomena (Savin, 2019).

Murray, however, hypothesised that the evolution of networks into more 'civilised spaces' would encourage further government intervention. He proposed that this civilising transformation would lead governments to become happier with the idea of direct regulation through law and that platform providers, increasingly used to legal controls, would be happier to help governments enforce these (Murray, 2016, p. 8). The truth of this hypothesis is challenged by Bunting's recent observation that no systematic attempts by governments to review how rules are made for the platform economy have been undertaken so far, in a phenomenon he describes as 'the method deficit'. This gap has been filled instead by what he describes as 'regulation by outrage' (Bunting, 2020).

The overarching EU regulatory framework for online content moderation is described by De Streel et al. as 'increasingly complex and has been differentiated over the years according to the category of the online platform and the type of content reflecting a risk-based approach' (De Streel et al., 2020, p. 15). They also concluded that the ECD remains the baseline regulatory regime applicable to all categories of platforms and content (De Streel et al., 2020, p. 15). The evolution of the ECD is observed more specifically in a study by De Streel and Husovec that describes how this directive has been gradually adapted to the growing platform economy by complementary rules, enforcement tools and institutions. The study also notes how the Court of Justice of the European Union (CJEU) has contributed to this adaptation process by refining the ECD provisions (De Streel & Husovec, 2020). The influence of Internet and media convergence on the development of this thesis' second case study, the AVMSD, is well-documented (Flew, 2016, p. 220; Little, 2008; Onay, 2009; Savin, 2019; Valcke & Ausloos, 2014; Vlassis, 2017). This regulation has also been observed to be evolving towards economic rationales over cultural goals (Celsing, 2010; Ibrus & Rohn, 2016, p. 11; Jõesaar, 2015). In particular, Gollmitzer describes how these rationales came to dominate the development of the 2010 AVMSD (Gollmitzer, 2008). Regulatory interventions in audiovisual markets have also been shown to be shaped by the changing role of viewers by Helberger (Helberger, 2008, p. 17). The 2018 extension of the AVMSD provisions to video-

sharing platforms (which includes social network sites under certain conditions) has been evaluated and criticised by Savin, who described it as a 'knee-jerk reaction' (Savin, 2018). The development of the 2018 Code has been subject to similar criticism on the basis this action was taken despite a knowledge deficit surrounding the societal impact of disinformation (Dittrich, 2019; C. Marsden et al., 2020). The 2018 Code has faced further criticism for its potential negative effects on fundamental rights (Bayer et al., 2019; Kuczerawy, 2019).

2.3 Conclusion

This research seeks to bring both of these categories into conversation with one other in such a way as to overcome their respective limitations. Scholarship in platform studies has largely been focused on questions of internal rather than external governance. Regulatory scholarship has frequently characterised the EU's regime without engaging in more detail with substantive evidence in the form of legal provisions, code or policy. It has furthermore failed to consider how these measures have affected social networking sites in particular. Rarer are instances that consider audiovisual and other forms of content in parallel, even though social network sites and other platforms often host both. Finally, this paper has the opportunity to build on evolutionary patterns identified earlier by including the 2018 AVMSD and the 2018 Code in this discussions. This thesis thus aims to overcome these limitations in order to produce definitive and comprehensive results.

3. Methodology

This thesis will conduct a within-case analysis in order to identify the regulatory patterns that underly the evolution of EU policy towards content hosted by social networking sites. This analysis will deploy a process-tracing method to examine the qualitative data gathered. Process tracing is the most appropriate method to answering this research question because it inherently undertakes an analysis of the trajectory of change and causation (Collier, 2011, p. 823). Collier breaks this method down into two separate activities which will be performed in this thesis, namely description and sequence. First, this thesis will endeavour to produce a rich description of each building block in this regulatory regime. This means applying process-tracing tools such as content analysis to examine each measure and the related documentation in depth. Secondly, it will construct a sequence from these building blocks that pays close attention to independent, dependent and intervening variables and gives the reader an insight into causal mechanisms. This exercise will inherently shed light on the

regulatory patterns underlying the evolution of this policy as it maps the trajectory of change and causation in this process (Collier, 2011, p. 823).

3.1 Definitions

'Social media' is a sub-category of 'platform providers', a term used to describe those services that convey third-party content online with value added services (Bayer et al., 2019). For the purposes of this research, this thesis will adopt the popular definition of 'social network site' proposed by Ellison and Boyd to convey the nature of the regulatory subjects discussed. According to their definition, a social network site 'is a networked communication platform in which participants 1) have uniquely identifiable profiles that consist of user-supplied content, content provided by other users, and/or system-level data; 2) can publicly articulate connections that can be viewed and traversed by others; and 3) can consume, produce, and/or interact with streams of user-generated content provided by their connections on the site' (Ellison & Boyd, 2013, p. 9). The scope of this thesis is limited to examining the EU policy measures that have applied to content hosted by social network sites that fall within this definition. Facebook and Twitter are examples of such social network sites, while platform providers like Airbnb and Uber are not. Social networking sites, under certain conditions, can also be described as intermediaries, intermediary service providers or video-sharing platforms. The conditions under which these labels may be applied will be clarified later in this thesis.

This thesis will also refer to a typology of regulation as it seeks to characterise each of the cases studied. This typology distinguishes between three types of regulation: direct regulation, co-regulation, and self-regulation. Direct regulation is a command-based regulatory mechanism. Herein, the State (or in this case, the EU) enacts laws that prohibit specific conduct and these laws are underpinned by sanctions in case of breach (Morgan & Yeung, 2007, p. 80). In contrast, this general legislation interacts with a self-regulatory body under co-regulation. The State and stakeholder groups herein form part of the institutional setting for regulation (C. T. Marsden, 2011, p. 46). Under co-regulation, the State may decide to delegate responsibility to the industry to maintain and apply an approved code of practice, however it retains the power to intervene (Ofcom, 2006, p. 12). Finally, where a self-regulatory regime is in place, membership is voluntary and these members may draw up their own rules by deploying tools such as codes of conduct (C. T. Marsden, 2011; Ofcom, 2006,

p. 12). The deployment of this regulatory typology will allow for a categorisation of the outcomes observed.

3.2 Case Selection

The case studies to be examined are the E-Commerce Directive, the Audiovisual Media Services Directive, and the Code of Practice on Disinformation. These cases represent some of the principal means of regulating content hosted by social network sites in the EU's portfolio. The scope of this thesis is limited to considering the regulatory measures introduced by these cases that apply to content hosted by social network sites. While all three cases have introduced such measures, the means adopted by each differ in many ways, like their legal effects, the category and type of content they address and the manner of regulating content that they prescribe. For example, the ECD introduced a liability regime that can benefit social network sites, provided that they fulfil certain conditions (European Parliament and the Council of the European Union, 2000). The recent AVMSD revision extended audiovisual rules to content hosted by social network sites under specific circumstances (European Parliament and the Council of the European Union, 2018). Finally, the 2018 Code introduced self-regulatory standards to fight disinformation, subject to voluntary agreement of industry (European Commission, 2018c). Therefore, these cases can already be characterised by meaningful variation in terms of methods and outcomes.

