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**Children on Social Media: A Comparison of  
COPPA and the Revised AVMSD**

**Catalina Goanta**

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# TTLF Working Papers

**Editors: Siegfried Fina, Mark Lemley, and Roland Vogl**

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## **Abstract**

For over a decade, PewDiePie has been YouTube's biggest content creator, with a total of 104 million subscribers, many of whom are children. His army of fans – the 9 year-old army – has been the subject of many memes and online commentary. While the creator might have discussed his demographics publicly, he is one of the few YouTubers to do that. In comparison, fellow creators Tana Mongeau and Jake Paul, also known for their popularity among children and teens, do not reveal any statistics to which they may have access to on the platforms they are active.

As a category of highly vulnerable users, children are directly affected by such harms, as they are said to have difficulties recognizing manipulating techniques which may affect their immediate interests. To protect these interests, both EU and US legislators have responded with (mandatory) statutory rules aimed, on the one hand, at platforms (the US model), but also to commercial actors using the platforms for their business models (the EU model). This research project sets out to investigate the similarities and differences between the two regulatory approaches, and critically reflect on their strengths and weaknesses in offering vulnerable groups an effective recourse to protective regimes. It does so on the basis of the following structure. First, it categorizes the issues which may arise with the activity of children online. Second, it looks at two regulatory approaches in the US and the EU, namely the Children's Online Privacy Protection Rule (COPPA), and the updated Audiovisual Media Services Directive (AVMSD), which are relevant for some of the legal issues surrounding the online activity of children. Lastly, the paper explores the shortcomings of these two legal frameworks and makes policy recommendations for their improvement.

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# 1. Introduction

For over a decade, PewDiePie has been YouTube's biggest content creator, with a total of 104 million subscribers, many of whom are children.<sup>1</sup> His army of fans – the 9 year-old army – has been the subject of many memes and online commentary.<sup>2</sup> While the creator might have discussed his demographics publicly, he is one of the few YouTubers to do that. In comparison, fellow creators Tana Mongeau and Jake Paul, also known for their popularity among children and teens, do not reveal any statistics to which they may have access to on the platforms they are active. The full picture of how many children spend time on social media is far from clear, as is the answer to the question of what type of content children follow. According to UK regulator Ofcom, in a study dating from 2019, compared to 2015 children between 5-15 are more likely to go online on a tablet, mobile, game console or smart TV.<sup>3</sup> Similarly, the Census Bureau's 2016 National Survey of Children's Health indicates that more than 20% of children between 14 and 17 spend more than seven hours a day on screens.<sup>4</sup> Not only are these children spending time online to follow influencers such as the ones mentioned above, but the past five years have also seen a surge in the number of children becoming influencers themselves and are relying on social media platforms to monetize their activities.<sup>5</sup>

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<sup>1</sup> 'PewDiePie Signs Live-Streaming Deal with YouTube' *BBC News* (5 May 2020)

<<https://www.bbc.com/news/technology-52540437>> accessed 2 August 2020.

<sup>2</sup> '9-Year-Old Army' (*Know Your Meme*) <<https://knowyourmeme.com/memes/9-year-old-army>> accessed 2 August 2020.

<sup>3</sup> 'Children and Parents: Media Use and Attitudes Report 2019' 36.

<sup>4</sup> 'There's Worrying New Research About Kids' Screen Time and Their Mental Health' (*Time*) <<https://time.com/5437607/smartphones-teens-mental-health/>> accessed 2 August 2020.

<sup>5</sup> 'Mini Jake Paul: Tydus Talbott YouTube's 4-Year-Old Star - Insider' <<https://www.insider.com/mini-jake-paul-tydus-talbott-youtube-celebrity-2018-6>> accessed 2 August 2020.

Internet platforms have been called the ‘new governors’ of online speech.<sup>6</sup> As ‘functional sovereigns’ who have seemingly taken over the functions of the state in setting and enforcing rules, platforms develop self-regulatory mechanisms such as contractual frameworks or dispute resolution systems to govern the activity of their users.<sup>7</sup> The leniency of internet governance during the past decades, both at global and European levels contributed to the consolidation of *de facto* private legal orders providing consumers with either less protection than mandated by law, or less protection than the law ought to have mandated, had the ensuing legal harms been more transparent for lawmakers. As a category of highly vulnerable users, children are directly affected by such harms, as they are said to have difficulties recognizing manipulating techniques which may affect their immediate interests. To protect these interests, both EU and US legislators have responded with (mandatory) statutory rules aimed, on the one hand, at platforms (the US model), but also to commercial actors using the platforms for their business models (the EU model). This research project sets out to investigate the similarities and differences between the two regulatory approaches, and critically reflect on their strengths and weaknesses in offering vulnerable groups an effective recourse to protective regimes. It does so on the basis of the following structure. First, it categorizes the issues which may arise with the activity of children online. Second, it looks at two regulatory approaches in the US and the EU, namely the Children's Online Privacy Protection Rule (COPPA),<sup>8</sup> and the updated Audiovisual Media Services Directive (AVMSD), which are relevant for some of the legal issues surrounding the online activity of children. Lastly, the paper explores the

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<sup>6</sup> Kate Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’ (2017) 131 Harvard Law Review 1598.

