Journal of Media Law

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rjml20

The post-editorial control era: how EU media law matches platforms' organisational control with cooperative responsibility

M. Z. van Drunen

To cite this article: M. Z. van Drunen (2020) The post-editorial control era: how EU media law matches platforms' organisational control with cooperative responsibility, Journal of Media Law, 12:2, 166-190, DOI: 10.1080/17577632.2020.1796067

To link to this article: https://doi.org/10.1080/17577632.2020.1796067

Published online: 24 Jul 2020.

JOURNAL OF MEDIA LAW
2020, VOL. 12, NO. 2, 166–190
https://doi.org/10.1080/17577632.2020.1796067

Routledge
Taylor & Francis Group

The post-editorial control era: how EU media law matches platforms' organisational control with cooperative responsibility

M. Z. van Drunen

Institute for Information Law, University of Amsterdam, Amsterdam, Netherlands

ABSTRACT

This paper argues the AVMSD attaches cooperative responsibility to platforms' organisational control. Firstly, it explores how the new concept of organisational control differs from the editorial control that has traditionally been central to media law, in particular concerning the greater involvement of other stakeholders active on platforms. Secondly, it analyses the measures the AVMSD requires platforms to take with regard to content on their service in light of their organisational control. Finally, it shows how the AVMSD not only requires platforms to assume responsibility for actions under their direct control, but also to enable users and uploaders to exercise their inherent influence differently. The AVMSD consequently moves away from centralised, and towards cooperative responsibility for platforms. The paper concludes by evaluating the choices the AVMSD makes (and fails to make) in the operationalisation of this new responsibility model.

KEYWORDS Platforms; cooperative responsibility; organisational control; Digital Services Act; AVMSD

Introduction

EU law is carving out a new legal space for platforms by focusing on their organisational control over the interactions of their users. Platforms have traditionally qualified as neutral hosts, on the grounds that they only provide the infrastructure through which their users share content. It has become increasingly clear that this does not accurately reflect platforms' activities.[1] To order the uploaded content into an attractive environment for users and advertisers,

CONTACT M. Z. van Drunen m.z.vandrunen@uva.nl @maxvandrunen

[1]Philip M Napoli and Robyn Caplan, 'Why Media Companies Insist They're Not Media Companies, Why They're Wrong, and Why It Matters' (2017) 22 First Monday <https://journals.uic.edu/ojs/index.php/fm/article/view/7051>.

platforms selectively promote and remove specific kinds of content. They thereby take over some tasks traditionally exercised by publishers.[2]

Simply extending the scope of media law to platforms, however, would disregard the differences between platforms' and publishers' editorial activities. Platforms indeed outsource the production and publication of content to their users, and instead focus on organising and curating this content. Moreover, much of the control platforms exercise over this process is automated and directly influenced by the behaviour and preferences of their users. That is not to say platforms have less influence than legacy media organisations. Rather, editorial control on platforms is exercised in a different manner and by multiple parties. The revised Audiovisual Media Services Directive (AVMSD)[3] acknowledges these differences by pointing out that platforms do not bear traditional editorial responsibility, and instead defines platforms by their ability to organise user-generated content and programmes.[4]

What responsibility to attach to platforms' control is a highly contentious question. For example, the Copyright Directive largely places the responsibility to prevent the availability of protected works on platforms themselves.[5] Conversely, the AVMSD not only involves platforms, but also the uploaders and users that exercise influence on their service. The AVMSD thereby moves away from centralised responsibility, and towards cooperative responsibility. Cooperative responsibility, initially developed and explored in further detail by Helberger, Pierson, and Poell, draws on insights from theories on risk sharing and the problem of many hands. It thereby aims to address situations in platform governance in which no single actor causes or can provide a solution to a service's impact on public values on their own. Rather than allocating responsibility to a single central actor, resolving such a problem of many hands requires consideration of the roles, capacities, knowledge, and incentives of the different stakeholders that can contribute to the cause or solution.[6]

[2]Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2018).

[3]Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 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 (Audiovisual Media Services Directive) in view of changing market realities 2018.

[4]This paper will therefore use the term platform to refer to services that exercise organisational control over user-uploaded content (see in further detail section 'The turn towards organisational control in EU platform regulation').

[5]Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC 2019.

[6]Natali Helberger, Jo Pierson and Thomas Poell, 'Governing Online Platforms: From Contested to Cooperative Responsibility' (2018) 34 The Information Society 1; Dennis F Thompson, 'Moral Responsibility of Public Officials: The Problem of Many Hands' (1980) 74 American Political Science Review 905; Dennis F Thompson, 'Responsibility for Failures of Government: The Problem of Many Hands' [2014] The American Review of Public Administration <https://journals.sagepub.com/doi/10.1177/0275074014524013>; Jessica NihlénFahlquist, 'Moral Responsibility for Environmental Problems – Individual or Institutional?' (2009) 22 Journal of Agricultural and Environmental Ethics 109.

Cooperative responsibility accordingly emphasises that many different stakeholders exercise control on platforms, including for example the party that initially uploads harmful content, the users that share it and make it go viral, the advertisers that provide the economic incentives, and of course the platform that provides the tools and infrastructure that enable this process. In line with literature on risk sharing and the many hands problem, this distribution of control makes it difficult to assign responsibility only to platforms themselves – they often do not have the capacity to address the impact of their service without taking the other parties that exercise control on their service into account. To adapt to the distribution of control of platforms, cooperative responsibility highlights the need for a 'shared responsibility and a division of labour between the platform and users'.[7] This in part involves recognising the responsibility of other parties that exercise control on platforms. However, it also requires platforms to actively create the conditions that allow the other parties on their service to exercise their influence responsibly. As fourth section will explore in further detail, the exact distribution of responsibility between platforms and other stakeholders differs depending not only on the control exercised by the platform, but also the capacities of the other stakeholders, and the responsibility they can be expected to take.[8]

The upcoming revision of the eCommerce Directive (ECD), the Digital Services Act, aims to further revise platforms' responsibilities by building on existing sector-specific platform legislation and creating a stronger link between a service's responsibility and its level of knowledge, influence, and control.[9] However, the concept of organisational control and its implications for the traditional, centralised approach to (editorial) responsibility remain unclear. This paper therefore asks how the obligations that the AVMSD attaches to the exercise of organisational control can be understood, and how those obligations can and should be evaluated in light of cooperative responsibility. The first section explores organisational control and its relation to the traditional concept of editorial control. The second section describes the obligations for content that the AVMSD attaches to the exercise of organisational control. The final section analyses the measures required by the AVMSD through the lens of cooperative responsibility,

[7]Helberger, Pierson and Poell (n 6) 3.
[8]Helberger, Pierson and Poell (n 6).
[9]Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market 2000. 'Shaping Europe's Digital Future' (European Commission 2020) COM(2020) 67 final 11 <https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_3.pdf>. Alex and Tomas Rudl, 'Leaked Document: EU Commission Mulls New Law to Regulate Online Platforms' (*netzpolitik.org*, 16 July 2019) <https://netzpolitik.org/2019/leaked-document-eu-commission-mulls-new-law-to-regulate-online-platforms/> accessed 3 January 2020.

highlights potential pitfalls, and suggests how it could be interpreted and further developed.