3.3 Process Tracing

Content analysis is the primary tool with which each individual case study will be examined. In order to aid the final construction of a sequence, this research will ask similar questions of each case. It will determine what type of content the measure targets and how that content is targeted. It will ask what obligations the measure demands of social network sites and the consequences that may be incurred in case of breach. Each chapter will endeavour to determine how each individual measure has evolved. The importance of this step to properly characterise the process is emphasised. As Collier highlighted, the potential success of the process tracing tool to draw causal inference rests on careful description of key steps in that process. Thus, in order to produce 'good snapshots at a series of specific moments', the content analysed by this thesis is not restricted to the black and white letters of regulation and code (Collier, 2011, p. 824). European Commission proposals, action plans, impact assessments, implementation reviews, legislative frameworks and intra-institutional communications published throughout this period are analysed. The next step in process

tracing requires examining this evidence in order to derive or test explanations for that case (Andrew Bennett, 2008, pp. 705–706). This thesis will test this evidence against regulatory patterns identified earlier in the literature, and will assess if further patterns may be identified. The action of process tracing in this research will thus proceed by establishing a timeline of events and henceforth drawing causal ideas embedded in this narrative in order to identify underlying regulatory patterns (Collier, 2011, pp. 828–829).

3.5 Limitations of the Research Design

While the three case studies examined by this thesis represent influential instruments in the EU Internet content regulation toolbox, they are by no means the only EU measures that target content hosted by social network sites. Therefore, the ability of the regulatory patterns identified to speak for the overall content policy regime is limited. However, the adoption of the process-tracing method demands that the scope is restricted in order to produce the rich descriptions required. This thesis may therefore provide a starting point for future research that incorporates other EU measures into this investigation. In addition, the application of the process tracing mechanism brings with it its own limitations. To confront these, the research design will apply the standard injunctions recommended by Bennett for good-process tracing like gathering diverse sources and kinds of evidence and anticipating and accounting for potential biases in those sources (A. Bennett & Elman, 2006; Andrew Bennett, 2008, p. 708; George & Bennett, 2005).

4. The E-Commerce Directive

The 2000 E-commerce Directive (ECD) was drafted during an Internet era characterised by static websites and limited user interactions. In 2020, this Directive is still the ‘baseline’ regulatory regime that applies to all types of content and all categories of platforms, including social network sites. It contains rules like the country-of-origin principle, a prohibition of general monitoring measures, the promotion of self- and co-regulation and a liability exemption regime for hosting platforms (De Streel et al., 2020). While the Directive has not been revised in its 20-year history, CJEU case law has adapted its provisions to technological developments and other market changes by clarifying their scope and the boundaries of its liability exemption regime. The Directive has also been gradually adapted to the growing platform economy with complementary rules, enforcement tools and institutions (De Streel & Husovec, 2020). The 2018 amending AVMSD and the 2018 Code, discussed in the following chapters, are examples of such complementary measures.

This chapter describes how case law has adapted this legislation to a changing online environment that includes the growth of social network sites. It examines regular legislative reviews to learn how the Commission and other stakeholders have responded to uncertainty surrounding key ECD terms and concepts. It then places the development of content moderation systems by social network sites within this context. First, however, it will address how this legislation was formulated and the ideas and aims that shaped this process.

4.1 Drafting the ECD

Policy-makers developed the ECD in the late 1990s during the era of Web 1.0 services or the 'read-only' web. On this version of the Internet, the vast majority of users were content consumers, not creators (Cormode & Krishnamurthy, 2008). User interactions were limited and static websites were updated infrequently. Examples of these so-called Web 1.0 services include company webpages and information portals (Aghaei et al., 2012). Internet user numbers were low, reaching just 60 million users in 60 countries in 1996, while site numbers were high, with an estimated 10 million sites in 1995 (European Commission, 1996, p. 3). Despite the fundamental differences between this era of the Internet and the era that social network sites belong to, one of the most prevalent issues facing the industry at this time remains a core concern for social network sites today, which is the liability of Internet service providers for content authored by third parties. In the 1990s, industry asked for immunity as a solution to this problem. However, early debates in Europe asked if these Internet service providers could be held responsible for some content and, if so, what steps they could take to manage this responsibility and limit their liability (OECD, 2011, p. 72).

The development of the EU Internet policy prioritised the economic opportunities presented by e-commerce. The 1997 E-commerce initiative aimed 'to encourage the vigorous growth of electronic commerce in Europe' by creating a favourable regulatory framework (European Commission, 1997b, p. 4). This initiative was based on four corresponding principles: no regulation for regulation's sake; all regulation must be based on Single Market freedoms; all regulation must take business realities into account; all interests should be reached effectively and objectively (European Commission, 1997b; Savin, 2019, pp. 4–5). Intermediary liability was considered a key issue to be addressed in order 'to form a coherent framework to bring about the free circulation of on-line services' (European Commission, 1998, p. 3). The creation of rules for the protection of minors and human dignity in audiovisual and

information services was also co-opted towards economic goals, by creating 'the right conditions for on-line businesses' (European Commission, 1997b, p. 14). The EU approach, supported by a core liberal market ideology, anticipated that when these rules fell short, Internet service providers would adopt filtering and monitoring as a strategy to maximise market share, as had transpired earlier in the case of spam (Edwards, 2005, p. 129). The EU thus adopted a regime that provided generous protections to Internet service providers. This regime would later prove critically important to the emergence of user-generated content industries, like social network sites (OECD, 2011, p. 74).

The approach adopted by the EU in the ECD was the most prevalent global approach to regulating the liability of internet service providers – the 'limitation of liability/notify and take down' approach. This approach was embodied in the 1998 German Multimedia Act and the 1998 US Digital Millenium Copyright Act (DMCA) (Edwards, 2005, p. 107). In the EU, this approach manifested as a liability exemption regime. Under this regime, it is still for domestic law to establish liability in principle. However, Articles 12-14 ECD provide for exemptions to or 'safe harbours' from this liability to internet society services engaged in any of three specific activities – mere conduit, caching, and hosting (European Parliament and the Council of the European Union, 2000). These Articles thus act as a filter that decides if an internet society service, held liable in domestic law, can benefit from immunity to liability under one of these three categories. These liability protections are applied horizontally, meaning they apply to all kinds of illegal content initiated by third-parties online. If the internet society service fails to qualify for one of these safe harbours, the scope of their liability is decided on the basis of Member State legislation (European Commission, 1998, p. 27). These Articles thus harmonise liability insofar as they provide a minimum level of protection for intermediary service providers. While Member States may not derogate from these Articles to the disadvantage of intermediaries, Member States can offer stronger protection to those intermediaries in domestic law (*L'Oréal and Others*, 2011; Oster, 2017, pp. 236–237).