<sup>7</sup> ‘From Territorial to Functional Sovereignty: The Case of Amazon’ «Law and Political Economy» <<https://lpeblog.org/2017/12/06/from-territorial-to-functional-sovereignty-the-case-of-amazon/>> accessed 10 August 2020.

<sup>8</sup> 15 U.S.C. 6501-6508.

shortcomings of these two legal frameworks and makes policy recommendations for their improvement.

## 2. The Online Activity of Children – An Overview of Harms

As children become digital natives,<sup>9</sup> their activity online increases, and so do the harms they expose themselves to.<sup>10</sup> Such harms can arise from various types of online interactions, as explored below.

Firstly, children can interact with their *direct peers*, on social media platforms (e.g. Facebook) or private messaging applications (e.g. WhatsApp). In this context, they can become the victims or perpetrators of cyberbullying,<sup>11</sup> and even of additional crimes such as holding or distributing child pornography.<sup>12</sup> These issues arise in connection to the way in which children use technology to communicate, but also due to the fact that many educational organizations fail to set out and enforce codes of conduct for online activity.<sup>13</sup> Such issues are governed by fields of law such as administrative law governing relationships in educational organizations, or criminal

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<sup>9</sup> Yun Li-Reilly, 'Remembering, Forgetting, Reinvention and Freedom: Social Media and Children's Right to Be Forgotten' (2017) 75 *Advocate* (Vancouver Bar Association) 661; Anna Wade, 'The Children's Online Privacy Protection Act: Can Website Regulations Be Applied to Mobile Phone Apps' (2014) 8 *Federal Courts Law Review* 197; Jessica K Sink and Richard Bales, 'Born in the Bandwidth: Digital Native as Pretext for Age Discrimination in Hiring' (2015) 31 *ABA Journal of Labor and Employment Law* 521.

<sup>10</sup> Danielle J Garber, 'COPPA: Protectiong Children's Personal Information on the Internet Notes and Comments' (2001) 10 *Journal of Law and Policy* 129.

<sup>11</sup> Diana N Evans, 'Disarming Digital Bullies: An Argument to Expand School Jurisdiction in Florida to Punish Acts of Cyberbullying That Occur Away from School Grounds Student Works' (2011) 41 *Stetson Law Review* 437; Jessica P Meredith, 'Combating Cyberbullying: Emphasizing Education over Criminalization Note' (2010) 63 *Federal Communications Law Journal* 311; Tiffany Sumrall, 'Lethal Words: The Harmful Impact of Cyberbullying and the Need for Federal Criminalization Comment' (2015) 53 *Houston Law Review* 1475; Jamie L Williams, 'Teens, Sexts & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Laws Note' (2011) 20 *William & Mary Bill of Rights Journal* 1017; Liat Franco and Khalid Ghanayim, 'The Criminalization of Cyberbullying among Children and Youth' (2019) 17 *Santa Clara Journal of International Law*.

<sup>12</sup> Victoria Bekiempis, 'Maryland Court: Teen Girl Who Sexted Friends Violated Child Pornography Laws' *The Guardian* (31 August 2019) <<https://www.theguardian.com/us-news/2019/aug/31/maryland-court-teen-girl-video-law>> accessed 3 August 2020.

<sup>13</sup> 'These Are the Memes That Caused Harvard to Rescind Offers to 10 Incoming Freshmen' (*The Tab US*, 5 June 2017) <<https://thetab.com/us/2017/06/05/harvard-memes-rescinded-69413>> accessed 3 August 2020.

law, in so far as cyberbullying is criminalized or connected to the infringement of child pornography laws.

Secondly, children can interact with their *indirect peers*, such as child influencers.<sup>14</sup> While child celebrities are not a new phenomenon, the use of social media has democratized the rise to fame of the average child. In addition, given the reliance on technology as entertainment to facilitate modern parenting, children content is very popular on platforms such as YouTube.<sup>15</sup> When involved in making this type of content, they can earn up to \$22 million per year in advertising revenue.<sup>16</sup> The kind of legal issues that arise in these indirect relationships can range from the non-disclosure of advertising (consumer law) to the lack of protection from parent managers (private law), or as freelance entertainment providers (employment law). Most of these issues reflect the sensitive position of children in interacting with commercial stakeholders such as advertisers or brands, given their complete lack of or limited capacity. When children follow content which is not age appropriate, there can also be a lot of discussion around the fitness of media regulation to protect children from content such as pornography or extreme violence which although limited on regular television, can be easily accessed on the Internet.