From editorial to organisational control

The traditional allocation of editorial responsibility

Media law has traditionally used editorial control to determine which organisations are media actors and bear the rights and responsibilities that come with this role.[10] Editorial control determines, for example, which organisations are media service providers under the AVMSD and which organisations qualify for the Copyright Directive's protection for press publications. Conversely, communications networks that only transmit content are defined by their lack of editorial control.[11] Editorial control can be an ambiguous concept, as it is often defined in a way that matches the responsibility a particular legal framework aims to allocate. The AVMSD aims to enable the free movement of audiovisual services and can accordingly focus on services that control the publication and organisation of content.[12] The ECtHR and recommendations from the Council of Europe are able to take a broader approach that also includes 'policy decisions on the content to make available or to promote, and on the manner in which to present or arrange it'.[13] In these definitions, editorial control concerns the influence on (1) the production of content, (2) its publication, and (3) how it is organised in relation to other content.

Owing to the impact on individuals and society that they can have by determining whether and how information will be received by the public, media actors have editorial responsibility for the way in which they exercise their editorial control.[14] Editorial control and editorial responsibility are not always neatly distinguished. Editorial control is sometimes used to refer to the responsible exercise of influence over editorial processes, and the AVSMD defines editorial responsibility as the exercise of effective

[10]'Recommendation of the Committee of Ministers to Member States on a New Notion of Media' (2011) CM/Rec(2011)7 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0>.
[11]See, for example: Copyright Directive article 2(4)(c) and 15; AVMSD article 1(c); 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) 2002. article 2(c); 'Recommendation of the Committee of Ministers to Member States on a New Notion of Media' (n 10) paras 29–36.
[12]Rachael Craufurd Smith, 'Determining Regulatory Competence for Audiovisual Media Services in the European Union' (2011) 3 Journal of Media Law 263, 266; Peggy Valcke and Jeff Ausloos, 'Television on the Internet: Challenges for Audiovisual Media Policy in a Converging Media Environment' in Yu-li Liu and Robert G Picard (eds), *Policy and Marketing Strategies for Digital Media* (Routledge 2014) 30.
[13]*Saliyev v Russia*. See for the same definition *Miami Herald Publishing Co v Tornillo* [1974] United States Supreme Court 418 U.S. 241. 'Recommendation of the Committee of Ministers to Member States on a New Notion of Media' (n 10) para 30.
[14]E.g. *Stoll v Switzerland* [104]; *ES v Austria* [2018] ECtHR 38450/12 [51].

control.[15] However, when editorial control is concretised, it is often used to refer to the actions with which an actor exercises influence and thereby assumes editorial responsibility.[16] This paper will therefore use the term editorial control to refer to the factual exercise of influence on editorial processes, and the term editorial responsibility to refer to the need to exercise this influence in compliance with the relevant norms and rules. It will take the same approach to the terms organisational control and organisational responsibility.

Editorial responsibility is not equally distributed between the different types of editorial control. It varies depending on a number of factors, including the specific type of editorial control exercised, the impact of the medium, and the amount of choice users continue to have.[17] Choices made during the production of content, such as the tone and information a piece of content will include, fall almost completely outside the scope of the law.[18] In this sense, the extensive freedom for the production of content is similar to the freedom of belief, which can only be restricted once the belief is expressed.[19] Responsibilities increase when content is published, at which point both the publisher and creator can be held responsible for illegal content.[20] However, even where content is intended to be published, creators and publishers of course benefit from extensive protection rooted in traditional arguments for the freedom of expression.[21]

The third element of editorial control covers the organisation of content. Media actors can selectively promote the visibility of certain content by, for example, publishing certain pieces on the front page, news section, or press archives.[22] Responsibilities for the organisation of content have traditionally been intertwined with responsibilities for the publication of content. The ECtHR, for example, typically assesses organisational actions by asking whether a publisher who targeted a specific audience or published a story in a prominent place bears more responsibility due to its increased impact.[23] The AVMSD similarly did not impose responsibility on actors

[15] AVMSD article 1(c) 'Recommendation of the Committee of Ministers to Member States on a New Notion of Media' (n 10) para 29.
[16] *Baltic Media Alliance* [2019] CJEU C-622/17 [40].
[17] See for example the ECtHR's distinction between publishing and linking to defamatory content in *Magyar Jeti ZRT v Hungary* [74–77].
[18] *Axel Springer v Germany (no 2)* [2014] ECtHR 48311/10 [65, 67]. *Gündüz v Turkey* [2003] ECtHR 35071/97 [43–44]. There are some exceptions for particularly harmful content such as child sexual abuse material.
[19] M Todd Parker, 'The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR' (2006) 17 Duke Journal of Comparative & International Law 91, 92.
[20] See on the shift *MedžlisIslamskeZajedniceBrčko and Others v Bosnia and Herzegovina* (European Court of Human Rights) [91, 106].
[21] Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015) 17. *Lindon, Otchakovsky-Laurens and July v Francea* [2007] European Court of Human Rights 21279/02, 36448/02 [45].
[22] *Stoll v. Switzerland* (n 14) para 150.*ML and WW v Germany* [2018] ECtHR 60798/10 and 65599/10 [112–113]. See in the context of the AVMSD Wolfgang Schulz and Stefan Heilmann, 'IRIS Special: Editorial Responsibility' (European Audiovisual Observatory 2008) 22 <https://rm.coe.int/1680783c0e>.
[23] *Belpietro v Italy* [2013] European Court of Human Rights 43612/10; *Jersild v Denmark*.

that only organise content. It was instead built around the assumption that one media service provider controls both publication and organisation.[24] Such broadcasters and VOD-providers have traditionally been subject to the highest levels of editorial responsibility. They are not only prohibited from publishing illegal content, but may also be required to promote a wide range of other public values, including the protection of minors, the ability of people with disabilities to participate in social life, and the availability of general interest content.[25]

The turn towards organisational control in EU platform regulation

Platforms have traditionally fallen outside this model of editorial responsibility. Their limited responsibility is of course not unique to media law but often rests on two pillars. Firstly, article 14 ECD provides a general liability exemption for neutral hosting services that take down illegal content once they become aware of it.[26] This focus on neutrality is not a natural fit for platforms that actively organise content, and in *L'Oréal v. eBay* the CJEU suggested that promoting the offers of users decreases a service's neutrality.[27] Conversely, Google's AdWord service could qualify for the safe harbour despite ordering search results based partially on renumeration. Later case law continues to assume social networks can fall under article 14 ECD.[28] Angelopoulos argues that the CJEU's case law can be squared with an interpretation under which an organisation remains neutral when it sets the general criteria for organising content, but not when it intervenes with regard to a specific piece of content.[29]

In addition to article 14 ECD's safe harbour, platforms can escape sector-specific responsibility when they only facilitate the activity to which legislation is designed to apply. Media law, for example, traditionally focused on the editorial responsibility for content production and publication. This allowed services that only organised content to escape both the responsibility for the content available on their service, as well as organisational responsibilities that are tied to the publication of content. This focus matched the traditional importance of publication as an element of editorial control. For example, regulators have sometimes qualified publication as a more powerful editorial tool than organisation, as the publisher is able to limit what the organiser is able to

[24]See in detail Jenny Weinand, *Implementing the EU Audiovisual Media Services Directive: Selected Issues in the Regulation of AVMS by National Media Authorities of France, Germany and the UK* (Nomos Verlag 2018) 484.

[25]See generally AVMSD articles 6a-7a, recitals 22–25

[26]ECD. recital 42; *Google France* [2010] CJEU C-236/08 to C-238/08 [114].

[27]*l'Oréal v eBay* [2011] CJEU C-324/09 [116].

[28]*Google France* (n 26). *Eva Glawischnig-Piesczek* [2019] CJEU C-18/18 [22]. *SABAM v Netlog* [2012] CJEU C-360/10.

[29]Christina Angelopoulos, 'On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market' [2017] SSRN Electronic Journal 34 <https://www.ssrn.com/abstract=2947800>.

present to the public.[30] The balance of power between publication and organisation is not set in stone, however, and starts to reverse when the amount of available content exceeds the amount of content the audience can process.