Social network sites can benefit from liability protections under Article 14 that offers immunity from liability to information society services engaged in the hosting or storage of information, under certain conditions (European Parliament and the Council of the European Union, 2000). First, they must be considered an intermediary within the meaning of the Directive (Oster, 2015). The social network site cannot claim immunity if the author of the

information is acting under the site's authority or control (Oster, 2017, p. 233). They must have no knowledge or, in some cases, awareness of illegal information. Furthermore, upon obtaining such information, they must act 'expeditiously' to disable access to this information. Article 15 also protects these sites against general requests to monitor the information that they store (European Parliament and the Council of the European Union, 2000). The application of these provisions is considered in further detail in the following section addressing case law.

4.2 Case Law

Although social network sites were just emerging when this Directive was adopted, they can benefit from liability protections under Article 14 as host service providers, under certain conditions. The applicability of this Article to social network sites has also been confirmed in case law (*Glawischnig-Piesczek v. Facebook Ireland*, 2019; *SABAM v. Netlog NV*, 2012; OECD, 2011, p. 20). The growth of these sites has nonetheless created successive regulatory challenges that has produced a growing body of case law (OECD, 2011, p. 80). Decisions in early national level case law varied widely and created legal uncertainty for providers (Van Eecke & Ooms, 2007, p. 3). CJEU rulings have sought to eliminate this uncertainty and have focused in particular on the scope of the hosting safe harbours under Article 14 and the possibility of preventive duties that do not violate Article 15 (De Streel & Husovec, 2020, p. 20). Despite these efforts, periodic legislative reviews reveal that considerable uncertainty remains over some terms and criteria. Responses to the continuing uncertainty from the Commission and other stakeholders have been varied, and these will be considered in the following section. Firstly, however, this section gives a brief overview of the criteria and terms in question. It is emphasised first however that social network sites may only benefit from the opportunity to fulfil the requirements of these Article 14 privileges as long as they qualify as 'intermediaries' within the meaning of the Directive. The social network site can qualify as an intermediary if the site has not provided or adopted the content in question, or has not exercised editorial control over or initiated the publication of that content (Oster, 2015).

Firstly, the activity of the social network sites must remain passive or neutral in order to benefit from liability protections, which implies that the site 'has neither knowledge of nor control over the information which is transmitted or stored'(*Google France and Google*, 2010; Riis & Schwemer, 2019, p. 8). This criterion has faced particular criticism for its effect

of discouraging social network sites from taking proactive measures against illegal content online owing to the risk involved of gaining 'knowledge' of illegal activities in this process (De Streel & Husovec, 2020). Further legal uncertainty remains over the concepts of 'actual knowledge' and 'acting expeditiously' in Article 14. Article 14(1)(a) holds that the host service provider is not liable for the information it stores on the condition that it does not have 'actual knowledge of illegal activity or information'. (European Parliament and the Council of the European Union, 2000). While the CJEU has established that 'actual knowledge' requires that the provider receives an adequately substantiated or sufficiently precise notice, the criteria for obtaining knowledge remain very open (De Streel & Husovec, 2020, p. 54; Husovec, 2017, p. 53; *L'Oréal and Others*, 2011). Finally, under Article 14(1)(b), host service providers must also act 'expeditiously' to remove or disable access to illegal information that they store upon obtaining 'actual knowledge'. However, the ECD does not provide guidance on the meaning of 'expeditiously' (European Parliament and the Council of the European Union, 2000; OECD, 2011, p. 81).

Under Article 15, Member States are prohibited from imposing a general obligation on hosting providers to monitor the material that they host (European Parliament and the Council of the European Union, 2000). However, the CJEU has drawn a 'blurred line' between general monitoring and specific monitoring measures (De Streel et al., 2020, p. 21). The CJEU has thrown out abstract and non-targeted filtering by a social network (Riis & Schwemer, 2019; *SABAM v. Netlog NV*, 2012). The CJEU however has permitted specific monitoring measures when achieving a fair balance between the fundamental rights of different stakeholders (*UPC Telekabel Wien v Constantin Film Verleih GmbH*, 2014; De Streel et al., 2020, p. 21).

It is clear that CJEU case law has contributed to the evolution of this legislation by refining its provisions. However, it has failed to eliminate considerable uncertainty surrounding the definition of key terms and criteria. The following section will consider the reactions to this uncertainty in ECD legislative reviews.

4.3 Legislative Reviews

Successive legislative reviews have demonstrated that ECD liability principles have enjoyed continued and consistent support across a broad range of stakeholders throughout its twenty-year history (De Streel et al., 2020, p. 41). The application of Article 14 has provoked mixed responses in parallel with the growth of social network sites, however. The first Commission

review of the ECD in 2003 observed that while there was as of yet ‘very little practical experience’ of the application of Articles 12-14, the ECD approach enjoyed broad support among stakeholders (European Commission, 2003a, p. 13). In 2007, a Commission liability study observed a ‘complex tapestry’ of ECD implementation, with legal practice and court decisions influenced by changes in the ‘social evaluation of the internet’ (Verbiest et al., 2007, p. 12). However, on the matter of Web 2.0 ‘content aggregators’ like social network sites, the study advised that the ‘existing rules seem to be appropriate’ and that furthermore it would be ‘unwise’ to adopt legal rules relating to business models ‘of a possibly ephemeral nature’ (Verbiest et al., 2007, p. 23).

By 2010, a public consultation indicated support for the clarification of existing rules, but this view was not consistent across terms and stakeholders. For example, Internet service providers were in a minority that supported the broad CJEU interpretation of ‘expeditious’ as ‘its flexibility enables the particularities of each individual case to be taken into account’ (European Commission, 2010, p. 11). Consensus was reached on other issues in this consultation, such as the need for a harmonised EU "notice-and-takedown" procedure, although the stakeholders failed to agree on the boundaries of these rules (European Commission, 2010, p. 10). This consultation result led the Commission to commit to adopting a horizontal initiative on notice and action procedures in 2012 and the Commission highlighted the potential of these procedures to enhance user trust and foster sustainable business models (European Commission, 2012, p. 13). While a proposal to that effect was never published, the Commission remained outwardly committed to analysing the need for new measures to encourage ‘rigorous procedures for removing illegal content while avoiding the take down of legal content’ (European Commission, 2015, p. 12). In 2016, it pledged to explore the need for guidance on the liability of online platforms when putting in place voluntary measures to fight illegal content online, and to further review the need for formal notice-and-action procedures (European Commission, 2016b, p. 9). In 2018, the Commission once again highlighted the effect of illegal content online of undermining user trust and damaging the business models of internet service providers (European Commission, 2018a). In stark contrast to these earlier communications, the 2020 Commission Communication ‘Shaping Europe’s Digital Future’ warned that forthcoming new and revised rules would increase the responsibilities of online platforms and ‘reinforce the oversight over platforms’ content policies in the EU’ (European Commission, 2020a, p. 6).