Thirdly, children may interact with *adults* as they become a source of content which can be used in somewhat benign (e.g. parents sharing content relating to their

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<sup>14</sup> 'Inside the Lives of Child Instagram Influencers - The Atlantic' <<https://www.theatlantic.com/family/archive/2019/02/inside-lives-child-instagram-influencers/583675/>> accessed 3 August 2020; Suzanne Bearne, 'Would You Let Your Child Become a "Kid Influencer"?' *BBC News* (23 August 2019) <<https://www.bbc.com/news/business-49333712>> accessed 3 August 2020.

<sup>15</sup> 'The Highest-Paid YouTube Stars of 2019: The Kids Are Killing It' <<https://www.forbes.com/sites/maddieberg/2019/12/18/the-highest-paid-youtube-stars-of-2019-the-kids-are-killing-it/>> accessed 3 August 2020.

<sup>16</sup> Natalie Sherman, 'The Kids Making up to \$1m a Year on YouTube' *BBC News* (2 March 2020) <<https://www.bbc.com/news/business-51619504>> accessed 3 August 2020; Amanda Perelli, 'The World's Top-Earning YouTube Star Is an 8-Year-Old Boy Who Made \$22 Million in a Single Year Reviewing Toys' (*Business Insider*) <<https://www.businessinsider.com/8-year-old-youtube-star-ryan-toysreview-made-22-million-2019-10>> accessed 3 August 2020.

children)<sup>17</sup> but also more malign ways (e.g. this content may be used by or sold to pedophiles). Such interactions, when leading to harms, have been mostly considered under family and privacy law, as well as criminal law.

Lastly, children can interact, albeit in a more veiled way, with *Internet companies*, such as the platforms with which they conclude non-negotiable agreements to make accounts on social media or download apps, or trackers which follow their activity online to further monetize it via data aggregation companies. In this case, children become a coveted source of monetizable data. This is particularly problematic since children – although mostly digital natives in the 21<sup>st</sup> century – are vulnerable Internet users who might or might not benefit from their parents’ monitoring and restricting of Internet activity. Children’s data can be obtained in two ways: (i) by actively asking children about their data; or (ii) by passively collecting the data without any consent (where consent could play a role due to limited capacity), or knowledge.<sup>18</sup> This matter is mostly considered a children’s privacy issue, and it rests at the heart of this doctrinal inquiry.

The overview above aimed to clarify the various types of harms children are exposed to when surfing the web, and to highlight the fields of law relevant for regulatory considerations. This discussion will be expanded upon in part three, when reflecting upon the fitness of current legal frameworks that do not govern the activity of children online as a whole, but rather break it down into sectoral issues which are regulated differently in the US and the EU.

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<sup>17</sup> Stacey Steinberg, *Growing Up Shared: How Parents Can Share Smarter on Social Media – and What You Can Do to Keep Your Family Safe in a No-Privacy World* (Sourcebooks, 2020).

<sup>18</sup> Garber (n 10).

### **3. The United States Approach: The Children's Online Privacy Protection Rule (COPPA)**

COPPA establishes a protective regime against unfair or deceptive acts or practices arising in connection with the collection, use, and/or disclosure of personal information from and about children on the Internet.<sup>19</sup> In other words, the primary goal behind COPPA is to give parents control over the information collected over their children.<sup>20</sup> According to COPPA, children are defined as persons under the age of 13.<sup>21</sup> This has been a core criticism for COPPA, since other federal regulatory frameworks governing access to school records extended parental oversight through the age of eighteen.<sup>22</sup> In addition, the collection of personal information is also defined, and it covers both the active and the passive collection of personal information from children, and personal information does not only include contact information but also any images, videos or audio files depicting children.<sup>23</sup>

COPPA was enacted in 1998 by the US Congress to offer protection to this vulnerable category of Internet users absent their parents' consent. The Federal Trade Commission implemented COPPA through a Rule effective since April 2000,<sup>24</sup> which

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<sup>19</sup> Stephen Raher, 'The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails' (2020) 17 Hastings Race and Poverty Law Journal 3; Joel R Reidenberg, 'E-Commerce and Trans-Atlantic Privacy E-Commerce and Privacy Institute for Intellectual Property & (and) Information Law Symposium' (2001) 38 Houston Law Review 717.

<sup>20</sup> 'Complying with COPPA: Frequently Asked Questions' (*Federal Trade Commission*, 20 July 2020) <<https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions-0>> accessed 9 August 2020; Laurel Jamtgaard, 'Big Bird Meets Big Brother: A Look at the Children's Online Privacy Protection Act Symposium on Internet Privacy' (2000) 16 Santa Clara Computer and High-Technology Law Journal 385; Emily DiRoma, 'Kids Say the Darndest Things: Minors and the Internet' (2019) 2019 Cardozo Law Review De-Novo 43; Rachael Malkin, 'How the Children's Online Privacy Protection Act Affects Online Businesses and Consumers of Today and Tomorrow Student Articles' (2001) 14 Loyola Consumer Law Review 153.