This shift is especially pronounced on user-upload platforms. By allowing users to freely upload content, they are essentially guaranteed to contain a large quantity and variety of illegal, harmful, normal, and general interest content. Platforms must algorithmically organise this stockpile of content in order to make it accessible to users.[31] This in turn allows the platform considerable influence over what content users are exposed to. Unless users already know a piece of content or uploader exists, there is no way for them to encounter it without going through the platforms' organisational filter. As a result, while a large quantity and wide variety of content may be available, the platform's organisational algorithm determines what content will find an audience. Media law's focus on responsibility for the publication of content made it difficult for this increasing importance of organisational control to be taken into account.[32]

The AVMSD changes this situation by extending its scope to video-sharing platforms. It defines these similarly to traditional media services, with the exception that video-sharing platforms do not exercise editorial control over publication *and* organisation, but only determine the organisation of programmes and user-generated videos.[33] The AVMSD's platform definition is similar to the Copyright Directive's, which also targets services that organise user-uploaded content. However, unlike the Copyright Directive, the AVMSD does not contain specific carveouts for (for example) academic repositories or educational services.[34] Its definition also does not focus on economic factors (such as the role of network effects in the Commission's initial guidance on platforms), or include services that exercise more control over content publication (such as Netflix, which qualifies as a VOD-provider rather than a platform under the AVSMD).[35]

[30]See for regulators' perspective 'Beleidsregels Classificatie Commerciële Mediadiensten Op Aanvraag 2011' (Commissariaat voor de Media 2011) BWBR0030512 para 30 <https://www.cvdm.nl/wp-content/uploads/2013/08/Beleidsregels-classificatie-commerci%C3%ABle-mediadiensten-op-aanvraag-2011.pdf>. See similarly the Guidance notes on who needs to notify an on-demand programme service to Ofcom 2015 para 4.6(b).

[31]Gillespie (n 2).

[32]Jillian C York and Ethan Zuckerman, '6 Moderating the Public Sphere' [2019] Human Rights in the Age of Platforms 137, 140. Refer to this as soft and hard control.

[33]See on the interpretation of traditional elements of the AVMSD's definition of platforms Lorna Woods, 'Video-Sharing Platforms in the Revised Audiovisual Media Services Directive' (2018) 23 Communications Law 127.

[34]The P2B regulation broadly speaks about 'facilitating the initiating of direct transactions', whereas the AVMSD and Copyright Directive focus on platforms' role in the organization of content. Copyright Directive article 17; Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services 2019. article 2(2).

[35]European Commission, 'Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy' (2016) <https://ec.europa.eu/digital-single-market/en/news/public-consultation-regulatory-environment-platforms-online-

In the broader discussion on which services are platforms and should bear the responsibilities that come with that role, the AVMSD thus broadly focuses on services that exercise organisational control over third-party media content. This does not capture all different tiers of services offered by platforms, such as their increasing involvement in content publication. YouTube, for example, offers a premium service that gives users access to content produced and published by YouTube itself. When such services are dissociable from platforms' main activity, they could be qualified as audiovisual media services on their own, with the accompanying set of responsibilities under the AVMSD. The AVMSD indicates that traditional media services may be provided on platforms by pointing out that platforms can exercise organisational control over programmes (which are defined as being provided by traditional media service providers). At the same time, the AVMSD captures a wide variety of services by relying on the loosely defined concept of organisational control to determine what a platform is. From the perspective of cooperative responsibility, the different kinds of services platforms provide can come with different levels of responsibility depending on (among other things) their level of control. The AVMSD indeed does not impose a predefined set of responsibilities on every service that exercises organisational control, but instead requires them to take appropriate measures depending on, among other things, the nature of the service they provide.

Organisational control in detail

The AVMSD defines platforms' organisational control in a very open manner. Specifically, it states that 'the organisation of [programmes and/or user-generated content] is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing'.[36] The AVMSD gives two reasons why services that exercise organisational control should bear more responsibility. Firstly, it argues platforms should bear additional responsibilities because they compete with traditional media service providers.[37] This goal is more directly related to the need for a level playing field than platforms' organisational control.[38]

intermediaries-data-and-cloud/> accessed 16 April 2019; Pieter Nooren and others, 'Should We Regulate Digital Platforms? A New Framework for Evaluating Policy Options' (2018) 10 Policy & Internet 264.

[36] AVMSD article 1 See on regulators' intention to explore the term in the application of the AMVSD 'ERGA Analysis & Discussion Paper to Contribute to the Consistent Implementation of the Revised Audiovisual Media Services (AVMS) Directive: Towards the Application of the Revised Directive by National Regulatory Authorities (NRAs)' (ERGA 2018) 69 <http://erga-online.eu/wp-content/uploads/2018/11/ERGA-2018-08-SG3-Analysis-and-Discussion-Paper.pdf>.

[37] AVMSD recitals 4, 44.

[38] See alternatively on the desire to protect national media markets Andrej Savin, 'Regulating Internet Platforms in the EU – The Emergence of the "Level Playing Field"' (2018) 34 Computer Law & Security Review 1215.

However, as the previous section has argued, platforms' organisational control is key to their ability to turn the content they host into an attractive (and competitive) service. The Copyright Directive makes this argument more explicitly by arguing that platforms aim to monetise the content their users upload 'by organising it and promoting it in order to attract a larger audience'.[39] Secondly, the AVSMD notes that platforms 'have a considerable impact in that they facilitate the possibility for users to shape and influence the opinions of other users'.[40] Later recitals specify platforms exercise their influence by organising content. Their responsibilities therefore relate to the organisation of content, not the content as such.[41] This distinguishes the AVMSD's approach to platforms from its approach to traditional media service providers, who are assumed to exercise full editorial control and bear full editorial responsibility.[42] The AVMSD in other words adapts the traditional argument for editorial responsibility to include the important impact of platform users.

The AVMSD expands on the notion that platforms organise content in three ways. Firstly, it notes that platforms *determine* the organisation of content. This wording indicates platforms do not need to have exclusive control over the organisation of content. Indeed, all major current platforms targeted by the AVMSD partially rely on explicit (e.g. sharing, liking, commenting on content) or implicit (e.g. time spent watching, likelihood that a user will continue watching) user feedback to organise content.[43] However, while users can provide input to the organisational algorithm, the platform decides how, when, and on what they can give input, and if and how this input will affect the organisation of content. Such factors afford the platform decisive influence over the way content is organised. In line with traditional approaches to editorial control, this ability to exercise decisive (not exclusive) influence over the way content is organised is key.[44]

Secondly, the AVMSD states that algorithms determine the organisation of content 'in particular by displaying, tagging and sequencing'. This language makes it clear that this list of methods is not cumulative or exhaustive, and highlights that platforms often use multiple ways to organise content simultaneously.[45] Platforms may for example automatically sequence videos, recommend a set of videos a user can choose from, or allow users to explore

[39]Copyright Directive recital 62
[40]AVMSD recital 4
[41]ibid. recital 48; see also article 28b(3), tying a platform's responsibilities in part to the nature of the service provided.
[42]Weinand (n 24) 484.
[43]Michael A DeVito, 'From Editors to Algorithms' (2017) 5 Digital Journalism 753. Jane B Singer, 'User-Generated Visibility: Secondary Gatekeeping in a Shared Media Space' (2014) 16 New Media & Society 55.
[44]Schulz and Heilmann (n 22) 15.
[45]Woods, 'Video-Sharing Platforms in the Revised Audiovisual Media Services Directive' (n 33) 133.

and contribute to tagged topics. In other words, organisational control does not necessarily require the platform to organise content in one way, but instead describes the variety of organisational methods through which platforms allow users to easily access content. Previous approaches to editorial control have typically required a degree of selectivity that allows an actor to differentiate between content based on its attributes. Thus, organising content alphabetically or chronologically typically does not constitute organisational control, whereas organising it by genre or popularity does.[46] In line with the rationale of organisational control, what may be key is that the organisation allows the platform to draw and have an impact on a large audience.