This review of Commission communications published since the adoption of the ECD noted first that the ECD liability regime has enjoyed consistent support throughout its 20-year history. It observed that CJEU refinements to its provisions have enjoyed the support of Internet service providers. However, it has also observed the proliferation of Commission pledges to explore measures to accelerate the removal of illegal content online since 2010, which points to the failure of the Commission first to draft adequate guidelines and secondly, to the failure of Internet service providers to successfully tackle the proliferation of illegal content online, at least from the point of view of the Commission.

4.4 Content Moderation by Social Network Sites

In February 2009, Facebook had a leading position in the social networking category in most European countries, finding its largest European audience in the UK with 22.7 million visitors (OECD, 2011, p. 50). In that same year, Facebook created its first specialised content moderation team of just 12 people (Klonick, 2018, p. 1620). Meanwhile Twitter established an early policy against policing user content, with Twitter co-founder Biz Stone declaring in 2011 that they 'strive not to remove Tweets on the basis of their content' (Klonick, 2018, p. 1620; Stone, 2011; Warzel, 2016). Twitter first introduced a 'report abuse' feature for individual tweets six years after its founding and it wasn't until the GamerGate controversy in 2014 that Twitter reversed this policy and introduced new public standards and policies (Klonick, 2018, p. 1628; Warzel, 2016).

The adoption of these content moderation systems by these social network sites raises two important issues in the context of the preceding discussion. First, the adoption of these systems gives credibility to the original liberal market ideology underlying the ECD that anticipated that Internet service providers would adopt a filtering and monitoring strategy in order to maximise market share (Edwards, 2005, p. 131). Secondly, however, a consideration of the time that elapsed between each company's founding alongside the establishment of their respective content moderation systems, and remembering that the adoption of the ECD preceded the founding of the older site Facebook by four years, seems to confirm Klonick's conclusion that the liability regimes they operate under did not influence the development of their moderation systems (Klonick, 2018, p. 1618). It is therefore notable that the expanding scope of the activities of these platforms, their exponential growth in scale and the delayed introduction of content moderation systems did not provoke a response in the form of a revision or substantial change to the ECD regime or even the proposing of a Notice and

Action Directive. While this context is important to consider in parallel with development of the ECD, the question of why the EU content policy regime did not rise to meet these challenges is a task for future research.

4.5 Conclusion

This chapter has explored how the ECD regime has evolved to adapt to a changing online environment. In the absence of a revision, this process has been driven substantively by case law that has worked to refine its provisions. The chapter observed that legal uncertainty persists in spite of CJEU efforts. It observed that this uncertainty which has been met with mixed responses from stakeholders, has prompted the multiple communications from the Commission but not substantive legislative action on this issue. Finally, the proliferation of these Communications and the delayed development of content moderation systems by social networking sites Facebook and Twitter are indicative of the failure of EU policy under the ECD to respond in equal terms to the growth of social network sites.

5. The 2018 Audiovisual Media Services Directive

The 2018 AVMSD is the latest of three Directives to amend the 1989 Television Without Frontiers Directive (TVWFD). This amending Directive complements the ECD's baseline regulatory regime by imposing further obligations on a sub-category of online platforms – video-sharing platforms (De Streel et al., 2020, p. 15). This revision extends these obligations to social network sites 'to the extent that they meet the definition of a video-sharing platform service' (European Parliament and the Council of the European Union, 2018, p. 70). This Directive does not find its roots in Internet policy. The original 1989 TVWFD aimed to create a single market in television broadcasting services (Schwithal, 2009, p. 233). The first amending Directive in 1997 responded to the development of pay TV (Gollmitzer, 2008, p. 335). Later in 2010, the second amending Directive extended the scope of its application to 'non-linear' audiovisual media services like video-on-demand (Gollmitzer, 2008, p. 335; Valcke et al., 2009, pp. 106–107). Although these predecessors to the 2018 revised AVMSD could not apply to content hosted by social network sites, they are important to consider for two main reasons. First, repeated decisions against extending the scope of this Directive to include the activities of social network sites is not a neutral policy- it is a policy of non-intervention. Secondly, the analysis of the regulatory tradition inherited by the 2018 AVMSD is important to understanding why today different standards can be applied to different categories of content hosted by social network sites.

The following chapter presents convergence at the heart of the evolution of EU audiovisual policy. It focuses on the technological aspect of convergence which refers to the effects of the digitization on broadcasting, Information Technology and telecommunications networks (Vlassis, 2017, p. 108). Firstly, it presents the consolidation of the regulatory tradition in the Television Without Frontiers Directives before outlining how technological convergence gave rise to the 2010 and 2018 amending Directives. It notes how the policy against introducing horizontal content regulation, which would necessarily implicate Internet services like social networks sites, was based on economic rationales and the perceived influence of the Internet. Finally, this chapter observes how the AVMSD and its predecessors have been evolving towards economic rationales over non-economic goals (Celsing, 2010; Ibrus & Rohn, 2016, p. 11; Jõesaar, 2015).

This chapter presents the development of these patterns by considering the life of this legislation in three sections: the Television Without Frontiers Directives; the 2010 Directive; and the 2018 Directive. It is necessary to highlight here that the activities of social network sites included in the 2018 extension did not exist in a regulatory gap before then but operated under the ECD legal framework.

5.1 Television Without Frontiers Directives

Ariño identifies two rationales that follow from the traditional case for applying stricter rules to television broadcasting than other communications. First, the technological rationale dictates that intervention is justified in order to achieve the efficient distribution of a scarce public resource (frequencies) and to prevent the rise of monopolistic or oligopolistic controls. Secondly, the public interest rationale, emphasises the power of the audiovisual medium for influence (Ariño, 2007, p. 129). Valcke and Stevens break this power down, identifying the simultaneity of impact, the immediacy of provision and the unilateral control of the broadcaster over programme scheduling as some of the characteristics to contribute to the influence of this medium, and thereby justifying special action in this domain (Valcke & Stevens, 2007, p. 288). Media regulation at the EU level drew early critics however, who argued that broadcast media was inherently tied to culture and, as culture was not included in the EC treaty, media regulation fell outside the purview of the Community (Little, 2008, p. 225). However, the European Court of Justice found that the broadcasting of television programmes was a service as described in primary legislation (*Italian State v. Guiseppe Sacchi*, 1974). Correspondingly, the TVWFD justified its intervention in 1989 on the basis of

two main objectives: the right of establishment and the free movement of services (Council of the European Communities, 1989; Little, 2008, p. 225). Later in 1992, Article 128 of the Treaty of Maastricht became the first formal legal instrument to acknowledge EU-level competency in culture (Commission of the European Communities & Council of the European Communities, 1992; Vlassis, 2017, p. 107). However, Article 167 TFEU (previously Article 151 TEC) merely conferred upon the Union the ability to 'contribute' to cultural policies in the Member States (European Union, 2012).