<sup>21</sup> §312.2 COPPA.

<sup>22</sup> Anita L Allen, 'Minor Distractions: Children, Privacy and E-Commerce E-Commerce and Privacy Institute for Intellectual Property & (and) Information Law Symposium' (2001) 38 Houston Law Review 751.

<sup>23</sup> Ibid.

<sup>24</sup> 15 U.S.C. § 6502(b); 5 U.S.C. § 553.

asks websites to display a privacy policy and let parents know about how they collect information, as well as obtain parental consent in a verifiable way before collecting children's information or sharing it with other parties.<sup>25</sup>

A very important aspect of COPPA is that it applies to websites or online services that are 'directed to children'.<sup>26</sup> The factors used to characterize what exactly may fall under this classification include the subject matter, visual content, the use of animations, the featuring of child-oriented activities, the presence of child celebrities, or language characteristics, but can also refer to the statistics obtained by such service providers showing the relevant age in their demographics. From this perspective, the FTC distinguishes between commercial services that are as such directed to children, and content posted on general audience platforms that is directed to children. In both cases, the FTC requires COPPA compliance.<sup>27</sup>

Overall, COPPA has been criticized for not having had sufficient impact.<sup>28</sup> However, the FTC has been active in its monitoring of popular game platforms<sup>29</sup> and

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<sup>25</sup> Shannon Finnegan, 'How Facebook Beat the Children's Online Privacy Protection Act: A Look into the Continued Ineffectiveness of COPPA and How to Hold Social Media Sites Accountable in the Future Comments' (2019) 50 Seton Hall Law Review 827; Neeka Hodaie, 'Real You Meets Virtual You: It Is Time for Consumers to Regain Power Online' (2019) 18 Seattle Journal for Social Justice 647.

<sup>26</sup> 16 C.F.R. § 312.2. See also Joseph A Zavaletta, 'COPPA, Kids, Cookies & (and) Chat Rooms: We're from the Government and We're Here to Protect Your Children' (2000) 17 Santa Clara Computer and High-Technology Law Journal 249.

<sup>27</sup> 'Complying with COPPA: Frequently Asked Questions' (n 20).

<sup>28</sup> Brittany A Martin, 'The Unregulated Underground Market for Your Data: Providing Adequate Protections for Consumer Privacy in the Modern Era Notes' (2019) 105 Iowa Law Review 865; Ari Ezra Waldman, 'Privacy Law's False Promise' (2019) 97 Washington University Law Review 773; Christopher W Savage, 'Managing the Ambient Trust Commons: The Economics of Online Consumer Information Privacy' (2019) 22 Stanford Technology Law Review 95; Allen (n 22); Finnegan (n 25); Lauren A Matecki, 'Update: COPPA Is Ineffective Legislation - Next Steps for Protecting Youth Privacy Rights in the Social Networking Era' (2010) 5 Northwestern Journal of Law and Social Policy 369.

<sup>29</sup> 'Developer of Apps Popular with Children Agrees to Settle FTC Allegations It Illegally Collected Kids' Data without Parental Consent' (*Federal Trade Commission*, 4 June 2020) <<https://www.ftc.gov/news-events/press-releases/2020/06/developer-apps-popular-children-agrees-settle-ftc-allegations-it>> accessed 3 August 2020.

even social media mammoths such as YouTube or Google.<sup>30</sup> Especially when dealing with the latter, the FTC reached a historical settlement with YouTube and Google, amounting to a payment of \$136 million to the FTC and \$34 million to New York for the violation of the Children’s Online Privacy Protection Act (COPPA) Rule. This is by ‘far the largest amount the FTC has ever obtained in a COPPA case since Congress enacted the law in 1998’.<sup>31</sup>

#### **4. The European Union Approach: The Updated Audiovisual Media Services Directive**

The regulatory effort to codify the emergence of non-linear media services in the light of Internet adoption was first crystallized in 2010 with the adoption of the first Audiovisual Media Services Directive.<sup>32</sup> Only six years later, the Commission

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<sup>30</sup> ‘Google LLC and YouTube, LLC’ (*Federal Trade Commission*, 3 September 2019) <<https://www.ftc.gov/enforcement/cases-proceedings/172-3083/google-llc-youtube-llc>> accessed 3 August 2020.

<sup>31</sup> ‘Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children’s Privacy Law’ (*Federal Trade Commission*, 3 September 2019) <<https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations>> accessed 3 August 2020.

