MEDIA POLICY BRIEF 21

Protection of children online: does current regulation deliver?

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Key messages

- Unless we see take action on online child protection, legal uncertainty and disputes will continue and we run the risk of excessive legislation being enacted in response.

- There is a lack of clarity for service providers, as well as questions about the effectiveness of self-regulation.

- There is a good deal of evidence that parents and children are struggling to understand their available options and responsibilities.

- Further challenges for the current strategy include the implementation of legislation, and the media literacy level of the public.

- Our recommendations include:
  - the development of a single, integrated Code of Conduct that sets minimum standards for providers of digital services likely to be used by children
  - that the EU develop a Recommendation that promotes an integrated and sustained approach to raising the media literacy of children and those who support them (parents, teachers, etc.)
  - that the Commission convene a permanent High Level Group on the protection of minors in the digital age to ensure that the many and diverse policies and practices already in place or to be developed are coordinated, evaluated and improved
  - the provision of dedicated European funding for pan-EU data collection to ensure robust, up-to-date evidence to guide the development of EU policy on the protection of minors in the digital age
  - the systematic inclusion of children's voices and experiences in the development and implementation of child protection policy in relation to the digital environment

Introduction

More children are going online, more frequently, via more devices and services, for more activities, at ever-younger ages. An estimated one in three internet users worldwide is under the age of 18[1].

The internet and accompanying technological developments offer huge opportunities for children in terms of learning and information, entertainment and play, communication and participation. Many online activities are now essential to daily life[2] [3].

However, they also pose risks to minors' safety, wellbeing and rights.[4] Children may be highly adept at using digital tools, but they lack understanding, especially in relation to social norms, of creative opportunities and the critical evaluation of misinformation, persuasion, exploitation or self-protection. They are, essentially, vulnerable targets for manipulation.

For example, the UK communications regulator Ofcom found in 2017 that newer forms of advertising online are difficult for children to identify. While 60% of 12- to 15-year-olds are aware of personalised online advertising and that vloggers may be paid to endorse products or brands, they find it difficult to identify such adverts in practice, particularly online. According to Ofcom's report, 'around half of 12-15s who use search engines understand that Google gets its revenue from companies paying to advertise on the site, [but] less than half correctly identify sponsored links on Google as advertising, despite these being distinguished by a box with the word 'ad' in it, and around a quarter of 8-11s and 12-15s believe that Google provides some kind of authenticating role.' [5]

There is thus a need to balance opportunity and protection for children online. European regulation has tended to prioritise self-regulation, public awareness raising, the development of technological tools and solutions, and the fight against child sexual abuse online.

New EU-wide legislation continues in a similar vein. The General Data Protection Regulation came into force in May 2018, replacing the legal regime established by the EU Data Protection Directive (1995). A revised Audiovisual Media Services Directive has been agreed by the European parliament, and once formally once adopted, member States will have 21 months to transpose the new directive into their national legislation.

A risk we run with any new regulation is that efforts to protect children might end up undermining their ability to benefit from the opportunities of the digital age, or inhibit social and market innovation. It is particularly challenging to address the online risk of harm to minors through regulation for several reasons:

- highly personal and sensitive matters are difficult to identify, quantify and assess within public policy deliberations

- the technology involved is changing fast
- it is difficult to determine online who is a child
- there are many independent actors involved, often across several jurisdictions
- potential benefits and harms can affect any part of children's lives
- In 2010 and 2014 European cross-national research (EU Kids Online, 2014) showed uneven incidence of both risk and digital skills depending on the country and age of child.

In this brief we consider the strengths and weaknesses of existing regulation and provide recommendations for improvements. A multi-stage problem faces risks at every level, but failure to act heightens the risk of knee-jerk, excessive legislation being enacted in response, as well as continuing legal uncertainty.

This brief is based on a paper that was commissioned by the European Parliament's CULT Committee to assist in its assessment of the requirements to ensure adequate support for protection of minors and children's wellbeing in the digital age.[6] Since the CULT Committee's 2012 report[7], which represented a comprehensive mapping of the issues at stake including key barriers for policy makers, only some of the many and excellent recommendations have been implemented.

