

# Governance, VSPs & codes of conduct

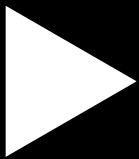
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## Regulating online media intermediaries – an ongoing regulatory experiment in the European Union (EU)

### Audiovisual Media Services Directive (AVMSD)



- Amendments adopted on 14 November 2018
- New regime extending the scope of audiovisual media regulation to Video Sharing Platform Providers (VSPs) and Social Media Service Providers (SMSPs) on
  - protection of minors against harmful content online,
  - combating hate speech and
  - public provocation to commit terrorist offences on the internet.



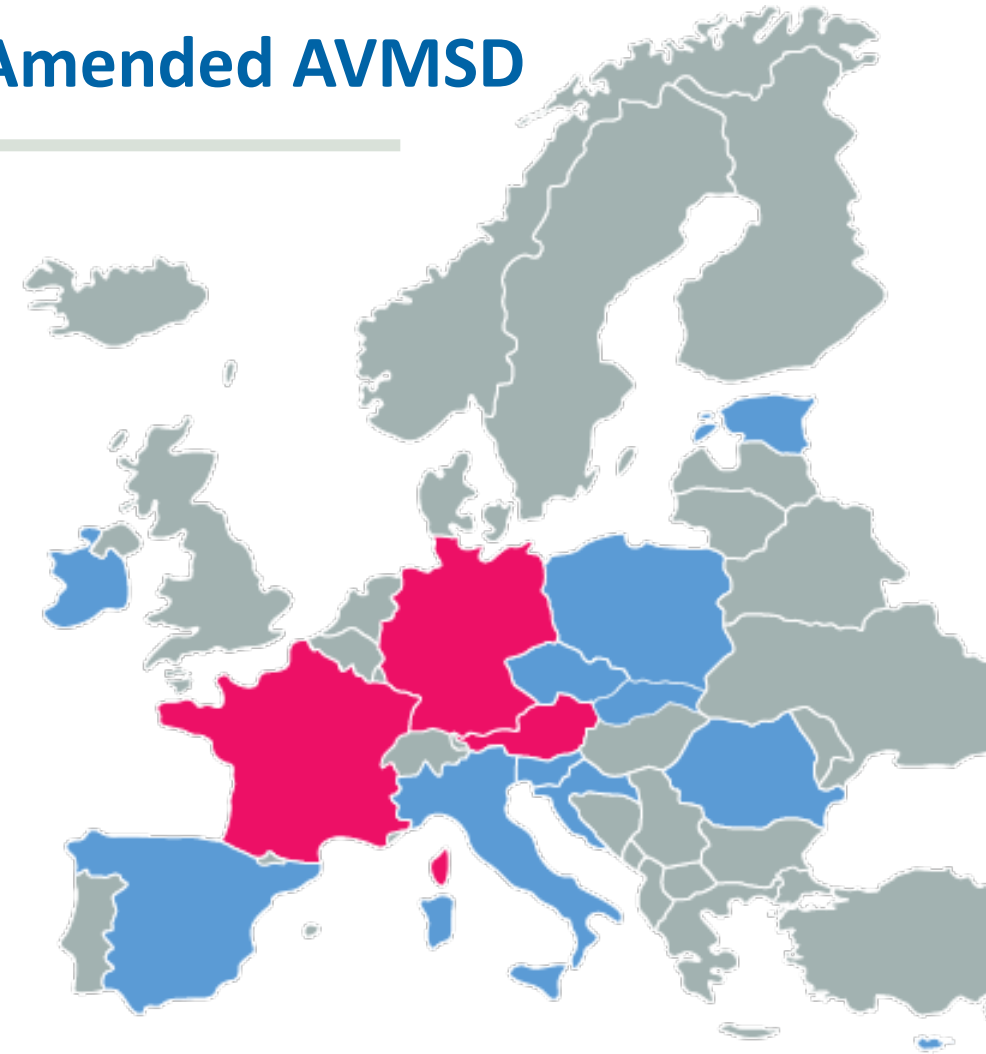
## The state of affairs in the EU transposing the Amended AVMSD

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Transposition deadline:  
19<sup>th</sup> Sept 2020 (but COVID-crisis)

Uneven picture: in 11 countries still ongoing (as of Sept 2021)

Cyprus Croatia CZ  
EE Ireland Italy  
Poland Romania Slovakia  
Slovenia Spain



## Case in point: regulating hate speech in audiovisual media services across Europe (1)

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### Illegal hate speech

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



(EU Fundamental Charter Art. 21 and the Council Framework Decision 2008/913/JHA)

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## Case in point: regulating hate speech in audiovisual media services across Europe (2)

### Ireland as the champion of the Country-of-Origin principle vis-a-vis VSPs

vs

### The scope of audiovisual media regulation on incitement to hatred in the EU

Scope of media regulation on incitement to hatred (illegal hate speech)	Frequency of occurrence
Race / Colour	Most common ground
Gender / Sex / Sexual orientation	Most common ground
Religion / Belief	Most common ground but with differing significance
Disability	Common ground
Nationality	Most common ground
Ethnicity	Common ground
Philosophic view	Infrequent
Age	Infrequent
Genocide denial (including the Holocaust)	Infrequent (but prevalent in criminal laws)
Violence / Brutality	Infrequent
Political views	Infrequent