Thirdly, the AVMSD for the first time explicitly recognises that organisational control may be exercised algorithmically. In so doing, it shows that the terms 'tech company' and 'media company' are not mutually exclusive; a company can still fall under media law if it uses technology to perform editorial tasks.[47] The recognition that organisational control can be automated creates a number of complexities. For example, human editorial staff has traditionally been an important indicator that an organisation exercises editorial control and bears responsibility.[48] Analogously, being able to direct the engineers that design the organisational algorithm could indicate which company exactly exercises control and falls under the AVMSD. At the same time, recognising platforms exercise organisational control algorithmically raises a number of complexities the AVMSD does not tackle. Some are avoided explicitly: while the place where editorial decisions are taken affects jurisdiction over traditional media services, organisational control plays no role in jurisdiction.[49] Others fall outside the AVMSD's substantive scope. For example, although the Green Paper that preceded the AVMSD's revision pointed out platforms may create new vulnerabilities by personalising content organisation, the current directive does not address such issues as manipulation or diversity.[50] It instead focuses on issues that result from platforms' ability to attract a large audience, such as that audience's exposure to illegal or harmful content. The AVMSD therefore continues to focus on responsibilities that are traditionally associated with the publication of content. Though the AVMSD moves the debate forward by acknowledging platforms' algorithmic organisational

[46]Remy Chavannes and Oliver Castendyk, 'Article 1 (Definitions)' in Oliver Castendyk, Egbert Dommering and Alexander Scheuer (eds), *European Media Law* (Kluwer Law International 2008) 825. Valcke and Ausloos (n 12) 30.

[47]Philip M Napoli, 'Social Media and the Public Interest: Governance of News Platforms in the Realm of Individual and Algorithmic Gatekeepers' (2015) 39 Telecommunications Policy 751, 7.

[48]*Baltic Media Alliance* (n 16) para 43.

[49]AVMSD article 28a

[50]'Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values' (European Commission 2013) COM(2013) 231 final 13 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:PDF>.

control and its implications for the operationalisation of responsibility, it does not yet deal with the full implications of this recognition.[51]

The building blocks of organisational responsibility

Media law has not only relied on editorial control to determine who bears editorial responsibility, but has also tailored editorial responsibility to the control exercised by publishers and broadcasters. As the previous section has argued, platforms are able to compete with publishers and influence users by exercising algorithmic control over the organisation of content, rather than human control over content production and publication. The AVSMD adapts to this shift by creating a new, separate set of responsibilities for the exercise of organisational control in article 28b.[52] Article 28b(1) and (2) generally require platforms to take appropriate measures with regard to content that is illegal, commercial, or harmful to minors.[53] Article 28b(3) outlines 10 concrete appropriate measures. The following section describes the measures the AVMSD requires platforms to (enable their users) to take with regard to the content on their service, in order to lay the groundwork for an evaluation of its responsibility model thought the lens of cooperative responsibility in the fourth section.

Reporting mechanisms

Knowledge about the way in which organised content relates to public values is a precondition for organising this content in accordance with these values. By outsourcing the production and publication of content to users, platforms can distance themselves from the choices made during these phases of the editorial process. They can instead focus on the organisation of this content, and can use metainformation e.g. how popular is content, by how many friends has it been shared, to do so. In short, exercising organisational control does not automatically afford platforms knowledge about the way in which the content they organise relates to public values.[54]

[51]The legal history indicates Member States could not reach a consensus on issues related to pluralism. 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 2016.

[52]Depending on their control, platforms may fall under the AVMSD's traditional advertising obligations. See further section 'organisational responsibility from the perspective of cooperative responsibility.

[53]In contrast to the UK's online harms white paper, the AVMSD aims to protect the general public from illegal content, and only protect minors from content that is harmful to them (AVMSD recital 4). The AVMSD continues to leave the definition of harmful content to the Member States, Jenny Weinand, 'The Revised Audiovisual Media Services Directive 2018 – Has the EU Learnt the Right Lessons from the Past?' (2018) 82 UFITA 260, 291. See on the similar focus on design in the UK online harms white paper Lorna Woods, 'The Duty of Care in the Online Harms White Paper' (2019) 11 Journal of Media Law 6.

[54]DeVito (n 43); Karin van Es, 'YouTube's Operational Logic: "The View" as Pervasive Category' [2019] 21 Television & New Media 223.

Article 14 ECD nevertheless ensured that third parties would be able to inform platforms about illegal content on their service. However, it did not explicitly regulate who should notify platforms, or how notification mechanisms should be designed.[55] Recent (self-)regulation is relying on more specific stakeholders to provide platforms with information about the content on their service. These include the platform itself (Copyright Directive), national authorities (proposed Terrorism Regulation), as well as traditional media organisations (primarily in the field of disinformation).[56] Finally, the AVSMD requires platforms to put in place mechanisms that allow users to flag, report, and rate content that is illegal or harmful, uploaders to declare commercial communications.[57] The AVMSD therefore aims to complement the ECD with notification systems that more explicitly target the parties already active on platforms (i.e. users and uploaders), are better designed and easy to use for these parties, and apply to a wider range of content.[58] These reporting mechanisms are the basis for four specific actions platforms may be required to (enable their users to) take. The remainder of this section will discuss these along two lines: those that are platform-driven, and those that are user-driven.

Platform-driven measures

The AVMSD firstly requires platforms to take appropriate measures with regard to illegal content. This is at first sight a bad match with the AVMSD's focus on organisational control. Platforms' ability to remove content does not result from their organisational control, but rather from the fact that they host content. As art. 14 ECD already requires hosting services to remove content if they have actual knowledge it is illegal, additional obligations (such as an obligation to demote suspected illegal content) could only apply to content that is not (yet) known to be illegal. The AVMSD accordingly does not require platforms to further restrict the accessibility of illegal content, but focuses on platforms' control over the architecture through which the audience

[55] *l'Oréal v. eBay* (n 27). Martin Husovec, *Injunctions Against Intermediaries in the European Union: Accountable But Not Liable?*, vol 41 (Cambridge University Press 2017) 53.

[56] Copyright Directive article 17 European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online 2019 [P8_TA-PROV(2019)0421]. Art 4. 'Draft Recommendation of the Committee of Ministers to Member States on Promoting a Favourable Environment for Quality Journalism in the Digital Age (7th Draft)' (Council of Europe 2019) <https://rm.coe.int/msi-joq-2018-rev7-e-draft-recommendation-on-quality-journalism-finalis/168098ab76>. See also the role of news media and advertisers as third-party fact-checkers for platforms 'Tackling Online Disinformation: A European Approach' (European Commission 2018) COM(2018) 236 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>.

[57] On the definition of user see Woods, 'Video-Sharing Platforms in the Revised Audiovisual Media Services Directive' (n 33) 133.