Although the TVWFD was characterised as 'mandatory liberalisation, optional interventionism', other EU policy documents published particularly following the 1997 amending Directive reveal the prioritisation of the public interest rationale in audiovisual policy-making (Littoz-Monnet, 2007, p. 84; Vlassis, 2017, p. 107). In 1999, the Commission explicitly stated that the aim of the Community's audiovisual policy was 'safeguarding certain public interests' which were 'not called into question by technological developments' (European Commission, 1999a, p. 2). It emphasised that the societal and cultural role of these services would serve as the point of departure for policy-making in this domain (European Commission, 1999b, p. 7). Later in 2003, the Commission continued to invoke the particular power of the audiovisual medium in order to justify the more detailed regulatory approach pursued by the TVWFD in comparison with the ECD. Here, the Commission recognised the 'paramount importance and the unparalleled impact of television broadcasting on [our] societies through the effect it has on the way people form their opinions', while 'no information society service has reached an importance and an impact similar to television broadcasting services' (European Commission, 2003b, p. 14). The perceived impact of information society services, like social network sites, would thus help shield them temporarily from the reach of EU audiovisual policy.

The Commission anticipated that convergence, understood in this domain as the 'ability of different network platforms to carry essentially similar kinds of services, or the coming together of consumer devices such as the telephone, television and personal computer', would prompt changes to this regulatory approach (European Commission, 1997c). The Commission was eager to facilitate this process, believing in its potential to become 'a powerful motor for job creation and growth, increasing consumer choice and promoting cultural diversity' (European Commission, 1997c, p. iii). It suggested that convergence could allow different standards could be applied to content depending on the specific characteristics

of the service concerned (European Commission, 1997c, p. 28). Such standards were introduced in the 2010 amending AVMSD.

5.2 2010 Audiovisual Media Services Directive

In 2002, the EU adopted a new regulatory framework for electronic communications. The goals of this framework were encouraging competition, improving internal market functioning and to 'guarantee basic user interests that would not be guaranteed by market forces' (European Commission, 2003b, p. 9; European Parliament and Council of the European Union, 2002). In 2003, the Commission announced the new aim of EU audiovisual policy to be 'promoting the development of the audiovisual sector in the Union' (European Commission, 2003b, p. 3). It did not propose the extension of this policy to the Internet, however, noting that the Internet was 'still used by substantially fewer people than the TV viewing public and with different motivations' (European Commission, 2003b, p. 5).

However, the emergence of on-demand services did prompt a change in this approach. On-demand services, like video-on-demand, are described as non-linear services because they allow users to choose the content they wish to view at any time. Linear services like television provide a linear schedule of programmes that cannot be changed by the viewer (Valcke & Stevens, 2007, p. 295). The 2005 proposal for an Audiovisual Media Services Directive to amend the TVWFD extended its scope to include non-linear services. The aim of this extension was to create a 'level playing field' by introducing a 'horizontal' or 'technology-neutral' approach to content regulation (European Commission, 2005). Towards this goal, it introduced a system of graduated regulation that extended the application of a basic set of principles to non-linear services, while additional rules would apply to linear services (Valcke & Stevens, 2007, p. 295).The Commission justified the application of different standards in Recital 28 of the Directive on the basis of the different degrees of choice and control available to users and the service's impact on society (European Parliament and the Council of the European Union, 2010). This system demonstrates how the changing role of viewers from consumers to 'empowered viewers' began to shape EU regulatory interventions in the audiovisual markets (Helberger, 2008, p. 17).

The dominance of economic rationales in this proposal was challenged by other institutional forces. Gollmitzer notes that an European Parliament (EP) amendment prompted the Commission to recognise the hybrid role of audiovisual services as both cultural and economic services (Gollmitzer, 2008). However, the dominance of economic rationales in the

final text reflects the diminishing power of the regulatory tradition in broadcasting, and the amending Directive was interpreted as a 'victory for liberal economic forces' that contained 'cultural considerations' (Iosifidis, 2011, p. 163; Vlassis, 2017).

5.3 2018 Audiovisual Media Services Directive

The 2018 amending Directive emerged in the context of a new Green Paper on Convergence and under the new 2015 Digital Single Market Strategy framework. In the 2013 Green Paper on audiovisual media service convergence, the Commission emphasised that the main rationale for regulation in audiovisual media services was the internal market (European Commission, 2013). The EP response to this paper called on the Commission to consider if the scope of the 2010 AVMSD was still relevant (European Parliament, 2014). The 2015 Digital Single Market Strategy seemed to offer a response by committing to take measures to encourage the 'responsible behaviour of platforms' by amending the 2010 AVMSD (European Commission, 2015). The proposal to amend the 2010 AVMSD adopted a different aim, however, by proposing to extend the 2010 AVMSD in order to create a 'level the playing field' (European Commission, 2016d). The European Commissioner for Digital Single Market Ansip confirmed the dominance of economic rationales behind this review when he said that its aim was to make 'online platforms and audiovisual and creative sectors powerhouses in the digital economy and to not weigh them down with unnecessary rules' (European Commission, 2016a; Vlassis, 2017, p. 103).

The 2016 proposal justified the extended scope on the basis that video-sharing platforms were 'getting stronger and competing for the same audiences' while being 'subject to different rules and varying levels of consumer protection' (European Commission, 2016d, p. 2). The negative phrasing in the proposal excludes 'social media services', *unless* they provide a service that falls under the definition of a video-sharing platform (European Commission, 2016d, p. 15). The Council General Approach adopted in 2017, however, emphasised the applicability of the amending Directive to 'social media services' under these circumstances. The Council argued in favour of including these services on the basis that they 'compete for the same audiences and revenues', and because they also have a 'considerable impact in that they facilitate the possibility for users to shape and influence the opinions of others' (Council of the European Union, 2017, p. 5). These justifications were repeated in the final revised Directive (European Parliament and Council of the European Union, 2018, p. 70). This argument in favour of intervention on the basis of the particular power of a medium

to influence echoes the earlier public interest rationale employed to justify the application of stricter rules to television broadcasting (Ariño, 2007, p. 129).