In an effort to track developments since 2012, the CULT Committee commissioned a set of three papers to define the problem,[8] identify the regulatory dilemmas,[9] and make recommendations. This paper specifically aimed to evaluate policy developments and inform new recommendations, based on the evidence gathered in the companion papers, the EU Kids Online project, and related literature.[10]

The state of EU regulation addressing minors and the internet

The rights of the child constitute an integral part of fundamental rights that the EU and Member States must respect by virtue of [European](#) and international law. The protection of minors online became an EU priority in the 2000s, and the European Commission has committed to bringing children's rights-based approach to everything it does[11]. The EU has now built a complex system of protections based on the EU acquis of existing law, Council of Europe and UN standards. Self-regulation has been promoted because it is seen as cheaper, more effective in providing incentives for compliance, and flexible in responding to rapid technological change and in encouraging user empowerment in ways that fit cultural contexts[12].

The main legal and policy instruments evaluated here are the revised Audiovisual Media Services Directive, the General Data Protection Regulation, and the four pillars of the European Strategy for a Better Internet for Children.

Audiovisual Media Services Directive

The EU's [Audiovisual Media Services Directive](#)[13] governs EU-wide coordination of national legislation on all audio-visual media, including both traditional TV broadcasts and on-demand services. The AVMSD has been revised in recent months, as the Commission seeks to update it for the digital age.

The Commission's proposal, which was agreed with the European Parliament in June 2018, includes revising content and advertising rules to created a single unified standard for the obligations of linear and non-linear audiovisual media services providers regarding content that might impair the physical, mental or moral development of minors. Therefore, video-sharing platforms such as YouTube will fall under the revised directive, as will audiovisual content shared on social media services such as Facebook. MEP Sabine Verheyen described the directive as establishing ["a fair, level playing field."](#)[14]

This means that video-sharing platforms will now have to put in place measures to protect children from harmful content (anything that could impair the physical, mental or moral development of minors) including:
- flagging and reporting mechanisms,
- age verification systems,
- systems to rate the content by the uploaders or users
- parental control systems
- clarification in the terms and conditions of the platform of a prohibition for users to share content that citizens should be protected from.

The most harmful content (such as gratuitous violence or pornography) must be subject to the strictest measures such as encryption and effective parental controls.

The revised AVMSD addresses media literacy, albeit with little clarity regarding implementation. The AVMSD originally defined media literacy in Recital 47 and asserted that it should be promoted through continuing education of teachers and trainers, internet training for children and national campaigns aimed at citizens. It obliged the Commission to assess media literacy levels in all Member States when reporting on implementation of the Directive (Article 33). The first version of the revised AVMSD, however, omitted mention of media literacy. Following lobbying from several groups,[15] the AVMSD now includes a definition of media literacy – "Media literacy refers to skills, knowledge and understanding that allows citizens to use media effectively and safely" – and states that "Member States shall promote and take measures for the development of media literacy."

This is welcome, but uncertainty remains regarding how this can be implemented effectively by States, especially as regards reaching the adult population not in education or training. It is also unclear whether and how the Commission will benchmark and then evaluate improvements over time.[16]

General Data Protection Regulation

The General Data Protection Regulation[17] came into force across the EU on 25 May 2018, replacing European laws from the 1990s that had struggled to keep up with the pace of technological change. According to the European Commission's website, the regulation aims to "strengthen citizens' fundamental rights in the digital age and facilitate business by simplifying rules for companies in the digital single market." It has a strong focus on transparency of data collection.[18]

Unlike preceding regulation, the GDPR includes several provisions aimed at enhancing the protection of children's personal data online, although its goal is not specifically to protect children from harm. These are:
- the right to be forgotten (Article 17 and Recital 65)
- a stated age at which a child can consent to have their data processed by online service providers (Article 8) with the requirement of verifiable parental consent below that age.
- It obliges service providers to use a clear and plain language that children can easily understand in all information society services that require personal data processing (Article 12 and Recital 58).

Interestingly, although the GDPR is focused on data protection rather than personal risk, and on the population at large rather than children in any significant degree, it may have (partially unintended) consequences for child protection in the digital environment.

It is hoped that the GDPR is reasonably future-proofed, but as the situation is changing so fast with more and more devices becoming internet-enabled, there is increased concern about the misuse or abuse of children's data.

The European Strategy for a Better Internet for Children

The [European Strategy for a Better Internet for Children](#)[19] coordinates ongoing policy initiatives at European and Member State level, developing baseline requirements and aiming to avoid fragmentation. It proposes actions to be undertaken by the Commission, Member States and industry, intended to promote self-regulatory tools, education and empowerment rather than regulation.

The Strategy brings together actions under four main pillars:

> Pillar 1: High-quality content online for children and young people, including stimulating the production of creative and educational online content for children and promoting positive online experiences for young children.