[58] See also its legislative history: Proposal Revised AVMSD (n 51) 3. The relationship between the two directives also indicates platforms can exercise organisational control without losing the neutrality required under the ECD. See generally Angelopoulos (n 29) 34.

accesses content. It requires them to adapt this architecture to include the reporting mechanisms outlined in section 'Reporting mechanisms', and relies on art. 14 ECD to require platforms to remove illegal content.[59] This signifies the added responsibility that comes with organisational control: all hosting services must remove content once they are notified, but for illegal content the AVMSD requires platforms to use their higher degree of control to better enable users to bring content to their attention. Specifically, by setting explicit rules on the ease-of-use design of notification mechanisms the AVMSD reduces the likelihood that notifications are too vague or unsubstantiated to produce the actual knowledge article 14 ECD requires.[60]

The AVMSD also targets the way in which platforms exercise organisational control more directly by requiring platforms to change the default accessibility and visibility of content that is harmful to minors. Platforms can restrict the accessibility of content in a wide variety of ways. They can for example require users to prove they want or should be able to access certain content, but can also cut off some of the organisational methods described in section 'Organisational control in detail'. Instagram, for example, removes misinformation from its hashtag pages and explore functionality.[61] Reddit has similarly stopped recommending contentious content to non-subscribers, and additionally requires users to opt in before they view it.[62] In all cases, the default restrictions apply to content that does not violate the law or community guidelines, but is nevertheless seen as contentious enough to limit its visibility for the general public.[63]

This diversity with which platforms can use their organisational control to restrict the accessibility of content is difficult to capture in legislation. This is especially true when platforms are expected to tailor accessibility restrictions to the harmfulness of content. The AVMSD accordingly frames its default access restrictions in broad terms. It generally requires platforms to put in place age verification mechanisms, and highlights that the most harmful content should be subject to the strictest access control measures. It similarly requires Member States to encourage self- or coregulation that effectively

[59]A takedown obligation was proposed and rejected during the AVMSD's legislative process: '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' (European Parliament 2016) 2016/0151(COD) 53 <http://www.europarl.europa.eu/RegData/commissions/imco/avis/2016/589291/IMCO_AD(2016)589291_EN.pdf>.

[60]*l'Oréal v. eBay* (n 27) para 122.

[61]'Combatting Misinformation on Instagram' (*About Facebook*, 16 December 2019) <https://about.fb.com/news/2019/12/combatting-misinformation-on-instagram/> accessed 17 December 2019.

[62]'Continuing Our Work to Improve Recommendations on YouTube' (*Official YouTube Blog*) <https://youtube.googleblog.com/2019/01/continuing-our-work-to-improve.html> accessed 3 January 2020.

[63]Certain content can also be promoted over contentious content, see for example 'Declaration by the Committee of Ministers on the Financial Sustainability of Quality Journalism in the Digital Age' (2019) Decl(13/02/2019)2 <https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168092dd4d>.

reduces children's exposure to advertising for unhealthy foods, without prescribing a specific way in which the visibility of such content must be limited.[64] In both cases, the AVMSD does not establish a link between users' reports and platforms' obligation to act (in contrast to, for example, illegal content notifications that can trigger removal obligations).

This flexibility matches the variety of ways in which organisational control can be exercised. At the same time, the exact way in which platforms' obligation to restrict access to content is operationalised has a significant impact on the public values at stake on platforms. Cutting off all the paths through which users can encounter a piece of content would effectively turn a platform into a hosting provider, and remove its added value as a tool for freedom of expression for contentious but legal content.[65] Cutting off only certain paths to encounter content can also disproportionately affect the ability of specific groups to encounter content. The platform policies outlined above try to do exactly this by limiting content's accessibility for non-subscribers. In other words, the many different forms of organisational control create ambiguities that must be resolved when the legislation is implemented. This puts added pressure on the underlying governance mechanism through which a platform's organisational responsibilities are operationalised and contested, which will be explored in section 'The back end: operationalising and contesting responsibility'.

User-driven measures

In addition to restricting the default accessibility of content, the obligations the AVMSD imposes also target the way in which users access and evaluate content. Enabling users to become more active participants in the media system and make more informed judgments about the content they watch has a long history in media law.[66] It can be one way to avoid the public values impact created when media organisations limit the default accessibility of legal content.[67] Transparency is the first and, in some cases, only step to

[64]'Children in Audiovisual Media Services – The Effectiveness of Age Verification and Media Literacy' (ERGA 2018).

[65]*Magyar KétfarkúKutyaPárt v Hungary* [2020] ECtHR 201/17 [87]. However, even a small obstacle can prevent users from consuming content online, Matthew Hindman, *The Internet Trap* (Princeton University Press 2018) 24 <https://press.princeton.edu/books/hardcover/9780691159263/the-internet-trap>.

[66]'Draft Recommendation of the Committee of Ministers to Member States on Promoting a Favourable Environment for Quality Journalism in the Digital Age (7th Draft)' (n 56); 'Recommendation of the Committee of Ministers to Member States on the Protection of Human Rights with Regard to Search Engines' (2012) CM/Rec(2012)3 s 1 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805caa87> accessed 10 June 2019; 'Recommendation of the Committee of Ministers to Member States on the Protection of Human Rights with Regard to Social Networking Services' (Council of Europe 2012) CM/Rec(2012)4 para 16 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805caa9b>.

[67]AVMSD recital 15 'Recommendation of the Committee of Ministers to Member States on Media Pluralism and Transparency of Media Ownership' (Council of Europe 2018) CM/Rec(2018)1 para 10 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13>.

allowing users to become more active participants. It is especially important in the context of advertising, where both consumer and media law require that commercial influences on editorial content are disclosed so users are not misled.[68] Although the AVMSD generally requires platforms to take appropriate measures to comply with its rules on advertising, the only concrete obligation it proposes in this context focuses on the transparency of commercial content within programmes or user-generated videos. Platforms must enable uploaders to declare commercial content, and notify the viewer when uploaders use this mechanism or the platform otherwise learns that a video contains commercial communications.[69] The AVMSD therefore again requires platforms to facilitate compliance with an existing obligation by requiring platforms to make it easier for uploaders to comply with their obligation to notify viewers of commercial influences on their content. This in turn enables the platform to relay these notifications to users in a more uniform and recognisable way.

Platforms' control over the way users access content poses new challenges to the role transparency plays in media law more generally. Because users must rely on the ways in which platforms organise content, simply informing them does not necessarily enable them to access or avoid specific content on a platform. The shift to organisational control thus also increases the importance of obligations that target the way in which users are enabled to access content. By using such tools, users can moreover determine what content they are exposed to without affecting the visibility of content for the general audience. The AVMSD provides for such filters in the form of parental control tools. Like default accessibility restrictions, control tools come in many specific forms.[70] Users can, for example, choose to filter out certain content (as YouTube's restricted mode does by hiding content rated as unsafe for minors) or choose to only filter in content (as YouTube Kids does by gradually allowing access to more content rated as safe for different ages).[71]

Of course, users are already able to exercise influence on the way in which content is organised by following topics, subscribing to uploaders, or searching for keywords. However, the preferences they indicate are typically only

[68] AVMSD article 9-11 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), OJ 2005 L149 2005.

[69] AVMSD article 28b(2) and 28b(3)(c)

[70] Jaron Harambam and others, 'Designing for the Better by Taking Users into Account: A Qualitative Evaluation of User Control Mechanisms in (News) Recommender Systems', *Proceedings of the 13th ACM Conference on Recommender Systems – RecSys '19* (ACM Press 2019) <http://dl.acm.org/citation.cfm?doid=3298689.3347014>.

[71] See critically Benjamin Burroughs, 'YouTube Kids: The App Economy and Mobile Parenting' (2017) 3 Social Media + Society 1.

one signal that is used to organise content according to a non-transparent metric.[72] Individual control tools place users in a different position by allowing them more direct control over the content they are exposed to. Media literacy programmes and transparency requirements have long aimed to increase users' ability to navigate media system and critically evaluate what information to consume and how to process it. Individually controlled curation tools enable users to act on such knowledge as their ability to seek out or avoid content is increasingly mediated by platforms' organisational control.