The 2018 amending AVMSD obliges video-sharing platforms to take appropriate measures to protect the public from three types of illegal online content: terrorist content, racism and xenophobia and child sexual abuse material. Under this revision, they must also take measures to protect the public from hate speech as defined in the EU Charter of Fundamental Rights. Finally, it holds video-sharing platforms responsible for protecting minors from content that could impair their mental, moral or physical development (De Streel et al., 2020, p. 24; European Parliament and Council of the European Union, 2018). The Directive suggests possible measures targeting the organisation of content hosted by video-sharing platforms in order to protect minors from this harmful content. Examples of these measures include content flagging mechanisms, complaint and verification systems, transparency obligations and parental control tools (De Streel & Husovec, 2020, p. 26). The Directive warns, however, that 'those measures shall not lead to any ex-ante control measures or upload filtering of content which do not comply with Article 15 of Directive 2000/31/EC' (the ECD) (European Parliament and Council of the European Union, 2018, p. 89). This statement has not proved sufficient to dispel legal uncertainty, however. Savin, in particular, criticises the increasing of duties of care included in the Directive for its effect of reducing the Commission commitment to the ECD liability regime to 'lip service' (Savin, 2018, p. 1218). He described the amending Directive as a 'knee-jerk' reaction to threats posed by newcomers like social network sites to the market incumbents (Savin, 2018, p. 1224).

This extension had the effect of introducing 'enhanced liability' of social network sites when their activities fall under the definition of video-sharing platform as outlined in the Directive. However, many of these mechanisms are already operationalised by social network sites (European Commission, 2017; Montagnani & Trapova, 2019). The mechanisms adopted by social network sites like Facebook and Twitter are discussed in more detail by Klonick (Klonick, 2018). This fact was also recognised by the 2016 Impact Assessment undertaken ahead of this proposal, which argued that the costs of the scope extension would be mitigated by the voluntary actions already operated by large video-sharing platforms (European Commission, 2016c, p. 4).

The amending 2018 AVMSD is nonetheless faithful to the EU pattern of applying old regulatory models to new phenomena, in this case social network sites (Savin, 2019, p. 3).

Furthermore, beyond the notable implications of this extension for social network sites under certain conditions, it is also remarkable that this extension is justified on the basis of economic rationales and the particular capacity of social network sites for influence, which seems to indicate the convergence of two regulatory traditions – television and internet (Ibrus & Rohn, 2016, p. 11).

5.4 Conclusion

This chapter has demonstrated how the extension of the AVMSD scope to include social network sites under certain conditions is the latest step in an already established regulatory tradition of applying old regulatory frameworks to new phenomena (De Streel & Husovec, 2020; Savin, 2019). It has shown how consecutive amendments have responded to technological convergence. It also confirmed that the AVMSD has been evolving towards economic rationales with reference to the broader policy papers and legislative frameworks under which this legislation has developed. Finally, it showed how this measure was also justified on the basis that the costs suffered by video-sharing platforms as a result of this extension would be mitigated by measures already in operation.

6. The 2018 Code of Practice on Disinformation

The deployment of online disinformation campaigns during the Ukrainian conflict in 2014, the US presidential election in 2016 and the Brexit referendum in 2016 triggered calls for special measures to address the proliferation of disinformation online (Saurwein & Spencer-Smith, 2020). The policies developed in response to this challenge worldwide have focused on social network sites in particular, because they are perceived to be prime vectors of disinformation (Tenove, 2020, p. 13). The centrepiece of the EU response is the 2018 Code of Practice on Disinformation which was developed upon the recommendation of a High Level Expert Group on fake news and online disinformation (HLEG) (de Cock Buning, 2018; European Commission, 2018c). The objective of this Code is to identify the actions that its signatories could take in response to the challenges posed by online disinformation (Kuczerawy, 2019, p. 2). The Code is a self-regulatory, voluntary and short-term response to these challenges. It counts leading social network sites like Facebook and Twitter among its signatories.

This Code differs from the two previous case studies on a number of critical characteristics. First, it is a soft-law, self-regulatory instrument to which no means of enforcement are attached and adherence is voluntary. Secondly, the Code exclusively targets content that is

harmful, but not illegal. As a result, unlike the ECD and the AVMSD for the most part, the Code prescribes the demotion and not the removal of the content deemed harmful. Furthermore, while the AVMSD mandates the restriction of access to particular content for specific categories of users (minors), the Code does not distinguish between users. Finally, the Code was written and agreed upon by a multistakeholder forum that included its signatories, while the AVMSD and the ECD were elaborated by EU institutions in legislative processes.

This chapter will place the Code within the preceding regulatory tradition and detail the process leading its adoption. It will describe and characterise its final approach. Finally, it will address prevalent criticisms of the code and test the Code against a recent trend identified by Bunting of 'regulation by outrage' (Bunting, 2020). Firstly however, the following section will seek to define the problem posed by this type of content and how it relates to the activities of social network sites.

6.1 Defining the problem

Theories of deliberative democracy consider communication exchanges in public deliberation to be necessary to achieving well-informed and legitimate decision-making (Habermas, 1996; Tenove, 2020; Young, 2000). Disinformation can undermine this system of public deliberation by increasing the quantity of false claims circulating that act to reduce the interest of and opportunity for members of the democratic polity to engage in public discussions (Tenove, 2020). On these grounds, the risks inherent in the distribution of disinformation justify regulation and governance (Saurwein & Spencer-Smith, 2020, p. 3). While regulatory intervention to combat disinformation may be justified in democratic theory, the actual impact on society of disinformation remains poorly researched (Dittrich, 2019, p. 6). Furthermore, the little research that has been undertaken is inconclusive. A recent US study found no conclusive evidence of the impact of micro-targeted and partisan political online advertising or online interference by foreign actors on voting behaviour (Benkler et al., 2018; Dittrich, 2019, p. 6). Widely diverging views on the scale of the problem in Europe have also emerged (Avaaz, 2019; Marchal et al., 2019; Saurwein & Spencer-Smith, 2020). In spite of this knowledge deficit, policies designed to combat disinformation are still being pursued. This has led Marsden et al. to conclude that the apparent significance of the disinformation threat, and not evidence, has led to government legislation in this area (C. Marsden et al., 2020).

In 2018, the Commission described the exposure of its citizens to large scale disinformation as ‘a major challenge for Europe’ and attributed a ‘key role’ to social network sites in the spread and amplification of online disinformation (European Commission, 2018b, p. 1). Notwithstanding the lack of evidence of the societal impact of the disinformation, the infrastructural features of these sites like their global reach, lack of gatekeeping and manual moderation and the speed of content spread have been shown to facilitate the spread of disinformation (Bechmann, 2020, p. 3). In addition, their business models have served to amplify disinformation because they deploy algorithms that seek to maximise traffic and advertising revenue and thus tend to deliver shocking content over reasoned democratic debate (Jones, 2019; Martens et al., 2018). In this way, both the accessibility and profit-driven aims of social network sites can facilitate and amplify the spread of disinformation online. These sites are therefore among the central addressees of the Commission’s response to online disinformation because of the major role they can play in this problem (Saurwein & Spencer-Smith, 2020, p. 6).