> Pillar 2: Stepping up awareness and empowerment, including digital and media literacy and teaching online safety in schools, scaling up awareness activities and youth participation, and simple and robust reporting tools for users.

> Pillar 3: Creating a safe environment for children online, including age-appropriate privacy settings, wider availability and use of parental controls, wider use of age rating and content classification, codes for online advertising and overspending.

> Pillar 4: Fighting against child sexual abuse and child sexual exploitation, including faster and systematic identification of child sexual abuse material disseminated online, notification and takedown of this material and international cooperation.

The [Better Internet for Kids (BIK) Policy Map](#)[20] (commissioned by the EC) found that member States report wide support and policy provision for the BIK strategy, demonstrating many successes for child online safety policies, but that many gaps remain - both in terms of policy governance and in stakeholder participation - since the last BIK mapping exercise took place in 2014.

Other relevant regulation

The [E-Commerce Directive](#)[21] provides liability exemptions for social media platforms as long as they play a "neutral, merely technical and passive role towards the hosted content," and remove or disable access to illegal content.

[A Council of Europe Recommendation](#)[22] adopted in early July 2018 recommends that the governments of member States adhere to guidelines to respect, protect and fulfil the

rights of the child in the digital environments. This is the most comprehensive guidance available to states internationally, embedding a human rights approach into provision and protection for children in the digital age.

International initiatives

- International Telecommunications Union (ITU) Guidelines on child online protection (2016)

- UN (Special Rapporteur on the sale of children, child prostitution and child pornography) Report on information and communication technologies and the sale and sexual exploitation of children (2015)

- UN (Office of the Special Representative of the Secretary-General on Violence against Children) Releasing children's potential and minimizing risks: ICTs, the internet and violence against children (UNICEF, 2015).

- UN (Internet Governance Forum,) The charter of human rights and principles for the internet (2018)

- The WeProtect Global Alliance (2013) for national and global action to end the sexual exploitation of children online

- UN (Committee on the Rights of the Child) General comment no. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16.

- The ICT Coalition (industry self-regulation, Europe) (2012)

Key challenges

There is growing evidence documenting the harmful consequences to children of particular experiences of content, contact or conduct,[23] including upsetting content, cyberbulling and sexual harassment[24] that are not satisfactorily addressed by the current regulatory framework. We have identified the following challenges:

- **The lack of clarity about the responsibilities of various categories of service providers**

Questions remain about whether providers are aware of their responsibilities that are set out in the AVMSD or how consistently they apply technological tools to help parents protect their children (e.g. content information, pins, scheduling, etc.).

The AVMSD now applies to video-sharing platforms and social media platforms when they are used to share audiovisual content, but any measures implemented must remain compatible with digital intermediaries' liability exemptions under the E-Commerce directive. There is no clear guidance, however, on how this is to be achieved.

A Commission Staff Working Document on the mid-term review of the Digital Single Market (European Commission, 2017a) found that divergent and sometimes contradictory interpretations at national level of the regime on liability exemptions in the E-Commerce Directive, despite clarification provided by the Court of Justice. The resulting legal uncertainty might prevent online platforms from taking proactive voluntary measures insofar as these liability exemptions are unavailable to service providers that play an active role regarding illegal third party content that they transmit or host.[25]

- **Doubts about the effectiveness of self-regulation**

As well as the issue of awareness, providers of audiovisual content are subject to little auditing under the AVMSD and transparency is often lacking in the measures they take to protect minors online (e.g. automated measures such as filters etc.).

A [2017 report from the European Regulators Group for Audiovisual Media Services (ERGA)](#)[26] found that traditional linear TV stations as well as VOD service providers (often large companies with established brands) have implemented a range of protection measures even without a legal obligation. However, given the lag in public awareness and underdeveloped relationship with regulators, newer and smaller providers find it more difficult. Protection tools can 'become ineffective when the services are distributed over certain platforms or received and consumed on certain devices.'

Research documents the current challenge and possible solutions, for example, finding that online marketing to children and young people is widespread and that marketing techniques, for example, in online games provided by the big brands, are not always transparent to children. [A 2016 study funded by the European Commission](#) concluded

that 'self-regulation does not necessarily guarantee sufficient protection of children online and across Europe children do not receive an equal level of protection.' The study found that the most popular games contained few protective measures but that, if provided, could be beneficial[27].