Organisational responsibility from the perspective of cooperative responsibility

In contrast to the centralised approach the AVMSD takes to traditional media actors and other EU law takes towards platforms, the AVMSD's approach to organisational responsibility sees a larger role for the users and uploaders on the platform. It thereby shifts their role from passive actors that must be protected, to participants who are given the tools needed to exercise their influence responsibly.[73] In so doing it adapts its approach to responsibility to the fact platforms do not exercise full editorial control. The AVMSD's approach to commercial communications serves as an example of this shift. Platforms must comply with traditional advertising rules only with regard to the advertising they sell, market, or arrange themselves. For other commercial content, platforms are only required to take appropriate measures to comply with advertising rules 'taking into account the limited control exercised'.[74]

The following section will use the concept of cooperative responsibility to better understand and evaluate how the AVMSD adjusts responsibility to platforms' organisational control. Cooperative responsibility was developed by drawing on insights from literature on risk sharing and the problem of many hands in order to address the fact that multiple stakeholders on platforms contribute to the erosion and realisation of public values. It thus takes account of platforms' lack of full editorial control, and correspondingly does not impose on platforms the exclusive responsibility to safeguard public values. Platforms continue to be responsible for actions in their own sphere of influence, such as the processing of user data and the need to take down

[72] DeVito (n 43).

[73] Francisco Javier Cabrera Blázquez and others, *The Legal Framework for Video-Sharing Platforms* (European Audiovisual Observatory 2018) 101 <http://book.coe.int/usd/en/european-audiovisual-observatory/7690-iris-plus-the-legal-framework-for-video-sharing-platforms.html>. See also the similar earlier shift in gatekeeping theory, e.g. KarineBarzilai-Nahon, 'Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control' (2008) 59 Journal of the American Society for Information Science and Technology 1493.

[74] AVMSD article 28b(2). In addition to of course other rules on advertising, see Ingrid Lambrecht, Valerie Verdoodt and Jasper Bellon, 'Platforms and Commercial Communications Aimed at Children: A Playground under Legislative Reform?' (2018) 32 International Review of Law, Computers & Technology 58.

content they know is illegal. However, they also have a responsibility to enable the other stakeholders on their service (in the AVMSD's case users and uploaders) to exercise their influence responsibly. This not only requires platforms to put in place the mechanisms required for these stakeholders to exercise their influence differently, but also, crucially, to actively create the conditions and foster the abilities these stakeholders need. This requires a delicate division of responsibilities between the different actors that exercise control on platforms. This division of responsibilities is not set in stone. This is not only because the specific infrastructure through which stakeholders on platforms exercise their influence differs from case to case, but also because part of platforms' task under cooperative responsibility is to actively change the capabilities and infrastructure that determine how users exercise their influence. As a result, cooperative responsibility can take on different forms depending on the conditions under which it is implemented.[75]

Given the concept's aim of addressing the distributed way control is exercised on platforms, it can be used to bring further clarity and coherence to the AVMSD's approach to organisational control. By definition, an actor that exercises organisational control only controls part of the editorial process.[76] Users not only have a large role in producing and publishing the content that is available on platforms, but can often also influence how this content is organised for them and others. Acknowledging this influence allows the AVMSD to enable and incentivise users to exercise their influence to safeguard the public values at stake on platforms, rather than building around it by requiring the platform to assume more control. This makes it possible to avoid a situation in which platforms channel users' influence for own purposes (as is currently often the case), or are required to increasingly tighten their control over the content their users see and upload.[77]

However, operationalising this responsibility model is a difficult task. It not only requires that users are given the tools they need, but also that these tools are designed in such a way that users can exercise their responsibility, that they are able to develop the capacity to do so, and that platforms' responsibility when users do not use the tools available to them can be determined. An operationalisation of cooperative responsibility that does not take these factors into account, but only gives users the tools with which they can exercise their influence responsibly, is only window dressing. It would also take a

[75]Helberger, Pierson and Poell (n 6).
[76]*Editorial Board of PravoyeDelo and Shtekel v Ukraine* [63].
[77]See also the concerns over platforms' opinion power in especially German literature, e.g. surrounding the recent revision of the Rundfunkstaatsvertrag Tobias Schmid, Laura Braam and Julia Mischke, 'Gegen-vMeinungsmacht – Reformbedürfnisse Aus Sicht Eines Regulierers' [2020] Multimedia und Recht 19. See generally on the AVMSD and media concentration Indrekıbrus and Ulrike Rohn, 'Sharing Killed the AVMSD Star: The Impossibility of European Audiovisual Media Regulation in the Era of the Sharing Economy' (2016) 5 Internet Policy Review <https://policyreview.info/articles/analysis/sharing-killed-avmsd-star-impossibility-european-audiovisual-media-regulation-era>.

very reductive view of platforms' organisational control, as it would stop at the acknowledgment that platforms can enable their users to determine what content they see while failing to take account of the fact that platforms also create the infrastructure and conditions under which users exercise their influence. The following section will evaluate these concerns by exploring how the AVMSD operationalises cooperative responsibility in two parts: a front end comprising the tools outlined in the third section through which users can exercise influence directly, and a back end through which more specific choices and the allocation of responsibility between platforms and other stakeholders can be contested.

The front end: adapting channels for user influence

The AVSMD firstly requires platforms to integrate tools into the user interface that allow users to directly exercise influence on content curation. Platforms of course already offer such tools (e.g. subscribe, block, share and flag buttons). However, they have developed in the context of a significant power imbalance between the user and platform, and are often designed to channel users' input for platforms' own purposes. Flags, for example, can be hidden or ambiguous so users' reports can be converted into justifications for the platform's moderation decisions.[78] The AVMSD pulls some of these mechanisms, i.e. flagging and parental control tools, out of the platforms' exclusive control. This shifts the platform-user relationship from one in which the platform channels users' influence for its own purposes, to one in which platforms enable users to safeguard and promote public values.

The changing function firstly has implications for the design of these mechanisms, and the AVMSD accordingly requires flagging mechanisms and user control tools to be transparent and easy to use. These requirements must be viewed in light of users' role in the governance system established by the AVMSD. To enable users to exercise their influence more responsibly, they must be able to know what they are communicating when they use the tools that the AVMSD makes available to them. One of the goals of the AVSMD, for example, was to ensure that platforms use the content standards laid down in EU law rather than their own.[79] Users of course do not know what exactly constitutes illegal content under EU law.[80] To be transparent, it is therefore more important that a flag refers to concrete behaviour a

[78]Gillespie (n 2); José van Dijck, Thomas Poell and Martijn de Waal, *The Platform Society : Public Values in a Connective World* (Oxford University Press 2018) 148 <https://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=1901418&site=ehost-live&scope=site>.

[79]Proposal Revised AVMSD (n 51).

[80]Joan Barata, 'New EU Rules on Video-Sharing Platforms: Will They Really Work?' (*Center for internet and Society*, 18 February 2019) <http://cyberlaw.stanford.edu/blog/2019/02/new-eu-rules-video-sharing-platforms-will-they-really-work>. Weinand (n 52) 731.

user can identify rather than clarifying that it relates to a standard as defined by EU law.

