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### Self- and Co-regulation in the new AVMSD

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# Self- and Co-regulation in the new AVMSD

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# Self- and Co-regulation in the new AVMSD

**Amedeo Arena, Mark D. Cole, Jan Henrich, Bernardo Herman, Michèle Ledger,  
Pascal Kamina, Susanne Lackner, Roberto Mastroianni, Gabor Polyak, Andrej  
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# Foreword

Canadian philosopher Marshall McLuhan<sup>1</sup> once stated that “[A]s technology advances, it reverses the characteristics of every situation again and again. The age of automation is going to be the age of *do it yourself*.”

Automation has not yet made its appearance in the legislative field; laws are still being adopted by parliamentary bodies and applied by courts of law. And yet, the advances in technology have reversed certain characteristics of how rules are put in place and implemented. Due to the Internet’s cross-border reach and the multitude of potential content providers (basically, anybody with access to the web), many states are finding it increasingly difficult to put a stop to harmful content. Also, tech giants such as Google and Facebook could, *prima facie*, be considered to be in a better position to police their own services. While the dreams of an unregulated Internet have long faded away, we seem to have entered the era of *regulate it yourself*.

Of course, a cyberstate where rules are created and imposed by tech giants does not seem to be a winning strategy. Legislative and punitive powers must remain with the state as sole guarantor of the public interest. But given the regulatory difficulties described above, self- and co-regulation appear to be instruments capable of complementing (but not supplementing) the action of the state in regulating the media sector. Special hopes are placed on these softer forms of regulation when it comes to tackling the challenges posed by the Internet.

The revised Audiovisual Media Services Directive (AVMSD) requires member states to encourage the use of co-regulation and the fostering of self-regulation through codes of conduct in certain fields covered by the Directive. It includes general requirements for asserting self- and co-regulation within its scope, as well as special arrangements for that particular purpose, in specific fields, especially those regarding the protection of minors vis-à-vis commercial communications.

This publication aims to analyse the system of self- and co-regulation provided for in the revised AVMSD. Under the scientific coordination of our partner institution - the Institute of European Media Law (EMR) - this publication includes country reports by Susanne Lackner (Austria), Bernardo Herman and Michèle Ledger (Belgium), Pascal Kamina (France), Jörg Ukrow (Germany), Gabor Polyak (Hungary), Roberto Mastroianni and Amedeo Arena (Italy), Krzysztof Wojciechowski (Poland) and Andrej Školkay (Slovakia). Furthermore, the EMR’s own research staff members – Mark D. Cole, Jan Henrich and Jörg Ukrow –

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<sup>1</sup> [https://en.wikipedia.org/wiki/Marshall\\_McLuhan](https://en.wikipedia.org/wiki/Marshall_McLuhan).

provide a description of the legal framework for self- and co-regulation in International and European law as well as a comparative analysis of the information contained in the national chapters, together with an introduction and a conclusion. Our special thanks go to Christina Etteldorf for the editorial coordination with the authors.

Strasbourg, November 2019

**Maja Cappello**

IRIS Coordinator

Head of the Department for Legal Information

European Audiovisual Observatory

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## Executive summary

The latest revision of the Audiovisual Media Services Directive, undergone in 2018, saw European lawmakers take a step forward in favour of stakeholders, and particularly service providers, being more involved in the regulatory process through self- and co-regulation.

In fact, self- and co-regulation were already introduced in the AVMS Directive of 2007, with regard to linear audiovisual media services, as EU lawmakers considered the need to adjust the European media law to ongoing technological and market developments.

Under the influence of globalisation and the growing role of private companies as global actors, voluntary self-regulatory initiatives were undertaken in many industries. Coincidentally, in some countries, the role of the state started to shift from a traditional dirigiste approach to a more “inclusive” one, where the industry plays an increasingly important role. Additionally, various provisions set under self-regulatory instruments such as guidelines, agreements and codes of conduct, derive from internationally recognised standards among stakeholders. Consequently, the impact of self-regulatory instruments on European and national legislation, in terms of standard setting, is notable. However, such instruments should not be considered as an alternative to state legislation, but rather complementary to it.

In practice, different models exist behind the generic terminology of self- and co-regulation, ranging from purely independent to statutory or regulated self-regulation. In all cases, the main challenge for public authorities has been to maintain the right balance between effective regulation and the safeguarding of fundamental rights; all while avoiding or at least minimising any potentially unwanted side effects of self-regulation. This includes concerns regarding the implementation of the provisions envisaged by the different codes; their compliance with EU and national laws; practical questions concerning transparency, monitoring, evaluation and review; as well as the enforcement of potential sanctions in case of non-compliance.

The report traces the origins of self- and co-regulation, as first referenced in EU law, before focusing on EU media law, and particularly on the AVMS Directive and its recent revision. It details the scope of application of the provisions on self- and co-regulation with regard to the protection of minors, commercial communications and the protection of the general public from harmful and hateful content. It also looks at the challenges posed by the cross-border aspect of audiovisual media services and the Internet in terms of extraterritorial regulation, and the impact that self- and co-regulation might have on media regulation and international law.

At national level, the general tendency leans towards the development of more self- and co-regulation policies. While some states have earlier traditions in this domain, others are adapting their national policies, as they are driven by recent developments at EU level.



The following section of the report offers an overview of self- and co-regulation policies in the audiovisual media sector in eight EU member states, namely Austria, Belgium, Germany, France, Hungary, Italy, Poland and Slovakia. It provides a description of the national legal frameworks, with references to the authorities involved in self- and co-regulation, including their powers in terms of regulation, decision-making, enforcement and supervision, as well as the different agreements and codes in place. This section also looks at the state of the implementation/transposition of self- and co-regulatory mechanisms at national level in those selected countries as well as the actual or potential challenges facing national legislators and competent authorities in their mission to implement such European requirements.

The selected cases in the country reports show different approaches to self- and co-regulation, with significant differences due to the partial level of harmonisation across the European Union. Nonetheless, certain tendencies may be highlighted with regard to the powers and competencies of self-regulatory organisations (dispute settlement, the issuing of recommendations, etc); the relationship they have with state regulatory authorities; and the influence the latter exercises over, or the sets of rules included in codes of conduct or other instruments in place. The final part of the report provides a comparative analysis of the main findings of the country reports section concerning the regulation of advertising, the protection of minors and video-sharing platforms.



# 1. Introduction

*Mark D. Cole, Professor for Media and Telecommunication Law at the University of Luxembourg and Director for Academic Affairs of the Institute of European Media Law (EMR )*

Originally based on Directive 89/552/EEC<sup>2</sup>, which is celebrating its 30th birthday this year, the provisions on audiovisual media services (originally still limited to television) were amended for the third time with Directive (EU) 2018/1808<sup>3</sup>. Mechanisms of self- and co-regulation are in focus at various points like never before. As a general concession to self- and co-regulation, the new Article 4a(1) states that “Member States shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct adopted at national level in the fields coordinated by this Directive to the extent permitted by their legal systems”. In detail, the implementation of such a mechanism is foreseen, *inter alia*, in the field of the protection of minors and audiovisual commercial communications. This applies not only to “classical” providers of linear audiovisual media services, who were already addressed in the origins of the Directive, but also to non-linear media service providers, in particular video sharing platforms, who are made more responsible by Directive 2018/1808/EU. The newly introduced Article 28b provides for a set of measures for such platforms, intended, *inter alia*, to protect minors and prevent the dissemination of hatred and criminal content, the implementation of which shall be supported by member states through co-regulation. Although self- and co-regulatory mechanisms at national level are not new in principle, the implementation of European requirements will pose challenges to national legislators (and regulators).

In these times of digitalisation and globalisation, the regulatory and control function of the law is subject to major changes. These changes do not mean that “lawless spaces” emerge in the digitalised world just because the law may need to adapt. Even though the more traditional understanding of sovereign control – territorially-related – is challenged by “online spaces”, it is a requirement stemming from constitutional principles that states ensure the validity of the law within their sphere of responsibility. Self- and co-regulation as a response to the challenge of finding efficient solutions in this sense find their limits in the positive regulatory tasks imposed by the respective constitution of a state.<sup>4</sup> The modern state basically has the task of using its possibilities to shape the protection of freedom for all through law. In doing so, however, it encounters considerable

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<sup>2</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23–30, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31989L0552>.

<sup>3</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 L 303, 28.11.2018, p. 69–92, <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>.

<sup>4</sup> Cf. *Stockhaus*, *Regulierte Selbstregulierung im europäischen Chemikalienrecht*, 2015, S. 99 f.



difficulties due to the market structures in the Internet sector that have developed largely without sovereign regulation for decades. The state may create provisions for the protection of legal interests within the territorial scope of its laws, not least for the protection of minors and consumers, but these rules provide only limited protection. In particular, the national state cannot exert an effective influence on globally available offers, and thus on the broad field of activities of transnational content providers, operators of video-sharing platforms and media intermediaries, up to and including the enforcement of decisions.<sup>5</sup> Transnationally oriented regulations and procedures of self- and co-regulation can thus help to mitigate protection deficits in cross-border situations.

Self-regulation and co-regulation are mechanisms for regulating economic and social relations or commercial practices among the various economic stakeholders. They may be decided spontaneously or be imposed.<sup>6</sup> These new types of regulations are considered superior to the classical state law type for a number of reasons: (1) they tend to promulgate comparatively new and innovative norms which announce and reflect eras of change and are often harbingers of legal progression in areas where binding rules are non-existent or insufficiently developed; (2) they are assumed to improve the substantive quality of decisions and policy making by incorporating new information obtained from the different participants; (3) they increase learning processes among the participants and in this way generate new knowledge; (4) they can strengthen the orientation of private action on the common good and on the basic values of society as well as the integration of public values into decisions; (5) they are supposed to resolve, contain or reduce conflict among competing interests and the actors involved; (6) they achieve cost-effectiveness and (7) they increase compliance with regulation via greater commitment to and support for the implementation of decisions.<sup>7</sup>

Despite these merits of self- and co-regulatory mechanisms, they are also linked with risks and challenges related to their implementation and enforcement. Therefore, this publication aims to analyse the system of self- and co-regulation provided for in the revised AVMSD. To ensure this, the publication is divided into four parts. After a general conceptualisation of self- and co-regulation, the first part deals with the legal framework in this context. The second part contains selected country reports, which provide insights into the national systems of self- and co-regulation and inform about current developments

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<sup>5</sup> Vgl. *Hoffmann-Riem*, *Regulierte Selbstregulierung im digitalen Kontext*, 2015, S. 25 f.

<sup>6</sup> See Opinion of the European Economic and Social Committee on Self-regulation and Co-regulation in the Community legislative framework (own-initiative opinion) (2015/C 291/05), OJEU C 291/29, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2015.291.01.0029.01.ENG&toc=OJ.C:2015:291:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.291.01.0029.01.ENG&toc=OJ.C:2015:291:TOC), paragraph 1.1

<sup>7</sup> See *European Economic and Social Committee*, *European Self- and Co-Regulation*, available at [https://www.eesc.europa.eu/resources/docs/auto\\_coregulation\\_en--2.pdf](https://www.eesc.europa.eu/resources/docs/auto_coregulation_en--2.pdf), 2; *Friedrich*, *Codes of Conduct*, in: *Wolfrum* (ed), *Max Planck Encyclopedia of Public International Law*, 2010, 264, paragraph 1; *Schuppert*, *Das Konzept der regulierten Selbst-Regulierung als Bestandteil einer als Regelungswissenschaft verstandenen Rechtswissenschaft*, *Die Verwaltung*, Sonderheft „Regulierte Selbstregulierung“ 2001, Beiheft 4, p. 201 et seq.; *Ukrow*, *Die Selbstkontrolle im Medienbereich in Europa*, 2000, p. 10 et seq.; *Wessel & Wouters*, *The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres*, *International Organizations Law Review* (2007) 257 (271).



in the respective EU member states. After a comparative analysis of the country reports, the results of the previous sections will be summarised and evaluated in a final conclusion.





## 2. Legal Framework for Self- and Co-Regulation in International and European Law

*Jörg Ukrow, Managing Executive Board Member of the Institute of European Media Law (EMR) and Deputy Director of the State Media Authority of Saarland*

### 2.1. Conceptualising Co- and Self-Regulation

In the vast literature on regulation theory of the last decades, a great deal has been written on the advantages and limitations of self-regulation as a regulatory technique occupying a spectrum from 'pure' self-regulation to forms of 'co-regulation' (or "regulated self-regulation"<sup>8</sup> as well as "statutory self-regulation"<sup>9</sup>).

Until the 1980s, law had served (albeit unevenly and incompletely) as the main institutional vehicle for policing media in aid of public interests, thereby protecting people, society and democracy from malfeasance. The state had traditionally made use of "standard rule-making" to try to influence and change human behaviour.<sup>10</sup> However, parallel to and promoted by globalisation and digitisation, the law's protective role began to diminish. Privately promulgated voluntary regimes emerged in its place and therewith a new type of rule-making increasingly appeared to be an alternative to the traditional regulatory approach.<sup>11</sup> It was during the 1990s in particular that the shift in the role of the state led to a proliferation of various instruments of the "soft law" type (guidelines, agreements, declarations, compromises, codes of conduct) of a non-binding nature and, in particular, self-regulation and co-regulation, which aimed to involve the stakeholders in the legislative process in a way that is binding (so that these two alternatives come under the heading of "hard law").

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<sup>8</sup> See, for example, *Hoffmann-Riem*, Multimedia-Politik vor neuen Herausforderungen, Rundfunk und Fernsehen 1995, p. 125 et seq.; *Schulz & Held*, Regulierte Selbstregulierung als Form modernen Regierens, 2002, p. A-1, A-4 et seq. (available at <https://www.hans-bredow-institut.de/uploads/media/Publikationen/cms/media/a80e5e6dbc2427639ca0f437fe76d3c4c95634ac.pdf>).

<sup>9</sup> *Hulin*, Statutory media self-regulation: beneficial or detrimental for media freedom? EUI Working Papers RSCAS 2014/127, available at <http://cadmus.eui.eu/handle/1814/34047>, p. 1, 6.

<sup>10</sup> See *Bakan*, The Invisible Hand of Law: Private Regulation and the Rule of Law, Cornell International Law Journal 48 (2015), available at <https://www.lawschool.cornell.edu/research/ILJ/upload/Bakan-final.pdf>, p. 279 (280).

<sup>11</sup> See *Cafaggi & Renda*, Public and Private Regulation: Mapping the Labyrinth, 2012, available at <https://www.files.ethz.ch/isn/153645/WD370%20Renda%20Public%20and%20Private%20Regulation.pdf>, p. 1 et seq., 7.



In general, some important advantages of self- and co-regulation cannot be denied. But their limits and the risks that they involve are well known as well. Steps must be taken to ensure that the different mechanisms established are more than just general statements of professional ethics and that their implementation is followed up and verified. In addition, the absence of independent checks and sanctions can give the impression that they are simply promotional instruments without any real potential for practical application.

In its Resolution of 9 September 2010 on Better Lawmaking, the European Parliament "warns against abandoning necessary legislation in favour of self-regulation or co-regulation or any other non-legislative measure (and) believes that the consequences of such choices should be subject to careful examination in each case, in accordance with Treaty law and the roles of the individual institutions". It also "stresses, at the same time, that soft law should be applied with the greatest of care and on a duly justified basis, without undermining legal certainty and the clarity of existing legislation, and after consultation of Parliament as underlined in its resolution on a revised Framework Agreement".<sup>12</sup>

According to the European Economic and Social Committee, self- and co-regulations should comply with the following general principles: (1) compliance with EU and international law; (2) transparency and publicity; (3) representativeness of the parties concerned; (4) prior consultation of the parties directly concerned; (5) added value for the general interest; (6) non-applicability when the definition of fundamental rights is at stake or in situations where the rules must be applied uniformly in all the member states; (7) judicial control; (8) monitoring of the degree and success of their implementation, using objective criteria and reliable indicators defined in advance and specified according to sectors and objectives; (9) checks and follow-up of their implementation by preventive measures or sanctions, in order to ensure their effectiveness; (10) provision of a system of fines or other penalties; (11) possibility of periodic review in the light of changing situations, legislation and the aspirations of their signatories; (12) clear identification of financing sources.<sup>13</sup>

Governments – both providing the framework for audiovisual and other media as well as Internet activities and having the capacity to intervene in a market if necessary – and the market as a self-regulatory mechanism are trying to cope with the problem of how to prevent a violation of the core values of a democratic society in the future communication order. For governments, both at national level and regarding efforts in international cooperation and coordination, 'better' regulation and supervision<sup>14</sup> of the aforementioned media markets is called for, notwithstanding the responsibility of respecting the human rights of free information and communication. Modified and/or new

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<sup>12</sup> Resolution (P7\_TA(2010)0311), paragraphs 46 and 47, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0311+0+DOC+XML+V0//EN>.

<sup>13</sup> See Opinion of the European Economic and Social Committee on Self-regulation and Co-regulation in the Community legislative framework, loc. cit (fn.6), paragraph 1.7.

<sup>14</sup> 'Regulation' means in a broad sense the legal framework shaping media services and transactions. 'Supervision' is distinct from regulation as it refers only to the enforcement of regulatory standards.



models of regulation and supervision are a central element in providing for democratic and pluralistic domestic and international media markets in the future.<sup>15</sup>

Strengthening regulation and supervision is always in potential conflict with the fundamental freedoms of media markets. There is always a necessity to seek an equilibrium between liberties and responsibilities in a manner which respects the principle of proportionality as a limit of state regulation. The evident tension between regulation or supervision and freedoms of information and communication is not a new phenomenon in media law. What is an at least partially additional challenge, however, is that in strengthening regulation and supervision nowadays, one has to take into account transnationally organised and operating media players as well as the need for international regulatory and supervisory cooperation and coordination.<sup>16</sup>

An important aspect of any attempt to strengthen and/or reform media regulation and supervision is that 'form follows function', that is to say that media regulation and supervision follow market developments. In this context, the determining factual situation is not one single media market, albeit the process of media convergence continues. Instead, the disruption of the former monolithic model of point-to-multi-point mass communication that progresses with increasing speed has led to a multitude of markets. Moreover, those markets are not predominantly or even exclusively domestic media markets, but inherently and comprehensively also global media markets. The necessarily global functional approach towards media regulation and supervision implies complex conceptual regulatory challenges.<sup>17</sup>

## 2.2. International Law

In its current state of development, international law is of no help to define limits of self- or co-regulation because non-state actors operate outside its traditional jurisdiction. One can argue that transnational private regulation has emerged as a response to the lack, paucity or outright failure of international law.<sup>18</sup>

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<sup>15</sup> See for parallel problems in financial regulation and supervision *Tietje & Lehmann*, The Role and Prospects of International Law in Financial Regulation and Supervision, *Journal of International Economic Law* 13(3) 2011, 663 (663), available at [https://www.jura.uni-bonn.de/fileadmin/Fachbereich\\_Rechtswissenschaft/Einrichtungen/Institute/IPR/LS\\_Lehmann/Publikationen/Tietje\\_Lehmann\\_Role\\_of\\_Fin\\_Law.pdf](https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Institute/IPR/LS_Lehmann/Publikationen/Tietje_Lehmann_Role_of_Fin_Law.pdf).

<sup>16</sup> See for parallel problems in financial regulation and supervision *Tietje & Lehmann*, The Role and Prospects of International Law in Financial Regulation and Supervision, loc. cit. (fn. 15), p. 664.

<sup>17</sup> See for parallel problems in financial regulation and supervision *Tietje & Lehmann*, The Role and Prospects of International Law in Financial Regulation and Supervision, loc. cit. (fn. 15).

<sup>18</sup> See *Verbruggen*, Gorillas in the Closet? Public and Private Actors in the Enforcement of Transnational Private Regulation, 7 *Regulation & Governance* 7 (2013) 512, (513).



Public international law directly governs neither self- or co-regulation nor, with the exception of child pornography,<sup>19</sup> the protection of minors or commercial communication, which are governed by the AVMS Directive. It only serves as an instrument to settle or ease regulatory conflicts. It is private international law which, until now, has played a more important role in the context of internet governance. However, there is every reason to try to reach the consensus necessary to keep improving cooperation and harmonisation. The advantage of having more international treaties and agreements in the Internet field is that regulatory conflicts could be diminished to a relevant extent.<sup>20</sup>

If reflective of a broad consensus and widely applied, codes of conduct or other instruments of self- or co-regulation may set internationally accepted standards of conduct. As these regulations often entail very precise and detailed norms, these standards are particularly suited as concretisations of existing customary or treaty-based international legal principles and rules, as well as their implementation. These codes may also gain legal significance through rules of reference in international treaties. Self-regulation may serve as a catalyst and generator of political and legal discourse that paves the way for the adoption of international agreements. Self- as well as co-regulation may also contribute to the emergence of new rules of customary international law. However, explicit disclaimers stating that observance of the codes is voluntary and not legally enforceable preclude any qualification of the act of adoption as an expression of *opinio iuris*, and thus make the emergence and identification of customary law particularly difficult.<sup>21</sup>

Regulatory conflicts within the Internet are now frequently linked to the interplay between the worldwide availability on the web of information considered to be harmful or offensive to fundamental values in the regulating state and the constitutional protections for freedom of expression which exist in the states where the content providers and/or service providers are located.<sup>22</sup> It is an important task of international law, on the one hand, to provide at least the basic framework standards necessary to enable regulatory competition among domestic jurisdictions that make it easier to foster creativity and cultural diversity in media services; on the other hand, it is also important to ensure respect for certain public goods.<sup>23</sup> The most important public goods in this regard, and in the present context, are the respect for human rights, the absence of hate speech and the protection of minors. All current efforts towards strengthening and reforming media regulation and supervision through international cooperation and coordination, that is, through international law, must be seen from this perspective.

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<sup>19</sup> See Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, UNTS, vol. 2171, p. 227.

<sup>20</sup> See *Segura-Serrano*, Internet Regulation and the Role of International Law, in: Max Planck UNYB 10 (2006) 191 (270 et seq.).

<sup>21</sup> See *Friedrich*, Codes of Conduct, in: Wolfrum (ed), Max Planck Encyclopedia of Public International Law, 2010, 264, paragraph 21 et seq.

<sup>22</sup> See *Segura-Serrano*, Internet Regulation and the Role of International Law, loc. cit. (fn. 20); See for parallel problems in the context of the AVMSD: *Cappello M. (ed.)*, Media law enforcement without frontiers, IRIS Special, European Audiovisual Observatory, Strasbourg, 2018.

<sup>23</sup> See for parallel problems in financial regulation and supervision *Tietje & Lehmann*, The Role and Prospects of International Law in Financial Regulation and Supervision, loc. cit. (fn. 15).



