Who’s sovereign? The AVMSD’s country of origin principle and video-sharing platforms

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Abstract
This article aims to discuss the impact of the expansion of the country of origin principle to video-sharing digital platforms, and how this contributes to a new paradigm of centralized governance of online media content in Europe. Compared to other jurisdictional regimes in the fields of data protection, intellectual property and personality rights, where other country-of-receipt and targeting tests are utilized, the case of the Audiovisual Media Services Directive (AVMSD) demonstrates the emergence of a split governance model between individual rights and public interests, which fails to protect adequately local cultural and social specificities in the media sphere.

Keywords
AVMSD, video-sharing digital platforms, jurisdiction, country-of-origin principle, e-Commerce Directive, GDPR, platform governance
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1. Introduction
The revision of the Audiovisual Media Services Directive (AVMSD) has introduced significant changes to both its material and jurisdictional scope. The Directive now applies to online video-sharing platforms (VSPs), previously excluded from its scope. The country-of-origin (CoO) principle continues to apply to the cross-border provision of audio-visual media services; in the case of VSPs, the place of establishment is identified as the main connecting factor to define jurisdiction. The revised framework gives new responsibilities to VSPs in respect to content such as incitement to terrorism and child sexual exploitation, incitement to violence or hatred, and content that could be harmful to minors. In doing so, it brings them into the paradigm of media governance, and fundamentally changes to how state authorities are able to govern both infrastructure and content.

On the back of processes of digitization and distribution of media content across state borders, the continuing power of state authorities to govern media industries started being questioned from the mid-1990s onwards. Building on the relevant literature in the fields of media law and policy and platform governance, this article claims that the inception of the new AVMSD and the strong CoO test provided in it marks a change of direction, emphasizing the role of national legislation and relevant authorities in setting rules and facilitating a process of homologation of legal standards within the EU media space.

This change can be better appreciated and understood when compared with the jurisdictional regimes of frameworks that currently apply to media content distributed on digital platforms, such as data protection, intellectual property rights and personality rights. The AVMSD stands out as the system in which the CoO principle is applied in its ‘purest’ form, with no space for targeting tests to mitigate it, as provided instead, for instance, in the General Data Protection Regulation (GDPR).
These differences can be explained with the pursuit of different policy aims and efforts to protect individual rights that underlay each of these different sectors. In the AVMSD, the use of a strong CoO principle denotes a strong emphasis on fostering a common space, with homogeneous regulatory standards, where audio-visual media content can circulate freely. The AVMSD and its jurisdictional regime are instruments of industrial policy first and foremost and, when applied to VSPs, fail to provide enough consideration for the corresponding fundamental rights at stake (such as, in this case, the freedom to impart and receive information), as opposed to the other frameworks considered where a stronger emphasis on protecting individual rights such as reputation, copyrights or trademarks has led to the application of country-of-receipt or targeting tests.

In the following sections, this article will first provide a general overview of the framework applicable to VSPs in the AVMSD (2) and explain how bringing platforms into the framework of media governance and assigning them new responsibilities is ultimately an effort, from state authorities, to reassert their power over this specific segment of the media industry (3). Having characterized the inclusion of VSPs in the scope of the AVMSD as a new paradigm of media governance, the suitability of a jurisdictional approach based on the CoO principle can be discussed more thoroughly, first briefly reconstructing its contested effectiveness since it was introduced in the Television Without Frontiers Directive (4) and then comparing it with other jurisdictional tests that apply to other fields of law relevant to online media governance (5–8). Building on this analysis, the specificities and the shortcomings of this new framework, particularly in respect to protecting the freedom to receive and impart information, as well as local context-specific approaches to harmful content, can be better understood (9).

2. Video-sharing platforms in the AVMSD
The Directive defines VSPs as services that provide programmes and/or user-generated videos to the general public, as their principal purpose (either of the whole service, or of a dissociable section thereof) or as an essential functionality thereof (Art 1). Two separate regimes apply to audio-visual media services (Chapters II–IX) and VSPs (Chapter IXA). As a result, while linear and on-demand service providers are now regulated under the same framework, both in terms of jurisdictional criteria (primarily dependent on where editorial decisions are taken) and derogations (discontinuing the two separate sets of procedures that
existed in the previous version of the Directive), Chapter IXA is to be read as complementing the provisions of the e-Commerce Directive (eCD) rather than the rest of the AVMSD. In general terms, the expanding scope of the AVMSD means that platforms that used to fall under the remit of the eCD as information society services now fall under the scope of the AVMSD and its more stringent substantive requirements.