6.2 The Code

In 2018, the Commission said that social network sites and other Internet platforms had thus far ‘failed to act proportionately’, and were ‘falling short of the challenge posed by disinformation and the manipulative use of platforms’ infrastructure’ (European Commission, 2018b). It tasked a multistakeholder forum on disinformation with formulating an EU-wide Code of Practice on Disinformation, as recommended by the HLEG. It emphasised that actions taken in pursuit of the Code objectives should ‘strictly respect freedom of expression and include safeguards that prevent their abuse’ (European Commission, 2018b, p. 8). The adoption of this Code was accompanied by the threat of future regulatory action (de Cock Buning, 2018, p. 6).

The 2018 Code formally adopted the HLEG definition of disinformation as ‘verifiably false or misleading information’ which, cumulatively,

(a) "Is created, presented and disseminated for economic gain or to intentionally deceive the public"; and

(b) "May cause public harm", intended as "threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens' health, the environment or security" (de Cock Buning, 2018; European Commission, 2018c, p. 1)

Signatories to this Code commit to taking action to ensure the transparency of political advertising and restrict the automated spread of disinformation (Nenadić, 2019, p. 6). The 2020 De Streel et al. study provides a summary of the commitments outlined in the Code. Firstly, commitments relating to content moderation practices include developing policies to enable the closure of false accounts; investing in technologies that help users make informed decisions when they receive false information; prioritising relevant and authentic information and facilitating the finding of alternative content on issues of general interest. Signatories also committed to pursuing better content moderation practices by improving the transparency of political and issue-based advertising and empowering the research community with better access to data (De Streel et al., 2020, p. 34). Progress made against the commitments is evaluated through annual reports published by the Code's signatories and reviewed by a third-party organisation.(Bayer et al., 2019, p. 106; European Commission, 2018c).

Bayer et al. described the Code's approach as 'hesitant' and hypothesised that this could be explained by the lack of technical solutions to the problem foreseen by its signatories or that perhaps these providers were still 'undecided how much effort would be needed to find a balance between their financial interests on the one hand and avoiding legal proceedings on the other' (Bayer et al., 2019, p. 83). The Sounding Board of the Multistakeholder Forum on disinformation online vehemently criticised the Code for lacking a common approach, measurable objectives or KPIs, meaningful commitments or enforcement tools (Sounding Board of the Multistakeholder Forum on disinformation online, 2018). Following its implementation, the third-party evaluation of the Code published in 2020 criticised the fragmented implementation of the commitments, the lack of clarity surrounding key Code concepts and scope and the absence of non-compliance mechanisms (Valdani, Vicari and Associates, 2020, p. 34). Despite these shortcomings, in the context of this thesis, this Code marks a major step in the evolution of EU policy towards content hosted by social network sites in two matters of scope: the potential scope of the harmful, but not illegal, content that it targets; and the scope of users it seeks to protect from this content.

6.3 Demotion, Not Removal

Signatories of the Code are encouraged to invest in technology that can prioritise relevant and authentic information in order to dilute the visibility of disinformation (European Commission, 2018c, p. 7). The choice to prioritise this information instead of filtering out disinformation follows from the HLEG report that reasoned that 'filtering out disinformation

is difficult to achieve without hitting legitimate content, and is therefore problematic from a freedom of expression perspective' (de Cock Buning, 2018, p. 31). By encouraging these proactive measures, the Code necessarily adds further complexity to the ECD regulatory framework discussed earlier in this thesis. In this context, while the Commission has emphasised that voluntary proactive measures 'do not in and of themselves lead to a loss of liability exemption', uncertainty persists in the absence of a CJEU judgement or clarification of legal framework (De Streel et al., 2020, p. 20; European Commission, 2017)

More staunch criticism of the Code is reserved however for its potential negative effect on fundamental rights. Kuczerawy asserts that, despite the Code's positive phrasing, decreasing the visibility of targeted content interferes with the dissemination of information and, therefore, with the right to receive and impart information (Kuczerawy, 2019, pp. 9–10). Bayer et al. similarly challenge this measure on the basis of principles of freedom of expression established by European Convention on Human Rights standards and European Court of Human Rights jurisprudence (Bayer et al., 2019, p. 80). While the Commission emphasised that actions taken in pursuit of the Code objectives should include safeguards to protect fundamental rights, the Code did not put forward measures to balance the interests it seeks to protect (Saurwein & Spencer-Smith, 2020, p. 16). In addition, as a self-regulatory instrument, the Code is not subject to judicial review that could examine potential violation of fundamental rights (Rudl, 2018; Saurwein & Spencer-Smith, 2020).

6.4 Self-regulation in EU Internet Policy

Self-regulation was promoted in early EU Internet policy as a means to facilitate the EU's commercial entry and the consolidation of its positioning in the wider Internet market (Feeley, 1999, p. 171). In this spirit, the 1997 Action Plan on Promoting Safe Use of the Internet mandated that legal action is only taken where self-regulation is deemed to have failed (European Commission, 1997a; Halpin & Simpson, 2002, p. 292). The use of self-regulatory instruments has also been encouraged by both the ECD and the AVMSD (European Parliament and Council of the European Union, 2018; European Parliament and the Council of the European Union, 2000). The EU drew a line, however, in 2003, by ruling out the application of forms of regulation short of state regulation where fundamental rights are at stake (European Parliament et al., 2003; C. Marsden et al., 2020, p. 10). This agreement was revised however in 2016, and its replacement stipulated that self-regulation could be

used in cases involving fundamental rights, however the Commission would be compelled to explain its choice of instrument (European Parliament et al., 2016).

The adoption of a self-regulatory instrument in order to address the challenge of online disinformation is therefore faithful to the regulatory tradition in this domain that prioritised the economic opportunities of e-commerce. The formulation of this Code by economic actors like social network sites also indicates the influence of these rationales over its development. The use of such instruments has even been encouraged by the two previous cases examined in this thesis. However, the arguments invoked to justify the adoption of this instrument did not employ these rationales. The 2018 Communication on tackling online disinformation highlighted the implication of declining user trust for democratic institutions, and not the operations of the Digital Single Market or economic development (European Commission, 2018b, pp. 1–2). The Commission newly emphasised the risks *posed by* platform business models in matters of disinformation, where in previous contexts it emphasised the risks *posed to* these models by the spread of illegal content online (European Commission, 2018b). Therefore, while the choice of a soft-law instrument and its formulation by economic actors may be indicative of the continued dominance of economic rationales, the narratives deployed and the threat of further regulatory action demonstrates the diminishing impact of this rationale in this policy domain.