In this age of digitalisation and globalisation, domestic media regulation and supervision inherently tends to have extraterritorial reach and effect. Extraterritorial regulation within the Internet field, and more so by means of self- or co-regulation, is justified by some using the argument that every jurisdiction has the right to regulate those extraterritorial acts that may produce harm or other local effects within its national boundaries.<sup>24</sup> Not least with regard to the global dimension of the Internet, extraterritoriality may be seen as an inherent characteristic of modern media services and the law governing them. This, in turn, causes problems in the same way that extraterritorial jurisdiction causes conflicts more generally. It is therefore important to find solutions to these jurisdictional problems based on the principle of cooperation in international media law.<sup>25</sup> Such solutions are particularly difficult in the field of supervision. Supervision is, like all forms of law enforcement, deeply rooted in domestic legal systems and traditions. Moreover, states are very reluctant to allow 'foreign' (that is, also international) law and/or authorities to influence, let alone determine, domestic supervision. Therefore, there have been no relevant efforts to establish some kind of centralised European or even international media supervisory authority.

## 2.3. European Law

### 2.3.1. Development of self- and co-regulation at EU level

Self- and co-regulation should be viewed as significant instruments for accompanying or supplementing hard law, but not as an alternative to it, unless there are 'fundamental rules' providing a sufficient enabling basis. The EU treaties (TEU, TFEU)<sup>26</sup> do not provide any such enabling basis. Yet, the European Union is obliged to legislate only where it is necessary, in accordance with Article 5 TEU and the Protocol on the application of the principles of subsidiarity and proportionality.<sup>27</sup> Accordingly, the Interinstitutional Agreement on Better Law-Making 2003 concluded by the three EU Institutions involved in producing European legislation, namely the Commission, the Council and the Parliament, recognises the need to use, in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms.<sup>28</sup>

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<sup>24</sup> See *Goldsmith*, *Against Cyberanarchy*, *University of Chicago Law Review* (1998), 1199 (1239) et seq..

<sup>25</sup> See for parallel problems in financial regulation and supervision *Tietje / Lehmann*, *The Role and Prospects of International Law in Financial Regulation and Supervision*, loc. cit. (fn. 15).

<sup>26</sup> Treaty on European Union and Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 13–390 (consolidated versions), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>.

<sup>27</sup> See *Senden*, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?* *Electronic Journal of Comparative Law*, vol. 9.1 (2005), available at <https://www.ejcl.org/91/art91-3.PDF>, p. 1 (5).

<sup>28</sup> Inter-Institutional Agreement on Better Law-making (2003/C 321/01), OJEU C 321, 31.12.2003, p. 1-5, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003O1231%2801%29>,



In this Interinstitutional Agreement, self-regulation is defined as “the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)”. As a rule, this type of voluntary initiative does not imply that the institutions have adopted any particular stance, in particular where such initiatives are undertaken in areas which are not covered by the Treaties or in which the Union has not hitherto legislated. As one of its responsibilities, the Commission will scrutinise self-regulation practices in order to verify that they comply with the provisions of the EC Treaty.<sup>29</sup>

Co-regulation is defined in the Interinstitutional Agreement as “the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations). This mechanism may be used on the basis of criteria defined in the legislative act so as to enable the legislation to be adapted to the problems and sectors concerned, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned”.<sup>30</sup>

The Interinstitutional Agreement of December 2003 includes a set of legal rules and requirements which would enable their co-existence, their compatibility and their complementarity to be better managed by means of legal provisions and provides for monitoring and follow-up mechanisms. It thus opened a new chapter in the development of self-regulation and co-regulation in the Single Market.<sup>31</sup>

In application of this agreement, in 2011, the European Commission adopted its “Communication on a renewed EU strategy 2011-14 for Corporate Social Responsibility” launching “a process with enterprises and other stakeholders to develop a code of good practice for self- and co-regulation exercises, which should improve the effectiveness of the corporate responsibility process”.<sup>32</sup>

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paragraph 16; See, for example, *Senden*, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?* *Electronic Journal of Comparative Law*, vol. 9.1 (2005), 1 loc. cit. (fn. 27) p. (18 et seq.) Meanwhile, this agreement was replaced by an Interinstitutional Agreement of 2016 (available at [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32016Q0512\(01\)](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32016Q0512(01))). In recital 3 of this new agreement, the three Institutions recall the Union obligation to legislate only where and to the extent necessary, in accordance with Article 5 of the Treaty on European Union on the principles of subsidiarity and proportionality”. Although this new agreement does no more expressly “recognise the need to use, in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms”, the usage of these mechanisms remains in line with the general approach of the agreement.

<sup>29</sup> Ibidem, paragraph 22.

<sup>30</sup> Ibidem, paragraph 18

<sup>31</sup> See *European Economic and Social Committee*, *European Self- and Co-Regulation*, loc. cit. (fn. 7), p. 12

<sup>32</sup> COM(2011) 681 final, available at

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0681>.



This process led to the adoption in 2013 of the “Principles for better self- and co-regulation”.<sup>33</sup> This initiative was meant to “help actors involved in self- and co-regulation to do better and get better recognition, respect, and credibility for their efforts” and to “help to ensure that self- and co-regulation exercises achieve their intended societal, environmental and governance goals more effectively and more efficiently”. All stakeholders were invited “to consider these Principles as benchmark for self- and co-regulation and to promote their use”<sup>34</sup>. The principles cover the three subsequent phases of conception, implementation and enforcement. In the first phase, as many potential useful actors as possible should be represented. Envisaged actions should be prepared openly and involve all interested parties. The different capabilities of participants should be taken into account and participants are expected to commit real effort to making the initiative a success according to the principle of good faith. The objectives of self- and co-regulation must be set out clearly and unambiguously and include targets as well as indicators for evaluation purposes. Actions must be designed in compliance with applicable law and fundamental rights as enshrined in EU and national law. With respect to the implementation phase, the Principles underline the significance of iterative improvements, monitoring, evaluation and financing. At the enforcement phase, the Principles stress that a complaint resolution mechanism has to be in place, and that non-compliance should be subject to a graduated scale of sanctions.

In its Communication to the European Parliament and to the Council on “Better Regulation for Better Results – an EU Agenda” of May 19, 2015<sup>35</sup>, the Commission stressed that, when considering policy solutions, it would consider both regulatory and well-designed non-regulatory means, modelled on the Principles for Better Self- and Co-regulation and the EU practice thereof.<sup>36</sup>

### 2.3.2. Development of self- and co-regulation in the media at EU level

Not only the discussion on self- and co-regulation in general, but also the discussion of these regulation types with regard to the media started about twenty years ago.<sup>37</sup> In the

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<sup>33</sup> Available at <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/CoP%20-%20Principles%20for%20better%20self-%20and%20co-regulation.pdf>. See, for example, *Furnémont & Smokvina*, European Co-Regulation Practices in the Media, 2017, available at <https://rm.coe.int/european-co-regulation-practices-in-the-media/16808c9c74>, p. 24 et seq.

<sup>34</sup> See <https://ec.europa.eu/digital-single-market/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice>.

<sup>35</sup> COM(2015) 215 final, available at [http://ec.europa.eu/smart-regulation/better\\_regulation/documents/com\\_2015\\_215\\_en.pdf](http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2015_215_en.pdf).

<sup>36</sup> *Ibidem*, p. 6

<sup>37</sup> Cf. on this in general : Study on co-regulation measures in the media sector (2007), Study for the European Commission, Directorate Information Society and Media Unit A1 Audiovisual and Media Policies, prepared by the Hans-Bredow-Institut in cooperation with the Institute of European Media Law, available at <https://ec.europa.eu/digital-single-market/en/news/study-co-regulation-measures-media-sector-2007>.



Council conclusions of 27 September 1999 concerning the results of the public consultation on the Convergence Green Paper (in particular, the aspects relating to the media and the audiovisual sector)<sup>38</sup>, the Council of the European Union, aware of the discussion on the possible scope and of the merits and risks of self-regulation in the media as highlighted by the participants of the Saarbrücken expert seminar on self-regulation in the media,<sup>39</sup> underlined that self-regulation could usefully complement regulation and contribute to achieving the right balance between facilitating the development of open and competitive markets and securing public interest objectives.

In its conclusions of the same day on the role of self-regulation in the light of the development of new media services,<sup>40</sup> the Council of the European Union recognises that while self-regulation would continue to usefully complement regulation in all media forms in a number of member states, it was appropriate here to consider the role of self-regulation in new media services. Thus, the Council takes note (1) that self-regulation systems have been developed for the media in most European countries, some of which cover all media, while others are restricted to individual media or new information and communication services, (2) that there are significant differences between the ways in which different self-regulation systems are organised and complement or contribute to state regulation which reflect Europe's democratic, regional and cultural diversity, and (3) that self-regulation could usefully complement regulation in the context of the future development of new media services. The Council recognises that the definition of the public interest objectives and the choice of the best way to reach these objectives in this field remains inherently the responsibility of member states, without prejudice to Community law, and that media self-regulation systems, in accordance with national, cultural, and legal traditions and practices, may however make a contribution to safeguarding public interests.

From the beginning, self- and co-regulation in the field of media have been implemented mainly in three areas: the protection of minors, the protection of consumers and journalism ethics. In the last decade, self- and co-regulation have also been implemented not for one specific sector of media policy, but across the whole media policy sector in order to impose the same regulatory system on a certain category of media players, namely non-linear audiovisual services.<sup>41</sup>

In its report to the European Commission on “A free and pluralistic media to sustain European democracy”<sup>42</sup>, the High Level Group on Media Freedom and Pluralism encouraged self-regulation by the media: “Because the trust that the general public places in the media is an asset to them, media organisations themselves should justify this trust by being more

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<sup>38</sup> OJ C 283, 6.10.1999, p. 1–2, available at [https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:31999Y1006\(01\)](https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:31999Y1006(01)).

<sup>39</sup> See „Europäische Union: Saarbrücker Schlußfolgerungen zur Selbstregulierung“, <http://merlin.obs.coe.int/iris/1999/5/article3.en.html>.

<sup>40</sup> OJ L 283, 6.11.1999, p. 3–3, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31999Y1006%2802%29>.

<sup>41</sup> See *Furnémont & Smokvina*, European Co-Regulation Practices in the Media, loc. cit. (fn. 33) p. 22.

<sup>42</sup> Available at <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/HLG%20Final%20Report.pdf>. Unless otherwise stated below, AVMSD means Directive 2010/13/EU as amended by Directive (EU) 2018/1808.



proactive in matters of self-regulation. Each media outlet should follow clearly identifiable codes of conduct and editorial lines, and it should be mandatory for them to publish these on their website or to state explicitly where the organisation follows common international codes of conduct and ethical guidelines”.<sup>43</sup>

### 2.3.3. In particular: Self- and co-regulation in the previous AVMSD

Several codes of conduct set up in the fields coordinated by Directive 2010/13/EU have proved to be well designed, in line with the Principles for Better Self- and Co-regulation. The existence of a legislative backstop was considered an important success factor in promoting compliance with a self- or co-regulatory code. It is equally important that such codes establish specific targets and objectives allowing for the regular, transparent and independent monitoring and evaluation of the objectives aimed at by the codes of conduct. The codes of conduct should also provide for effective enforcement. These principles should be followed by the self- and co-regulatory codes adopted in the fields coordinated by the AVMSD.<sup>44</sup>

Experience has shown that both self- and co-regulatory instruments, implemented in accordance with the different legal traditions of the member states, can play an important role in delivering a high level of consumer protection. Measures aimed at achieving general public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves.<sup>45</sup>

Self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations and associations to adopt common guidelines amongst themselves and for themselves. They are responsible for developing, monitoring and enforcing compliance with those guidelines. Member states should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislative, judicial and administrative mechanisms in place and its useful contribution to the achievement of the objectives of the AVMSD. However, while self-regulation might be a complementary method of implementing certain provisions of the AVMSD, it should not constitute a substitute for the obligations of the national legislator. Co-regulation provides, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the member states. In co-regulation, the regulatory role is shared between stakeholders and the government or the national regulatory authorities or bodies. The role of the relevant public authorities includes recognition of the co-regulatory scheme, auditing of its processes and the funding of the scheme. Co-regulation should allow for the possibility of state intervention in the event of its objectives not being met. Without

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<sup>43</sup> Ibidem, p. 36.

<sup>44</sup> See Recital 12 of Directive (EU) 2018/1808.

<sup>45</sup> See Recital 13 of Directive (EU) 2018/1808.



prejudice to the formal obligations of the member states regarding transposition, the AVMSD encourages the use of self- and co-regulation. This should neither oblige member states to set up self- or co-regulation regimes, or both, nor disrupt or jeopardise current co-regulation initiatives which are already in place in member states and which are functioning effectively.<sup>46</sup>

### 2.3.4. EU Primary Law/Fundamental rights framework

Co-regulation is not mentioned in the European treaties, which tend to be based on a traditional form of public authority regulation. Yet, neither self-regulation nor co-regulation are generally inadmissible as a regulatory model from a European point of view. However, these types of regulation must respect the primacy of EU primary law, especially the competition rules of the TFEU.<sup>47</sup>

The recognition of self- or co-regulation models as implementing tools for EU directives is evidently possible where these directives specifically refer to these tools as instruments for the transposition of their provisions. On the other hand, where directives do not mention self- or co-regulation systems, it is necessary to refer to the general rules governing the transposition of directives into national law. These general rules do not provide for a formal incorporation of the relevant provisions of a directive in express, specific legislation by the member states. A general legal context may, depending on the content of the directive in question, be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.<sup>48</sup>

In contrast to pure self-regulation, co-regulation frameworks can be used as an additional transposition model for EU directives which do not expressly address these regulation types if these frameworks fulfil the necessary conditions, especially with regard to sanctions foreseen in the relevant directive. In principle, this is possible because co-regulation is always associated with a legal framework which, together with other rules, can ensure the proper implementation of the directive(s) concerned.<sup>49</sup>

As stressed by the former OSCE Representative on Freedom of the Media, Miklos Haraszti, “true ethics standards can be created only by independent media professionals

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<sup>46</sup> See Recital 14 of Directive (EU) 2018/1808.

<sup>47</sup> See *Ukrow*, Selbstkontrollen im Medienbereich und Europäisches Gemeinschaftsrecht, in *Ukrow* (ed.), *Die Selbstkontrolle im Medienbereich in Europa*, 2000, 1 (73 et seq.).

<sup>48</sup> See ECJ case law, for example, ECJ, case C-96/95, *Commission/Germany*, Rec. 1997, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61995CJ0096>, p. I-1653; ECJ, case 361/88, *Commission/Germany*, Rec. 1991, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61988CJ0361>, p. I-2567.

<sup>49</sup> See *Palzer*, *Co-Regulation of the Media in Europe: European Provisions for the Establishment of Co-regulation Frameworks*, IRIS plus 2002-6, 4.



and can be obeyed by them only voluntarily. Whether passed in good will or not, any attempt to impose standards on journalists by law will result in arbitrary limitation of their legitimate freedoms, and restriction of the free flow of information in society”.<sup>50</sup>

The European Union has so far not been encouraging self-regulation and co-regulation in issues related to fundamental rights or in situations where the rules must be applied in a uniform fashion. The latter may change with the introduction of the EU codes of conduct as foreseen in the new AVMSD.<sup>51</sup>

## 2.3.5. The revised EU AVMSD

### 2.3.5.1. Introduction

The revised AVMSD includes general requirements for asserting self- and co-regulation within its scope, as well as special arrangements for that particular purpose, in specific fields, in particular regarding the protection of minors vis-à-vis commercial communications.

It is noteworthy that the recitals of the Directive address an issue which is not otherwise mentioned in the text of the Directive. According to the 30<sup>th</sup> recital, it is important that minors are effectively protected from exposure to audiovisual commercial communications relating to the promotion of gambling.<sup>52</sup>

### 2.3.5.2. General rules with respect to self- and co-regulation

The AVMSD stresses that, in order to remove barriers to the free circulation of cross-border services within the Union, it is necessary to ensure the effectiveness of self- and co-regulatory measures aiming, in particular, at protecting consumers or public health.<sup>53</sup>

According to Article 4a(1) member states shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct adopted at national level in the fields coordinated by this directive to the extent permitted by their legal systems. Those codes shall:

- (a) be such that they are broadly accepted by the main stakeholders in the Member States concerned;
- (b) clearly and unambiguously set out their objectives;

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<sup>50</sup> OSCE Representative on Freedom of the Media (2008) The media self-regulation guidebook. Available at <https://www.osce.org/fom/31497?download=true>.

<sup>51</sup> See *Furnémont & Smokvina*, European Co-Regulation Practices in the Media, loc. cit. (fn. 26), p. 23.

<sup>52</sup> In this context, the recital underlines that several self- or co-regulatory systems exist at Union and national level for the promotion of responsible gambling, including in audiovisual commercial communications.

<sup>53</sup> See Recital 31 of the AVMSD 2018



(c) provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at; and

(d) provide for effective enforcement including effective and proportionate sanctions.<sup>54</sup>

According to Article 4a(2), member states and the Commission may foster self-regulation through Union codes of conduct drawn up by media service providers, video-sharing platform service providers or organisations representing them, in cooperation, as necessary, with other sectors such as industry, trade, professional and consumer associations or organisations. Those codes shall be such that they are broadly accepted by the main stakeholders at Union level and shall comply with points (b) to (d). The Union codes of conduct shall be without prejudice to the national codes of conduct.

In cooperation with the member states, the Commission shall facilitate the development of Union codes of conduct, where appropriate, in accordance with the principles of subsidiarity and proportionality.

The signatories of Union codes of conduct shall submit the drafts of those codes and amendments thereto to the Commission. The Commission shall consult the Contact Committee on those draft codes or amendments thereto.

The Commission shall make the Union codes of conduct publicly available and may give them appropriate publicity.

According to Article 4a(3), member states shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in compliance with this directive and Union law, including where their national independent regulatory authorities or bodies conclude that any code of conduct or parts thereof have proven not to be sufficiently effective. The last note takes special account of the ultimate responsibility of states for the protection of legal interests such as the protection of minors and consumer protection in a system of regulated self-regulation.<sup>55</sup>

According to Article 6a(4), the Commission shall encourage media service providers to exchange best practices on co-regulatory codes of conduct. Member states and the Commission may foster self-regulation through Union codes of conduct as referred to in Article 4a(2) for the purposes of Article 6, which is designated especially to ensure the protection of minors.<sup>56</sup>

### 2.3.5.3. Self- and co-regulation as a means to protect minors

According to Article 6a(1) AVMSD, member states shall take appropriate measures to ensure that audiovisual media services provided by media service providers under their jurisdiction

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<sup>54</sup> Simple declarations of intent clearly do not meet these requirements; See also *Gundel*, Die Fortentwicklung der europäischen Medienregulierung: Zur Neufassung der AVMD-Richtlinie, Zeitschrift für Urheber- und Medienrecht, 2019, 131 (133).

<sup>55</sup> See also *Gundel*, Die Fortentwicklung der europäischen Medienregulierung: Zur Neufassung der AVMD-Richtlinie, loc. cit. (fn. 54), p. 133.

<sup>56</sup> See Article 6a paragraph 1 AVMSD.



which may impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see them. Such measures may include selecting the time of the broadcast, age verification tools or other technical measures. They shall be proportionate to the potential harm of the programme. The most harmful content, such as gratuitous violence and pornography, shall be subject to the strictest measures.

#### 2.3.5.4. Self- and co-regulation in the field of commercial communications

According to Article 9(3) AVMSD, member states shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct as provided for in Article 4a(1) regarding inappropriate audiovisual commercial communications for alcoholic beverages. Those codes shall aim to effectively reduce the exposure of minors to audiovisual commercial communications for alcoholic beverages. Certain self- or co-regulatory systems exist at Union and national level in order to market alcoholic beverages responsibly, including in audiovisual commercial communications. Those systems should be further encouraged, in particular those aiming at ensuring that responsible drinking messages accompany audiovisual commercial communications for alcoholic beverages.<sup>57</sup>

Some widely recognised nutritional guidelines exist at national and international level, such as the World Health Organisation Regional Office for Europe's nutrient profile model, in order to differentiate foods on the basis of their nutritional composition in the context of the television advertising of foods to children.<sup>58</sup> According to Article 9(4), member states shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct as provided for in Article 4a(1) regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, for foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended. Those codes shall aim to effectively reduce the exposure of children to audiovisual commercial communications for such foods and beverages. They shall aim to provide that such audiovisual commercial communications do not emphasise the positive quality of the nutritional aspects of such foods and beverages.

According to Article 9(5) AVMSD, member states and the Commission may foster self-regulation through Union codes of conduct as referred to in Article 4a(2) for the purposes of this Article which regulates the qualitative aspects of audiovisual commercial communications provided by media service providers.

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<sup>57</sup> See Recital 29 of Directive (EU) 2018/1808.

<sup>58</sup> See Recital 28 of Directive (EU) 2018/1808.



### 2.3.5.5. Self- and co-regulation with respect to video-sharing platforms

Video-sharing platforms (VSPs) will play a fundamental role in determining the boundaries of legitimate political speech or the right to adopt and express unconventional social and cultural points of view under the new AVMSD. Although they already had responsibilities to take down known unlawful content as hosts under the EU's E-Commerce Directive,<sup>59</sup> the AVMSD adds a series of additional responsibilities which will be subject to additional administrative oversight.<sup>60</sup>

According to Article 28b(2)(4) AVMSD, member states shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct as provided for in Article 4a(1) aiming at effectively reducing the exposure of children to audiovisual commercial communications for foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended. Those codes shall aim to provide that such audiovisual commercial communications do not emphasise the positive quality of the nutritional aspects of such foods and beverages.

To further reinforce the distinction between VSPs and audiovisual media services, the implementation of the measures with respect to VSPs might be carried out preferably through co-regulation, as explicitly stated in Article 28b(4) AVMSD: “For the purposes of the implementation of the measures referred to in paragraphs 1 and 3 of this Article, Member States shall encourage the use of co-regulation as provided for in Article 4a(1)”

For the purposes of some of the measures referred to in Article 28b(3) AVMSD, the directive specifies that VSPs should apply them through their terms and conditions and through other systems and mechanisms “established and operated” by the VSPs. This is a classic description of a self- or co-regulatory model, where the service provider has the primary responsibility for establishing and operating a regulatory system.<sup>61</sup>

Because delegating regulatory powers to private companies could certainly run into trouble with the fundamental rights of the VSPs' users (and with the basic principles of constitutional democracies), the AVMSD requires VSPs to protect users' rights, and provides users with a wide array of safeguards. The text of the revised AVMSD includes a catalogue of both procedural (for example, providing for complaint and redress mechanisms) and technical (for example, age verification and parental control systems) measures to be implemented by the VSPs. The implementation of these measures is the responsibility of

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<sup>59</sup> See *Cabrera Blázquez, Cappello, Fontaine, Rabie. & Valais*, The legal framework for video-sharing platforms, IRIS Plus, 2018, p. 16 et seq.

<sup>60</sup> See *Barata*, The new Audiovisual Media Services Directive: turning video hosting platforms into private media regulatory bodies, Blog of October 24th, 2018 (available at <https://cyberlaw.stanford.edu/blog/2018/10/new-audiovisual-media-services-directive-turning-video-hosting-platforms-private-media>).