In its 2016 Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, the Commission proposed to 'maintain the existing intermediary liability regime while implementing a sectorial, problem-driven approach to regulation.' [28]

While the requirement in the AVMSD that video-sharing platforms to put in place measures to protect minors and others is a welcome move, this places considerable burden on providers to self- regulate in a transparent and effective manner. It will be vital that the Commission does indeed 'explore the need for guidance on the liability of online platforms when putting in place voluntary, good-faith measures to fight illegal content online' and 'regularly review the effectiveness and comprehensiveness of such voluntary efforts with a view to determining the possible need for additional measures and to ensure that the exercise of users' fundamental rights is not limited.' Given rising doubts about the effectiveness of self-regulation, this strategy raises some concerns.

- **Parents and children are struggling to understand the available tools, the risks they face and their responsibilities.**

The technological tools on different devices are complex and inconsistent, which undermines user/parental awareness and literacy.

For example, Ofcom research in the UK in 2017 found that only 38% of UK parents of 5-15 year-olds whose child has a profile on Facebook or Facebook Messenger knew that 13 is the minimum age requirement; awareness of the minimum age was lower among parents whose child used Instagram (21%), Snapchat (15%) or WhatsApp (7%).[29] UK research with youth juries[30] shows many children lack the ability to understand their rights regarding how their data are used by internet services and platforms, and when it was clearly explained to them how their data might be used, children felt exploited.

Parents do not always feel they have adequate access to appropriate end-user tools. Ofcom's 2017 research found almost all UK parents mediate their child's internet use, variously employing technical tools, regularly talking to their children about staying safe online, supervising their child, and using rules about access and behaviour online. Following industry action (initiated by UK government), end-user filters were used by 40% of parents with broadband access, but their effectiveness is in doubt as 20% of parents of 5- to 15-year-olds who use filters, and a similar proportion of 12- to 15-year-olds, believed it is easy to bypass them[31].

Recent comparative data across Europe is sparse, although 2014 data from seven countries suggested variable levels of parental mediation and little benefit from parental

use of filtering tools.[32] This may be because, as a 2017 benchmarking exercise on parental control tools concluded,[33] no major improvements of these tools have been made in recent years.

Provision for parents requires urgent attention, integrating awareness-raising activities and parental tools. A survey of parents in eight EU countries conducted for the EC (at the instigation of the European Parliament, 2012) found that parents 'perceived stricter regulation of businesses and more education for children on online risks as the most effective protective measures.' Parents accept their own responsibility for protecting their children,[34] but want parental pre-approval mechanisms built into the games their children play online.

⭕ The media literacy of the general public

Media literacy is often cited as a solution to societal problems that involve the media.[35] As new issues continue to arise (e.g. the need for critical information literacy given the rise of disinformation and 'fake news'), it is widely agreed the need for media literacy is only likely to grow.

However, there is little knowledge about actual levels of media and information literacy. The most recent EU-wide survey of students and teachers' digital competence and attitudes towards ICTs in education was in 2011[36]. Research into media literacy levels among children and the effectiveness of media education is also lacking. A 2014 EMEDUS report on formal media education in Europe concluded that 'we have absolutely no research and fact-based knowledge about the work that is being done in European classrooms.'[37] A 2017 review revealed sporadic media education across Europe, with challenges in provision and implementation unresolved[38].

It is difficult to imagine a way to effectively deliver media literacy to the adult population, and current legislation does not tackle this issue. What is clear is that children and their parents today cannot be expected to independently raise their digital literacy levels sufficiently to a point where there they are fully capable of avoiding harmful content.

⭕ How to implement legislation

The online risk of harm to minors is challenging to address through regulation because of several factors: to start with, risks concern highly personal and sensitive matters that makes them difficult to identify, quantify and assess within public policy deliberations.

The technologies involved are complex, converging and fast-changing, as well as being developed and distributed by a diverse ecology of organisations ranging from global companies to small start-ups integrated within long value-chains[39]. The situation is ever changing, and as more devices for the home, including children's toys and clothes, include cameras, voice recording and become internet-enabled, there is increased concern about the misuse or abuse of children's data[40][41].

There are many actors without clear hierarchies involved in achieving a sufficient, necessitating coordination among families, educators and businesses. Potential benefits and harms may occur across any aspect of children's lives, with consequences varying depending on a child's vulnerability and circumstances.