Art 28b makes it the responsibility of competent authorities at Member State level to ensure that VSPs falling under their jurisdiction adequately protect the general public from audio-visual content (including of commercial nature) that is illegal under EU law (such as incitement to terrorism and child sexual exploitation) and harmful content such as incitement to violence or hatred towards protected groups as per Art 21 of the Charter of Fundamental Rights of the European Union. Platforms are also required to protect minors from harmful content which may impair their physical, mental or moral development, and to comply with the rules for commercial communications set out in Art 9(1) for certain foods and beverages. Any measures taken in compliance with the Directive ought to be compatible with the regime of intermediary liability and its exemptions set out in the eCD and be practicable and proportionate to the size of each platform.

These fields have varied degrees of harmonization across Member States: in the case of content harmful for minors, there are, for instance, significant differences in terms of both substantive standards of what constitutes harmful content, and the age threshold for shielding minors from such content (Woods 2018). In respect to the other two categories, the national laws of EU Member States have a higher degree of consistency, also due to the EU Counter-Racism Framework Decision, yet criminal provisions identifying the protected characteristics and defining punishable conduct can vary significantly from one country to another.

Art 28b(6) allows Member States to impose stricter standards on platforms, similar to the same possibility granted in respect to audio-visual media service providers in Art 4; however, Art 28b only requires any such stricter measures to ‘comply with the requirements set out by applicable Union Law’, such as those set out in Articles 12 to 15 of the eCD, whereas Art 4 includes an explicit conflict rule stating that in the event of a conflict with the eCD, the revised AVMSD shall prevail. As a result, the provision of Art 3.4 of the eCD on the exceptions to the free-movement principle would continue to apply to digital platforms.

The practical situation resulting from the combined provisions of the revised AVMSD and eCD is thus as follows. Art 28b(1) lists a number of fields in respect to which the AVMSD
introduces a degree of minimum harmonization. The partial overlap of these fields and the material scope of the eCD can be interpreted as a double-layered framework whereby Member States are generally allowed to impose domestic standards on any of the fields harmonized by the eCD while being expressly required to set domestic standards and monitor the compliance of platforms with them, in respect to the sub-category included in Art 28b(1). In both cases, the internal market clause from Art 3 of the eCD operates, including the derogation procedure from paragraph 4 allowing Member States to restrict services from another Member State on public policy grounds. Although the surrounding mechanisms (the CoO rule; derogations and stricter measures) are largely in line with the eCD, the material scope of Art 28b escalates the responsibilities of platforms, requiring them to take action in respect to a range of different content beyond the legal obligations previously envisaged.

Platforms’ internal terms and conditions play a significant role in this framework, since the AVMSD demands that they identify appropriate mechanisms to prevent the uploading of content that is inappropriate, illegal or which may impair the development of minors, and of inappropriate advertising; that they allow users to flag inappropriate content; and that they provide mechanisms to help users access their services safely. However, the oversight of state authorities would only apply to measures taken in compliance with specific legal obligations rather than as part of platforms’ independent internal policies, likely resulting in further confusion and difficulty of implementation (Barata 2019).

3. A new local paradigm of information governance

The revised Directive thus envisages specific obligations for VSPs, in a marked shift from the predominant paradigm of platform governance of the last couple of decades, largely centred on questions of liability and its exclusion.

The Directive offers some insights into the rationales for the shift and offers a substantially twofold reason. On the one hand, establishing an even playing field for all operators in the audio-visual media industry remains a long-standing concern and Recital 4 acknowledges that VSPs have now become competitors to broadcasters and on-demand service providers for audience and advertisement revenues. On the other hand, Recital 47 focuses on the role that platforms play in facilitating the flow of media content today: the organizational role that they play in this context, whether manually or through automated
means, justifies attributing them a degree of responsibility, albeit different than other service providers.

Recent academic literature has reflected on this latter circumstance. As platforms increasingly adopt different forms of ‘hard’ control (such as removals and take-downs of illegal content) and ‘soft’ control (such as curation and prioritization) over the content they distribute, their traditional role as passive intermediaries is progressively giving way to a more nuanced understanding of the role of platforms as facilitators, rather than simple hosts, of public communications. Flew et al. (2019: 41) have drawn parallels between platforms’ content moderation and the traditional media’s editorial control, suggesting that the former ‘mirrors the editorial and governance process undertaken by legacy media companies in content regulation’, although the ‘decentralization of decision-making across time zones and cultural contexts makes these processes more diverse, complex and demanding to negotiate than traditional, professionally oriented and geographically anchored editorial decisions’. Since platforms provide the infrastructure and terms of service for users to share content of their choice, it has been suggested that governance models should evolve towards a form of shared responsibility involving content uploaders and users (Helberger et al. 2018). Elaborating on this concept, Van Drunen (2020) has observed that the AVMSD operates exactly in this direction, but does not fully address the role of algorithms in organizing content and the role of external stakeholders.