<sup>61</sup> See *ERGA*, Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive. Towards the application of the revised Directive by National Regulatory Authorities (NRAs), 2018, p. 25 (available at <http://erga-online.eu/wp-content/uploads/2018/11/ERGA-2018-08-SG3-Analysis-and-Discussion-Paper.pdf>).



the VSPs, and there is a specific assessment task foreseen for national regulatory authorities (NRAs) (that is, the competent NRA would assess the appropriateness of the measures taken by the VSPs under its jurisdiction, as provided for in Article 28b(5) AVMSD). Such safeguards can ensure the sufficient monitoring of VSP content regulation activities, protect users' rights, and where necessary redress any potential excess by private actors.<sup>62</sup>

Accordingly, the challenge is for NRAs to elaborate criteria enabling them to determine whether a measure not only has been put in place but can be considered 'appropriate' in light of the objectives pursued under Article 28b(1) and (2) AVMSD.<sup>63</sup>

The catalogue of measures provides for a comprehensive (but non-exhaustive) toolbox:

- Applying in the terms and conditions of the VSPs the content-related requirements (the protection of minors, protection from the incitement to hatred and violence and certain illegal content, as well as qualitative criteria applicable to audiovisual commercial communications);
- Enabling users to easily report, flag and rate content, and to file complaints directly with the VSP provider;
- Including age verification systems for the protection of minors, parental control systems and media literacy tools, provided that the protection of personal data is guaranteed;
- A functionality through which individual users can declare whether videos contain audiovisual commercial communications.<sup>64</sup>

One of the challenges for co-regulation in the field of VSPs may lie in the requirement that the measures taken have to be both practicable and 'proportionate', in particular taking into account the size of the video-sharing platform service and the nature of the service that is provided. These two principles may promote a case-by-case assessment of the fulfilment of the aforementioned measures which can collide with the principles of legal certainty and clarity and can provoke disputes between institutions of self- and co-regulation on the one hand, and NRA's on the other hand. Additionally, the supervision of VSPs by NRAs may represent a huge task for regulators, bringing significant extra costs and burden, especially if NRAs find themselves in receipt of high volumes of individual users' complaints (potentially coming from several EU member states).<sup>65</sup>

The Subgroup on Self- and Co-regulation of the European Regulators Group for Audiovisual Media Services (ERGA) has considered the application of co-regulatory best practices to the future regulation of VSPs and has proposed a 'Framework for Effective Co-

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<sup>62</sup> See *Kuklis*, European regulation of video-sharing platforms: what's new, and will it work? Blog of 29 November, 2018 (available at <https://blogs.lse.ac.uk/mediapolicyproject/2018/11/29/european-regulation-of-video-sharing-platforms-whats-new-and-will-it-work/>).

<sup>63</sup> See *ERGA*, Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, loc. cit. (fn. 61), p. 40.

<sup>64</sup> Cf on this *ibidem*, p. 25 et seq.

<sup>65</sup> See *ibidem*, p. 41.

regulation of Video Sharing Platforms<sup>66</sup>. Its principles are not intended as an exhaustive list or a prescriptive solution. Rather, the framework aims to structure continuing discussions within ERGA on models of VSP co-regulation.

Co-regulation is, however, not strictly required and Article 28b(6) AVMSD allows for “measures that are more detailed or stricter than the measures referred to in paragraph 3 of this Article”.

## 2.3.6. Co- and Self-Regulation in Other Areas in EU law

The first initiatives for self-regulation and co-regulation initially focused on three areas: technical standardisation, professional rules and social dialogue. Since these beginnings, self-regulation and co-regulation initiatives have been extended in particular to cover consumers, especially in the spheres of business, financial services and industry. Not least the growth of the Internet had been a driving force of this development. Environmental protection, corporate social responsibility and energy efficiency have been subject to increased self-regulation and co-regulation in recent years too.<sup>67</sup>

## 2.3.7. Initiatives of the Council of Europe

### 2.3.7.1. Introduction

In contrast to the AVMSD, neither the European Convention on Transfrontier Television<sup>68</sup> nor the Protocol amending the European Convention on Transfrontier Television<sup>69</sup> as parallel regulatory instruments, although with a narrower scope, address self- or co-regulation. However, the Council of Europe has a long tradition of promoting self-regulation and, to a lesser extent, co-regulation. These instruments found attention in a series of recommendations and resolutions of the Committee of Ministers of the Council of Europe. These recommendations and resolutions have no direct legal effect insofar as the member states are not obliged to incorporate their provisions into domestic law. However, there is a certain amount of political pressure to respect and implement these regulations.

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<sup>66</sup> Available at

<http://erga-online.eu/wp-content/uploads/2018/11/ERGA-2018-09-SG4-Framework-for-Effective-CR-of-VSPs.pdf>.

<sup>67</sup> See *European Economic and Social Committee*, *European Self- and Co-Regulation*, p. 13 et seq.; *Senden*, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?*, loc. cit. (fn. 27) p. 13 et seq..

<sup>68</sup> ETS No. 132, 1989.

<sup>69</sup> ETS No. 171, 1998.



### 2.3.7.2. Resolutions

Already at the third European Ministerial Conference on Mass Media in 1991, the ministers adopted a Resolution on “Media economics and political and cultural pluralism” in which, with a focus on self-regulation with regard to the protection of consumers, they “encourage professional circles concerned to adopt self-regulatory measures so as to contribute to the formulation of national and European policy in regard to advertising, sponsorship and new forms of commercial promotion and funding for broadcasting undertakings”.<sup>70</sup>

At the fourth European Ministerial Conference on Mass Media in 1994, self-regulation was mentioned with respect to journalism ethics.<sup>71</sup>

In 1995, the fifth European Ministerial Conference on Mass Media addressed self-regulation especially by content providers and operators of the new technologies and new communications and information services at national and pan-European levels (via codes of conduct, technical procedures for controlling access to content or services, etc.).<sup>72</sup>

### 2.3.7.3. Recommendations

In its Recommendation Rec(2001)8<sup>73</sup> on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services), adopted on 5 September 2001,<sup>74</sup> the Committee of Ministers recommends that the governments of member states implement in their domestic law and/or practice the principles and mechanisms concerning self-regulation and user protection against illegal or harmful content principles appended to this recommendation. This appendix stresses that member states should encourage (1) the establishment of organisations which are representative of Internet actors (2) such organisations to establish regulatory mechanisms within their remit, in particular with regard to the establishment of codes of conduct and the monitoring of compliance with these codes, and to participate in relevant legislative processes and in the implementation of relevant norms, in particular by monitoring compliance with these norms and (3) Europe-wide and international cooperation between such organisations.

In its Recommendation CM/Rec(2008)6 on measures to promote respect for freedom of expression and information with regard to Internet filters, adopted by the Committee of

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<sup>70</sup> European Ministerial Conferences on Mass Media Policy and Council of Europe Conferences of Ministers responsible for Media and New Communication Services, Texts Adopted, 2016, p. 15 (17); available at <https://rm.coe.int/16806461fb>.

<sup>71</sup> Ibidem, p. 25 (27), principle 8.

<sup>72</sup> Ibidem, p. 33 (34), p. 35 (37), p. 38 (39).

<sup>73</sup> Available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016804d5105](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804d5105).

<sup>74</sup> This recommendation is referred to in Recommendation CM/Rec(2009)5 of the Committee of Ministers to member states on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment, adopted on 8 July 2009, available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d0b0f](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d0b0f).



Ministers on 26 March 2008,<sup>75</sup> the Committee of Ministers underlines that one of the measures with regard to Internet filters which member states shall take, in line with the guidelines set out in the appendix to this recommendation, is to “co-operate with self- and co-regulatory bodies in order to develop standards for developmental-age appropriate rating systems for content carrying a risk of harm, taking into account the diversity of cultures, values and opinions”.<sup>76</sup>

In its Recommendation CM/Rec(2011)7 on a new notion of media, adopted on 21 September 2011,<sup>77</sup> the Committee of Ministers recalls that self-regulation “also speaks of the importance of media and journalism for our societies, especially for democracy” and that “as regards in particular new media, codes of conduct or ethical standards for bloggers have already been accepted by at least part of the online journalism community”.<sup>78</sup> The Committee of Ministers stresses that “the development of professional and ethical standards to a large extent reflects people’s expectations. However, self-regulation may not always be regarded as sufficient and people look to public authorities to ensure that minima are guaranteed”.<sup>79</sup> The Committee of Ministers recommends that member states “engage in dialogue with all actors in the media ecosystem in order for them to be properly apprised of the applicable legal framework and invite traditional and new media to exchange good practice and, if appropriate, consult each other in order to develop self-regulatory tools, including codes of conduct, which take account of, or incorporate in a suitable form, generally accepted media and journalistic standards”.<sup>80</sup>

In its Recommendation CM/Rec(2015)6 on the free, transboundary flow of information on the Internet, adopted on 1 April 2015,<sup>81</sup> one of the recommendations concerns the “value of self-regulation”. According to this principle, member states “should encourage, facilitate and support the development of appropriate self-regulatory codes of conduct so that all stakeholders respect the right to respect for private and family life, the right to freedom of expression and the right to freedom of assembly and association, in full compliance with Articles 8, 10 and 11 of the ECHR, with particular regard to the free flow of Internet traffic”.

In its Recommendation CM/Rec(2018)11 on media pluralism and transparency of media ownership, adopted on 7 March 2018,<sup>82</sup> the Committee of Ministers underlines that “effective self-regulatory systems can enhance both public accountability and trust”. Any self-regulatory mechanisms developed in the area of Internet intermediaries should “operate independently and transparently, be open to meaningful participation from all

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<sup>75</sup> Available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d3bc4](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d3bc4).

<sup>76</sup> Appendix to Recommendation CM/Rec(2008)6, Sec. II. ii.

<sup>77</sup> Available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cc2c0](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0).

<sup>78</sup> Appendix to Recommendation CM/Rec(2011)7, paragraphs 37 and 41.

<sup>79</sup> Appendix to Recommendation CM/Rec(2011)7, paragraph 53.

<sup>80</sup> Recommendation CM/Rec(2011)7, paragraph 7.

<sup>81</sup> Available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805c3f20](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c3f20).

<sup>82</sup> Available at <https://rm.coe.int/1680790e13>.



relevant stakeholders, be accountable to the public and work in accordance with ethical standards that take full account of the multimedia ecosystem”.<sup>83</sup>

According to Recommendation CM/Rec(2019)1 on preventing and combating sexism, adopted on 27 March 2019,<sup>84</sup> as the latest recommendation addressing self-regulation, the governments of member states are invited to consider the following measure: “Urge and provide support for the participation of the information and communication technology, media and advertising sectors in the drafting, adoption and implementation of self-regulatory policies and mechanisms for the elimination of sexism, including sexist hate speech, within each sector”.<sup>85</sup>

The Parliamentary Assembly also firmly supported self-regulation in the media, for instance, in its Resolution 1003 (1993) on Ethics of Journalism.<sup>86</sup>

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<sup>83</sup> Guideline 2.4 on media pluralism and transparency of media ownership as Appendix to Recommendation CM/Rec(2018)1.

<sup>84</sup> Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168093b26a>.

<sup>85</sup> Guideline II.C.3 for preventing and combating sexism: measures for implementation as appendix to Recommendation CM/Rec(20 19)1.

<sup>86</sup> Available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16414&lang=en>, paragraphs 36 et seq.





## 3. Country Reports

### 3.1. AT - Austria

*Susanne Lackner, Vice Chair, KommAustria, Vienna*

#### 3.1.1. Introduction

Theoretical analysis of the concepts of self- and co-regulation is omitted below, since this is covered in other chapters of this publication.

Nor is there any need to discuss any further here the fact that self-regulatory systems are mainly linked to and originate from Anglo-Saxon political understanding.<sup>87</sup> In Austria, partly as a result of the Josephinist influence on its public administration, the role played by self- and co-regulation in the audiovisual media sector differs from that in many other member states.<sup>88</sup>

The most well-known Austrian self-regulatory bodies in the media sector are the *Österreichische Presserat* (Austrian Press Council)<sup>89</sup> and the *Österreichische Werberat* (Austrian Advertising Council)<sup>90</sup>. In the youth protection field, the *Jugendmedienkommission* (Youth Media Commission)<sup>91</sup> deals with film classification, but believes its main function is to act as the information office for voluntary film classification.

As a further prefix to the information given below, it should also be noted that the only example of co-regulation in the Austrian media sector is the quality assurance system for Austrian public broadcasting.<sup>92</sup> Although it is not the subject of this publication, it is worth briefly explaining how the supervision of public service broadcasting, which was

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<sup>87</sup> See *Jarren/Wassmer*, Persönlichkeitsschutz in der Online-Kommunikation am Beispiel von Social Media-Anbietern, Berka-Grabenwarther-Holubek (ed.): Persönlichkeitsschutz in elektronischen Massenmedien, with further references, 126.

<sup>88</sup> See *Leitl-Staudinger*, "Organisation der Rundfunkregulierung als Unabhängigkeitssicherung", in: "Unabhängigkeit der Medien", Schriftenreihe Recht der elektronischen Massenmedien, Vienna 2011, with further references, 111; and *Kassai/Kogler/Truppe*, Rundfunkrechtsreform 2010. in: *Medien und Recht*, 6/2010, 11.

<sup>89</sup> <https://www.presserat.at/>.

<sup>90</sup> <https://werberat.at/>.

<sup>91</sup> [https://www.bmbwf.gv.at/Themen/schule/schulpraxis/ugbm/jmk/jmk\\_aufg.html](https://www.bmbwf.gv.at/Themen/schule/schulpraxis/ugbm/jmk/jmk_aufg.html).

<sup>92</sup> Article 4a of the *Bundesgesetz über den öffentlich-rechtlichen Rundfunk* (Federal Act on the Austrian Broadcasting Corporation – ORF-G), Federal Law Gazette No. 379/1984 in the version published in Federal Law Gazette No. 61/2018.



developed in the framework of the relevant state aid procedure, is structured.<sup>93</sup> At the centre of the quality assurance process is the principle of self-assessment by the ORF (Austrian Broadcasting Corporation), which is based on a detailed procedure including, for example, representative surveys among viewers. The regulator oversees this procedure with the usual sovereign instruments, but may not make any kind of content-related assessment. The fact that the ORF, which is formally required to appoint ‘independent’ experts, has interpreted this concept rather broadly by appointing a former ZDF intendant and an ARD programme director, has been criticised.<sup>94</sup> However, efforts to adopt a more independent process for the appointment of experts have been thwarted by various constitutional law provisos concerning the independence of public service broadcasting in Austria.

If self-regulation is defined as a common understanding among participants, without any influence from the state regarding their efforts to meet regulatory objectives, with state authority at the other end of the spectrum,<sup>95</sup> Austria only has one *or* the other when it comes to the governance of audiovisual (and other) media – apart from the quality assurance system.

Despite this cautious approach to non-state regulation, the Austrian legislator has acted on the recommendation set out in Directive 2010/13/EU, that is, that self- and co-regulation instruments should be used by offering financial incentives.<sup>96</sup> Self- and co-regulation are considered as possible additions to state regulation, with the legally binding implementation of directives also part of the picture.<sup>97</sup> The body responsible for the administration of subsidies is the *Kommunikationsbehörde Austria* (Austrian Communications Authority – KommAustria), defined as the regulatory body in the field of ‘electronic audio media and electronic audiovisual media’.<sup>98</sup> A total of EUR 50 000 per year is allocated to self-regulatory bodies for commercial communication and the press, in particular for commercial communication.

Support is available to recognised self-regulatory bodies in the field of commercial communication in media in order to safeguard their independence, ensure they perform their tasks under their bylaws and effectively implement their decisions and resolutions. The law defines recognised self-regulatory bodies as those that ensure, in particular, the broad representation of the affected professional groups and sufficient transparency in respect of the basis of decisions, procedures and the implementation of decisions.

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<sup>93</sup> State aid Case no. E 2/2008 (ex CP 163/2004 and CP 227/2005) – Financing of ORF ([https://ec.europa.eu/competition/state\\_aid/cases/223847/223847\\_1014816\\_27\\_1.pdf](https://ec.europa.eu/competition/state_aid/cases/223847/223847_1014816_27_1.pdf)), paragraph 235, Article 4a ORF-G.

<sup>94</sup> [https://zukunft.orf.at/show\\_content2.php?s2id=176](https://zukunft.orf.at/show_content2.php?s2id=176).

<sup>95</sup> See *Leitl-Staudinger*, *Organisation der Rundfunkregulierung als Unabhängigkeitssicherung*, in: *Unabhängigkeit der Medien*, Schriftenreihe Recht der elektronischen Massenmedien, Vienna 2011, with further references.

<sup>96</sup> Recital 44 of Directive 2010/13/EU.

<sup>97</sup> Article 33 of the *Bundesgesetzes über die Einrichtung einer Kommunikationsbehörde Austria* (Federal Act on the establishment of an Austrian Communications Authority, KommAustria-Gesetz – KOG), Federal Law Gazette No. 47/2019; *Kogler/Traimer/Truppe*, *Österreichische Rundfunkgesetze*<sup>4</sup>, Anmerkungen zu § 33 KOG, p.867.

<sup>98</sup> Article 1 KOG.



### 3.1.2. Self- and co-regulation in the area of advertising

The Austrian Advertising Council,<sup>99</sup> which was completely restructured in 2008, defines itself primarily as a self-restricting body in the fields of ethics and morality that acts on the basis of a code of ethics.<sup>100</sup> The code serves as a set of guidelines on how to protect consumers from the misuse of advertising and to monitor and correct erroneous publications and erroneous developments in advance of and on the boundaries of legislative provisions. The Advertising Council says that, in view of the high level of statutory regulations on advertising and consumer protection in Austria, its role is limited to the areas of ethics and morality, which are also subject to constant social change, hence the need for the code of ethics to be regularly updated. At its heart, the code seeks to prevent advertising that is discriminatory, constitutes an affront to human dignity or is misleading. It deals in particular with ethics and morality, violence, health, the environment, unlawful advertising (data protection, copyright law, etc.), gender discrimination, children and young people, the elderly, alcohol and tobacco, and more recently, influencer marketing.<sup>101</sup> The Advertising Council is not responsible for political advertising.

Members of the Advertising Council include all essential stakeholders in the advertising industry: private broadcasters and ORF, the *Verband Österreichischer Zeitungen* (Austrian Newspapers' Association), agencies, *Bundesland* chambers of commerce, etc. It currently has access to 241 experts in various fields (media, advertising and fields such as medicine and psychology).

The Advertising Council only acts when it receives a complaint. Clearly unfounded complaints are immediately rejected, while others are sent to the company concerned with a request for a response. There are three types of decision that the Advertising Council can then take: it can decide there are no grounds for action, issue a warning or, as a final measure, demand that the advertising campaign be immediately halted. However, these decisions are not legally binding.

Since 2010, the number of complaints has remained fairly stable at around 300 per year, apart from 2014 (over 600) and 2017 (around 500). Complaints have mainly concerned gender discrimination, ethics and morality, misleading advertising and racism.

Essentially, the areas of regulation overseen by KommAustria and the Advertising Council do not overlap, other than in relation to certain ethical principles that are also enshrined in broadcasting law (adopted to implement the Directive), such as human dignity and non-discrimination. In the media field as a whole, Austria therefore has a complementary system of advertising regulation. The legislator has taken account of the importance of the Advertising Council by stating that, when assessing alleged violations of advertising provisions, the regulator should take into account the established practice of generally recognised independent self-regulatory bodies.<sup>102</sup> In practice, however, this

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<sup>99</sup> <https://werberat.at/>.

<sup>100</sup> [https://werberat.at/show\\_4267.aspx](https://werberat.at/show_4267.aspx).

<sup>101</sup> [https://werberat.at/news\\_255.aspx](https://werberat.at/news_255.aspx).

<sup>102</sup> Article 39(4) KOG.



provision is largely irrelevant because, as mentioned above, there are very few areas in which the regulatory objectives of the different broadcasting regulations overlap. Advertising Council decisions, for example, can be used to interpret ethical principles.

The declaratory provision of Directive 2010/13/EU, which is also found in the new Article 9(4), on the adoption of a code of conduct regarding foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, is also binding on media service providers under Austrian law (Article 36(3) of the Audiovisual Media Services Act – AMD-G). The main private broadcasters and ORF have implemented this provision as part of a general code of conduct for inappropriate audiovisual commercial communication for children's programmes<sup>103</sup> and have abided by the Advertising Council's decisions when complaints have been lodged, noting the non-binding nature of such decisions.

Additional voluntary commitments in the form of codes of conduct appended to the code of ethics have also been adopted by the Austrian brewery industry<sup>104</sup> and the *Verband der österreichischen Spirituosenindustrie* (Association of the Austrian Spirits Industry).<sup>105</sup> These could be seen as pre-empting the corresponding provision of Article 9(3) of the Directive.

Not much more can be said here about the future role of self-regulation in the advertising sector, since it will, of course, depend on the implementation of the new Directive. Since 2001, KommAustria has been legally obliged to produce a monthly advertising monitoring report based on random sampling, and the results show that the learning process among broadcasters is relative. This is partly because many broadcasters have failed to establish successful internal monitoring systems. However, it is also clear that in the fields of both self-regulation and state supervision, in view of the growing challenges of the Internet, such as those created by influencers, awareness-raising – nowadays known as media literacy – needs to play a more prominent role.

### 3.1.3. Self- and co-regulation in the area of the protection of minors in the audiovisual media

The cautious approach to voluntary self-regulation in the Austrian audiovisual industry is repeated in the area of youth protection. This is partly because, in principle, the clarification of regulatory objectives seems possible through political discourse, upstream of the state standard-setting process.<sup>106</sup> Objections are also based on the fact that youth protection in Austria is fundamentally a matter for the *Länder* and there are some major discrepancies in

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<sup>103</sup> [https://werberat.at/layout/HFSS\\_Kodex\\_Kindersendungen.pdf](https://werberat.at/layout/HFSS_Kodex_Kindersendungen.pdf).

<sup>104</sup> [https://werberat.at/layout/Kommunikationskodex2013\\_Brauereien.pdf](https://werberat.at/layout/Kommunikationskodex2013_Brauereien.pdf).

<sup>105</sup> <https://werberat.at/layout/Kom.kodex-Spirituosenindustrie.pdf>.

<sup>106</sup> Pöschl, *Die Gewährleistung von Jugendschutz durch das Rundfunkrecht*, in: *Medienfreiheit versus Inhaltsregulierung*, (Berka, Grabenwarter, Holubek, ed.): Schriftenreihe Recht der elektronischen Massenmedien, Vienna 2006, 131.



the level of protection provided across the country. However, there are also constitutional law concerns about prior censorship in an approval-based system.<sup>107</sup>

It is well known that, during the negotiations on the amendment of the Directive, the idea of an EU-wide level of youth protection was always rejected on the grounds that the protection of young people is regarded very differently in the various member states as an expression of different social and moral traditions. The introduction of common standards continues to be refused for this reason.