The AVSMD does not explicitly address what platforms' responsibilities are when users do not use the tools that platforms are required to make available. This is potentially problematic, as it increases the likelihood that users are simply put into the position of active consumers who are expected to take responsibility regardless of their capacity or the incentive structure to do so. In certain situations, platforms can be required to assume a more active position when users do not use the available tools. For example, the AVSMD's obligations for the accessibility of harmful content target both platforms and users. Though it does not explicitly address the allocation of responsibility in these cases, the AVMSD's revision has in general moved away from the standpoint that offering a user control tools justifies a lower level of responsibility for media organisations. For example, VOD providers have traditionally been subject to less responsibility than broadcasters, in part because they organise content in a way that allows users more choice about what they view than broadcasters. Their responsibility has been largely equalised in the 2018 revision of the AVMSD.[81] The legislative history indicates that this is not because user choice has decreased, but rather because the increasing importance of VOD services required a higher level of consumer protection and a more level playing field with traditional broadcasters.[82] What is important, in other words, is not the amount of user choice that is technically available, but that the goals of the AVMSD are safeguarded on services on which users increasingly access content. Analogously, platforms may be expected to do more to ensure minors are not exposed to harmful content as long as users do not use the control tools that are available to them. This is especially true in the context of the harmful content targeted by the AVMSD, as the party whose responsibility it is to use the control tools (the parent) and the party that is affected if these are not used (the minor) are not the same.

In other cases, users' and platforms' responsibilities do not overlap but complement one another. For example, the AVMSD maintains the prohibition on general monitoring obligations for platforms, built around the privacy and freedom of expression concerns triggered by requiring platforms to assume such broad control.[83] The AVMSD therefore fully relies on users and uploaders to flag content that platforms are expected to remove, restrict

[81] Some differences remain, especially with regard to European works, advertising, and the right of reply.

[82] 'Ex-Post REFIT Evaluation of the Audiovisual Media Services Directive 2010/13/EU' (Commission 2016) COM(2016) 287 final 18 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0170&from=EN>. See also Weinand (n 53) 274. Arguing the distinction makes less sense in light of increasing convergence.

[83] Aleksandra Kuczerawy, *Intermediary Liability and Freedom of Expression in the EU: From Concepts to Safeguards* (Intersentia 2018) <https://intersentia.com/en/intermediary-liability-and-freedom-of-expression-in-the-eu-from-concepts-to-safeguards.html>.

access to, or make transparent. Platforms' role in such a case is restricted to enabling and incentivising users to fulfil their responsibility. Of course, users' actual obligation to use the tools available to them is highly contextual. For example, while users' responsibility to report illegal content is very limited, uploaders have a well-established legal responsibility to make advertising recognisable under media and consumer law.[84] Article 28b(3)(b) AVMSD moreover requires platforms to include and apply the AVMSD's rules on advertising recognisability in their own terms of service. Failing to easily declare advertising through the AVMSD's tools can therefore not only factor into the assessment of the uploaders' violation of his own responsibility; it can also require the platform to conclude the uploader has violated its terms of service.

More fundamentally, platforms' responsibility is not separate from whether users can and do use the tools they make available. Platforms' obligation to enable users to exercise their influence responsibly also requires them to ensure that users can develop the capacity to do so. The AVSMD accordingly requires platforms to provide for effective media literacy measures and raise users' awareness of these measures. Doing so not only requires the platform to promote the general media skills necessary for the information ecosystem they provide, but also to inform users about the specific tools they offer. Platforms' obligation to promote the media literacy of their users is moreover complemented by a more general obligation to develop media literacy on the part of the Member States which have set up a governance mechanism that relies on users to take a more active role.[85] Users' passive approach on platforms is therefore not taken as a given. Nevertheless, acclimatising the public to a new information environment will be a long process, and one which will not be evenly distributed among all users.[86] In other words, although users' passive approach is not taken as a given, the extent to which they can be expected to assume responsibility will change over time.

The back end: operationalising and contesting responsibility.

Directly involving the other stakeholders that are able to exercise influence on platforms is important, but not sufficient. Enabling them to exercise their influence in line with public values triggers a number of more specific normative choices. Broadly defined normative standards such as hate speech or

[84]See on influencers' responsibility especially Catalina Goanta and Sofia Ranchordas, 'The Regulation of Social Media Influencers: An Introduction' [2019] SSRN <https://www.ssrn.com/abstract=3457197>.
[85]AVMSD article 33a, 28b(3)(j), recital 59.
[86]Robert Tomljenović, 'Regulatory Authorities for Electronic Media and Media Literacy Comparative Analysis of the Best European Practices' (2018) <https://rm.coe.int/regulatory-authorities-for-electronic-media/1680903a2a>.

content that is harmful to minors must be broken down into concrete elements a user can identify.[87] Platforms' responsibility to act on the signals provided to them must be operationalised and tailored to the specific ways in which organisational control is exercised. And, crucially, platforms' responsibility when users remain passive must be determined.

These points are difficult to pin down in legislation. This is not only because platforms exercise organisational control in diverse and constantly evolving ways, or because the AVMSD explicitly aims to increase users' capacities through media literacy programmes. It is also because of the interplay between the platform infrastructure that the AVMSD aims to change, and the audience that is expected to use it. Users adapt to changes in the infrastructure of the platform, which in turn adapts to its changing user base.[88] For example, although Twitter's 'favorite' button was first introduced to allow users to bookmark tweets, it was changed to a 'like' button as users began to use it to signal agreement.[89] The exact form cooperative responsibility takes is in short not static, but evolves in light of the changing behaviour and capacities of the different stakeholders. Operationalising it therefore not only requires that mechanisms are put in place for users and uploaders to exercise their influence responsibly, but also that the operationalisation of these measures as well as the overarching standards can be openly negotiated and contested.[90]

Public oversight over and collaboration in the processes through which platforms organise content firstly requires more transparency regarding the specific way in which platforms standards are operationalised.[91] The AVMSD accordingly requires platforms to explain what effect they have given to the user notifications that are at the basis of the regulatory system described in the third section. Such transparency has for a long time argued to be necessary to hold platforms accountable for the way in which they curate content, and can provide substance for a debate about whether a platform is over- or under restrictive in its moderation.[92] However, transparency alone will not produce accountability if the parties that receive the

[87]Weinand (n 53) 291. Barata (n 80).
[88]Peter Nagy and Gina Neff, 'Imagined Affordance: Reconstructing a Keyword for Communication Theory' (2015) 1 Social Media + Society 1. Jean Burgess and Joshua Green, *YouTube: Online Video and Participatory Culture* (Polity Press 2018).
[89]See more broadly Taina Bucher and Anne Helmond, 'The Affordances of Social Media Platforms', *The SAGE Handbook of Social Media* (Sage Publications 2017).
[90]Lorna Woods, 'The Carnegie Statutory Duty of Care and Fundamental Freedoms' (Carnegie UK trust 2019) <https://www.carnegieuktrust.org.uk/blog/the-statutory-duty-of-care-and-fundamental-freedoms/>. van Dijck, Poell and de Waal (n 78) 139.
[91]van Dijck, Poell and de Waal (n 78) 70.
[92]ibid 149. 'European Regulation of Video-Sharing Platforms: What's New, and Will It Work?' (*Media@LSE*, 29 November 2018) <https://blogs.lse.ac.uk/medialse/2018/11/29/european-regulation-of-video-sharing-platforms-whats-new-and-will-it-work/> accessed 26 November 2019.

information are not able to exercise the pressure necessary for the platform to change its policies.[93]

The AVMSD provides the public with a number of ways to contest the operationalisation and application of platforms' responsibilities under the AVMSD. It firstly enables individual users to contest measures a platform takes under the AVMSD through internal complaint mechanisms as well as in and out of court.[94] The exact scope of these rights is fragmented and unclear.[95] This is especially true with regard to the removal of content, which strictly speaking falls under the ECD rather than the AVMSD. As section 'Platform-driven measures' has argued, however, the AVMSD is intended to complement the ECD, and specifically relies on the ECD to require the removal of content reported as a result of the AVMSD. More fundamentally, article 28b(3) requires every appropriate measure imposed on platforms to strike a careful balance between all interests and rights involved, including those of the initial creator or uploader as well as the general interest. This supports the notion that users can assert their freedom of expression rights when content is removed or has its accessibility restricted though the mechanisms harmonised by the AVMSD.[96]

Asserting their rights not only enables users to obtain effective protection in cases where their rights are violated, but also allows them to contest how the overarching standard should be operationalised with regard to specific cases.[97] The complaint and out of court redress mechanism the AVMSD provides moreover enable users to contest the ways in which the AVMSD's provisions regarding illegal and harmful content are implemented and applied by raising a complaint or dispute, without the specific requirement that they assert their rights. This broader function of individual redress mechanisms is especially important given the amount of moderation decisions taken on platforms, not all of which are on their own significant enough to motivate users to contest them.