Even if the classic tenet that platforms do not bear editorial responsibility is starting to show its age, creating a jurisdictional criterion from this newly conceived role would be quite a difficult step, one that in all likelihood would fail to allocate regulatory competence to a single Member State or guarantee an even playing field for industry players. The difficulty, however, now resides more in the impracticality of the solution than in the inapplicability of the concept of editorial responsibility to the category of platforms. Considerations of the practicality of policy decisions can change more rapidly than deeper considerations about the suitability of regulatory models for embracing social and technological change.

On a more theoretical level, the de-localization of these new pseudo-editorial processes is part of a broader dynamic that is progressively challenging the traditional connection between state sovereignty and territorial borders. Earlier academic works noted how the rise of digital technologies deprived public authorities’ rule-making of its traditional connection to geographic realities and physical borders. At a time when the universal
accessibility of online information was starting to be understood as one of the main differences from legacy media, the lack of a specific geographic context for the effects of online activity was understood to deprive state authorities of the necessary legitimacy, let alone effective power, to regulate the flow of digital information (Johnson and Post 1996: 1370). This conversation seemed, at the time, to be heading naturally towards the conclusion that no national government could credibly claim authority to restrict or regulate the flow of communications within its physical boundaries in response to supposed local harms (Johnson and Post 1996: 1390).

In the following years, however, attempts from state authorities to regain control of digital space by passing legislation did not go unnoticed (Berman 2002: 315–16). More recently, arguments for the legitimacy and even necessity of state regulation have made a definite comeback, in an apparent reappraisal of the role of national governments as viable alternatives to hyperglobalization and industry-led governance. Most notably, such appraisals have noted how embedding governance in the domestic sphere would offer an opportunity to cater for different national standards of content regulation (Haggart 2020: 327).

Within the current context of multiple – public and private, national and supranational – actors performing in the governance arena, the role of states has been proposed as comprising ‘various adaptive policy capacities […] which allow them to mobilize strategically around various policy issues’ (Raboy and Mawani 2013: 348). Jurisdiction can be characterized as one of these capacities, as it touches on deeper issues of sovereignty and the definition of community boundaries (Berman 2002: 319). A state’s territory provides it with a means to legitimize its claim to jurisdiction over flows of information that originate from outside and are receivable within, although the lack of effective methods for enforcing such claims is normally a major obstacle. Indeed, commentators have observed how a key challenge of digital media policy is the lack of direct, straightforward ways to enforce conflicting national standards in the global arena (Flew et al. 2019: 42). A suitable solution is therefore to exert jurisdiction over platforms and have them enforce domestic standards: a relatively affordable method for state authorities of ‘leveraging the infrastructure of private ordering […] to carry out their own policy preferences’ (Bloch-Wehba 2019: 29).

Mac Síthigh (2020: 13–14) has reflected on the inclusion of VSPs in the AVMSD from the perspective of how their governance model is evolving, describing it as a ‘discursive shift towards a “media” paradigm, for services that have fallen squarely within the general category
of information society services under the eCD for the last two decades’. The significance of this step has also been acknowledged by Kukliš (2021) who described it as a ‘new approach to content regulation that […] can later be extended to other areas’. The novelty of the approach resides, in the author’s view, in what is known as a systemic approach, meaning that platforms are only responsible for the distribution (i.e. ‘systemic treatment’) of content as opposed to the traditional responsibility of broadcasters for individual pieces of content.

Framing the inclusion of VSPs in the AVMSD as an issue of media governance is helpful for understanding and discussing its deeper and broader implications. Considered from this perspective, the new framework reveals a new, complex dynamic between the governance of infrastructure and the governance of information; new balances are emerging along the public/private and local/global axes, and state authorities are making efforts to recover their apparently lost centrality. Questions of jurisdiction, like those raised by the new AVMSD, are thus not merely technical issues; they underlie broader questions concerning what entities can exercise their authority, what rules apply, and what policy objectives are given priority.

4. The country-of-origin principle and video-sharing platforms
Given the nature of issues at stake, it is not surprising that the application of the CoO principle in the EU regulatory framework for audio-visual media services has been widely debated (and often criticized) since the first inception of the Television Without Frontier Directive (TWFD) in 1989, and in its first major revision in 2007. The question of jurisdiction, or more specifically the determination of which Member States have the power to regulate a service, has long proven contentious, as demonstrated by the long series of interpretative difficulties and subsequent legislative revisions that have tried to clarify the issue.