<sup>32</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 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), OJ L95, 15 April 2010. See also Thomas Walter Haug, ‘The New Audiovisual Media Services Directive as a Missed Opportunity in View of the Protection of Children and Young People against Harmful Influences of Advertisement in Nowadays’ *Media EU Law* (2008) 4 *Hanse Law Review* 35; Tom Gibbons and Irini Katsirea, ‘Commercial Influences on Programme Content: The German and UK Approaches to Transposing EU Rules on Product Placement Broadcasting in an Age of Commercialism’ (2012) 4 *Journal of Media Law* 159; Oliver C Fug, ‘The Challenge of Double Graduation: The Protection of Minors against Developmentally Harmful Content in the Legal Orders of Denmark, Germany and Greece Broadcasting in an Age of Commercialism’ (2012) 4 *Journal of Media Law* 253; Rachael Craufurd Smith, ‘Determining Regulatory Competence for Audiovisual Media Services in the European Union’ (2011) 3 *Journal of Media Law* 263; Jenny Metzendorf, ‘The Implementation of the Audiovisual Media Services Directive by National Regulatory Authorities: National Responses to Regulatory Challenges’ (2014) 5 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 88; Irini Katsirea, ‘Electronic Press: Pres-like or Television-Like’ (2015) 23 *International Journal of Law and Information Technology* 134; Hab Kararzyna Klafkowska-Wasniowska, ‘Soccer or Football: The Level Playing Field Idea for the European Single Market in the Audiovisual Media Services’ (2017) 26 *Michigan State International Law Review* 295.

proposed a review of this Directive,<sup>33</sup> and the updated instrument was adopted in 2018, giving Member States 21 months to transpose it in national legislation.<sup>34</sup>

According to the European Commission, the main legal aspects of the updated regime include:

- a strengthened Country of Origin principle, maintaining the framework according to which media service providers need only comply with the rules of the Member State in which they are based;<sup>35</sup>
- the Directive now partly extends to video-sharing platforms (e.g. YouTube, Instagram);
- increased protection for minors against online harmful content;
- increased protection on TV and video against hate speech, incitement to terrorism and incitement to violence;
- increased obligations to provide a minimum of 30% European content for on-demand services;
- increased flexibility for television advertising, shifting time limits previously calculated per hour;

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<sup>33</sup> 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, COM/2016/0287 final - 2016/0151 (COD). See also Mercedes Sanchez Ruiz, 'The Current European Rules Governing Product Placement and the New Legislative Proposal Amending the Audiovisual Media Services Directive Estudios' (2017) 9 Cuadernos de Derecho Transnacional 506; Andrej Savin, 'EU Regulatory Models for Platforms on the Content Carrier Layers: Convergence and Changing Policy Patterns' (2018) 2018 Nordic Journal of Commercial Law 7; Carsten Ullrich, 'Standards for Duty of Care: Debating Intermediary Liability from a Sectoral Perspective' (2017) 8 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 111.

<sup>34</sup> 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, OJ L303, 28 November 2018. See also MZ van Drunen, 'The Post-Editorial Control Era: How EU Media Law Matches Platforms' Organisational Control with Cooperative Responsibility' (2020) 0 Journal of Media Law 1.

<sup>35</sup> Zsolt Kokoly, 'The Anti-Circumvention Procedure in the Audiovisual Media Services Directive' (2019) 8 Acta Universitatis Sapientiae: Legal Studies 43.

- increased protections for children against health endangering advertising (e.g. promoting high fat, salt, sodium and sugar foods), including in codes of conduct;
- independence of audiovisual regulators.<sup>36</sup>

It is important to note that the Directive does not define the terms ‘minors’ and ‘children’. The most important addition from the perspective of collecting and processing data from minors is Article 6a(2) of the Directive, which states that ‘[p]ersonal data of minors collected or otherwise generated by media service providers pursuant to paragraph 1 shall not be processed for commercial purposes, such as direct marketing, profiling and behaviorally targeted advertising.’ This rule connects the collection or generation of data belonging to minors to media service providers, who are defined in Article 1(1)(d) as ‘the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organized’. On social media, media service providers are considered the actual natural or legal persons behind e.g. YouTube channels, Instagram profiles, and so on. Social media platforms are considered ‘video-sharing platform services’, as defined in Article 1(1)(aa): ‘a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate,

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<sup>36</sup> European Commission, ‘Revision of the Audiovisual Media Services Directive (AVMSD)’ (*Shaping Europe’s digital future - European Commission*, 25 May 2016) <<https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd>> accessed 9 August 2020; Lorna Woods, ‘EU Law Analysis: The Proposed New Audiovisual Media Services Directive: Key Features’ (*EU Law Analysis*, 26 May 2016) <<http://eulawanalysis.blogspot.com/2016/05/the-proposed-new-audiovisual-media.html>> accessed 9 August 2020.

by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organization of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing’.