Nevertheless, not all decisions taken in the implementation and application of the AVMSD are so apparent or significant that individuals can or will contest them. In the AVMSD, these decisions are shifted to the

[93]M Ananny and K Crawford, 'Seeing without Knowing: Limitations of the Transparency Ideal and Its Application to Algorithmic Accountability' (2016) 20 New Media & Society 973.

[94]AVMSD articles 28b(3)(i), 28b(7), 28b(8).

[95]Commercial communications are not covered. The internal complaint mechanisms cover the implementation of the notification mechanisms and platforms' actions relating to harmful content; out of court disputes concern the application of article 28b(1) and (3); and users can assert their rights pursuant to article 28b(1) and (3); Barata (n 85); LubosKuklis, 'AVMSD and Video-Sharing Platforms Regulation: Toward a User-Oriented Solution?' (*LSE Media Policy Project*, 28 May 2019) <https://blogs.lse.ac.uk/mediapolicyproject/2019/05/28/avmsd-and-video-sharing-platforms-regulation-toward-a-user-oriented-solution/> accessed 10 June 2019.

[96]See analogously *UPC Telekabel Wien* [2014] CJEU C-314/12 [57].

[97]'Recommendation of the Committee of Ministers to Member States on the Roles and Responsibilities of Internet Intermediaries' (2018) CM/Rec(2018)2 para 2.5.6 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14>.

implementation process where the AVSMD encourages and prefers coregulation.[98] This ties into broader calls in the literature and Council of Europe recommendations for a more prominent role for other stakeholders in algorithmic and platform governance.[99] The role of these parties is different from the role of individual users. In contrast to individual users who contest a standard following a specific decision, actors such as civil society organisations play a role in shaping the overarching standard as representatives of particular interests of users or the public.[100] In doing so they can increase democratic control over the way public values are affected and realised on platforms more broadly.[101] However, they also possess deep institutional knowledge on the normative issues associated with editorial decision-making, and the way in which these normative issues can be translated into organisational culture and decision-making. Media providers have long experience of the practical choices involved in deciding for example what content is harmful to minors, and what this means for its accessibility. Similarly, academia possesses for example empirical knowledge on what content is harmful to minors' psychological development, how more legal/normative concepts such as hate speech can best be understood, and, increasingly, how such legal terms can be translated into a metric that an algorithm can use.

The information needs of parties that assess the operationalisation of a platform's responsibility more broadly are different from the information needs of the general public. The AVMSD accordingly requires national regulators to put in place mechanisms to assess the appropriateness of the measures taken by platform. It moreover emphasises regulators and coregulatory schemes ought to provide for a way to monitor the effectiveness of the governance system set up by the AVMSD and 'allow for the possibility of state intervention in the event of its objectives not being met'.[102] In other words, to safeguard public values on platforms it is important to continuously monitor whether the objectives of the AVMSD are being achieved following changes in the platform infrastructure. This enables an iterative process according to which the operationalisation of the responsibilities of the different stakeholders can be adapted according to their evolving capacities and behaviour.[103]

[98]HabKlafkowska-Wasniowska, 'Soccer or Football: The Level Playing Field Idea for the European Single Market in the Audiovisual Media Services' (2018) 26 Michigan State International Law Review 326.

[99]'Draft Recommendation of the Committee of Ministers to Member States on Promoting a Favourable Environment for Quality Journalism in the Digital Age (7th Draft)' (n 56) para 2.2.3. van Dijck, Poell and de Waal (n 78) 151.

[100]See on transnational governance initiatives between NGO's, firms, and governments Robert Gorwa, 'The Platform Governance Triangle: Conceptualising the Informal Regulation of Online Content' (2019) 8 Internet Policy Review <https://policyreview.info/articles/analysis/platform-governance-triangle-conceptualising-informal-regulation-online-content>.

[101]van Dijck, Poell and de Waal (n 78) 71.

[102]AVMSD recital 14.

[103]'A Framework for Effective Co-Regulation of Video Sharing Platforms' (ERGA 2018) 2 <http://erga-online.eu/wp-content/uploads/2018/11/ERGA-2018-09-SG4-Framework-for-Effective-CR-of-VSPs.pdf>.

Conclusion

Although organisational control allows platforms to have a significant impact on public values, it does not afford them the type of knowledge and control of traditional publishers. Instead, other stakeholders such as users and uploaders have an inherently large influence on the way in which public values on platforms can be realised. The responsibility the AVMSD attaches to organisational control accordingly not only targets platforms' responsibility for their own actions, but also requires platforms to enable others on their service to exercise their influence in line with public values. It thereby moves away from its traditional centralised approach to editorial responsibility. This opens up a number of questions on the way in which the AVMSD's new approach to responsibility can be understood and should be operationalised.

Cooperative responsibility, which aims to address the distribution of control on platforms, can help to identify and answer these questions. They include not only concerns about whether users use tools available to them, but also which responsibilities platforms have to create the conditions for users to assume responsibility, and how platforms' responsibilities can be continuously adapted as users' capabilities change. At points, the AVMSD triggers these questions but does not fully engage with them. This creates the possibility that users will again be expected to become active consumers without the conditions and capacities necessary to do so having been put in place. This risk is partially mitigated by the fact the AVMSD establishes the procedural mechanisms through which the appropriate allocation and operationalisation of responsibility can be contested. This process requires, however, that the implications of the AVMSD's shift away from centralised editorial control, to distributed organisational control on platforms, are fully recognised.

Doing so would enable the AVMSD to draw on calls in the literature for a stronger focus on the influence and responsibility of other stakeholders on the platform, the platform architecture that channels their influence, and an iterative regulatory process that can adapt to changes in both.[104] The lessons learnt in doing so provide important practical information for not only the AVMSD, but also future media and platform law. Though the AVMSD recognises platforms' organisational control, it does not yet fully address the responsibilities that come with platforms' own increasingly sophisticated algorithmic organisation of content, or the role of all stakeholders on platforms (including not only users and uploaders, but for example also advertisers). However, by putting forward an alternative approach to responsibility it broadens the

[104]Helberger, Pierson and Poell (n 6); Woods, 'The Carnegie Statutory Duty of Care and Fundamental Freedoms' (n 90).

policy options as the Commission builds on existing platform regulation with a Digital Services Act that better matches platforms knowledge and control.

Acknowledgement

The author would like to thank Natali Helberger, João Pedro Quintais, and Anna Marieke Weerdmeester for their extensive and constructive feedback on the paper.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

This work was supported by the European Research Council under Grant 638514 (PersoNews).

Notes on contributor

M. Z. van Drunen is a PhD student at the Institute for Information Law, University of Amsterdam. His research focuses on the editorial responsibilities of platforms and legacy media organisations in relation to news personalisation.

ORCID

M. Z. van Drunen http://orcid.org/0000-0003-3917-6655