While accepting that dramatic changes in the industry at the time, such as the emergence of private broadcasting and satellite transmission, justified its adoption, commentators generally observed that it would take a heavy toll on States’ capacity to govern their own media spheres (Katsirea 2005), and it was argued that when applied to the audio-visual media sector, the aim of CoO to protect the freedom to provide services is lost, and it becomes a rule of competence that makes national regulators fundamentally helpless towards incoming services (Hörnle 2005). The issue of circumvention was noted as particularly troublesome, with the approach pursued by the Court of Justice (which in turn contributed to
shaping the wording of Art 4) described as too narrow and offering insufficient consideration to cultural concerns put forward by the Member States (Harrison and Woods 2007: 173–93).

When the TWFD was revised into the AVMSD in 2007, commentators questioned the continued suitability of the CoO principle for the audio-visual media sector. Craufurd Smith (2011: 276) argued that the principle was ultimately necessary to achieve the objective of single state control with the degree of precision that other tests, based for instance on the content of the service or its target audience, would not have provided. Herold (2008) rightly suggested that the principle would strike an overall advantageous balance for media consumers by offering them, in exchange for a moderate degree of legal harmonization, access to a wide choice of international media services. Subsequently expanding the scope of the principle, through the AVMSD, to non-linear services paved the way for new business models in the new market of that time (Herold 2009: 104–05). Others have warned at various points in time that continuation of the principle and mechanisms in light of the changing circumstances in the industry could be problematic and miss chances to develop new tools (see Valcke and Steven 2007; Burri 2013).

Arguably the result has been a complicated and ineffective mechanism, with interpretative difficulties regarding the possibilities of restricting the reception of foreign broadcasts. Ultimately, the continuing need for a circumvention principle in the different iterations of the TWFD and AVMSD, and its limited effectiveness in practical terms, were interpreted as evidence of the ‘problematic nature of the country of origin principle in the politically sensitive broadcasting context’ (Craufurd Smith 2011: 276).

The 2018 revision of the AVMSD also continues the principles and tools of its older version and expands their scope of application. The Directive provides for two separate jurisdictional regimes to apply to media service providers and VSPs. Pursuant to Art 2, media service providers fall under the jurisdiction of a Member State when they have their head office or take editorial decisions there. In case neither of these two elements can be univocally identified, the Directive provides for other alternative solutions (the place where a significant part of the workforce operates, or where the service first began its activity); however, the revised Directive continues the emphasis on editorial responsibility as the main connecting element for media services. For VSPs, instead, the criteria from the eCD apply in the first instance, requiring platforms to comply with the laws applicable in the Member State where they are established, meaning the State where they pursue an economic activity through a fixed
establishment for an indefinite period. Secondly, when a platform cannot be considered established in a Member State according to the eCD, the AVMSD provides for further jurisdictional criteria such as a parent or subsidiary undertaking established in a Member State or being part of a company group with an undertaking established in a Member State. In the event of multiple subsidiaries, jurisdiction will be established in the Member State where a subsidiary has been established for the longest time. Pursuant to the CoO principle, the relevant content is regulated by the competent national authorities on an EU-wide basis.

The application of the CoO principle to VSPs, particularly in light of the new responsibilities that the Directive assigns them, has been met with criticism. Rozgonyi (2020: 89) has expressed concerns over the ability of the new framework to take into account the ‘multiple sensitive historical, cultural and societal divergencies across Europe’ particularly in respect to areas like hate speech and the protection of minors, and the likely emergence of ‘clashes between legal traditions’ (92). Barata (2020) has noted that, while traditional broadcasters tend to cater for local audiences’ specificities and shape their editorial decisions accordingly, platforms are more likely to localize their main offices and strategic decisions in one single EU country for reasons beyond mere editorial control, and this in turn would further diminish the opportunities to cater for different attitudes towards nationally sensitive issues.