What is more, the policy rationales behind taking specific measures with respect to data collection and children are explored in the Preamble of the Directive, where Recital 21 mentions the complementarity of the General Data Protection Regulation (GDPR) to the AVMSD:<sup>37</sup> ‘Regulation (EU) 2016/679 of the European Parliament and the Council recognizes that children merit specific protection with regard to the processing of their personal data. The establishment of child protection mechanisms by media service providers inevitably leads to the processing of the personal data of minors. Given that such mechanisms aim at protecting children, personal data of minors processed in the framework of technical child protection measures should not be used for commercial purposes.’

## **5. Comparison Between Core Principles in COPPA and AVMSD: Notice, Consent and Unfair Practices**

Both the COPPA and the revised AVMSD are examples of federal and respectively pan-European legislative measures taken to protect children online. While COPPA is in itself a privacy instrument empowering parents to be in control of their children’s data,<sup>38</sup> whereas the revised AVMSD is a media instrument that applies, *inter alia*, to children and minors. Given the quasi-maximum harmonization nature of the AVMSD,

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<sup>37</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4 April 2016.

<sup>38</sup> Michelle Z Hall, ‘Internet Privacy or Information Piracy: Spinning Lies on the World Wide Web Note and Comment’ (2001) 18 New York Law School Journal of Human Rights 609.

whereas the standard of some regulatory considerations is set out for all Member States, a lot of leeway is left for various policy considerations. In what follows, a few similarities and differences between the COPPA and the revised AVMSD are discussed, in order to identify the most visible pitfalls and make recommendations for their improvement.

Firstly, both COPPA and AVMSD are centered around the concept of *effective parental control*. For COPPA, this is reflected in the notice and consent model,<sup>39</sup> which is supposed to put parents in a position where they can make informed choices on behalf of their children, when it comes to using services on the Internet which may collect and aggregate their information.<sup>40</sup> Similarly, the AVMSD promotes parental control, albeit from a perspective of content moderation, and thus exposure of children to harmful content, and not necessarily based on the privacy consideration.<sup>41</sup> Parental controls seem to be not only a reasonable idea, based on the sharing of responsibility for online browsing,<sup>42</sup> but also a legally necessary one, arising from private law rules on minority. However, the shortcomings of this approach are many. Parental controls in an automated environment may also require automated implementation. For instance, parents ought to have advanced knowledge about the features of e.g. internet

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<sup>39</sup> Christina Nguyen, 'Monitoring Your Teenagers' Online Activity: Why Consent or Disclosure Should Be Required Student Scholarship' (2016) 15 Seattle Journal for Social Justice [i].

<sup>40</sup> Paul M Schwartz and Daniel J Solove, 'The PII Problem: Privacy and a New Concept of Personally Identifiable Information' (2011) 86 New York University Law Review 1814; Melanie L Hersh, 'Is Coppa a Cop Out - The Child Online Privacy Protection Act as Proof That Parents, Not Government, Should Be Protecting Children's Interests on the Internet Conference - Counseling the Client - A Natural Law Approach - Note' (2000) 28 Fordham Urban Law Journal 1831; Eldar Haber, 'Toying with Privacy: Regulating the Internet of Toys' (2019) 80 Ohio State Law Journal 399.

<sup>41</sup> Recital 20 AVMSD reads: '[...] The most harmful content, which may impair the physical, mental or moral development of minors, but is not necessarily a criminal offence, should be subject to the strictest measures such as encryption and effective parental controls, without prejudice to the adoption of stricter measures by Member States.'

<sup>42</sup> Wonsun Shin, Jisu Huh and Ronald J Faber, 'Tweens' Online Privacy Risks and the Role of Parental Mediation' (2012) 56 Journal of Broadcasting and Electronic Media 632.

browsers, to make sure their children do not visit unwanted websites,<sup>43</sup> or to keep track of the websites visited or accounts made by children. Additional tools can be found on the market and installed on various devices with the specific purpose of tracking children. Sometimes, however, these tools become tracking services themselves. The FTC has taken action against a company making such tools, called EchoMetrix, as it ‘it failed to adequately inform parents using its web monitoring software that information collected about their children would be disclosed to third-party marketers’.<sup>44</sup>

Secondly, very much linked to the disclosures connected to the notice requirement, COPPA prohibits the non-disclosure of the collection of children data as an *unfair or deceptive acts or practices*.<sup>45</sup> While the AVSMD does not use a similar classification, it is important to note that apart from the GDPR, another European directive that is complementary to the AVSMD is the Unfair Commercial Practices Directive,<sup>46</sup> which would lead to the same qualification for the non-disclosure of practices which manipulate consumers, especially if they are considered vulnerable consumers, such as children. This is also acknowledged in Recital 46 of the Directive, which states that ‘[c]ommercial communications on video-sharing platform services are already regulated by Directive 2005/29/EC of the European Parliament and of the Council, which prohibits unfair business-to-consumer commercial practices, including misleading and aggressive practices occurring in information society services’. This

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<sup>43</sup> ‘How to Set Parental Controls on a Google Chrome Browser - Business Insider’ <<https://www.businessinsider.com/how-to-set-parental-controls-on-google-chrome?international=true&r=US&IR=T>> accessed 9 August 2020.