As far as the protection of minors is concerned, Austria lies in the middle ground between strict and liberal approaches, with a general leaning towards more liberal views. This is reflected in the small number of complaints submitted to KommAustria. In its decisions, KommAustria tends to follow the criteria used by the German KJM.<sup>108</sup>

Film classification is a matter for the *Jugendmedienkommission* (Youth Media Commission), which is part of the *Bundesministerium für Bildung, Wissenschaft und Forschung* (Federal Ministry for Education, Science and Research).<sup>109</sup> Divided into various classification committees, its members are mainly experts in education or social work. Youth and parents' organisations, religious organisations and *Länder*-based organisations are also represented. The *Jugendmedienkommission* is the official information office for the Austrian *Bundesländer* in relation to age ratings for films and its recommendations are binding in many *Bundesländer*.

The *Jugendmedienkommission* acts as the information office for the voluntary classification of films, videos and other image carriers, and provides a comprehensive database of films classified since 2000, containing brief information about the films and the reasons for their respective age ratings.<sup>110</sup>

ORF is open about the measures it takes to protect young people: it follows the recommendations of the *Jugendmedienkommission* and the German self-regulatory bodies (FSF and FSK); subscribes to measures such as a "responsible" purchasing policy for third-party productions; and uses watersheds (scheduling programmes in accordance with children's age categories).<sup>111</sup> As far as private Austrian broadcasters are concerned, information about measures taken to comply with the youth protection requirements enshrined in the relevant broadcasting law<sup>112</sup> is not easily accessible. As mentioned above, few cases have resulted from official monitoring or complaints submitted to the regulatory body. Here also, it is evident that German or Austrian classification systems are being respected, age ratings are being adopted and watersheds are being used.

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<sup>107</sup> *ibid.*, p. 130.

<sup>108</sup> <https://www.kjm-online.de/>.

<sup>109</sup> [https://www.bmbwf.gv.at/Themen/schule/schulpraxis/ugbm/jmk/jmk\\_aufg.html](https://www.bmbwf.gv.at/Themen/schule/schulpraxis/ugbm/jmk/jmk_aufg.html).

<sup>110</sup> <https://jmkextern.bmb.gv.at/>.

<sup>111</sup> <https://der.orf.at/unternehmen/leitbild-werte/gewalt-jugendschutz/index.html>.

<sup>112</sup> Linear services are covered by Article 42 of the Audiovisuelle Mediendienste-Gesetz (Audiovisual Media Services Act – AMD-G), Federal Law Gazette I No. 84/2001 in the version of Federal Law Gazette I No. 86/2015; Article 39 AMD-G applies to on-demand services.



Detailed information about youth protection mechanisms is provided by platform operators.<sup>113</sup> It is pleasing to note that blocking mechanisms are usually activated as the default setting and KommAustria, although it is not in its area of responsibility, has conducted related mediation and awareness-raising talks on the subject.

Efforts to meet the greatest challenge in this area, that is, the need to develop self-regulatory systems to protect young people online, are not yet very advanced in Austria, although numerous educational initiatives are in place. For example, the 'saferinternet' initiative, financed by the European Commission, is working with the Internet Service Providers' Association (ISPA) to raise awareness of this issue.<sup>114</sup> Without playing down the importance of stakeholder-recognised self-regulation, it should be noted, in view of the different dynamic of the Internet, that individual stakeholders, who are not organised in associations, are becoming increasingly influential. In order to avoid unwanted behaviours, preventive awareness-raising activities, such as the promotion of media literacy, therefore seem to be becoming the method of choice. The same applies to state supervision. Reference is made here, for example, to KommAustria's efforts to improve the compliance of influencers.<sup>115</sup>

### 3.1.4. New challenges for video-sharing platforms

Since the Directive is not yet being implemented in Austria and, at least officially, there are no plans to do so at present, it does not need to be discussed here.

However, it already seems clear that, as a result of the continuation of the country of origin principle in this field (a subject closely examined during negotiations concerning the Directive),<sup>116</sup> alongside the structural broadening of the Directive's scope under Article 28b and related interpretation problems, the way in which regulators operate in the online sphere will need to fundamentally change. To put it bluntly, it could be said that preparatory work on the implementation of Article 28b of the Directive appears almost redundant outside Ireland. In the context of the European Regulators Group for Audiovisual Media Services (ERGA), which is now expressly recognised in Article 30 of the Directive, the regulatory authorities responsible for audiovisual media are discussing this issue as well as questions related to law enforcement on the Internet in general, and devising strategies for the necessary restructuring of their work.

KommAustria and other regulatory authorities have long held the view that certain YouTube, Facebook and, more recently, Instagram and Twitch platforms can be considered (on-demand) audiovisual media services that fall under the scope of Directive 2010/13/EU.

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<sup>113</sup> <https://www.magenta.at/hardwaresupport/device/magenta/tv-on/topic/sicherheit/jugendschutz-altersbeschränkung-einrichten/1>; <https://www.a1.net/hilfe-kontakt/article/Fernsehen/Erste-Hilfe-Sicherheit/Sicherheitseinstellungen/Welche-Jugendschutz-Einstellungen-gibt-es-und-was-bewirken-sie-/50000000007343/500000000027194>.

<sup>114</sup> <https://www.saferinternet.at/>.

<sup>115</sup> <https://www.rtr.at/de/m/InfoAbruf>.

<sup>116</sup> Kogler, Audiovisuelle Mediendienste-Richtlinie, in: Kommunikation und Recht, 9/2018, 9.



Recital 3 of the Directive expressly states, in relation to the definition contained in Article 1(1)(aa), that content provided on video-sharing platforms can constitute audiovisual media services: “*channels or any other audiovisual services under the editorial responsibility of a provider can constitute audiovisual media services in themselves, even if they are offered on a video-sharing platform which is characterised by the absence of editorial responsibility.*”

This regulatory activity shows that, in Austria at least, platforms other than these hugely popular platforms are virtually irrelevant. In other words, in future, almost all mass-appeal services on video-sharing platforms will fall under Irish jurisdiction.<sup>117</sup> Known exceptions are the France-based Dailymotion platform and the Twitch live-streaming service, which will probably be treated as Luxembourg-based, like its parent company, Amazon. During the negotiations on the Directive, live channels were included in the definition of a video-sharing platform in Article 1(b)(aa),<sup>118</sup> and Twitch falls under the jurisdiction of Luxembourg.

In light of the above, jurisdiction over the same overall service (content on a video-sharing platform) will sometimes be shared: Ireland will be responsible for the platform and the relevant member state for the content played through it. In theory, this could, in turn, mean that both Ireland and another member state are responsible for ensuring compliance with the same provision, namely Article 9(1) of the Directive – which applies to both media service providers and platform operators<sup>119</sup> – on the basis of different commercial communication rules. With regard to the other rules that video-sharing platforms must follow (protection of minors, incitement to hatred, etc.<sup>120</sup>), the situation could also arise whereby a service aimed at the public in a member state has to meet certain standards that are different to those applicable to audiovisual services in the state concerned. This gap, which is created by the country of origin principle, takes on a completely different dimension in the context of video-sharing platforms as opposed to linear services. In summary, there is a danger that, especially in view of increasingly complex procedures, one of the main objectives of the regulation of audiovisual media relevant to the formation of opinion, that is, consumer protection, could, on the whole, be weakened.

Furthermore, the use of co-regulatory models for platform providers leads to a shift in the interpretation of concepts that were previously assessed by the courts and authorities, such as that of harmful content, and to a ‘privatisation of the law’ when it comes to freedom of speech.<sup>121</sup> Fears that this could result in overblocking are well known. There are already EU codes of conduct for platforms on the themes of hate speech<sup>122</sup> and disinformation<sup>123</sup>. The effects on freedom of speech, one of the most important principles

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<sup>117</sup> See ‘Online video sharing: Offerings, audiences, economic aspects’, European Audiovisual Observatory, p. 20, <https://rm.coe.int/online-video-sharing/16808b2e16>

<sup>118</sup> Kogler, *Audiovisuelle Mediendienste-Richtlinie*, in: *Kommunikation und Recht*, 9/2018, 2.

<sup>119</sup> Article 28b(2) 2nd sentence of the Directive.

<sup>120</sup> Article 28b(1) of the Directive.

<sup>121</sup> *Krisztina Rozgonyi*, A New Model for Media Regulation, *InterMEDIA*, April 2018 Vol 46 Issue 1, p. 20.

<sup>122</sup> [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/countering-illegal-hate-speech-online\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/countering-illegal-hate-speech-online_en).

<sup>123</sup> <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>.



of democratic societies, cannot be determined from the relevant evaluation reports. This is because content that is prohibited under the relevant community standards is deleted or cannot be uploaded in the first place due to the use of artificial intelligence. The significance of this 'chilling' effect on freedom of speech cannot be overstated, not least because these platforms are extremely important for public discourse and the formation of political and social opinion.<sup>124</sup>

This interconnection and intertwining between different legal cultures is complicated by the fact that the platforms are subject to a private company's community standards, which are based on an American understanding of the law. For the sake of consistency, the legal situation of the markets in which the platforms operate is ignored, other than with regard to illegal content.<sup>125</sup>

Of course, how Ireland deals with the challenges it faces will be crucial. A consultation dealing in part with the implementation of the Directive was held in March.<sup>126</sup> The Irish regulator, the BAI, submitted a comprehensive, concise response with concrete recommendations.<sup>127</sup> It favours an extra-judicial dispute resolution system with decision-making bodies independent of the platforms and close attention paid to freedom of speech in the monitoring of codes of conduct. An important and interesting proposal concerns the creation of a 'priority complainant' scheme that would include other regulatory authorities. Although, as the BAI correctly points out, the decisions of other regulatory bodies cannot be legally binding, a platform's willingness to take part in such a dispute resolution mechanism would be viewed positively when assessing its compliance.

This brief summary of the issues at stake only provides a glimpse of the type of questions that legislators and then regulators will need to address. Disruption of audiovisual media regulation is inevitable. Regulators will face a huge challenge that will require them to adapt their resources and working methods, and follow a 'prevention rather than punishment' approach.

Finally, it should be pointed out that the issues of co-regulation have not been examined in detail since a 2006 report published on behalf of the European Commission by the Hans-Bredow-Institut and the EMR.<sup>128</sup> The present publication is therefore extremely important for legislators, regulators and industry stakeholders, not only because it is up to date, but in particular in view of the growing significance of co-regulatory and self-regulatory systems in the online context, both within and outside the scope of application of the new Audiovisual Media Services Directive.

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<sup>124</sup> See *Hans Peter Lehofer*, Pluralismus unter den Bedingungen des Internets, in: Berka-Grabenwarter-Holubek (ed.), *Meinungsvielfalt im Rundfunk und in den Online-Medien*, p. 103.

<sup>125</sup> Facebook's Community Standards apply to all users, not to individual countries, for example: <https://www.facebook.com/communitystandards/>.

<sup>126</sup> <https://www.dccae.gov.ie/en-ie/communications/consultations/Pages/Regulation-of-Harmful-Online-Content-and-the-Implementation-of-the-revised-Audiovisual-Media-Services-Directive.aspx>.

<sup>127</sup> <https://www.dccae.gov.ie/en-ie/communications/consultations/Pages/Regulation-of-Harmful-Online-Content-and-the-Implementation-of-the-revised-Audiovisual-Media-Services-Directive.aspx>.

<sup>128</sup> [http://ec.europa.eu/archives/information\\_society/avpolicy/docs/library/studies/coregul/final\\_rep\\_de.pdf](http://ec.europa.eu/archives/information_society/avpolicy/docs/library/studies/coregul/final_rep_de.pdf).



## 3.2. BE - Belgium

*Bernardo Herman, Director of European Affairs, CSA, and Michèle Ledger, Head of Practice Cullen International, researcher CRIDS*

### 3.2.1. Introduction

Belgium is a complex country because the competence for audiovisual matters is split between various linguistic regions. Four distinct legislative and regulatory frameworks apply and are enforced by separate regulatory authorities: one for Flanders, one for the Wallonia-Brussels Federation (French-speaking region of Belgium), one for the German-speaking community and one for the bilingual Brussels-Capital Region<sup>129</sup>).

This country report focuses on self- and co-regulation in Flanders and the Wallonia-Brussels Federation as these zones are where most of the services are regulated.

The Flemish regulatory body is the Vlaamse Regulator voor de Media<sup>130</sup> (VRM) and the regulatory body for the Wallonia-Brussels Federation is the Conseil Supérieur de l'Audiovisuel (CSA)<sup>131</sup>.

#### 3.2.1.1. Co-regulation

In the Wallonia-Brussels Federation, the main statutory legislation (the coordinated Decree on audiovisual media services<sup>132</sup>) has, since 2010, foreseen a very specific co-regulatory mechanism which is exercised through the Advice Council (Collège d'Avis).

According to Article 135, §1 of the decree, one of the Advice Council's tasks is to elaborate rules<sup>133</sup> in certain areas which can become legally binding if they are approved by the government of the Wallonia-Brussels Federation. The Advice Council has the competence to elaborate rules in the following areas: commercial communications; the protection of human dignity; the protection of minors; accessibility; the broadcasting of short extracts of events of high interest to the public; and political information during election periods.

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<sup>129</sup> The competence is specified in Article 127, paragraph 2 of the Belgian Constitution.

<sup>130</sup> Cf. <https://www.vlaamseregulatormedia.be/en>.

<sup>131</sup> For more information: <http://www.csa.be>.

<sup>132</sup> Décret coordonné sur les services de médias audiovisuels, consolidated version of 21.8.2018), available at: <http://www.csa.be/documents/2882>.

<sup>133</sup> 'Rule' is used in a generic manner to cover the idea that a non-binding norm has been adopted. Once it becomes binding, we use the term 'regulation'.

The composition of the Advice Council and the procedure under which it can prepare these rules were revised in June 2018.<sup>134</sup>

**Composition** - The revised Article 138 of the coordinated Decree specifies that the government, after having consulted the relevant sectoral organisations, can appoint a maximum of 22 members, considering the need to ensure a pluralistic and philosophical balance in the composition of the Advice Council in line with a dedicated law on protecting ideological and philosophical beliefs.<sup>135</sup> The appointed members must belong to the following sectoral categories:

- two representatives of the public service broadcaster,
- two representatives of a recognised federation of local TV channels,
- four representatives of commercial TV channels,
- five representatives of different categories of radio stations,
- three representatives of distributors,
- two representatives of electronic communications network operators,
- four members of the Executive Board of the CSA.

The term of the mandate is four years.<sup>136</sup> Several other professional organisations are invited to attend the meetings of the Advice Council in a consultative capacity, such as associations of print media and collecting rights management organisations. Furthermore, the government and the minister in charge each have one seat, and an advisory vote.

**Procedure** – According to the current practice, the Advice Council elaborates rules following debates that take place at working group level and that are prepared by expert members of staff within the CSA.

Before adopting a rule, the Advice Council has a duty to consult interested stakeholders, including those who are not represented in the Advice Council (Article 135, §3). Hearings may also be organised. The procedure specifies that rules are adopted by a simple majority. In case of division, the chairman has a casting vote.

The Executive Board of the CSA or the government can decide that the adopted regulations must be evaluated periodically (Article 135 §4). Interested stakeholders are asked to present a report on how the regulations are put into application. The Advice Council then carries out the evaluation based on a report submitted by the Executive Board of the CSA. Alternatively, monitoring groups can be established for a specified period; for instance, a monitoring group was established for a five-year period by the Regulation on the accessibility of programmes for persons with disabilities.

Between January 2009 and September 2019, the Advice Council adopted eight rules which were all given legal effect after receiving the government's approval. These regulations are now legally binding on all operators.

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<sup>134</sup> Wallonia-Brussels Federation Decree of 2 June 2016 amending the coordinated Decree of 26 March 2009 on audiovisual media services - M.B. 8 July 2016.

<sup>135</sup> Article 7 of the law of 16 July 1976.

<sup>136</sup> The mandate can be renewed.

In Flanders, there is no co-regulation at this moment in time.

### 3.2.1.2. Self-regulation

Self-regulation plays a limited role in the Wallonia-Brussels Federation and in Flanders and is limited to advertising and to professional rules for journalists (not further developed in this country report).<sup>137</sup>

With regard to advertising, a self-regulatory system was set up at national level through the Jury for Ethical Practices on Advertising (le Jury d’Ethique Publicitaire/Jury voor Ethische Praktijken inzake Reclame, JEP)<sup>138</sup> to ensure that the advertising sector complies with ethical principles (see 3.2.2 below).

## 3.2.2. Self- and co-regulation in the area of advertising

The legal provisions on advertising for linear and non-linear audiovisual services are contained in the respective laws of the French-speaking community (the coordinated Decree on audiovisual media services) and Flanders (the Flemish Act on radio and television broadcasting of 27 March 2009).<sup>139</sup>

The media regulatory authorities (CSA and VRM) oversee the application of these rules.

For the French-speaking community, the rules contained in the coordinated decree cover the content of advertising in general (it is prohibited to violate human dignity; be discriminatory; be damaging to religious/political/philosophical beliefs; encourage dangerous behaviour; have a negative impact on the environment; be in breach of copyright or personality rights; contain references to a person/institution without authorisation); the protection of minors and other specific areas (for example, content must be distinguishable and subliminal techniques cannot be used); restrictions on the advertising of certain products; specific types of advertising such as interactive advertising, virtual advertising, split screen advertising, sponsorship, teleshopping and product placement; and quantitative rules for linear services.

In the case of Flanders, the rules contained in the Act on radio and television broadcasting cover the basic principles (for example, content cannot be in conflict with legal provisions or be in breach of rules on the protection of privacy; it must be easily identifiable and surreptitious advertising is banned; content cannot violate human dignity, incite violent or discriminatory behaviour, contain/promote any form of discrimination, discredit those who do not consume or use a given product/service, be misleading, etc.);

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<sup>137</sup> The Council of Journalistic Ethics ([Conseil de déontologie journalistique](#)) promotes the enforcement of a deontological code in the journalism sector.

<sup>138</sup> Jury d’Ethique Publicitaire, <https://www.jep.be/fr>.

<sup>139</sup> A non-official translation is available on the VRM website: [https://www.vlaamseregulatormedia.be/sites/default/files/act\\_on\\_.broadcastingvs2.pdf](https://www.vlaamseregulatormedia.be/sites/default/files/act_on_.broadcastingvs2.pdf).



restrictions/ban on the advertising of specific products; advertising aimed at minors; and specific types of advertising (televised advertising and teleshopping, radio advertising, sponsorship and product placement).

The media authorities do not intervene before the advertisement is broadcast/made available (*ex ante*) but may intervene *ex post* (following a complaint or at their own initiative).

### 3.2.2.1. Self-regulation

For complaints which do not relate to the areas covered by the respective laws, a self-regulatory system at national level has been in place since 1976: le Jury d’Ethique Publicitaire/Jury voor Ethische Praktijken inzake Reclame (JEP<sup>140</sup>).

The JEP’s mission is to ensure that advertising is fair, truthful and socially responsible. It examines whether advertisements (on all media) are in line with ethical rules (based on legislation and self-regulatory codes of conduct).

It can intervene *ex ante* (when requested by advertisers, advertising agencies or media companies) or *ex post*, following a complaint.

The JEP is a private body financed by Belgian advertisers, the media, and advertising agencies. It is composed equally of civil society<sup>141</sup> representatives and of representatives of the advertising sector (advertisers, advertising agencies and media outlets). This membership enables the JEP to be well accepted both by viewers and consumers and by the advertising industry. The representatives take their own decisions.

In terms of decision making, the JEP’s secretariat (composed of two lawyers) instructs the cases and the Jury (that is, the members of the JEP) takes decisions. Parties can lodge an appeal before an appeal body set up within the JEP.

The JEP informs the advertiser that a complaint has been filed and allows it to respond. The Jury adopts a decision and if the advertiser does not comply with the decision, the JEP requests the media involved to remove the advertisement.

The JEP bases its decisions on legal provisions as well as on self-regulatory codes of conduct.<sup>142</sup> In particular, the Belgian Advertising Council (Raad for de Reclame Raad/Conseil pour la Publicité) has adopted a self-regulatory code of practice called the Belgian Advertising Council Code (a general code, based on the ICC code<sup>143</sup> and sector-

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<sup>140</sup> For more information cf. <https://www.jep.be/nl>.

<sup>141</sup> Unia, the Centre for Equal Opportunities and Opposition to Racism, the Institut for equality between men and women, the Gezinsbond, the Conseil de la Jeunesse de la Communauté Française and The Shift, and persons selected with the Fondation Roi Baudouin from the bar and academia.

<sup>142</sup> An overview is available at <https://www.jep.be/fr/codes-regles>.

<sup>143</sup> Code ICC consolidé sur les pratiques de publicité et de communication commerciale, [https://www.jep.be/sites/default/files/rule\\_recommandation/icc\\_fr\\_code.pdf](https://www.jep.be/sites/default/files/rule_recommandation/icc_fr_code.pdf).



specific codes). The Council promotes commercial communications in Belgium and is composed of associations representing the advertising sector.

In terms of accepting JEP decisions, the signatories commit to respecting its decisions. If a signatory fails to do so or does not respond to the changes requested, the JEP will ask the media broadcasting the advertisement to suspend it. As an example, in 2017,<sup>144</sup> in 50 cases, the JEP either requested changes to be made to the advertisement or banned it. In 45 cases, the advertisers complied with the decision.

The JEP publishes annual monitoring reports on its activities.

### 3.2.2.2. Co-regulation

While the co-regulation mechanism is in place in the Wallonia-Brussels Federation, the option has not been used so far in practice for advertising.

## 3.2.3. Self- and co-regulation in the area of the protection of minors in the audiovisual media

### 3.2.3.1. Co-regulation

The Advice Council of the CSA has adopted one rule which was endorsed by the government and published in the Belgian official journal on 30 January 2014. The regulation<sup>145</sup> entered into force in July 2014 and details the messages to be given to viewers by distributors of TV channels to guard viewers against exposing children below the age of three to television.

The regulation was evaluated for a second time by the CSA in January 2017.<sup>146</sup> It reviewed the way in which the distributors put in place the warning messages and heard the views of the distributors. It concluded that the regulation is correctly applied as long as the warning appears on at least one of the four media listed in the regulation (as long as the medium chosen is used in practice and the distributor can justify the chosen medium).

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<sup>144</sup> See 2017 annual report, [https://www.jep.be/sites/default/files/year\\_report/rapport\\_annuel\\_2017\\_fr.pdf](https://www.jep.be/sites/default/files/year_report/rapport_annuel_2017_fr.pdf).

<sup>145</sup> Règlement définissant les modalités de délivrance des messages d'information du public sur la consommation télévisuelle par les enfants de moins de 3 ans en application de l'art. 88bis §1 du décret coordonné du 26 mars 2009 sur les SMA, <http://www.csa.be/documents/2123>.