Scope of media regulation on incitement to hatred (illegal hate speech)	Frequency of occurrence
Education	Infrequent
Family / Marital status	Infrequent
Language	Infrequent
Property	Infrequent
Trade Union membership	Infrequent
Social / birth status	Infrequent
Health condition	Infrequent
Genetic heritage / native identity	Infrequent
Anti-Semitism and Xenophobia	Infrequent
Embracement of totalitarian regimes	Infrequent
Morals	Infrequent

## At a crossroad: the policy objectives of the Amended AVMSD and the Country-of-Origin principle

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

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

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Regulatory dysfunctionality of the Country-of-Origin principle:

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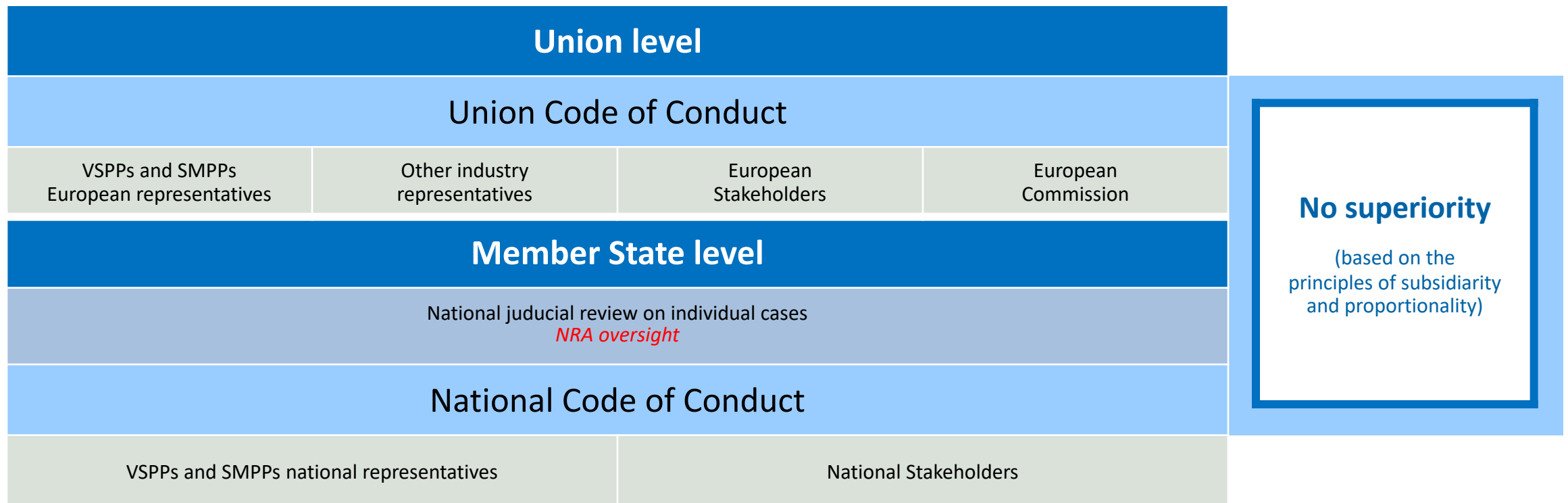
## A possible way out: the Responsive Governing Model to regulation

- (I.) Principles of intervention and standards applicable;
- (II.) the outline of a new (co-)regulatory regime;
- (III.) organisational and operational aspects.

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



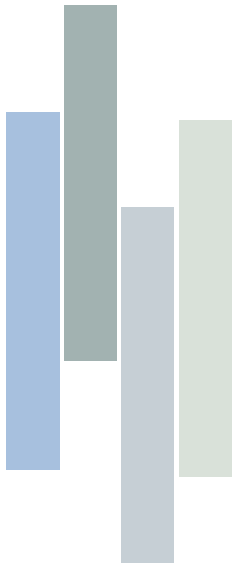
## Outlining the Responsive Governing Model (1)



## Outlining the Responsive Governing Model (2)

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### Key pillars



- i. The shapes of the Code(s) of Conduct
    - Who designs? Duty of care? What level of accountability?
  - ii. Monitoring
    - What capacities do NRAs need? What level of cooperation?
  - iii. Enforcement
    - What role to the judiciary? Regulatory sandboxes?
    - Who to enforce and to what effect?
  - iv. Organisational and operational aspects
    - Regulatory capacity?
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## Outlining the Responsive Governing Model (3)

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### Legal dimensions

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

### Policy aspects

1. Impact assessment of self-regulatory actions
2. Interactive forums of dispute settlement



### The role of regulatory networks: ERGA and EPRA

- a. Skills and competencies
  - b. Organisational aspects
  - c. Next level of inter- and supranational cooperation
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## What is at stake?

### European regulatory efforts **vs** re- nationalisation of speech regulation

#### I EU 2018-2019:

AVMSD – regulation of VSPs re: hate speech and protection of minors  
Digital Single Market Directive (copyright and related rights)

#### II EU 2020-:

Digital Services Act package – draft DSA and draft DMA

#### III EU MSs/national initiatives 2018-2021:

- Germany: NetzDG - Jan 2018; FB (WhatsUp) Kartellamt decision - Feb 2019; FB 2millionEUR fine - July 2019; revision of the NetzDG – June 2021;
- France: Govt Report on SM accountability May 2019; 'Avia law' on illegal hate speech online March 2020 but partly quashed by the Constitutional Court in July 2020;
- Austria: KoPI-G – Communications Platform Act on measures to protect users on communications platforms – Dec 2020;
- UK: Draft Online Harms Bill – May 2021.