<sup>44</sup> ‘FTC Settles with Company That Failed to Tell Parents That Children’s Information Would Be Disclosed to Marketers’ (*Federal Trade Commission*, 30 November 2010) <<https://www.ftc.gov/news-events/press-releases/2010/11/ftc-settles-company-failed-tell-parents-childrens-information>> accessed 9 August 2020.

<sup>45</sup> §312.3

<sup>46</sup> 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, OJ L 149, 11 June 2005.

classification (and resulting prohibition) raises a lot of questions about the overlap in the substantive as well as procedural enforcement of both instruments. As a matter of fact, similar data collection processes that were not clarified to consumers have been considered unfair commercial practices by institutions such as the Italian Competition Authority.<sup>47</sup>

Thirdly, moving from the substantive similarities to these *enforcement* issues, COPPA is enforced at federal level by the FTC, whereas the AVMSD needs to be implemented by national media authorities primarily, given its nature as a media instrument. The FTC is the same agency that deals with the enforcement of consumer as well as competition law, whereas media agencies at Member State level do not generally deal with competition, privacy or consumer protection. The overlap between these particular European regulatory policy areas is seen as a challenge but also an opportunity,<sup>48</sup> but absent further coordination between enforcement agencies, enforcement will undoubtedly be affected by the uncoordinated expectations of agencies in dealing with their responsibility under the different instruments at stake.

## **6. How Suitable Are Both Legal Frameworks in Protecting Children's Online Privacy?**

Legislators trying to protect children from online harms have no easy task. Both COPPA and the AVMSD are a step in the good direction, at least when considering

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<sup>47</sup> CPI, 'Italy: Antitrust Watchdog Opens Facebook Probe' (*Competition Policy International*, 8 April 2018) <<https://www.competitionpolicyinternational.com/italy-antitrust-watchdog-opens-facebook-probe/>> accessed 9 August 2020.

<sup>48</sup> N Helberger, F Zuiderveen Borgesius and A Reyna, 'The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law' (2017) 54 *Common Market Law Review* <<https://dare.uva.nl/search?identifier=1957659a-1069-4c59-a913-20ca5dec0cdc>> accessed 3 November 2019; Catalina Goanta and Stephan Mulders, "'Move Fast and Break Things": Unfair Commercial Practices and Consent on Social Media' (2019) 8 *Journal of European Consumer and Market Law* <<https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/8.4/EuCML2019026>> accessed 9 August 2020.

their goals, namely of protecting children, who are a special, vulnerable category of Internet users. In achieving these goals, from the short comparison between COPPA and the AVMSD, it seems legislators deal with considerable conceptual and implementation hurdles. This discussion focuses on two of these hurdles, namely the fitness of substantive legal concepts applied to novel factual situations, as well as enforcement questions primarily arising out of the lack of public infrastructures capable to monitor and assess the implementation of substantive rules.

As far as the first point is concerned, in this paper, the fitness of substantive legal concepts is understood to reflect a doctrinal consideration of the conceptual backbones in the two regulatory instruments.<sup>49</sup> This conceptual backbone is a combination of the notion of ‘legal capacity’ and the notion of ‘consent’. From a contractual perspective, minority is supposed to represent the protective regime necessary for a specific category of natural persons who, due to not having reached full developmental abilities, need to rely on other persons to double check their transactions. In the case of a child buying a \$1,000 mobile phone from a store, a lot of jurisdictions would consider such a sale to not be valid on the grounds that for expenses other than daily necessities, such a sale would have to be ratified, or perfected by parents or other legal guardians. This is done to avoid the likelihood that such a transaction would be detrimental for the child. The discussion around legal capacity is much more complex, as it may be divided between specific ages in different countries around the world, to indicate on the one hand the full lack of capacity, on the one hand, the existence of some limited capacity, on the other.

The rationale behind the expression of capacity in modern contract law is based on a certain allocation of resources - for instance, that a child would not have access to

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<sup>49</sup> The AVMSD uses the concept of parental consent in relation to the moderation of harmful content, and not so much relating to the collection of children’s data, which is simply prohibited.

a family's savings account. Instead, a child would be given limited resources that they would have to manage under the control of their guardians. The rise of e-commerce, especially around digital content relating to games, is already an example of how this allocation of resources may come under fire when parental controls are not set in place.<sup>50</sup> Without a practical way of exercising such control,<sup>51</sup> the theoretical notion of legal capacity comes under fire. If an iTunes account shows purchases that are children-oriented, neither iTunes nor app developers can tell at the onset of the contract for that digital content, that their contracting party is a child or their parent/guardian. In case a child makes in-app purchases, or downloads and pays for content without parental consent, while parents may have some leeway to invalidate contracts with service providers, the scale at which this issue occurs can be said to have an impact on the notion of limited capacity itself. Combined with consent,<sup>52</sup> which has come under fire for its inefficient role in cyberspace, given the vast informational overload Internet users are exposed to, the doctrinal importance of legal capacity seems to wane even more. As a result, parental controls and consent heavily rely on digital literacy and good parenting practices. From this perspective, both COPPA and the AVSMD should be seen as one way to reduce online harms by putting pressure on content providers and social media companies to assume their own responsibility in the content that is available for children, but they can only make an impact when combined with the exercise of responsibility by parents as well.