<sup>146</sup> See :

[http://www.csa.be/system/documents\\_files/2678/original/Rapport%20CAV%202016\\_Conclusions%20des%20évaluations%20art%2088bis%20§1er.docx.pdf?1516957345](http://www.csa.be/system/documents_files/2678/original/Rapport%20CAV%202016_Conclusions%20des%20évaluations%20art%2088bis%20§1er.docx.pdf?1516957345).



### 3.2.3.2. Self-regulation

No specific self-regulatory initiatives exist in Belgium on the protection of minors, except when linked to advertising, a domain in which the JEP has a role to play. For instance, the JEP can enforce the Code on food advertising,<sup>147</sup> developed by the Belgian Federation for the Food Industry (FEVIA), which contains specific rules on the advertising of food directed at children. It can also oversee the application of the rules of the Belgian Pledge, whereby the signatories agree not to advertise products to children under the age of 12 unless they meet specific nutritional criteria.

### 3.2.4. New challenges for video-sharing platforms

No specific (self- or co-regulatory) rules are in place at the moment on the roles and responsibilities of VSPs in relation to the areas addressed in the new AVMSD. Since no legislation has been proposed yet to implement the directive (see below), it is too early to report on the solutions that will be adopted.

As the ERGA report<sup>148</sup> on the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation shows, there is a need for closer supervision channels between platforms and regulators. One of the biggest challenges will be to make sure that regulators have sufficient powers and resources to carry out their supervision tasks effectively in a context which guarantees a sufficient degree of transparency relating to the implementation of the VSP commitments.

### 3.2.5. State of implementation of the new AVMSD Rules

At the time of writing, following the general elections of May 2019, the respective governments (at national and regional levels) have not yet been formed. The formal transposition process has therefore not yet started; however, some initial preparation work has been taking place.

In April 2019, the minister in charge in the Wallonia-Brussels Federation requested the opinion of the Advice Council (which also has the competence to provide advice) in order to prepare the implementation of the new directive. In June, after its creation by the plenary, the first meetings of the dedicated working group launched the discussion on the subject. Given that the European Commission's guidelines on video-sharing platforms will

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<sup>147</sup> [https://www.jep.be/sites/default/files/rule\\_reccommendation/fevia\\_nl.pdf](https://www.jep.be/sites/default/files/rule_reccommendation/fevia_nl.pdf).

<sup>148</sup> [http://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-06\\_Report-intermediate-monitoring-Code-of-Practice-on-disinformation.pdf](http://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-06_Report-intermediate-monitoring-Code-of-Practice-on-disinformation.pdf), June 2019.



feed the debate but are not expected to be finalised before Autumn 2019, the Advice Council is not expected to adopt its opinion before the end of October 2019.

In Flanders, the ministry in charge has consulted the main stakeholders<sup>149</sup> for their views on the transposition of the directive and initial drafting has started.

### 3.3. DE - Germany

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#### 3.3.1. Introduction

Self- and co-regulation are not explicitly mentioned in the Basic Law (Grundgesetz, GG) of the Federal Republic of Germany, but this is no obstacle to their suitability as legislative instruments. This is clear from the very fact that in Germany, the constitutionally guaranteed legal power for individuals and groups to shape their own actions autonomously is a fundamental element of the law-based state. Just as fundamental rights, general freedom of action or the freedom to choose an occupation and own property, as well as freedom of expression and of the media (Articles 2, 12, 14 and 5 GG<sup>150</sup>), give specific definition in German law to the principle of autonomy and, therefore, the legal right to self-development.<sup>151</sup> The Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) has expressly recognised this right to shape one's own actions in the area of waste avoidance, stating that Germany has enacted measures to achieve the goal pursued by the EU's Packaging Directive<sup>152</sup>, including by initially relying on the self-regulation of the economic stakeholders concerned.<sup>153</sup>

The concept of "regulated self-regulation" also provides a constitutionally necessary interface between activities of the state and society aimed at defending constitutional

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<sup>149</sup> In particular, the Flemish public broadcaster, the Flemish commercial broadcasters, service providers, independent producers, consumer organisations, advertisers, and the Flemish children's rights agency.

<sup>150</sup> Basic Law for the Federal Republic of Germany in the revised version published in the Federal Gazette (Bundesgesetzblatt, BGBl) Part III, subdivision No. 100-1, last amended by section 1 of the Act of 28 March 2019 (BGBl. I S. 404), available at <https://www.gesetze-im-internet.de/gg/BJNR000010949.html>.

<sup>151</sup> Cf. Wolfgang Hoffmann-Riem, *Regulierte Selbstregulierung im digitalen Kontext*, 2015, p. 13 (available at [https://www.law-school.de/fileadmin/content/law-school.de/de/units/unit\\_affil\\_riem/pdf/407\\_Regulierte\\_Selbstregulierung\\_im\\_digitalen\\_Kontext.pdf](https://www.law-school.de/fileadmin/content/law-school.de/de/units/unit_affil_riem/pdf/407_Regulierte_Selbstregulierung_im_digitalen_Kontext.pdf)).

<sup>152</sup> European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (Packaging Directive), OJ L 365/10, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31994L0062>.

<sup>153</sup> Federal Constitutional Court, Decision of the 2nd Chamber of the Second Division of 21 November 2011, 2 BvR 516/09, marginal no. 32.



safeguards, such as the protection of minors. This interface can help bring about a constitutional resolution of the tension between governmental and private measures in a way that makes both the state and society responsible for ensuring that the public interest is served.<sup>154</sup> The self- and co-regulation mechanisms which exist in Germany resolve this tension in different ways. There is no single cross-media and cross-thematic body available here. Rather, in the media field a large number of organisations and schemes have developed down the years, such as the German Press Council (Deutscher Presserat), the German Advertising Standards Council (Deutscher Werberat), the Film Industry's Voluntary Self-Regulation Scheme (Freiwillige Selbstkontrolle der Filmwirtschaft, FSK), the Entertainment Software Rating Board (Unterhaltungssoftware-Selbstkontrolle, USK), the Television Industry's Voluntary Self-Regulation Scheme (Freiwillige Selbstkontrolle Fernsehen, FSF) and the Voluntary Self-Regulation of Multimedia Providers Scheme (Freiwillige Selbstkontrolle Multimedia-Diensteanbieter, FSM).<sup>155</sup>

### 3.3.2. Self- and co-regulation in the area of advertising

The German Advertising Standards Council has been in operation for nearly half a century and is the oldest German instrument of media self-regulation after the German Press Council, which was founded in 1956<sup>156</sup>. It was set up in 1972 by the Presiding Committee of the Central Association of the German Advertising Federation (Zentralverband der deutschen Werbewirtschaft, ZAW) to provide voluntary self-regulation of the advertising industry without state supervision. This self-monitoring entity is currently funded by the 45 ZAW members operating in the fields of advertising and commerce, as well as by communications and media agencies, research organisations and the advertising professions.<sup>157</sup> This means it is supported by all relevant branches of the advertising industry in Germany, thus considerably increasing the acceptance of its decisions.

The Advertising Standards Council has cross-media responsibility for all forms of commercial communication, both online and offline. It covers traditional advertising such as on television and radio, on posters and in newspapers, magazines and cinemas, as well as Internet/mobile advertising, advertising on social networks, sponsorship or point-of-sale advertising. It has no responsibility in the case of advertising by political parties, churches, foundations, clubs or non-governmental organisations.

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<sup>154</sup> Cf. Dieter Grimm, "Regulierte Selbstregulierung in der Tradition des Verfassungsstaats", in *Regulierte Selbstregulierung als Steuerungskonzept des Gewährleistungsstaates*, 2001, pp. 9 ff., and Thomas Vesting, "Subjektive Freiheitsrechte als Elemente von Selbstorganisations- und Selbstregulierungsprozessen in der liberalen Gesellschaft", *ibid.*, pp. 21 ff.

<sup>155</sup> Cf. Birgit Braml, in Bornemann/Erdemir (eds.), *Jugendmedienschutz-Staatsvertrag*, 2017, Article 19, marginal nos. 9 ff.

<sup>156</sup> Cf. Nicole Dietrich, *Der Deutsche Presserat*, 2002; Nicole Gottzmann, *Möglichkeiten und Grenzen der freiwilligen Selbstkontrolle in der Presse und der Werbung*, 2005, pp. 23 ff.; Felix Heimann, *Der Pressekodex im Spannungsfeld zwischen Medienrecht und Medienethik*, 2009, pp. 57 ff.

<sup>157</sup> The list of its member organisations is available at <https://www.werberat.de/trager>.



The Advertising Standards Council's rules set guidelines for the content of commercial advertising and comprise not only basic rules<sup>158</sup> but also, and in particular, rules of conduct with regard to (1) combating the denigration of and discrimination against individuals, (2) advertising with and for children and young people on television, radio and electronic information and communications services ("telemédia"), (3) commercial communications for food items, (4) commercial communication for alcoholic drinks (including social media guidelines for the manufacturers thereof) and (5) commercial communications for games of chance. The rules also contain statements on (1) advertisements depicting accident risks, (2) tyre advertisements, (3) the responsible use of traffic noise in radio advertising and (4) advertising with celebrities.<sup>159</sup>

As guidelines, these rules of conduct defined by the Advertising Standards Council (Advertising Code) help to ensure that when advertising campaigns are designed, the limits to what is permissible are not exceeded. Moreover, the basic rules of commercial communication and specific codes of conduct are the basis for the Advertising Standards Council's decisions on individual advertising items. The Advertising Standards Council's Rules of Procedure<sup>160</sup> and Working Principles guarantee a uniform and fair procedure for the complainants and companies involved. If a complaint involves a possible breach of the law (and not the non-observance of the voluntary advertising codes), the Advertising Standards Council will either forward the case to institutions with the capacity to bring proceedings or let the complainants know who to contact.

The Advertising Standards Council's task is to take appropriate steps to further the development of advertising in terms of content, expression and design; to promote responsible action; to identify and eliminate undesirable developments in advertising; and to serve as a permanent referral body for consumer-related advertising problems.<sup>161</sup>

The members of the German Advertising Standards Council include:

- four delegates from the advertising industry,
- three delegates from the advertising media,
- two delegates from advertising agencies,

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<sup>158</sup> Commercial communications must comply with the generally recognised fundamental values of society and its prevailing standards of decency and morality and must always be based on fair competition and responsibility towards society. In particular, advertising must (a) not abuse consumer trust and exploit the lack of experience or knowledge; (b) must not inflict either mental or physical harm on children and young people; (c) must not encourage or tacitly tolerate any form of discrimination based on race, origin, religion, gender, age, disability or sexual orientation or be aimed at reducing an individual to a sexual object; (d) must not encourage or tacitly tolerate any form of violent, aggressive or antisocial behaviour nor induce fear or instrumentalise misfortune and suffering; and (e) must not encourage or tacitly tolerate any attitudes that put at risk consumer safety.

<sup>159</sup> The rules are contained in the Guidelines to the Advertising Code, available at <https://www.werberat.de/werbekodex>.

<sup>160</sup> Available at [https://www.werberat.de/sites/default/files/uploads/media/verfahrensordnung\\_werberat\\_deutsch\\_1.pdf](https://www.werberat.de/sites/default/files/uploads/media/verfahrensordnung_werberat_deutsch_1.pdf).

<sup>161</sup> See paragraph 1 of the Working Principles of the German Advertising Standards Council (2009 version) (available in English at [https://www.werberat.de/sites/default/files/uploads/working\\_principles\\_2009.pdf](https://www.werberat.de/sites/default/files/uploads/working_principles_2009.pdf)).

- one delegate from the advertising professions.

The members of the German Advertising Standards Council must be members of the ZAW Presiding Committee, through which they are elected. The ZAW Presiding Committee can also co-opt additional members from the advertising industry. Their term of office expires at the same time as that of the Presiding Committee.<sup>162</sup>

The Advertising Standards Council is free to form its own opinion and is not required to follow any instructions. When carrying out its work, it must take account of statutory rules, the ZAW Guidelines and international advertising codes of conduct insofar as they are applicable under German law.<sup>163</sup>

Measures carried out by the German Advertising Standards Council on behalf of the ZAW Presiding Committee include, in particular:

- developing self-disciplinary guidelines and drawing up rules on competition to be adopted by the ZAW Presiding Council, and
- providing instructions to the ZAW management on the implementation of individual organisational measures (especially the handling of complaints, etc) designed to counter aberrations or undesirable developments in the field of advertising.<sup>164</sup>

All complaints received by the Advertising Standards Council are first of all screened by the office in accordance with the Rules of Procedure. If a complaint is considered manifestly unfounded, it is rejected and an explanation of the reasons underlying its rejection is provided. In other cases, the company against which the complaint is directed is given the opportunity to issue a reply, which becomes part of the basis for the decision. If the Advertising Standards Council concludes that there has been no breach of the rules of conduct, the complaint is dismissed. The company is also informed of the no-breach ruling in writing. If the Advertising Standards Council's decision-making body finds a breach of the codes, it orders the advertiser to change or discontinue the item concerned. Up to now, it has persuaded companies to accept its objections in more than 90 per cent of cases. It rarely has to issue a public reprimand. This is published in the press and taken up by the media. In the majority of cases, this measure results in the company running socially acceptable advertising campaigns in the future.<sup>165</sup>

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<sup>162</sup> See paragraph 4 of the Working Principles of the German Standards Advertising Council.

<sup>163</sup> See paragraph 9 of the Working Principles of the German Standards Advertising Council.

<sup>164</sup> See paragraph 3 of the Working Principles of the German Standards Advertising Council.

<sup>165</sup> Cf. Nicole Gottzmann, *Möglichkeiten und Grenzen der freiwilligen Selbstkontrolle in der Presse und der Werbung*, 2005, pp. 220 ff.; Vera Haesen, *Der Schutz gegen den unlauteren Wettbewerb in Deutschland und England vor dem Hintergrund fortschreitender europäischer Harmonisierung*, 2015, p. 46 f. For complaints procedures in general, see <https://www.werberat.de/beschwerdeverfahren>.



### 3.3.3. Self- and co-regulation with regard to the protection of minors in the audiovisual media

A form of regulated social self-regulation in the area of the protection of minors has been provided for since 1949, when the Film Industry's Voluntary Self-Regulation Scheme (Freiwillige Selbstkontrolle der Filmwirtschaft, FSK) was set up.<sup>166</sup> Its work was given a legal boost in 1951 with the Act on the Protection of Minors in Public Life (Gesetz zum Schutze der Jugend in der Öffentlichkeit). For the first time, it provided for films to be given age ratings. These were changed in 1957 to those still used today: from age 6, 12, 16 and 18. In 1985, the Act was amended with the introduction of the new legal classification “suitable for all ages” (“freigegeben ohne Altersbeschränkung”, since 2008 “FSK ab 0 freigegeben”). In addition, a legally binding age rating was laid down for video films becoming established on the market and for any future new audiovisual media containing film sequences. Furthermore, in the wake of the amended Act, the *Länder* established the office of the Permanent Representative of the Supreme Youth Protection Authorities at the FSK (Ständiger Vertreter der Obersten Landesjugendbehörden bei der FSK); the permanent representative chairs FSK meetings to examine content and bears administrative responsibility for decisions taken.<sup>167</sup> In 2003, this Act, together with the Act on the Dissemination of Publications Harmful to Minors (“Gesetz über die Verbreitung jugendgefährdender Schriften und Medieninhalte (GjSM)), was replaced by the Federal Protection of Minors Act (Jugendschutzgesetz)).<sup>168 169</sup>

An important development with regard to the system of regulated self-regulation in the fields of broadcasting and electronic information and communications media is the Interstate Treaty on the Protection of Minors from Harmful Media (Jugendmedienschutz-Staatsvertrag, JMStV),<sup>170</sup> which entered into force in 2003, at the same time as the Federal Protection of Minors Act. According to Article 19, voluntary self-regulation bodies can be set up to monitor compliance with the Interstate Treaty's provisions. In order that their work can take precedence, these bodies have to be certified by the Commission for the Protection of Minors in the Media (Kommission für Jugendmedienschutz, KJM). According to Article 19(2) JMStV, this certification must be granted when (1) the independence and expertise of their appointed examiners are guaranteed and representatives of social groups who

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<sup>166</sup> Cf. Oliver Salewski, *Die Freiwillige Selbstkontrolle (FSK) zwischen filmwirtschaftlichen Interessen und Jugendschutz*, 2013; <https://www.spio-fsk.de/?seitid=16&tid=473>.

<sup>167</sup> Cf. on this subject Georg Stath, *Jugendmedienschutz im Bereich der Filme und Unterhaltungssoftware*, 2006, pp. 33 ff.

<sup>168</sup> Protection of Minors Act of 23 July 2002 (BGBl. I p. 2730), most recently amended by section 11 of the Act of 10 March 2017 (BGBl. I p. 420). Available at <https://www.gesetze-im-internet.de/juschg/BJNR273000002.html>.

<sup>169</sup> Cf. on this subject Jörg Ukrow, *Jugendschutzrecht*, 2003, pp. 14 ff., 60 ff., 77 ff.

<sup>170</sup> Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia (Interstate Treaty on the Protection of Minors from Harmful Media – JMStV) in the version of the Ninth Interstate Treaty Amending Interstate Broadcasting Treaties, available (in English) at [https://www.kjm-online.de/fileadmin/user\\_upload/Rechtsgrundlagen/Gesetze\\_Staatsvertraege/Interstate\\_Treaty\\_on\\_the\\_Protection\\_of\\_Minors\\_in\\_the\\_Media\\_JMStV\\_in\\_English\\_19th\\_Interstate\\_Broadcasting\\_Treaty.pdf](https://www.kjm-online.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Treaty_on_the_Protection_of_Minors_in_the_Media_JMStV_in_English_19th_Interstate_Broadcasting_Treaty.pdf).



specifically deal with matters relating to the protection of minors are consulted, (2) the provision of appropriate resources is assured by a large number of providers, (3) examiners have available to them guidance likely to guarantee the effective protection of children and young people, (4) rules of procedure exist that govern the scope of the examination (in the case of broadcasters, also the obligation to submit content) and any penalties that could be imposed, as well as the possibility of reviewing decisions, including in response to applications from youth welfare organisations set up under state (*Land*) legislation, (5) there is a guarantee that the providers concerned are heard before a decision is made and that the reasons for the decision are given in writing to the parties, and (6) a complaints body is set up.<sup>171</sup>

Once the certification procedure has been successfully completed, the fact that a broadcaster or provider of electronic information and communications services is a member of such a body and complies with its statutes can result in their taking precedence over the relevant state media authority with regard to supervisory measures: according to Article 20(5) of this Interstate Treaty, in the case of an alleged breach of the provisions on the protection of minors, this body must initially be asked to look into the claims made. Supervisory measures against the provider are only possible in exceptional cases, namely when the self-regulation body's decision or failure to take a decision "exceeds the legal margin of discretion."<sup>172</sup> That margin of discretion is exceeded when procedural errors are made; when incorrect facts are established; when there has been a failure to invoke the applicable law; and when generally valid assessment criteria are breached when the law is applied. The KJM checks whether one of these situations applies by considering the reasons that the self-regulation body is required to provide for its decision.<sup>173</sup> Furthermore, the self-regulation body's precedence over the KJM based on the margin of discretion only applies when items that can be submitted for assessment have actually been submitted.

The only possibility according to Article 19(5) JMStV for the KJM to respond to errors made by a certified self-regulation body is to revoke the certification if the preconditions for it have subsequently ceased to exist or if that body has reached a decision in breach of the law on the protection of minors.<sup>174</sup>

A provider's failure to comply with a decision taken by a self-regulation body after conducting an investigation can attract penalties imposed by the association but it is also possible for the KJM to act in the case of breaches of substantive law. Article 20(1) JMStV states that the KJM must even take "the necessary measures", but the JMStV does not provide a full list of such measures. In addition to the mere determination of a breach, as the weakest measure available, it is possible to revoke a broadcaster's licence as a last

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<sup>171</sup> Cf. on this Birgit Braml, in Bornemann/Erdemir (eds.), *Jugendmedienschutz-Staatsvertrag*, 2017, Article 19, marginal nos. 19 ff.

<sup>172</sup> Cf. Wolfgang Hoffmann-Riem, *Regulierte Selbstregulierung im digitalen Kontext*, 2015, p. 21.

<sup>173</sup> Cf. Mark D. Cole, *Kontrolle und Aufsicht im Jugendmedienschutz: Einrichtungen und Verfahren nach dem JMStV im Vergleich zum JuSchG*, 2015, pp. 32 ff. (available at [https://www.kjm-online.de/fileadmin/user\\_upload/KJM/Publikationen/Gutachten/Kontrolle\\_und\\_Aufsicht\\_Jugendmedienschutz.pdf](https://www.kjm-online.de/fileadmin/user_upload/KJM/Publikationen/Gutachten/Kontrolle_und_Aufsicht_Jugendmedienschutz.pdf)).

<sup>174</sup> Mark D. Cole, op. cit, p. 57.

resort. Furthermore, Article 24 JMStV provides for the institution of proceedings to impose administrative sanctions.

The 19th Treaty for amending the Interstate Treaties with regard to broadcasting law,<sup>175</sup> which also amended the JMStV, increased the importance of regulated self-regulation in both drafting and applying legislation.

According to Article 5(2) JMStV, age ratings pursuant to section 14(2) of the Federal Protection of Minors Act and age classifications undertaken on the basis of the JMStV apply *mutatis mutandis*, the aim being to ensure uniform age ratings and classifications for both online and offline content and to take account of media convergence. Accordingly, age ratings undertaken by a certified voluntary self-regulation body and confirmed by the KJM must always be adopted by the supreme state (*Land*) youth protection authorities for media with the same or basically the same content without conducting a further assessment under the Protection of Minors Act.<sup>176</sup> The KJM can only raise an objection to the confirmation of an age rating by a certified voluntary self-regulation body if the latter has exceeded its margin of discretion when deciding the rating.

The second sentence of Article 12 JMStV takes the notion of convergence into account by establishing that the rating procedure can also be carried out under the Protection of Minors Act for versions of films and games in electronic information and communications media that can be submitted for assessment in the same way as those on physical media. Accordingly, the provider of an online offering can decide whether to submit it to a voluntary self-regulation body under the Protection of Minors Act (in particular the FSK or the USK) or to a certified voluntary self-regulation body under the JMStV.<sup>177</sup>

The powers of certified voluntary self-regulation bodies have also been strengthened where legislation is concerned. Guidelines pursuant to Article 8(1) JMStV that provide for scheduling restrictions for the circulation of films are first and foremost issued through the certified voluntary self-regulation bodies in the case of commercial broadcasters. If such a body has issued a guideline, the KJM and the state media authorities can only superimpose their own rules on them if that body has exceeded its margin of discretion. If both the KJM or the state media authorities and a certified voluntary self-regulation body issue such guidelines, the latter's guidelines take priority according to Article 8(3) JMStV provided they have been issued within the legal limits of the margin of discretion. However, this does not affect the possibility for the KJM or the state media authorities to establish a general framework for regulated self-regulation guidelines,

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<sup>175</sup> Available at [https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/19\\_Staatsvertrag\\_zur\\_Aenderung\\_rundfunkrechtlicher\\_Staatsvertraege.pdf](https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/19_Staatsvertrag_zur_Aenderung_rundfunkrechtlicher_Staatsvertraege.pdf).