5. The different jurisdictional regimes applicable to digital platforms
At present, online media governance is scattered in a range of different regimes that apply to VSPs (in the case of the AVMSD) or to the broader category of digital platforms more in general:

- The eCD remains the lex generalis that determines the choice of law on the basis of the CoO principle and the place of establishment as the main connecting element; it also provides a framework for derogations.
- In respect to user-generated audio-visual media content distributed via VSPs, the AVMSD operates as a lex specialis, and determines the relevant jurisdiction and applicable law on the basis of the CoO principle; the framework for derogations from the eCD applies, although in respect to a broader coordinated field.
Further to those two:

- Data protection law, and particularly the right to erasure, although not directly concerned with the regulation of media industries is increasingly becoming relevant to it. This field is explicitly excluded from the scope of the eCD. The GDPR is similarly based on the CoO principle, although it intersects it with a targeting principle. Compared to the eCD and the AVMSD, the GDPR introduces a stronger degree of harmonization in this area and neither requires Member States to derogate from its provisions nor leaves them little room to do so. Recent decisions of the Court of Justice have opened up the theoretical possibility that state courts could issue injunctions with global effect.

- Intellectual property rights have varying degrees of harmonization; in respect to trade marks, the courts of the state where the defendant is domiciled will normally have jurisdiction and issue EU-wide injunctions. In respect to IP rights, the applicable law changes depending on whether the right at stake is harmonized at the EU level, while the question of extra-territorial injunctions remains open.

- In the field of tort conflicts, violations of privacy and personality rights are excluded from the Rome II Regulation, and are therefore subject to the existing choice of law rules in the Member States. Libel and privacy suits follow a model whereby the substantive law is determined on an ad hoc basis (depending on where the plaintiff is based or the damage has taken place); similarly to the field of data protection, recent decisions of the Court of Justice have accepted that digital platforms could be expected to comply with national courts’ orders from any relevant jurisdiction, and could potentially implement them worldwide, imposing those standards on other jurisdictions.

In the next three sections, the jurisdictional regimes applicable to data protection, intellectual property and personality rights will be analysed more in detail.

6. Applicable law and territorial scope of injunctions in the field of data protection

In the field of data protection, the GDPR combines an establishment principle, which considers any data processing activities subject to the Regulation when the controller, processor or their subsidiaries are established on EU territory, with a further targeting principle that applies to the processing of data of subjects located in the European Union.

The GDPR also provides for a one-stop-shop mechanism by tasking the national data protection authority of the country of establishment; however, this principle only applies to
entities established in the European Union and not to foreign service providers as such. A derogation from the principle is possible, in that national authorities can claim their own competence in relation to infringements that affect data subjects in their territory. This mechanism has, however, received considerable criticism. Rozgonyi (2020) suggested that the GDPR experience should have warned EU authorities against deploying the same principle in the context of media services.

The concept of establishment in this context has acquired a peculiarly expansive meaning; building on the case-law of the Court of Justice, ‘establishment’ has come to mean ‘any real and effective activity — even a minimal one — exercised through stable arrangements’. The Court has justified this particular broad understanding ‘in the light of the objective pursued by that directive, consisting in ensuring effective and complete protection of the right to privacy and in avoiding any circumvention of national rules’ (CJEU 2015: paras. 30–31).

The targeting criterion used in the context of data protection sets an interesting precedent. Barata (2020) has rightly stressed that digital platforms, in contrast to traditional media companies, tend to cater less for local audiences’ preferences and sensitivities. However, it is also well known that platforms have both the capacity and the economic incentives to target individual users according to their consumption patterns.

The Court of Justice’s decision in Google v CNIL has offered further opportunities to reflect on the territorial scope of this system. The Court considered that national authorities should be granted a space for considering the appropriate balance between data protection and freedom of expression ‘in the light of national standards’ on a case-by-case basis. The line of argument took into consideration that:

[i]n a globalised world, Internet users’ access — including those outside the Union — to the referencing of a link referring to information regarding a person whose centre of interests is situated in the Union is […] likely to have immediate and substantial effects on that person within the Union itself. Such considerations are such as to justify the existence of a competence on the part of the EU legislature to lay down the obligation, for a search engine operator, to carry out, when granting a request for de-referencing made by such a person, a de-referencing on all the versions of its search engine. (CJEU 2019: paras. 57–58)

The possibility that a fundamental right of a person, whose centre of interest is in an EU Member State, might be compromised by information available at the global level, beyond
the territory of the European Union, was considered sufficient to justify the extraterritorial application of EU law. This principle might apply, in theory, to a range of situations where extraterritorial jurisdiction is not commonly accepted. ‘The balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world’, the Court observed (59).

The Court reflected that this balance has already been struck within the territory of the European Union by the EU legislature. However, this level of harmonization does not extend beyond the territory of the Union. The Court deduced this from the wording of the relevant provisions and from the lack of a cooperation mechanism among data protection authorities outside the European Union of the kind that exists within the European Union. With regard to intra-EU implementation of the right to data protection, the Court noted that, although Rec 10 of the GDPR emphasizes the need for a consistent and high level of protection throughout the European Union of the right to data protection, exemptions and derogations are possible in the light of Art 9 of the old Data Protection Directive and Art 85 of the GDPR, to cater for the different weightings of competing rights in each member state. Finally, the Court stressed the importance of cooperation among national supervisory authorities ‘to reach a consensus and a single decision which is binding on all those authorities with which the controller must ensure compliance’ (68).