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<sup>50</sup> Brian X Chen, 'Are Your Children Racking Up Charges From Mobile Games? Here's How to Fight Back' *The New York Times* (6 February 2019) <<https://www.nytimes.com/2019/02/06/technology/personaltech/children-charges-mobile-games.html>> accessed 10 August 2020.

<sup>51</sup> 'Securing Your IOS Device for Your Children, Part 1: Setting up a Kid-Friendly iTunes Account' (*Engadget*) <<https://www.engadget.com/2013-03-29-securing-your-ios-device-for-your-children-part-1-setting-up-a.html>> accessed 10 August 2020.

<sup>52</sup> Elettra Bietti, 'Consent as a Free Pass: Platform Power and the Limits of the Informational Turn' (2019) 40 *Pace Law Review* 310.

This segues into the second point relating to enforcement. Current studies relating to the monitoring of digital content providers are few, and mostly led by academia and/or industry.<sup>53</sup> If the FTC is to apply COPPA across the very wide range of industries where it is applicable, it needs to be able to determine who the transgressors are, and how to nudge them to become compliant. So far, by focusing on the negotiation of new standards with e.g. social media companies,<sup>54</sup> the FTC has been signaling to the market that it will increasingly pay attention to COPPA infringements. At the same time, this settlement entailed some of the most effective practical implementations that the FTC could have hoped for, leading to platform interface and infrastructure changes (e.g. indicating if content is meant for children or not),<sup>55</sup> which have already trickled down to all the media service providers hosted on platforms such as YouTube, but which also raise additional questions relating to what YouTube itself does to ensure compliance with these standards.

In contrast, media authorities in the European Union have, so far, not been involved in similarly public negotiations. It is true that the deadline for the transposition of the AVMSD is August 2020, so it remains to be seen what enforcement novelties will arise out of the transposition, but given the nature of data collection as a more data protection issue than a media law question, it is to be expected that the enforcement of Article 6a(2) will be done by privacy watchdogs. It may be the case that the application of Article 6a(2) will be impaired by the fact that the actors collecting data over children are not necessarily the media service providers

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<sup>53</sup> Kanad Basu and others, 'COPPTCHA: COPPA Tracking by Checking Hardware-Level Activity' (2020) 15 IEEE Transactions on Information Forensics and Security 3213; Irwin Reyes and others, "'Is Our Children's Apps Learning?'" Automatically Detecting COPPA Violations' 7.

<sup>54</sup> Casey Newton, 'YouTube's FTC Settlement Won't End Its Problems with Regulators' (*The Verge*, 5 September 2019) <<https://www.theverge.com/interface/2019/9/5/20850287/youtube-ftc-settlement-google-antitrust-investigation>> accessed 10 August 2020.

<sup>55</sup> 'Determining If Your Content Is "Made for Kids" - YouTube Help' <<https://support.google.com/youtube/answer/9528076?hl=en>> accessed 10 August 2020.

themselves, who only have access to demographic data as a statistical performance overview of their media outlet, but instead by the video-sharing platform services, which have the power to collect and reuse all the platform data. From this perspective, the AVMSD may be a missed opportunity to police the collection of children data. However, since the AVMSD has colossal implications for platform liability and content moderation, it is possible to consider that the latest changes in the YouTube interface (e.g. not allowing comments for children's videos, etc.) have been adopted not only as a result of the pressure from the FTC, but also in the wake of the entry into force of the revised AVMSD.<sup>56</sup> To complement regulatory reform with enforcement effectiveness, public authorities ought to consider the development of public interest technology. Data protection offices in most digitally developed European Member States are already setting up data units or technology departments to develop in-house tools for market monitoring. Without these tools, authorities rely mostly on antiquated investigative options which include consumer or civil society complaints, to determine what harms are taking place where. The battle for protecting children's privacy from unwanted data collection cannot be had without data.

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<sup>56</sup> 'New EU Rules on Video-Sharing Platforms: Will They Really Work?' (*Media@LSE*, 21 February 2019) <<https://blogs.lse.ac.uk/medialse/2019/02/21/new-eu-rules-on-video-sharing-platforms-will-they-really-work/>> accessed 10 August 2020.