<sup>176</sup> However, this does not apply to cases in which no rating is issued because the relevant state youth authority thinks the physical medium or electronic information and communications services in question might jeopardise the development of children and young people or put at risk efforts to bring them up to become autonomous and socially responsible individuals. Section 14(3) and (4) and section 18 of the Protection of Minors Act remain unaffected.

<sup>177</sup> Cf. official explanatory report on the 19th Interstate Broadcasting Treaty, p. 35 (available at [https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Begruendung\\_zum\\_19\\_RAESTV.pdf](https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Begruendung_zum_19_RAESTV.pdf)).



pursuant to Article 8.<sup>178</sup> Moreover, with the provision added to the second sentence of Article 15(2) JMStV that consultations must be held with the certified voluntary self-regulation bodies on statutes and guidelines concerning the implementation of this Interstate Treaty, consideration is given to their role as participants in the system of regulated self-regulation. In the view of the *Länder*, the procedure for organising consultations means that account can be taken of the experience of the certified voluntary self-regulation bodies and that the uniform implementation of the adopted regulations can be guaranteed.<sup>179</sup>

Moreover, the amended JMStV further strengthens the link between the system of protecting minors from harmful media by technical means and the notion of regulated self-regulation. According to the second sentence of Article 11(1) JMStV, a program for the protection of minors<sup>180</sup> must be duly assessed by a certified voluntary self-regulation body. That body thus takes on the function of a certification board required to assess the extent to which that program meets the requirements of the JMStV. This self-regulation act is subject to the supervision of the KJM, which has to examine whether the certified voluntary self-regulation body has stayed within the boundaries of its margin of discretion in certifying a program for the protection of minors. The certification of such programs thus also constitutes a process of regulated self-regulation.<sup>181</sup> According to Article 11(4) JMStV, programs judged suitable must be reviewed by the certified voluntary self-regulation bodies at least every three years to check that they meet the relevant criteria. In order to ensure transparency and take account of the interests of users, the findings of these reviews must be published without delay.

The aforementioned extension of self-regulatory powers is now the subject of a legal dispute because the KJM has ruled that the voluntary self-regulation organisation of multimedia service providers *Freiwillige Selbstkontrolle Multimedia-Dienstleister e.V. (FSM)* exceeded its legal margin of discretion in its assessment of *JusProg* as a program for the protection of minors pursuant to Article 11(1) JMStV. The KJM unanimously declared the assessment of that program null and void pursuant to the first sentence of Article 19b(2), which states that the FSM should have taken into account the fact that *JusProg* does not cover a significant proportion of children's media consumption because it only works on Windows PCs using the Chrome browser. At the same time, the suitability certification gives providers extensive advantages since they can distribute their age-rated content without

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<sup>178</sup> Cf. official explanatory report on the 19th Interstate Broadcasting Treaty, loc. cit. (Fn. 177), p. 31 f. A new fourth sentence has been added to Article 9(1) JMStV that carries over this clarification of the relationship of certified voluntary self-regulation bodies to the KJM or the state media authorities with regard to the broadcasting watersheds guideline and to exceptions to age ratings provided for by section 14(2) of the Protection of Minors Act. This also means the strengthening of the certified voluntary self-regulation bodies.

<sup>179</sup> Cf. official explanatory report on the 19th Interstate Broadcasting Treaty, loc. cit. (Fn. 177), p. 36.

<sup>180</sup> According to the first sentence of Article 11(1) JMStV, programs to protect minors are software programs that, as mentioned in Article 5(3(1) JMStV, read age ratings and items that may impair the development of children and young people. According to Article 11(1), 3rd sentence, JMStV, they are suitable when they enable age-differentiated access to electronic information and communications media and are based on state-of-the-art identification technology. They must also be user-friendly and permit autonomous use by consumers.

<sup>181</sup> Cf. official explanatory report on the 19th Interstate Broadcasting Treaty, loc. cit. (Fn. 177), p. 5.



any additional safeguards, even though the mobile devices and operating systems used by most children and young people are unable to read the age ratings.<sup>182</sup>

According to Article 11(6) JMStV, the certified voluntary self-regulation bodies can, in consultation with the KJM, carry out pilot projects for promoting technical systems for the protection of minors and agree on procedures. They can also agree on ways of dealing with violations of regulatory provisions during a test phase, for example.<sup>183</sup> The same applies to age-rating systems made available by voluntary self-regulation bodies.<sup>184</sup>

Pursuant to Article 19(4), the KJM may also revoke the certification of a certified voluntary self-regulation body if the preconditions for the certification are subsequently no longer met or if the body's decision-making practice fails to comply with the Treaty's provisions. As a less severe penalty, the KJM can also issue a partial revocation or auxiliary provisions.

The new Article 19b JMStV governs the supervision of certified voluntary self-regulation bodies. Paragraph 1 allows the KJM to object to or set aside a body's decisions if the margin of discretion has been exceeded.<sup>185</sup> The protection provided by Article 20(3) and (5) JMStV thus takes effect within the limits of the margin of discretion. Therefore, according to the notion of regulated self-regulation, the KJM can only intervene if the certified body has exceeded the margin of discretion to which it is legally entitled. If the suitability has been erroneously confirmed, Article 19b(2) JMStV provides for the assessment to be declared null and void by the KJM within three months of the decision being taken or to impose conditions on the provider. If it takes no action within this time-limit, the certified voluntary self-regulation body's decision on the suitability is considered to have been confirmed.<sup>186</sup>

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<sup>182</sup> Cf. KJM press release 05/2019 of 15.05.2019: (translation) "KJM declares null and void the FSM's assessment of the suitability of JusProg as a program for the protection of minors" (available at <https://www.kjm-online.de/service/pressemitteilungen/meldung/news/kjm-stellt-fest-beurteilung-der-fsm-zur-eignung-von-jusprog-als-jugendschutzprogramm-ist-unwirksam/>) and IRIS newsletter 2019-7:1/10.

<sup>183</sup> See also the official explanatory report on the 19th Interstate Broadcasting Treaty, loc. cit (Fn. 177), p. 35.

<sup>184</sup> Cf. Sebastian Gutknecht in: Bornemann/Erdemir (eds.), *Jugendmedienschutz-Staatsvertrag*, 2017, Article 11 marginal nos. 57 ff.

<sup>185</sup> According to the third sentence of Article 19b(1) JMStV, there is no provision for compensation for pecuniary loss.

<sup>186</sup> The same applies to the checks on compliance with the suitability requirements that, according to the first sentence of Article 11(4) JMStV, must be carried out at least every three years. Here, too, there is no provision for compensation for pecuniary loss. The purpose of the time limit is to give the provider legal certainty after three months have expired.

### 3.3.4. New challenges for video-sharing platforms

As far as dealing with user complaints about hate speech and other content on the Internet<sup>187</sup> punishable under criminal law is concerned, the Act to improve law enforcement in social networks (Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken), or the Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG)<sup>188</sup>, is based on the statutory provisions on the protection of minors from harmful media. According to section 1(1), this Federal Act applies to providers of electronic information and communications services (“telemedia”) that operate for-profit Internet platforms designed to enable users to share any content they wish with others or to make it publicly accessible (social networks).<sup>189</sup> Accordingly, video-sharing platform services within the meaning of the AVMSD can also be covered by the Act. However, section 1(2) NetzDG exempts a social network provider from the reporting and complaints management obligations pursuant to sections 2 and 3 if the network has less than two million domestic users. The major American video-sharing platform YouTube acknowledges that this is not the case as far as it is concerned. Whether other platforms such as Dailymotion, Flickr or Vimeo exceed this figure has yet to be determined.

According to section 3(1) NetzDG, the provider of a social network must ensure that an effective and transparent procedure is available for dealing with complaints about unlawful content. The procedure for communicating such complaints must be easily identifiable, directly accessible and constantly available. According to paragraph 2 of this provision, it must guarantee that, *inter alia*, the social network provider (1) takes note of the complainant without delay and examines whether the content complained about is unlawful and must be removed or whether access to it must be blocked; (2) will in principle<sup>190</sup> remove clearly unlawful content within 24 hours of receiving the complaint or block access to it; (3) remove any unlawful content without delay, as a rule within seven days of receiving the complaint, or block access to it.

This period of seven days can, however, be exceeded according to section 3(2)(3)(b) NetzDG, if, for example, the social network transfers the decision on the unlawfulness of the content to a certified regulated self-regulation body within seven days of receiving the complaint and agrees to accept its decision. The certification by the Federal Office of Justice (Bundesamt für Justiz), governed by section 3(6) and (8) NetzDG, is based on Article 19(3) JMStV.

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<sup>187</sup> According to section 1(3) of the Network Enforcement Act, content that contains elements of the offence referred to in Articles 86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b in conjunction with 184d, 185 to 187, 201a, 241 or 269 of the German Criminal Code (available at <https://www.gesetze-im-internet.de/stgb/>) and is not justified.

<sup>188</sup> Of 1 September 2017 (BGBl. I p. 3352), available at <https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html>.

<sup>189</sup> Platforms with journalistically/editorially arranged content for which the service provider itself is responsible are not considered social networks within the meaning of this Act. The same applies to platforms only operated for the purpose of individual communications or the dissemination of specific content.

<sup>190</sup> The 24-hour period does not apply if the social network has agreed a longer period with the appropriate prosecuting authority for the removal or blocking of the clearly unlawful content.



According to section 2 NetzDG, providers of social networks that receive more than 100 complaints about unlawful content in a calendar year are, in the interests of the transparency and effectiveness of the enforcement system, obliged to produce half-yearly reports in German on how they have dealt with such complaints on their platforms and to publish them both in the Federal Gazette (Bundesanzeiger) and on their own website.<sup>191</sup>

The certification pursuant to section 3(7) NetzDG can be revoked in full or in part or be subject to auxiliary provisions if the preconditions for it have subsequently ceased to exist. Moreover, section 4 provides for regulatory proceedings to impose a penalty.

In the light of the privatisation of law enforcement, it is constantly debated whether the Network Enforcement Act is in conformity with higher-ranking law, especially the fundamental rights guaranteed by the Basic Law and the communication freedoms enshrined in the European Convention on Human Rights and the European Union's e-Commerce Directive.<sup>192</sup>

Moreover, in the past, one of the main problems regarding law enforcement in social networks has proved to be both the fact that the judicial authorities, the offices that hand out administrative fines and individuals affected have no responsible people available for them to contact in the case of social network operators, and the fact that the platform operator has no German address for the service of documents. The European document service mechanisms (registered letter with acknowledgement of receipt in civil proceedings) are generally insufficient. It is precisely because social networks have considerable power to influence public opinion that it is crucial to have a fast and secure document service system to enable any individuals affected to take swift legal action, and above all, to allow the courts to deal with false news punishable under criminal law.<sup>193</sup> Section 5(1) NetzDG, accordingly, now requires social network providers to appoint an authorised representative in Germany, and to clearly draw attention to this person in such a way that he/she is easily identifiable and directly accessible on their platform. Documents can be served on this person in proceedings to impose fines pursuant to section 4 NetzDG or in proceedings before German courts concerning the dissemination of unlawful content. This also applies to the service of documents that initiate such proceedings.

Accordingly, in the case of requests for information by a domestic prosecuting authority, section 5(2) NetzDG requires the appointment of an authorised representative in Germany who is obliged to reply to such a request within 48 hours of its receipt. If the reply does not contain the exhaustive information requested, the reasons why must be stated.

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<sup>191</sup> The report published on its own website must be easily identifiable, directly accessible and constantly available. For more information, see, for example, Facebook's second NetzDG Transparency Report, available in English at

[https://fbnewsroomde.files.wordpress.com/2019/01/facebook\\_netzdg\\_january\\_2019\\_english71.pdf](https://fbnewsroomde.files.wordpress.com/2019/01/facebook_netzdg_january_2019_english71.pdf).

<sup>192</sup> Cf. on the results of a hearing of the Bundestag's Legal Affairs Committee on 15 May 2019

<https://www.bundestag.de/dokumente/textarchiv/2019/kw20-pa-recht-netzwerkdurchsetzungsgesetz-636616>.

<sup>193</sup> Cf. Bundestag, Doc. 18/12356, p. 27 (available at

<http://dip21.bundestag.de/dip21/btd/18/123/1812356.pdf>).



### 3.3.5. State of the transposition of the AVMSD

According to information received, the Federal Government is planning to amend the Protection of Minors Act by the end of 2019.

It is currently unclear whether and to what extent it is necessary, in order to transpose the AVMSD provisions on providers of video-sharing platforms, to amend the Telemedia Act<sup>194</sup>, which has hitherto dealt in particular with matters relating to the country of origin principle, general obligations to provide information and specific obligations to provide information in the case of commercial communications, as well as with questions of responsibility in the transposition of the European Union's e-Commerce Directive.

The *Länder* have, in the meantime, published a second draft of an Interstate Media Treaty (Medienstaatsvertrag) aimed at reforming the current Interstate Broadcasting Treaty, together with an opportunity to express views: from 3 July to 9 August 2019, it was possible to comment<sup>195</sup> on the revised proposals of the *Länder*.<sup>196</sup> The purpose of the new treaty is to transpose the provisions of the AVMSD, and the objective of the *Länder* is to reach an agreement on its individual provisions before the end of the year. If they are successful in that endeavour, it could come into force in the summer of 2020.<sup>197</sup> In the draft, the *Länder* proceed upon the assumption that Articles 2(5a) and (5b), 28a und 28b of the AVMSD and its special provisions on the advertising of tobacco and medicinal products will also be transposed into federal law. In particular, the draft undertakes a literal transposition of the Directive's provisions on video-sharing platforms with regard to definitions<sup>198</sup> and of the provisions on advertising on these services.<sup>199</sup> The draft contains no additions to the provisions on regulated self-regulation in the area of the protection of minors in the media, which is surprising, since the AVMSD itself emphasises the differences between the services covered in the past and the newly included video-sharing platforms. However, it can also be seen as an open-minded approach to additions to the Interstate Treaty on the Protection of Minors from Harmful Media and the Interstate Media Treaty during the further deliberations.<sup>200</sup>

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<sup>194</sup> Telemedia Act of 26 February 2007 (BGBl. I p. 179), last amended by section 1 of the Act of 28 September 2017 (BGBl. I p. 3530), available at <https://www.gesetze-im-internet.de/tmg/>.

<sup>195</sup> Cf. <https://www.rlp.de/de/landesregierung/staatskanzlei/medienpolitik/beteiligungsverfahren-medienstaatsvertrag/>.

<sup>196</sup> [https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/MStV-E\\_Synopse\\_2019-07\\_Online\\_.pdf](https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/MStV-E_Synopse_2019-07_Online_.pdf).

<sup>197</sup> <https://www.rlp.de/de/aktuelles/einzelansicht/news/detail/News/zweite-anhoerung-zum-medienstaatsvertrag-am-03-juli-2019-gestartet-1/>.

<sup>198</sup> Article 2(2) Nos. 14 e to 14 g draft Interstate Media Treaty.

<sup>199</sup> Article 53 j draft Interstate Media Treaty.

<sup>200</sup> On the question of staggered transposition given the complex nature of the transposition, cf. Jörg Ukrow, "Die Umsetzung der Novelle der AVMD-Richtlinie als möglicher Bestandteil eines „Staatsvertrages zur positiven Medienordnung (Medienstaatsvertrages)" - Erste Überlegungen, 2018, p. 3 (available at [https://emr-sb.de/wp-content/uploads/2018/07/EMR\\_Das-aktuelle-Stichwort\\_AVMD-RStV-Synopse.pdf](https://emr-sb.de/wp-content/uploads/2018/07/EMR_Das-aktuelle-Stichwort_AVMD-RStV-Synopse.pdf)).

## 3.4. FR - France

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### 3.4.1. Introduction

There have been no decisions by the French Constitutional Court regarding self- and co-regulation. Self- and co-regulation are not included in the general principles applicable to the administrative action developed by French administrative courts. However, independent administrative authorities widely use soft law in their regulatory mission through recommendations which are often defined after consultations or hearings with the interested parties. This is especially true in the field of media and communications.

The audiovisual and broadcasting sectors are highly regulated in France. The basic regulatory framework is almost entirely defined in the Law of 30 September 1986 on Freedom of Communication<sup>201</sup>, as amended, and in its numerous implementing decrees. Media actors are also subject to the provisions of the Law of July 1881 on the Freedom of the Press<sup>202</sup>, which contains the main applicable press and media offences.

Regulations and standards applicable to actors in this sector are either set by law, as described, or defined (specified) by the Conseil Supérieur de l'Audiovisuel (CSA), the independent administrative authority in charge of monitoring and regulating the sector. To a large extent, the existence and powers of the CSA predate the establishment of pure co-regulation systems.

The CSA defines or specifies the applicable standards, sometimes after prior consultations or hearings with the interested parties, through decisions, recommendations and circular letters to broadcasters and on-demand audiovisual services. These standards mainly concern the pluralism of information, advertising and sponsorship, the protection of minors and the ethics and deontology of programmes.

The CSA can impose administrative sanctions if commercial or public audiovisual media services do not respect their commitments and obligations under the applicable regulations. Compliance with these standards is checked *ex post*.

Until 1992, an exception existed for advertising, which was subject to an *ex ante* control by the CSA (and before that, by the previous broadcasting authority, the Commission nationale de la communication et des libertés (CNCL)). This *ex ante* control was abandoned in 1992, together with the obligation to declare advertisements to the CSA. In order to secure their messages, professionals of the advertising sector set up a purely private *ex ante* control through their professional organisation, the BVP (now ARPP - see hereunder). Therefore, concerning advertising, state regulation coexists with self-regulation in a form

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<sup>201</sup> *Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard)*, available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930>.

<sup>202</sup> *Loi du 29 juillet 1881 sur la liberté de la presse du 29 juillet 1881*, available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722>.



of *de facto* co-regulation. However, both systems are totally independent, and state regulation (as construed or applied by the CSA) prevails over self-regulation.

The rating system implemented in the audiovisual sector could be considered as an example of co-regulation, as it was first developed by the broadcasters themselves, and later included by the CSA in its licence, which gives it regulatory status.

Lastly, professional agreements have been entered into between professional organisations in the cinema industry and television channels, notably concerning the so-called “chronology of media” and the release windows for film distribution. Their provisions have been extended by decree under the extension provisions introduced in the French Cinema Code.

### 3.4.2. Self- and co-regulation in the area of advertising

The Law of 30 September 1986 grants the CSA full power to review, by all means adapted, the contents and methods of programming or advertising programmes by “audiovisual communication services”, a category which covers linear and non-linear audiovisual media services (including radio services).<sup>203</sup> As mentioned, until 1992, this review was carried out *ex ante* by the CSA, and involved the obligation to declare advertising prior to broadcasting. After discussions with broadcasters and the advertising industry, this system was abandoned for an *ex post* review.

In France, the advertising sector is subject to a self-regulation system organised around a private professional association created by members of the advertising industry, namely the Professional Advertising Regulation Authority (Autorité de Régulation Professionnelle de la Publicité, ARPP, formerly Bureau de Vérification de la Publicité, BVP).<sup>204</sup>

The ARPP defines the deontological rules, set out in its Charter, which apply to the whole profession. This covers all forms of media advertising, including print, radio, Internet, outdoor/posters, television and cinema advertising. It provides advice to professionals during production and gives its opinion on the conformity of their campaign or messages with the applicable regulations before their publication or broadcasting. The ARPP develops, or helps specific sectors to develop specific codes of deontology in the field of advertising.

In principle, advertisers and media are not required by law to present or obtain pre-clearance of their advertising with the ARPP; however, a form of *ex ante* review is performed by the ARPP for advertising films intended for television or on-demand media services. This mechanism derives from an agreement made between the CSA and representatives of the

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<sup>203</sup> The Law of September 30, 1986, Article 14-1 extends this power to product placement.

<sup>204</sup> The ARPP is a private body, independent of the state. It has around 700 members, which include advertisers, advertising agencies and media companies. All the major actors in the French advertising industry are represented on its board.



advertising industry in 1990. The legal basis for this review by the ARPP is found in the charter<sup>205</sup> referred to in the membership agreements.

This *ex ante* review applies to advertisers and agencies. By contrast, the *ex post* review by the CSA applies to audiovisual media services. Agencies and/or advertisers must provide the ARPP with a copy of their final advertisements prior to their distribution. A registration number is given to each advertisement, which is screened by a working group of the ARPP. After screening, an opinion on the compliance or non-compliance of the message with the regulation and/or deontologic rules is given by the ARPP.

Although members undertake to follow the opinion issued by the ARPP (under a “maximum efforts” clause), this only has a consultative value. A member that decides not to follow an opinion must notify the General Manager of the ARPP. All modifications to an advertising film, even minimal, must be submitted to the ARPP. In the case of non-compliance with one of its opinions, the ARPP may issue a formal warning or ask the media not to publish/broadcast the advertisement, but the member is not required to do so by law.

Observations made by the ARPP are not made public and are not available on its website; however, they are transmitted to broadcasters and distributors. Moreover, the ARPP does not hesitate to issue press releases on certain advertisements for which it has serious reservations.

The CSA is under no legal obligation to request or follow the decisions or opinions of the ARPP with regards to advertising. In practice, it does not request such advice and does not consult the ARPP.

In other terms, the *ex ante* and *ex post* reviews are complementary, but totally independent.

However, exchanges do take place between the CSA and the ARPP: the ARPP, on the one hand, consults the CSA before issuing regulations or doctrines; the CSA, on the other hand, informs the ARPP of any infringements of the regulations it may be informed of. There is no regulatory basis for such exchanges.

As regards the *ex post* review, a working group within the CSA, under the authority of a member of the CSA, examines all questions relating to advertising. Advertisements are monitored by the CSA. Violations of the advertising regulations can, following the appropriate procedure (usually a cease and desist letter or a request for explanation sent by the CSA), carry penalties for the media service and can, theoretically, lead to a “black screen” or the withdrawal or the non-renewal of the licence for broadcasters. Complaints can be made to the CSA by any interested person. The CSA is not required to open a procedure or to act upon such a complaint.

Observations made by the CSA to audiovisual media services are made public on the CSA website<sup>206</sup> and in the CSA’s monthly information newsletter in the weeks that follow.

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<sup>205</sup> *Règlement intérieur*, art. 6.2 (<https://www.arpp.org/statuts-et-ri/>).

<sup>206</sup> [www.csa.fr](http://www.csa.fr).

The ARPP screens more than 20 000 advertising programmes intended for screening by audiovisual media services per year. While it is common for the ARPP to require modifications, it rarely issues opinions asking for the withdrawal of the campaign. Its opinions are usually followed by members. Due to the efficiency of this *ex ante* review and to the conformity of the ARPP's opinion with its regulations and policy (sometimes ascertained through consultations with the CSA), CSA decisions in relation to advertising cleared by the ARPP are rare.