6.5 Conclusion

The approach taken to the problem of disinformation seems to fulfil the requirements of 'regulation by outrage' described by Bunting. Media coverage and political pressure intensified around a problem (disinformation), threats of regulation were made and social network sites responded with a semi-formal promise to do better in the 2018 Code (Bunting, 2020). From the EU perspective, the adoption of a self-regulatory Code of Practice to address the challenge of online disinformation is faithful to its regulatory tradition in Internet policy and such action is encouraged by the previous two case studies. The Code however represents a significant step in the evolution of EU policy towards content hosted by social network sites because its measures seek to protect society at large and not just specific categories of users from information that is harmful, but not illegal. Thus while the Code indeed faces criticism for features inherent to its self-regulatory nature and the added layer of complexity it adds to the ECD liability framework, its most fundamental contribution to the evolution of the policy

discussed in this thesis is the scope of harmful content it introduces and broad category of users it seeks to protect.

7. Identifying regulatory patterns

The examination of the three case studies in parallel reveals two regulatory patterns underlying the evolution of this policy. The first pattern shows how old frameworks have been extended to social network sites, and bolstered by complementary measures that have targeted specific categories or types of content that they host. This finding supports the application of earlier patterns outlined by De Streel and Husovec and Savin to the evolution of this particular policy (De Streel & Husovec, 2020; Savin, 2019). The second regulatory pattern identified is the dominance of economic rationales throughout this process. The analysis reveals that while economic rationales were deployed in the early stages of policy development towards economic goals (the growth of e-commerce), they were repackaged in the later stages of policy development to pursue non-economic goals – ensuring the responsible behaviour of social network sites. These patterns are described in more detail in the sections that follow.

7.1 New Phenomena, Old Frameworks

Chapter 4 described how, despite being adopted when social network sites were just emerging, the application of the ECD legal framework was easily extended to growing social network sites without calling for a revision of its scope. This legal framework remains the baseline regulatory regime applicable to social network sites and the content that they host (De Streel et al., 2020, p. 15). The 2018 amending AVMSD extended the scope of a framework first formulated in 1989 to certain activities of social network sites. This amending Directive is therefore simultaneously an example of the application of an old framework to the new phenomenon – social network sites - and a complementary measure that bolsters the ECD framework. Finally, the 2018 Code is an example of a supplementary measure targeting a new phenomenon – online disinformation – without prejudice to the old ECD framework. These findings support the application of patterns identified earlier by De Streel and Husovec and Savin to this policy domain (De Streel & Husovec, 2020; Savin, 2019).

7.2 Dominance of Economic Rationales

The dominance of economic rationales has been visible throughout the evolution of EU policy towards content hosted by social network sites. The applicable regulatory framework in the early stages of policy development deployed these rationales in pursuit of economic goals. Later, the policy redirection codified in legislation in the 2018 amending AVMSD repackaged these rationales and directed them to pursue non-economic goals i.e. the 'responsible behaviour' of online platforms, including social network sites.

The ECD chapter demonstrated how early EU Internet policy prioritised the economic opportunities of e-commerce. The generous protections afforded to Internet service providers were part of an effort to create a regulatory framework that could encourage the growth of e-commerce in Europe (European Commission, 1997b). Lawmakers placed their faith in the self-correcting powers of the market to act as a safeguard when these rules fell short (Edwards, 2005). The evolution of this legislation in the years that followed enjoyed the support of Internet service providers, and the ECD liability principles continue to enjoy broad support today (De Streel et al., 2020).

The continued dominance of economic rationales in Internet content regulation was not a certainty, however. The TVWFD is evidence that legislation based on Internal Market aims can pursue non-economic goals. Furthermore, early Commission documents indicated that standards developed under its audiovisual policy (that prioritised the societal and cultural role of these services) could be extended to new categories of content providers as a result of the convergence process (European Commission, 1997c, p. 28). However, as demonstrated in the earlier AVMSD chapter, this policy later evolved towards economic rationales over cultural goals (Celsing, 2010; Ibrus & Rohn, 2016, p. 11; Jõesaar, 2015). During this time, social network sites continued to operate under the ECD legal framework while their perceived influence sheltered them from the reach of the 2010 amending AVMSD. When the scope of EU audiovisual policy finally extended to include social network sites, this policy area, like EU Internet policy, was now dominated by economic rationales. The 2018 amending AVMSD deployed an economic rationale of creating a 'level playing field' in the audiovisual market as a tool to ensure the 'responsible behaviour' of online platforms like social network sites (European Commission, 2016d). The emphasis on the inclusion of social network sites within the scope, in cases where the site falls within the definition of a video-sharing platform, was simultaneously justified on the basis the influence of these sites and on the

grounds that they compete for the same audiences and revenues (Council of the European Union, 2017).

Finally, the adoption of the self-regulatory and voluntary 2018 Code is faithful to the traditional reliance in EU Internet policy on the self-correcting powers of the market and encouraged by the ECD and the AVMSD. The formulation of this Code by economic actors also inherently imbues this instrument with those same rationales. However, the threat of further regulation that accompanied the Code, and the narrative deployed around it, indicate that the power of these rationales in this policy area may soon diminish.

8. Final Conclusion

At the end of 2020, EU lawmakers plan to debut a modernised regulatory framework for online services, including social network sites, in a Digital Services Act (European Commission, 2020b). This thesis thus set out to take advantage of a tangible opportunity to conduct a comprehensive investigation into the evolution of the EU policy towards content hosted by social network sites in anticipation of this change. To this end, it asked what regulatory patterns underly the evolution of EU policy towards content hosted by social network sites. In parallel, this research also aimed to build on the existing literature by examining recent changes in this regime like the 2018 amending AVMSD and the 2018 Code and by bringing two areas of scholarship in regulation and platform studies into conversation with one another.

Two clear regulatory patterns emerged following the analysis undertaken into the three case studies in parallel. First, the analysis confirmed that a pattern identified in different contexts by De Streel and Husovec and Savin was also visible in this policy domain. According to this regulatory pattern, EU content policy has evolved by applying old frameworks, like the ECD and the AVMSD, to new phenomena, in this case social network sites. Complementary measures targeting specific content are then pursued to make up for the lack of specificity of these frameworks. The 2018 Code and the 2018 AVMSD are examples of such measures (De Streel & Husovec, 2020; Savin, 2019). The second pattern identified shows how EU policy towards content hosted by social network sites has consistently deployed economic rationales, first to pursue economic goals and then later to pursue non-economic objectives.

It bears repeating that there are limitations to this study. The measures considered in this research, while influential, are not the only EU policy measures that apply to content hosted by social network sites. This limits the potential of this thesis' findings to speak for the

overall evolution of EU policy towards content hosted by social network sites. However, future research can not only build on these findings by considering a wider range of measures but it may also employ these results to make a more informed assessment of the changes introduced in the forthcoming Digital Services Act.

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