There remain questions regarding the [practicalities of the interpretation, implementation, compliance and enforcement of the GDPR](#).[42] For example, the implications of differing ages of consent for children to use information society services (Article 8) across Europe is unclear when children move across borders, and in terms of applicable jurisdiction when the provider is in a different country from the child. There is uncertainty over when consent should be the legitimate base for data processing, the practical effectiveness of and need for age verification, the extent to which risk impact assessments are required, whether and when children's data can be profiled (Recital 71), and the practicalities of ensuring users understand terms and conditions and of gaining verifiable parental consent. It has also not been made clear whether Data Protection Authorities will have sufficient capacity to enforce the regulation.

Many questions about the AVMSD are also of pressing concern. As noted [by the EBU](#), "The robustness of the revised AVMS Directive will depend on the implementation of the proposed rules by national governments and regulators."[43] The AVMSD calls for co-regulation for the implementation of the 'new regime', but little information on how this could work. It is also necessary to consider the implications of the new measures for freedom of expression.

Recommendations

These challenges are significant, and a more effective and better-coordinated mix of standard-setting, regulatory instruments and business incentives must be found.

We recommend:

- **The inclusion of a single, integrated, comprehensive Code of Conduct in the Strategy for a Better Internet for Children**

This must set minimum standards for providers of digital services likely to be used by children, to replace the historically separate codes applicable to different sectors. It should be underpinned by strong backstop powers, including independent monitoring and evaluation, a trusted and sufficiently resourced body empowered to ensure compliance and significant sanctions at its disposal as needed.

The Code would be able to guide intermediaries in their child protection responsibilities and provide clear consumer information and protections if services are not intended for children.

The Code of Conduct on countering illegal hate speech online by the Commission with Facebook, Microsoft, Twitter and Google could provide inspiration as its first year saw notable progress, according to the Commission's evaluation, with challenges remaining.[44] While not concerned with children, this indicates what codes can achieve and is pertinent to current deliberations over moderation, transparency and blocking on YouTube.

- **A review of notice and takedown policies**

For child sexual abuse material, takedown should aim to disrupt and undermine business models for illegal content; for other categories of illegal content, takedown urgency should be commensurate with harm.

Internet intermediaries including social media and video-sharing platforms should be guided on the full range of content and conduct harmful to children, including harassment and cyberbullying content.

These should be underpinned by a triennial review at EC level and a permanent High Level Group established to monitor and review its operation (including by independent testing). If it is not working, hosts and network providers should not benefit from safe harbour provisions of the E-Commerce Directive.

- ⭕ **More research to inform, update and evaluate the functioning of the emerging complex regulatory system**

There are glaring EU-wide evidence gaps that must be overcome. We recommend the provision of dedicated European funding to ensure pan-EU data collection on a regular basis to ensure robust, up-to-date evidence to guide the development of EU policy on the protection of minors in the digital age.

European funding should be dedicated to rigorous, cross-nationally comparative and regularly updated research on children, parents and educators' understanding of children's experiences, concerns, practices, rights, responsibilities and vulnerabilities as digital services users, taking into consideration the child's age, ethnic and socio-economic background, among other key factors.

The established data collection instruments of the EU should include the topic of child online protection (e.g. European Social Survey) and periodic funds should be provided to analyse the results to inform policy development and implementation.

- ⭕ **Media literacy**

We propose that the EU should develop a Recommendation that promotes an integrated and sustained approach to raising the media literacy of children and those who support them, including parents and teachers. This should promote critical understanding, creative production and participation as well as teaching protective actions and technical skills.

Media literacy should be promoted consistently through all relevant EU policies and applied in national contexts from nursery years onwards, including both formal and informal educational and relevant cultural and information institutions, as well as encouraging wider voluntary participation.

- ⭕ **Enhancing stakeholder coordination and cooperation**

In order to achieve effective coordination, we recommend that the Commission should convene a permanent High Level Group on the protection of minors in the digital age to ensure that the many and diverse policies and practices already in place or to be developed are coordinated, evaluated and improved. This would bring together the Code of Conduct to develop and implement new standards for service providers, the Recommendation on media literacy, and encourage Member States to develop more centralised advice on services deemed beneficial for children. This group should report annually to the Commission and be as transparent as possible in its deliberations.

⭕ The systemic inclusion of children's voices and experiences

Children's voices and experiences must be included in the development and implementation of child protection policy in relation to the digital environment: all actions must include the meaningful participation of children themselves and the relevant experts able to represent children's best interests.

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The Media Policy Project aims to establish a deliberative relationship between policy makers, civil society actors, media professionals and relevant media research. We want policy makers to have timely access to the best policy-relevant research and better access to the views of civil society. We also hope to engage the policy community with research on the policy making process itself.

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