The system established through the ARPP is considered in France, notably by the CSA, as very efficient, and as a model of self-regulation.

### 3.4.3. Self- and co-regulation in the area of the protection of minors in the audiovisual media

There are two mechanisms of self- and co-regulation in the field of the protection of minors in the media. The first one, already addressed, concerns the monitoring of advertising. The second one concerns the identification of programmes through rating logos.

The system of “*signalétique jeunesse*” (rating logos) for programmes applicable in France was first developed and adopted by the main television channels in 1996, without statutory guidance, and was later harmonised and modified under the initiative of the CSA.<sup>207</sup>

The Law of 1 August 2000 amending Article 15 of the Broadcasting Law of 30 September 1986 created a legal basis for this *signalétique jeunesse*.<sup>208</sup> The system was extended to all programmes, including televised magazines, in 2001.

In 2002, after consulting the actors concerned, the CSA decided to modernise the system in order to facilitate its perception by the public. Currently, the *signalétique jeunesse* and the associated classification are subject to two recommendations: the Recommendation of 7 June 2005, modified in 2012 and 2014, applicable to television

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<sup>207</sup> The first form of identification, a “carré blanc” (white square), appeared in 1961. There were no provisions on rating logos in the Law of 30 September 1986 nor in the previous broadcasting acts. In 1995, the CSA, following a study on violence on television, initiated talks with broadcasters in order to find a way to improve the protection of minors. Following these discussions, broadcasters undertook, *inter alia*: (a) to implement a classification of audiovisual and cinematographic works in 5 categories, and (b) to warn the public by the use of a *signalétique* jointly designed by them. All hertzian broadcasters adopted such a system on July 2, 1996. A slightly different *signalétique* remained for the pay channel Canal+. These undertakings were later incorporated into the broadcasting licences concluded with the CSA (and for public channels, in the decrees establishing their obligations).

<sup>208</sup> Article 15 provides: “When programmes likely to harm the physical, mental or moral state of minors are proposed to the public by television services, the CSA takes care that they are preceded by a warning to the public and that they are identified by the presence of a visual symbol throughout their duration”. The law does not repeat this provision for on-demand services, but the CSA extended the requirement of rating logos to these services on the basis of the general provisions on the protection of minors (Recommendation of 20 December 2011).



services; and the Recommendation of December 2011, applicable to on-demand media services and their distributors.<sup>209</sup> The obligation to use the system is included in the broadcasting licences of private broadcasters, and was included in the decrees detailing the obligations of public broadcasters. Therefore, private broadcasters failing to use the system would be in breach of their obligations under the licence. The same would be true if the broadcasters “underrate” their programmes. A similar liability applies to on-demand services under the general principles for the protection of minors. The review is carried out *ex post*.

Breaching these regulations can carry penalties, following the appropriate procedure (usually a cease and desist letter or a request for explanation sent by the CSA), and can, theoretically, lead to a “black screen” or (for broadcasters) the withdrawal or the non-renewal of the licence. Complaints can be made to the CSA by any interested person. The CSA is not required to open a procedure or to act upon such a complaint.

The CSA has set out criteria to be used for the classification of programmes in its recommendations. The required categorisation of programmes within one of the five categories of classification, which guides, *inter alia*, the use of rating logos, is determined by media services themselves, and is their sole responsibility.<sup>210</sup>

### 3.4.4. New challenges for video-sharing platforms

At the present time, there are no mechanisms of self- and co-regulation in France that specifically address the protection of minors against the dissemination of hatred and criminal content on video-sharing platforms. The issues are addressed through the general provisions dealing with such contents,<sup>211</sup> and through the liability regime established for hosting platforms under the E-Commerce Directive<sup>212</sup>, extended by case law to video-sharing platforms.

However, a bill “fight against hatred on Internet” is currently under discussion in parliament.<sup>213</sup> The proposed legislation intends (1) to create, for the main online platforms (including video-sharing platforms) and search engines, a positive obligation to withdraw clearly illicit contents containing an incentive to hatred or insults based on race, religion, ethnicity, sex, sexual orientation, or disability, or an apology of crimes against humanity and terrorism; (2) to facilitate and reinforce the existing criminal provisions in this respect; (3) to establish an administrative regulation aimed at preventing the diffusion of such contents by subjecting the main platforms to obligations of organisation, cooperation and

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<sup>209</sup> Both available on the CSA website ([www.csa.fr](http://www.csa.fr)).

<sup>210</sup> In practice, the main broadcasters institute a screening committee, in charge of proposing a classification of programmes.

<sup>211</sup> Law of 29 July 1881 on the freedom of the press.

<sup>212</sup> As implemented on point by Law No. 2004-575 of 21 June 2004.

<sup>213</sup> Bill No. 1785, filed on 20 March 2019, available at <http://www.assemblee-nationale.fr/15/propositions/pion1785.asp>. This bill implements the main recommendations of a report to the Prime Minister of 20 September 2018, entitled “To reinforce the fight against racism and anti-semitism”.



transparency; and (4) to create mechanisms ensuring that contents prohibited by a court order are not duplicated or displaced on mirror websites.

In order to implement these objectives, the bill first defines a new mode of administrative regulation for operators of platforms above a certain threshold of traffic — defined by reference to the number of connections on the French territory — to be determined by decree. It provides for an obligation to withdraw the above-mentioned illegal contents within 24 hours of their notification, and for the possibility of administrative sanctions by the CSA in case of refusal or delay to do so. The bill further simplifies the methods of notifying illegal contents, and forces operators to provide clear and detailed information for the public on the notification process. It also entrusts the CSA with the mission of regulating and the power to administrate sanctions in this field; provides for an obligation for all platforms concerned to have a legal representative in France; and quadruples the applicable criminal penalties. Lastly, the bill extends the reach of injunctions delivered against websites to mirror sites.

### 3.4.5. State of implementation of the new AVMSD rules

At the present time, and subject to the above-mentioned bill on hatred content on the Internet, there are no legislative proposals on the implementation of Directive (EU) 2018/1808. The agenda for implementation has not yet been disclosed.



## 3.5. HU - Hungary

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### 3.5.1. Introduction

Although the competences and the sanctioning tools of the Hungarian regulatory body, the Media Council of the National Media and Infocommunication Authority, are strong,<sup>214</sup> and its independence is also controversial,<sup>215</sup> self-regulation could not become strong enough to counterbalance or limit public intervention in the media sector.<sup>216</sup> As a pure self-regulatory solution, the Forum of Editors in Chief (Főszerkesztők Fóruma), the Hungarian Publishers Association (Magyar Lapkiadók Egyesülete) and the Association of Hungarian Content Providers (Magyar Tartalomszolgáltatók Egyesülete) operate *Korrektor.hu*,<sup>217</sup> a self-regulatory complaint-handling system. The participating organisations published a common ethical codex<sup>218</sup> that is obligatory for the members of the organisations. However, the power of self-regulation on media market players is very limited. The last decision published on the website dates from 2016.<sup>219</sup>

However, Act CLXXXV of 2010 on Media Services and on the Mass Media<sup>220</sup> established a specific co-regulation system as an alternative to official control. The law makes it possible for media operators to implement the regulations concerning media content within the framework of self-regulatory bodies with an exclusive legal power. The co-regulatory system is organised on the basis of the different media types, not on the basis of the different regulatory fields, which results in some overlapping between the competences of the co-regulatory bodies involved. However, linear media services (television and radio broadcast services) are not subject to the co-regulation. In the case of linear services, neither the regulation of commercial communication nor the regulation of the protection of minors can be enforced by the co-regulatory system.

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<sup>214</sup> Cappello, M. (ed.), *Media law enforcement without frontiers*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2018, available at <https://rm.coe.int/media-law-enforcement-without-frontiers/1680907efe>.

<sup>215</sup> Cole, M. D., Iacino, G., Matzneller, P., Metzendorf, J., Schweda, S., *AudioVisual Media Services- Regulatory Authorities' InDependence And Efficiency Review*, Update on recent changes and developments in Member States and Candidate Countries that are relevant for the analysis of independence and efficient functioning of audiovisual media services regulatory bodies (SMART 2013/0083), <https://ec.europa.eu/digital-single-market/en/news/study-audiovisual-media-services>.

<sup>216</sup> Tófalvy, T., *Média a törvényen túl? Önszabályozás a magyar írott médiában: előzmények, kontextus, lehetőségek*. Médiakutató Nr. 4 (2013).

<sup>217</sup> See <http://korrektor.hu/>.

<sup>218</sup> Available in Hungarian: <http://korrektor.hu/etikai-kodex/>.

<sup>219</sup> <http://korrektor.hu/hatarozat/>.

<sup>220</sup> Available (English) at [http://hunmedialaw.org/dokumentum/153/Mttv\\_110803\\_EN\\_final.pdf](http://hunmedialaw.org/dokumentum/153/Mttv_110803_EN_final.pdf).



According to the law,<sup>221</sup> the Media Council<sup>222</sup> concludes an administrative agreement with the co-regulatory bodies. Based on the agreement,<sup>223</sup> the self-regulatory body concerned performs specific tasks related to the scope of official authority, media administration and media policy. The scope of the self-regulatory bodies extends to the assessment of complaints concerning the activities of service providers; the settlement of disputes between media enterprises; and the supervision of how service providers operate. The procedure carried out by the self-regulatory body has priority over the administrative procedure of the Media Council. The law emphasises that the self-regulatory body does not have administrative authority.<sup>224</sup>

Since summer 2011, four organisations have been part of the established co-regulation system: the Hungarian Publisher's Association (Magyar Lapkiadók Egyesülete), the Association of Hungarian Content Providers (Magyar Tartalomszolgáltatók Egyesülete), the Association of Hungarian Electronic Broadcasters (Magyar Elektronikus Műsorszolgáltatók Egyesülete) and the Hungarian Advertising Self-Regulatory Board (Önszabályozó Reklám Testület).

The administrative agreement comprises a professional code of conduct devised by the self-regulatory body, the adoption of which requires the approval of the Media Council. The result of the co-regulation system would have been more significant had the codes elaborated on legal facts been set down in a more detailed and clearer way, making them easier to interpret during editorial work. In essence, media law views and facts have been adopted by the codes without modification and with some minor supplements. Thus, the law's content is ambiguous; its directly restrictive provisions for freedom of expression are being interpreted by lay dispute settlement forums. Real self-regulation is therefore not realised in the system.

Issues concerning the regulation of procedures, including imposable sanctions and their execution, are entrusted to the self-regulatory bodies by law<sup>225</sup> without any definition of procedural guarantees being given. This is a matter of concern, because in practice, the codes consider the rights of the complainant according to the law; in fact, they even restrict the rights of the users (the potential complaints) who were excluded from the establishment and the implementation of the codes. The complainant is obliged to contact the media service provider within a specified period of time and confer with them. After an unsuccessful attempt at conferring with the service provider, a written petition must be submitted, paying attention to strict content conditions and paying the procedure fee; this is not regulated in the law itself. The most significant advantage of co-regulation for service providers is the absence of fees as applicable sanctions within its framework. The most

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<sup>221</sup> Act CLXXXV of 2010 on Media Services and on the Mass Media, sections 190-202/A.

<sup>222</sup> The Media Council is part of the National Media and Infocommunication Authority; it is entitled to render decisions on its own authority. The National Media and Infocommunication Authority is an integrated/convergent authority which handles the supervision of the telecommunications and media markets within a single body. See *Cappello, M. (ed.), Media law enforcement without frontiers*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2018, <https://rm.coe.int/media-law-enforcement-without-frontiers/1680907efe>.

<sup>223</sup> Sell all agreements (in Hungarian): [http://mediatorveny.hu/szerzodesek\\_kodexek/](http://mediatorveny.hu/szerzodesek_kodexek/).

<sup>224</sup> Act CLXXXV of 2010 on Media Services and on the Mass Media, section 191.

<sup>225</sup> *Ibid.*, Section 194.



substantial sanction that can be imposed according to the codes is exclusion from the co-regulation system for a specific period. Further sanctions serve to ascertain, stop and publicise norm violation and to provide moral reparation. On the other hand, the codes do not at all include provisions for the implementation of decisions made within the framework of the co-regulation system.

According to law, the Media Council is obliged to review all the self-regulatory body's decisions. The authority also acts as a forum for legal remedies: if any of the parties requests the revision of a decision, the Media Council is obliged to review that decision within 30 days. If the Media Council finds that the self-regulatory body's decision does not comply with the administrative agreement concluded with the self-regulatory body, in particular with the provisions of the Code of Conduct, or that it violates the provisions of the relevant legislation, or if the self-regulatory body is unable to enforce its decision, the Media Council establishes a procedure concerning the subject of the petition. This opens the possibility for a judicial review as well. On the other hand, because of the ambiguous content of media law facts and the possibility of their wide range of interpretation, the Media Council has a rather wide scope of revisionary authority. Furthermore, the Media Council has the authority to oversee all activities performed by the self-regulatory body under the administrative agreement, to supervise procedures and decisions extensively and, as a last resort, terminate the administrative agreement.

One of the most significant concerns relating to independence from financing is that the Media Council – not in accordance with the principles and aspects established and considered in the media law, but with those published in the administrative agreement – provides the co-regulatory bodies with financial support. Independence from market operators is threatened by the fact that experts acting in the course of complaints procedures are exclusively delegated by the enterprises concerned, and in most cases they have a permanent legal relationship with that particular establishment. Although this does not endanger the impartiality of the procedures, since there are appropriate rules to avoid conflicts of interest concerning the acting committees, it is clearly dominated by the views and interests of the service providers.

There have only been a few complaints procedures so far<sup>226</sup>; this is probably partly because of the procedural difficulties, although it is more likely to be due to the low level of awareness of the co-regulation system. The co-regulation system undoubtedly places a less severe restriction on freedom of the press than the authorities. In its present form, however, it ignores all voluntary initiatives and it is no more than an alternative sanctioning system which service providers apply to themselves. Joining the co-regulation system is a difficult compromise for editorial offices. By joining the co-regulation system, they accept and conform to the strict rules concerning media content so as not to be forced to expect substantial fees as stipulated by the law. It can also be interpreted as a compromise between the market players and the government that can lead to the strengthening of self-

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<sup>226</sup> For the decisions of the Hungarian Publisher's Association see: <http://tarsszabalyozas.hu/category/beszamolo/>. The other participating bodies have not published their decisions.



ensorship, especially in a country where one third of journalists admit that they apply self-censorship in their work.<sup>227</sup> On the other hand, a significantly higher number of complaints can also disproportionately limit media freedom in the absence of strong procedural and transparency guarantees.

### 3.5.2. Self- and co-regulation in the area of advertising

Self-regulation in the advertising market has the longest tradition and the most significant impact in Hungary. The main body of both self- and co-regulation in the area of advertising is the Hungarian Advertising Self-Regulatory Board.<sup>228</sup> It was established in 1996 and is a member of the European Advertising Standards Alliance. All self-regulatory activity is based on the Hungarian Code of Advertisement Ethics, that is, a collection of the practical, professional-ethical norms of those engaged in advertising activities in Hungary.<sup>229</sup> The current text of the Codex was passed by 22 organisations from various economic fields. It regulates all kinds of advertisements published in Hungary, including public service advertisements, sponsorship and all other tools of purchase incentives, as well as all business to consumers commercial communication practices.<sup>230</sup> In its 31 articles, the Codex regulates, among other things, the identification of the advertisement; the protection of advertising concepts; the protection of the Hungarian language; the protection of children; and misleading and comparative advertising. Some special rules regulate the advertising of special products and services such as slimming products, healthcare products, alcoholic beverages, foods, vehicles, gambling, as well as premium rate or value-added telecommunication services. There are detailed rules concerning digital (online and mobile) advertising that also include the conditions governing how the consumers' personal data are handled.

The Codex is enforced in the procedures of the so-called *ad hoc* Ethical Committee of the Advertising Self-Regulatory Board. Its procedures and the applicable sanctions are regulated in a separate codex.<sup>231</sup> The Ethical Committee proceeds on request; the procedures are not open. In all cases, the committee has at least four members and a chairperson. The chairperson is the President of the Hungarian Advertising Self-Regulatory Board, and the members, appointed by the Secretary General of the Hungarian Advertising Self-Regulatory Board, should represent advertising service providers, media outlets and advertisers; furthermore, an independent legal expert is also appointed. The procedure can be initiated by any competitor or consumer whose rights or legitimate interests have been violated by conduct contrary to the Codex. If the complaint was made by a competitor, the secretary general calls on the parties to reach a settlement; a complaint by a consumer

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<sup>227</sup> Mérték Médiaelemző Műhely, Az újságírók sajtószabadság-képe 2016-ban Magyarországon, Mertek.eu, <https://mertek.eu/2017/06/16/az-ujsgirok-sajtoszabadsag-kepe-2016-ban-magyarorszagon/>.

<sup>228</sup> <http://www.ort.hu/>.

<sup>229</sup> In Hungarian: <http://www.ort.hu/wp-content/uploads/2018/09/magyar-reklametikai-kodex-2015.pdf>. For the English (but not the latest) version see: <http://www2.ort.hu/en/code/foreword>.

<sup>230</sup> Codex Article 1.

<sup>231</sup> In Hungarian: <http://www.ort.hu/alapdokumentumok/eljarasi-szabalyzat/>.



should be answered by the defendant within five days. If the reconciliation procedure does not yield results, the secretary general will determine the appropriate course of action.

The committee examines the advertisement, and in its resolution, can claim that the Codex has been violated, oblige the advertiser to change the advertisement or to change the slot of the advertisement, to cease the violation and restore the original state. The committee can also call upon the media outlet and the advertising services provider to conduct themselves in line with its resolution, and it can oblige the media outlet to refuse that the advertisement be published. Moreover, the committee can publish its resolution and the facts hindering the execution of the resolution.

The decision can be appealed before the President of the Hungarian Advertising Self-Regulatory Board. The president will rule on the appeal, together with two independent legal experts.

The *ad hoc* Ethical Committee is also entitled to check the advertisement in advance. It can decide whether the advertisement violates ethical rules.

The Hungarian Advertising Self-Regulatory Board also carries out monitoring activities. A specific sort of product or a media type is monitored to check whether their advertising activity is in line with the Codex.

It is noteworthy from the point of view of lack of transparency that the results of the proceedings and the monitoring activity are not published on the Board's website.

### 3.5.3. Self- and co-regulation in the area of the protection of minors in the audiovisual media

In the case of linear media services (television and radio), the protection of minors is regulated by the media laws<sup>232</sup> and enforced by the Media Council. According to the law, all programmes should be classified in one of the six categories, based on the impact of the programme on minors. As a concept, the law defines an age limit and a time zone to each category. The Media Council published a recommendation on the specific aspects of the classification.<sup>233</sup> Some programme types, such as reality shows, are an area of special focus for the authority.<sup>234</sup>

The protection of minors is, as in the case of all other types of media, subject to co-regulation. Besides the organisations and procedures of self- and co-regulation presented above, a special form of cooperation between stakeholders in the field of the protection of minors is represented by the Internet Roundtable for Child Protection. This organisation

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<sup>232</sup> Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content, section 19; Act CLXXXV of 2010 on Media Services and on the Mass Media, sections 9-10.

<sup>233</sup> Available (in Hungarian) at [http://nmhh.hu/cikk/180154/A\\_Mediatanacs\\_klasszifikacios\\_ajanlasi\\_korhatarbesorolas\\_es\\_a\\_kepernyore\\_illes\\_ztheto\\_piktogramok](http://nmhh.hu/cikk/180154/A_Mediatanacs_klasszifikacios_ajanlasi_korhatarbesorolas_es_a_kepernyore_illes_ztheto_piktogramok).

<sup>234</sup> For instance, there is a "Való Világ Barometer" to all series of the reality show on the channel of the RTL Group: [http://nmhh.hu/cikk/199516/Valo\\_Vilag\\_9\\_Barometer](http://nmhh.hu/cikk/199516/Valo_Vilag_9_Barometer).



was launched by Act CVIII of 2001 on electronic commerce and information society services, and amended in 2013. The law obliges the providers of information society services to take measures for the protection of minors when they publish content that might seriously impair the physical, mental, spiritual and moral development of minors, in particular those that are dominated by the representation of violence and/or sexual content.

The overall implementation of this obligation is monitored by the Internet Roundtable for the Protection of Children (hereinafter referred to as the Internet Roundtable). Moreover, the Internet Roundtable encourages and supports the enforcement of other provisions for the protection of minors in media services and information society services. The Internet Roundtable operates as the advisory board to the President of the National Media and Infocommunication Authority in the field of the protection of minors.

The Internet Roundtable is comprised of a chairperson and twenty members.<sup>235</sup> The chairperson and two members are delegated by the president of the Authority; one member is delegated by the minister in charge of information technology; and another one by the minister in charge of e-administration. Professional organisations and civil society organisations dealing with the protection of minors can delegate eight members. An additional eight members are delegated by self-regulatory organisations and the interest groups of media service providers, providers of information society services and providers of electronic communications services .

The Internet Roundtable is entitled to publish non-binding recommendations and opinions for service providers concerning the implementation of the law<sup>236</sup>. It also initiates measures intended to increase the media awareness of minors and their parents. Moreover, it is also entitled to investigate individual complaints and to publish non-binding recommendations or opinions relying on the general conclusions thereof. Anyone may contact the Internet Roundtable in case of violation of rules regarding the protection of minors.

### 3.5.4. New challenges for video-sharing platforms

For a small market like Hungary, the regulation of video-sharing platforms means first of all running the risk that global market players may not be interested in taking into account the local social, economic and legal framework. Even if Alphabet or Facebook are subject to European regulations, none of the biggest players will stay under Hungarian jurisdiction.

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<sup>235</sup> The list of the members is available at [http://english.nmhh.hu/article/162718/A\\_Gyermekvedelmi\\_Internetkerekasztal\\_feladata\\_es\\_tagjai](http://english.nmhh.hu/article/162718/A_Gyermekvedelmi_Internetkerekasztal_feladata_es_tagjai).

<sup>236</sup> The recommendations are published at [http://english.nmhh.hu/article/184882/A\\_Gyermekvedelmi\\_Internetkerekasztal\\_ajanlasi\\_a\\_kiskorukra\\_karos\\_i\\_nernetes\\_tartalmak\\_es\\_szolgaltatasok\\_eseten\\_alkalmazando\\_figyelemfelhivo\\_jelzesekre\\_es\\_szuroszoftvekre](http://english.nmhh.hu/article/184882/A_Gyermekvedelmi_Internetkerekasztal_ajanlasi_a_kiskorukra_karos_i_nernetes_tartalmak_es_szolgaltatasok_eseten_alkalmazando_figyelemfelhivo_jelzesekre_es_szuroszoftvekre).