Erdos (2020) has noted how the CNIL decision leaves ample room for national authorities to resort to extra-territorial injunctions as a theoretical possibility: if the Court, as it seems, is prepared to accept any national implementing provision as sufficient grounds to claim a national standard in justification of extra-territorial injunctions, then the practical outcome of this decision will eventually depend on future approaches from national authorities regarding the adoption of measures to discourage circumvention and extra-territorial injunctions in individual cases.

7. Applicable law and the territorial scope of injunctions in the field of intellectual property

The case of intellectual property rights is different, as these rights have different levels of harmonization at the EU level: while EU trademarks and Community design rights are
formally fully harmonized, other rights such as copyright, despite a lack of comparable formal harmonization, are nonetheless substantively harmonized to a large extent.

Pursuant to Art 125–126 of the EU Trademark Regulation, a national court of the Member State where the defendant is domiciled or normally has an establishment has jurisdiction over the entire EU territory in respect to infringements committed or threatened within the territory of any Member State. As the Court of Justice explained in DHL, granting EU-wide effect to courts’ injunctions serves a wider policy aim, in that it prevents ‘inconsistent decisions relating to the Community trademark concerned’, which in turn would run ‘counter to the objective of the uniform protection of the Community trademark pursued by Regulation No 40/94 as well as to the unitary character of that mark’ (CJEU 2011: para. 45).

With respect to IP rights, Art 8(1) of the Rome II Regulation identifies the law of ‘the country for which protections is claimed’ as applicable to non-contractual obligations arising from an infringement of IP rights. This would normally be the Member State where the defendant committed the infringement, unless the IP right in question is harmonized at the EU level, in which case the relevant EU framework is also the applicable law. By contrast, in respect to copyright, the Berne Convention applies to protected works the law of the CoO when the author is a national; otherwise, the Convention grants to authors based in foreign countries the same protection as granted by the national law to local authors. Hörnle (2021) has observed that online copyright infringements would often spread over different national jurisdictions and national laws, raising difficulties in terms of the costs of litigation and practical enforcement; by comparison, the Berne Convention offers a more practical solution to the limitations of territorial copyright through a system of mutual protection through State laws.

Rosati (2019) has observed that the Court of Justice has not yet had the opportunity to decide on the validity of national cross-border injunctions granted in respect to a harmonized but local IP right, suggesting that the lack of unitary character of national copyrights and the lack of equal effect across the European Union should advise against allowing such a possibility. On this point, the recent the Directive on Copyright in the Digital Single Market (CDSMD) is yet another example of how intervening in platforms’ obligations and liability rules can offer a very practical way for lawmakers to achieve substantive results in terms of expanding the territorial reach of national laws. Art 17 of the CDSMD introduces new obligations for digital platforms, largely removing their immunity from the eCD and
holding them liable for the unauthorized posting of copyrighted material by their users, unless they can demonstrate that they have made their best efforts to secure permission from rights-holders, or if they have removed the unlawful content once notified by the rights-holders. Spindler (2019: 372) noted that although the CDSMD was introduced with the general intention of achieving a higher degree of harmonization in the field, and therefore leaving little leeway for Member States’ national implementations, Art 17.1 of the CDSMD indirectly identifies as applicable any jurisdiction where the content in question can be retrieved, effectively creating a ‘European “patchwork” in the event of divergent implementation in the Member States’. While transposition in national laws, at the time of writing, is still ongoing, it will be interesting to see whether courts will aim for pan-European, global removal orders, or if instead they will resort to localized orders, possibly through the use of geo-blocking technologies. So far, an opinion from the Advocate General has confirmed the compatibility of Art 17 with the freedom of expression and information guaranteed in the EU Charter of Fundamental Rights of the European Union. Although the opinion does not focus specifically on territorial and jurisdictional issues, it draws inspiration, in interpreting the notion of monitoring obligations, from the Glawischnig decision, where the Court had adopted an expansive interpretation of platforms’ obligations and their territorial limitations.

8. Applicable law and the territorial scope of injunctions in the field of personality rights

Finally, personality rights such as reputation and privacy are excluded from the scope of the Rome II Regulation, making defamation suits subject to the existing choice of law rules in the Member States. The decision of EU authorities not to seek further harmonization in this field has been interpreted as an effort to preserve the capacity of each national forum to strike its own balance between freedom of expression and competing rights (Mills 2015). However, the recent trend of global removal orders seems to defy this purpose. On the basis of the Recast Brussels Regulation and Court of Justice’s case-law, a mosaic approach allows plaintiffs to bring a defamation lawsuit in the locus damni, locus acti, or even forum actoris; the latter two have jurisdiction over the entirety of the harm and can issue injunctions for the correction or removal of content. Recently, in the Glawischnig decision concerning a case of defamation, the Court of Justice found that the eCD does not impose territorial limitations regarding the
scope of removal obligations and, as a result, such obligations can be imposed worldwide, within the framework of the relevant international law.

The Court of Justice has ultimately reached similar conclusions in Glawischnig and CNIL, irrespective of the different levels of harmonization at EU level of the rights to reputation and to data protection. Advocate General Spuznar, in CNIL, suggested as a general criterion that unharmonized rights could justify injunctions with a broader geographic scope than harmonized rights (Rosati 2019). The Advocate General’s opinion was apparently disregarded by the Court. More convincing, then, is the consideration that the effectiveness of certain rights and policy aims is dependent on the territorial scope of their protection. This is certainly the case for data protection (Tjong Tjin Tai 2016; Wolters 2021) and in libel suits, plaintiffs have also been traditionally required to demonstrate a connection to the place where they intend to bring the suit, in the form of a centre of interests and reputation to defend there. The argument can obviously work in both directions, justifying for instance the global protection of rights that have acquired a ‘transnational aspect’ as has been suggested is the case of data protection, due to the development of international processing and transfer of personal data (Azzi 2018: 127).

The same argument could be made, probably with a bit of stretch, in favour of public policy aims that similarly can only be protected effectively in connection with a specific territory. Following a similar line of reasoning, Erdos (2020: 27) observed that, in CNIL, the Court accepted that any assessment and balancing, in lack of substantive harmonization at the EU level, should be ‘carried out by reference to national, rather than EU, standards’.

9. Jurisdictional profiles applicable to video-sharing platforms in the Audiovisual Media Services Directive

Compared to the different frameworks considered above, content falling under the scope of Chapter IX is the area with the lowest level of substantive harmonization to which a ‘pure’ CoO principle applies. In the field of data protection, already harmonized to a higher extent and by means of a Regulation, the CoO principle is mixed with a targeting principle; while for non-harmonized areas, intellectual property rights are subject to the Rome II Regulation, which identifies the applicable law as the law of the country for which protection is claimed, and personality rights are subject to the existing choice of law rules in the Member States.
The fragmented landscape emerging from these different jurisdictional approaches stems from the different balances struck between competing interests, and the prevalence of different policy objectives in each case. In those areas where individual rights receive deeper consideration, the use of country-of-receipt and targeting tests has prevailed. Incidentally, these happen to be fields where the European Union has expressly opted not to harmonize jurisdictional rules (personality rights) or where industry stakeholders may benefit from a territorial system that optimizes the protection of intellectual property rights by basing jurisdiction on the place where a copyright infringement occurred, or a trademark was registered.

Conversely, in the fields of data protection and audio-visual media services, different policy considerations have led to adopting a mechanism rooted in internal market freedoms, such as the CoO principle, which can prove helpful to establish a common space within the European Union where data and audio-visual media services can circulate freely. Industry stakeholders, in these cases, benefit from legal homogeneity rather than from the territorialization and fragmentation of legal standards. In the case of data protection, however, a competing interest in the form of an individual right to data protection has emerged to counter-balance the centralizing effect of the CoO principle. Much of the CJEU case-law on data protection, even before the inception of the GDPR, has been noted to emphasize a ‘rhetoric’ of effective and complete protection of personal data, failing in turn to balance it with other possible competing individual rights (Kohl and Rowland 2017: 102–03).

Yet the most classic concern for the impact of country of receipt and targeting tests on fundamental rights is traditionally framed in terms of a race to the bottom, pushing platforms to comply with the most restrictive standards (Harcourt 2007; Smith 2017). Context-specific approaches to harmful content, such as advertising standards or hate speech, can be considered from other perspectives than merely quantitative: local standards are not more or less valid exclusively by virtue of their higher or lower capacity to facilitate the free flow of information across national borders. They rather each draw their own legitimacy from their direct connection with the social and cultural dynamics in the country, and different balances can be reached within the boundaries set by the scope of freedom of expression and its limits. The AVMSD offers little leeway to states wishing to protect their local audiences from information deemed as harmful according to domestic standards in respect to both infra-EU and, even more so, extra-EU content. Although Art 3.4 of the eCD offers, in comparison to
the equivalent provisions in the AVMSD applying to linear and on-demand service providers, a broader range of conditions for using derogations, and it is generally considered more lenient, the procedure has been rarely used, and mainly for consumer protection (European Commission 2012: 21). Yet the applicability of this procedure to the issues at stake remains disputed: Wagner (2014: 289) expressed the view that, although Art 3(4) of the eCD did not expressly include cultural policy objectives, these should be implicitly included, given the value attached to cultural diversity in the EU treaties, although the Commission itself considered that the list of general interests in Art 3(4) did not include the protection of culture and should be interpreted as exhaustive (European Commission 2012: 21).

The framework, however, caters even less for the users’ interest in accessing information that would have possibly been lawful under their domestic regime, but is not in the country where the relevant platform is established. The framing of such dynamics of cross-border distribution of media content as a generic issue of national sensitivities rather than a question of fundamental rights to impart and receive information has been noted, critically, as a generalized trend in courts’ and decision-makers’ practice at the global level for some time now (Smith 2017). Ultimately, the governance split between the AVMSD and the other models examined (which all utilize some targeting or country-or-receipt test to varying extents) can be attributed to the overlooking of those fundamental rights involved in the dynamics of cross-border distribution of audio-visual media content via digital platforms.

The 2018 AVMSD revision introduced a few relevant novelties into the landscape of digital media governance. Its reassertion of a strong CoO principle strengthens the role of state authorities, which had been weakened by the digitization of media content and its ease of distribution across national boundaries. Content included in the scope of the AVMSD is now subject to a stronger degree of legal homogeneity, while other types of media content distributed via digital platforms can be subject to different applicable laws. On a separate but related note, the requirement that platforms respect the domestic law of the country of establishment, and Art 4a of the AVMSD encouraging Member States to develop self- and co-regulatory codes at the national level, together with VSPs, under the supervision of national regulatory authorities, have the further effect of anchoring the regulation of these areas to state mechanisms. Some areas, most notably hate speech through an EU-wide code of conduct, had been recently subject to a distinct trend of Europe-wide industry self-regulation without the involvement of public authorities.
10. Conclusions

Some of the current imbalances identified here might be addressed when the forthcoming Digital Services Act (DSA) amends the eCD. Art 1.2 of the draft available at the time of writing indicates that the new Regulation would apply to platform services provided to end users established or located in the European Union, irrespective of the platforms’ place of establishment. This could successfully overcome the current imbalance between different services equally accessible from the European Union but provided from inside and outside the Union.

Platforms seem set to maintain in the future their role as standard-setters at the global level. By providing more of a legal basis for public oversight, the AVMSD is starting to reserve a more substantive role for state regulators, at least in a reactive capacity. Other emerging policy and legal frameworks are taking steps in a similar direction: the DSA and the European Democracy Action Plan launched in late 2020 envisage increasing regulatory oversight, accountability and transparency for online platforms, and a co-regulatory approach with the involvement of other stakeholders from relevant industries. This growing emphasis on state regulators gaining a more central role and the promotion of co-regulatory initiatives, coupled with a strong CoO principle in the AVMSD, are all elements of a more generalized trend likely to give way to a more marked legal homogeneity of substantive standards within the European Union.

The next challenge is then to strike a suitable balance between industrial policy, on the one hand, and the protection of fundamental rights and local public interests, on the other. The current fragmentation of governance regimes, and the different weights attributed to various policy and legal considerations in different areas, demonstrate the difficulty of reaching such a balance. Providing more clarity and certainty on the issues of derogations and extraterritorial application would, in all likeliness, benefit the development of the European media market. It is possible that, in the years to come, some of the limitations of the current, fragmented regime will be overcome in different ways; for instance, by adopting a more content-neutral approach bringing all kinds of online media content under the same regulatory framework, as recently recommended by ERGA (ERGA 2020: 5).

The arrangement for VSPs is, however, currently unsatisfactory and fails to consider both the need for state authorities to protect public interests, and the reality of the industry where increasing convergence continues to blur the lines between different means for
distribution. With the upcoming DSA seemingly silent about derogations, cooperation among national authorities will possibly be a last resort of some kind. Cooperation should, however, concentrate more on mutual enforcement rather than common standards, in order to better cater for local and cultural contexts. As opposed to the case of data protection, the issue here is not as much about reaching EU-wide consensus on a suitable balance of competing interests, but about granting leeway to individual member states to protect the right to impart and receive information according to local sensitivities that are unique by definition.

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