However, the biggest Hungarian news portals, *Index.hu* and *Origo.hu*, have their own video-sharing platforms: Index operates Indavideo<sup>237</sup> and Origo operates Videa<sup>238</sup>. As a result, the AVMSD rules will also be relevant for these national services. Both service providers are members of the Association of Hungarian Content Providers (Magyar Tartalomszolgáltatók Egyesülete), so they basically take part in the self- and co-regulatory mechanisms. A specific Hungarian situation that essentially limits the possibility of real cooperation between these players is that Index is the biggest independent news portal and Origo is owned by the Central European Press and Media Foundation<sup>239</sup>, the main player of the pro-government media. The political fragmentation of the media market poses a high risk to effective self- or co-regulation in any fields.

### 3.5.4.1. State of implementation of the new AVMSD rules

In June 2019, the Hungarian Government submitted a bill to amend certain laws regulating the media services,<sup>240</sup> and it was adopted in July.<sup>241</sup> An essential part of the amendment aims at implementing the new AVMSD rules.

However, according to the explanation of the law, video-sharing platforms will be regulated by the Law on Information Society Services and Electronic Commerce. The explanation of the law interprets the nature of these services as basically hosting providers in terms of the E-Commerce Directive,<sup>242</sup> and the rules governing their activity are not content-related but only concern the organisation of their stored content. Therefore, the Media Act will only define the concept of this kind of service and expand the competences of the National Media and Infocommunication Authority to the procedures concerning video-sharing platforms.<sup>243</sup> However, the amendment to the Law on Information Society Services and Electronic Commerce has not yet been submitted, so detailed rules are not yet known.

Otherwise, the amendment extends the possibility of applying a co-regulatory approach to new fields. In the future, the enforcement of the rules on commercial communications for alcoholic beverages distributed by on-demand audiovisual media services will be carried out in the framework of the co-regulatory system, based on a new agreement between the regulatory body and a self-regulatory body. This law implements the new Article 9, section 3 AVMSD, in accordance with which, the rules on commercial

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<sup>237</sup> See: <https://indavideo.hu/>.

<sup>238</sup> See: <https://videa.hu/>.

<sup>239</sup> Polyák, G., How Hungary shrunk the media, European Centre for Press and Media Freedom, <https://www.ecpmf.eu/news/threats/how-hungary-shrunk-the-media>.

<sup>240</sup> [https://www.parlament.hu/irom41/06355/06355.pdf?fbclid=IwAR3yoea2P-ijWhunUk1Rjj\\_0HeHNfBlg8ovT217A1kBDzYobhOhCxyjl4s](https://www.parlament.hu/irom41/06355/06355.pdf?fbclid=IwAR3yoea2P-ijWhunUk1Rjj_0HeHNfBlg8ovT217A1kBDzYobhOhCxyjl4s).

<sup>241</sup> Act LXIII of 2019 on the amendment of certain laws regulating the media services.

<sup>242</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, OJ L 178, 17.7.2000, p. 1–16, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031>, in particular electronic commerce, in the Internal Market.

<sup>243</sup> See page 41 of the bill.



communication distributed by on-demand audiovisual media services for foods and beverages that may damage the health of minors will also be enforced by the co-regulatory system. However, the amendment modifies the general rules on the compulsory content elements of the code of conduct. In the future, the code should also regulate how to ensure the regular, transparent and independent monitoring and evaluation of the achievement of its objectives,<sup>244</sup> as well as regulate the systematic, transparent and independent monitoring and evaluation of the achievement of its objectives.

This implementation does not depart from the principle of the Media Law that linear media services are not subject to co-regulation.

As concerns the protection of minors, the amendment complements the law, in line with the AVMSD. The following points are concerned:

- the personal data of minors collected or generated by the media service provider cannot be used for commercial purposes,
- the protection of minors from commercial communication for harmful foods and beverages,
- a prohibition on the interruption of programmes targeted directly at minors below 14 years of age.

As for audiovisual commercial communication, the amendment makes it clear that product placement is legal, with the exceptions provided in the AVMSD. Although the law implements a more flexible calculation of advertising time (new AVMSD Article 23), it proposes stronger regulation. Advertising time may not exceed the limit of 20% within the period from 6 a.m. to 6 p.m. and within the period from 6 p.m. to midnight. The separation of both periods provides more flexibility for media providers, but the period without any limitations on advertising time is shorter than proposed in the amended AVMSD.<sup>245</sup>

## 3.6. IT - Italy

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### 3.6.1. Introduction

Self- and co-regulation have traditionally had a limited role in Italy, except in specific sectors such as industrial relations (collective bargaining), journalism (freedom of the press) and advertising. Recourse to self- and co-regulation instruments has become increasingly frequent only since the early 2000s.

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<sup>244</sup> Article 4a, section 1, point c of the AVMSD.

<sup>245</sup> According to the AVMSD, there are no limits between 11 p.m. and 7 a.m.



Italy has long been characterised by regulatory hypertrophy, leading to the chronic underenforcement of statutory provisions. This trend has caused extensive recourse to sanctions (even criminal sanctions) in regulatory schemes and the general notion that a rule without a sanction is a somewhat imperfect or incomplete rule (*leges imperfectae* in Ulpianus' trichotomy). Against this background, it is no wonder that self- and co-regulation, which rely on moral suasion and spontaneous compliance, have traditionally been regarded as inadequate regulatory instruments.

Yet, recourse to self- and co-regulation is entirely consistent with the Italian Constitution. Article 1 thereof provides that sovereignty belongs to the people, who exercise it in the forms and within the limits set in the Constitution itself. In this connection, Article 118 of the Italian Constitution provides that “the State, the Regions, the Provinces, the Metropolitan Cities and the Municipalities shall promote the citizens' private initiative, either in individual or associate form, in the pursuit of activities of general interest, on the basis of the principle of subsidiarity.” As regulation is a general interest activity, its exercise *by* the citizens (self-regulation) or *with* the citizens (co-regulation) is part and parcel of the principle of subsidiarity and is usually referred to as the 'horizontal' dimension of that principle.

Thus, although self- and co-regulation cannot be regarded as an Italian traditional regulatory technique, their introduction into the Italian legal system, often prompted by EU legislative instruments, did not encounter significant resistance from courts and legal scholarship.

### 3.6.2. Self- and co-regulation in the area of advertising

As far as the regulation of advertising is concerned, regard must be had to the Institute for Advertising Self-Regulation and the Permanent Observatory on Product Placement. A “Self-regulation code for tv sales” of astrology, ceromancy, and similar services<sup>246</sup> has also been in place since 2002, but in view of its specific remit, for reasons of space, it will not be the subject of this report.

#### 3.6.2.1. The Institute for Advertising Self-Regulation (Istituto dell'Autodisciplina Pubblicitaria)

The Institute for Advertising Self-Regulation (Istituto dell'Autodisciplina Pubblicitaria, hereafter: IAP) is a non-profit organisation with legal personality. The IAP is responsible for updating, monitoring and enforcing the Commercial Communication Self-Regulation Code (Codice di Autodisciplina della Comunicazione Commerciale, hereafter: CCSC).<sup>247</sup> The IAP is also responsible for the settlement of disputes which may arise from a breach of the CCSC

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<sup>246</sup> The Code is available (in Italian) at [http://www.ispettoratocomunicazioni.toscana.it/index/09/televend\\_cod.pdf](http://www.ispettoratocomunicazioni.toscana.it/index/09/televend_cod.pdf).

<sup>247</sup> The latest version of the Code is available in Italian at: <https://www.iap.it/codice-e-altre-fonti/il-codice/>, and in English at: <https://www.iap.it/about/the-code/?lang=en>.

provisions. Two IAP organs carry out the monitoring and enforcement activity: the Review Board (*Comitato di controllo*) and the *Giuri*, which acts as the IAP's jurisdictional body.

The CCSC, adopted in 1966 as the 'Advertising Self-Regulation Code' (*Codice dell'Autodisciplina Pubblicitaria*), is the earliest example of self-regulation in the media sector in Italy. Since then, the Code has been updated several times in order to take into account the developments which have occurred in the advertising sector. The latest edition of the Code, the 66<sup>th</sup>, entered into force on 29 April 2019.

The CCSC signatories include broadcasters (including Rai, Mediaset, Sky and Telecom Italia Media), local broadcasters' associations (for example, Aeranti-Corallo and Federazione Radio Televisioni), and advertising agencies and associations (for example, ASSOCOM and UNICOM). The CCSC's aim is to ensure that commercial communication is fair, truthful, and correct.

The CCSC is mainly an instance of self-regulation in that it has no link with statutory regulation, and it is binding only on its signatories. Nonetheless, interactions exist between self-regulatory and statutory rules in specific areas, such as prior authorisation for the advertising of non-prescription pharmaceutical products.

### 3.6.2.2. The Permanent Observatory on Product Placement

Section 40bis(5) of the Consolidated Law on Audiovisual and Radio Media Services (CLARMS)<sup>248</sup> entrusts the implementation of the provisions on product placement set out in the preceding paragraphs of Section 40bis CLARMS to the industry through the adoption of self-regulatory instruments. In its Decision No. 19/11/CSP of 20 January 2011, the Italian Regulatory Authority (Autorità per le Garanzie nelle Comunicazioni, AGCom) set up the Permanent Observatory on Product Placement, which is not *stricto sensu* a self-regulation "institution", but rather a contact point or a forum where AGCom and the relevant stakeholders can discuss issues arising from the practical implementation of product placement, as well as the compatibility of various forms of product placement with EU and domestic legislation.

The Permanent Observatory on Product Placement is chaired by the Head of the Contents and Programme Requirements Unit within AGCom's Audiovisual and Multimedia Contents Directorate. A document attached to Decision No. 19/11/CSP sets out the Observatory's working procedures and mission. In particular, this document encourages providers of linear and non-linear audiovisual media services, associations of national and local broadcasters, advertising agencies, and other stakeholders to participate in the Observatory's activities. Furthermore, self-regulatory organisations, public and private non-profit bodies having a specific technical expertise in product placement, and consumers' and users' associations are invited to liaise with the Observatory.

Already on 25 October 2010, AGCom adopted a notice defining the scope and guiding principles of self-regulation in the area of product placement. That notice clearly

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<sup>248</sup> Legislative Decree No. 177 of 31 July 2005, as subsequently amended.



stated that the adoption of self-regulation instruments by broadcasters was a precondition for them to lawfully engage in product placement. In the context of two infringement proceedings against RAI,<sup>249</sup> AGCom clarified its role *vis-à-vis* this self-regulation process: AGCom is not responsible for monitoring compliance by media service providers with their self-regulation instruments, as doing so would imply a spillover from “self-regulation” to “co-regulation”; AGCom’s task, instead, is to verify whether those self-regulation instruments are in keeping with the rules and principles on product placement laid down in the CLARMS.

It also flows from the “self-regulatory” nature of the process referred to in Section 40bis(5) CLARMS that the Permanent Observatory has no competence to lay down a Product Placement “Code” applicable to all broadcasters (as that would be a co-regulatory exercise), but must only act as a contact point where broadcasters can share and discuss best practices.

Established in 2011, the Observatory was not operational between July 2014 and July 2018. The Observatory’s last meeting took place on 29 November 2018.<sup>250</sup>

### 3.6.3. Self- and co-regulation in the area of the protection of minors in the audiovisual media

As far as the protection of minors is concerned, the main instance of co-regulation is the ‘Media and Minors’ Code and its Monitoring Committee. In 2014, AGCom established the Observatory on Minors’ Fundamental Rights on the Internet, with talk of analysing the habits of users and laying down guidelines that may serve as sources of inspiration for self-regulatory or co-regulatory instruments. AGCom published some of the results of this initiative in its White Paper “Media and Minors 2.0”.<sup>251</sup>

#### 3.6.3.1. The Monitoring Committee of the ‘Media and Minors’ Self-Regulation Code

This Monitoring Committee is responsible for the implementation and the enforcement of the ‘Media and Minors’ Self-Regulation Code (*Codice di Autoregolamentazione ‘Media e Minori’*, hereafter: the MMSC).<sup>252</sup> The Monitoring Committee is composed of representatives

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<sup>249</sup> AGCom Decision Nos. 162/11/CSP and 192/11/CSP.

<sup>250</sup> AGCom Notice of 20 November 2018.

<sup>251</sup> Available at <https://www.agcom.it/documents/10179/9285349/Documento+generico+16-01-2018/17e4f243-daa2-435f-a78f-b1e30755edbc?version=1.0>.

<sup>252</sup> The original denomination of the MMSC was ‘TV and minors’ Self-Regulation Code (*Codice di autoregolamentazione TV e minori*). In view of the adoption of the AVMSD, Article 6, paragraph 1 of the Decree of the President of the Republic 14 May 2007, No. 72, changed the name of the Monitoring Committee to “Monitoring Committee of the ‘Media and Minors’ Self-Regulation Code”. The MMSC, however, still applies to linear audiovisual media services only. The full text of the MMSC is available here:



of broadcasters, institutions, and viewers. The Monitoring Committee is funded by contributions from broadcasters' associations. The Ministry of Communications provides both staff and facilities to the Surveillance Committee.

The MMSC's signatories include AGCom, the National Council of Users, the Italian PSM, major commercial broadcasters, as well as a number of broadcasters' associations. According to its preamble, the 'Media and Minors' Code is aimed at the protection of the mental and moral integrity of children, with a special commitment to the safeguard of younger children (0-14 years old). Therefore, the Code provides a comprehensive set of rules concerning the participation of children in television broadcasts and the contents of TV programmes.

The MMSC lays down some general principles which apply to all TV programmes (the prohibition to show children who were perpetrators, witnesses, or victims of a crime, etc.), as well as different sets of detailed provisions applying to certain timeframes (for example, "TV for children" or "Protected timezone", spanning from 4 p.m. to 7 p.m. and "TV for everyone", spanning from 7 a.m. to 10.30 p.m.).

As for television advertising, the MMSC lays down some general provisions as well as specific rules divided into three increasing levels of protection: "General Protection", "Enhanced Protection" and "Specific Protection".

Although the CCSC was drafted in 2002 as a self-regulation instrument among broadcasters, it acquired co-regulatory status in 2004, when the Gasparri Law required all broadcasters – not just those who had pledged to abide by the Code – to comply with the provisions on the protection of minors set out in the Code.<sup>253</sup> Article 34(6) CLARMS currently sets out an equivalent requirement.

Article 35(1) CLARMS expressly provides that the Monitoring Committee and AGCom's Media Services Directorate must cooperate in monitoring compliance with the provisions designed to protect minors, also by reporting suspected infringements.<sup>254</sup> This cooperation is, in practice, twofold. Firstly, the Monitoring Committee forwards to AGCom its decisions (*delibere di risoluzione*) establishing a breach of the MMSC on the part of a broadcaster, so that AGCom may open an infringement proceeding against that broadcaster; on the basis of the results of the investigation, AGCom may either resolve not to take further action or impose a sanction on the wrongdoer. Secondly, if the Monitoring Committee becomes aware of a violation of a statutory provision designed to protect minors over which the Committee has no enforcement powers (for example, promotional announcements for pornographic channels or hotlines, inappropriate late night broadcasts, etc.), the Monitoring Committee, following a summary assessment, may submit a complaint (*segnalazione preliminare*) to AGCom, which will follow the procedure outlined above.

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[https://www.mise.gov.it/images/stories/mise\\_extra/codice-tv-minori-pdf.pdf](https://www.mise.gov.it/images/stories/mise_extra/codice-tv-minori-pdf.pdf). For an unofficial translation, see <http://goo.gl/vZRh7>.

<sup>253</sup> Section 10(1) of Law No. 112 of 3 May 2004.

<sup>254</sup> Section 6.3 MMSC also requires the Surveillance Committee to forward its decisions to AGCom and to report to AGCom infringements of the MMSC on the part of broadcasters.



### 3.6.4. New challenges for video-sharing platforms

Although the debate on the implementation of 2010/1808 has not yet started, as its transposition has not yet been tabled by the Italian Parliament, by and large, some of the challenges in implementing the relevant provisions of the above directive concern the sheer number of VSPs, their inherently transnational nature, and the lack of a general consensus about the expediency of making VSPs accountable, for instance, by extending some of the existing rules on audiovisual media services to include them.

Luckily, these factors are inherently transient in nature, thus we can anticipate that when the time for the implementation of Directive 2018/1808 comes, the debate on self- and co-regulation will be rekindled and all options will be on the table.

### 3.6.5. State of implementation of the new AVMSD rules

To date, the implementation process of Directive 2018/1808 has not yet started. This will require the adoption by the Italian Parliament of a statute entrusting the government with the power to implement the directive within the framework of some general guidelines set out in the delegation statute. However, the text of the last delegation bill, currently being examined by the Italian Parliament, makes no reference to Directive 2018/1808.

Among the existing self- and co-regulation bodies, the most active and responsive to statutory updates appears to be the IAP, which periodically updates its self-regulation code, as noted above.

## 3.7. PL - Poland

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### 3.7.1. Introduction

#### 3.7.1.1. Constitutional background

The Constitution of the Republic of Poland<sup>255</sup> does not refer specifically to self- and/or co-regulation. Legal instruments of this kind do not belong to the sources of universally binding law as listed in Article 87 of the Constitution. However, with reference to, *inter alia*,

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<sup>255</sup> The Constitution of the Republic of Poland, of 2 April 1997, Official Journal (*Dziennik Ustaw – Dz.U.*) No. 78, item 483. English translation: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.



the provision on internally binding acts, such as resolutions of the Council of Ministers or orders of the Prime Minister and ministers, which shall bind only units subordinated to the issuing organ (Article 93 of the Constitution), the Constitutional Tribunal considered the binding force of acts enacted by bodies of professional self-government societies, such as councils of advocates and legal advisers. The Court concluded that such acts, *per analogiam* with Article 93 of the Constitution, may have only internally binding power, that is, they may bind only members of a given society (for example, advocates, legal advisers and relevant trainees), but may not limit the freedom of third parties, such as candidates for the traineeship preceding the bar exam (*aplikacja*), as freedom to choose and pursue one's profession may only be limited by statutory acts.<sup>256</sup> This conclusion is not affected by the constitutional provision on self-governments for professions in which the public places its confidence, which shall concern themselves with the proper practice of such professions (Article 17.1 of the Constitution). It is, however, recognised that such professional self-governments may enact binding rules for their members, including codes of professional ethics. The Constitution also allows for the creation, by means of statute, of other forms of self-government, in particular economic self-governments; they shall not infringe the freedom to practice a profession nor limit the freedom to undertake economic activity (Article 17.2). Whether such organisations may also establish internally binding rules applicable to their members would depend in particular on the legal statutory basis for the adoption of such rules and for the organisational subordination of their addressees (for instance, members).<sup>257</sup> If these conditions are not met, organisations grouping economic entities may initiate and prepare self-regulatory instruments, which then require the voluntary acceptance of the entities that are to be formally bound by the given instrument. Broad acceptance of self-regulation by the main stakeholders is thus essential for its effectiveness.

### 3.7.1.2. Self-regulation in the advertising and television sectors before statutory rules on self-regulation

Self-regulation in the field of advertising and media appeared before the statutory regulation of such instruments in law. The first codes of conduct or ethics in the field of advertising were adopted by some associations active in the sector in the 1990s. The most broadly applied code was that of the Code of Conduct in the Field of Advertising of 1993,

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<sup>256</sup> Judgement of the Constitutional Tribunal of 18 February 2004, P 21/02. English summary: [http://trybunal.gov.pl/fileadmin/content/omowienia/P\\_21\\_02\\_GB.pdf](http://trybunal.gov.pl/fileadmin/content/omowienia/P_21_02_GB.pdf).

The Tribunal, in the judgment, declared as unconstitutional the statutory provisions allowing respective councils of advocates and/or legal advisers to specify the maximum available number of traineeships for advocates (as not compliant with Article 2 – rule of law and 65.1 – freedom of profession in conjunction with Art.31.3. – proportionality) and the rules applicable to competitive examinations for respective traineeships (as not compliant with Article 87.1 – sources of universally binding law).

<sup>257</sup> This assumption is built upon the *per analogiam* application of Article 93 of the Constitution (concerning internally binding acts of state administration) as interpreted by the Constitutional Court in the judgment of 28 June 2000, K 25/99. In its judgment, the Court found sufficient even functional subordination (of banks in relation to the Central Bank of Poland), however restricted this to subordination to a constitutional public institution performing public policy tasks emanating from the Constitution.



which was adopted by the Polish branch of the International Advertising Association, based on the code by the International Chamber of Commerce in Paris.<sup>258</sup> This Code of Conduct, which deals in particular with advertising aimed at children, misleading advertising, comparative advertising and limitations of the use of someone else's distinctive signs and goodwill, did not provide for the supervision of compliance with its rules, nor for dispute resolution mechanisms. Such measures appeared later, after the establishment of the Advertising Council (Rada Reklamy) in 1997, and became more broadly applied after its transformation into the Union of Associations Advertising Council (Związek Stowarzyszeń Rada Reklamy) in 2006. Through adjudication panels of the Committee of Advertising Ethics (Komisja Etyki Reklamy), it handles complaints about advertisements from consumers and competitors and offers copy advice (or confidential assessments) on the compliance of an advertisement with the Code of Advertising Ethics.<sup>259</sup>

Self-regulation in the field of audiovisual media started with the “Friendly Media” (*Przyjazne Media*) agreement concerning the protection of minors in TV programmes, which was concluded in 1999 between the major TV broadcasters active at that time on the Polish market.<sup>260</sup> The work on the agreement was initiated, organised and supported by the National Broadcasting Council (Krajowa Rada Radiofonii i Telewizji – KRRiT). KRRiT, however, was not satisfied with the fulfilment of the agreement by its signatories and judged that the first voluntary agreement involving Polish TV broadcasters did not meet its objectives and must be replaced by the legal provisions of the Broadcasting Act, as revised on 2 April 2004, and the KRRiT regulation on specific conditions for the qualification of programmes given different age categories of minors and symbols indicating such programmes.<sup>261</sup>

### 3.7.1.3. Statutory framework for self-regulation in general and in the audiovisual media sector in particular

The statutory framework for self-regulation legally relevant for consumer protection, including in the domain of advertising, was created with the implementation of Directive 2005/29/EC<sup>262</sup>, which was established by the Act of 23 August 2007 on Combating Unfair Commercial Practices (UCP)<sup>263</sup>. The act defines in Article 2, point 5 a code of conduct (*kodeks*

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<sup>258</sup> I. Wiszniewska, *Polskie prawo reklamy*, Warszawa 1998, p. 149. The text of the Code of Conduct – *ibidem*, p. 246 and ff.

<sup>259</sup> Information on the Advertising Council, and relevant documents, including the Code of Advertising Ethics, complaints handling rules, Statutes of the Union – are available in English at: <https://www.radareklamy.pl/english>.

<sup>260</sup> TVP, Polsat, TVN, Nasza Telewizja, TV Niepokalanów, Canal+, PTK, Wizja TV.

<sup>261</sup> *Informacja o realizacji Porozumienia Polskich Nadawców Telewizyjnych „Przyjazne Media”*, KRRiT, p. 3, [http://www.krrit.gov.pl/Data/Files/\\_public/pliki/publikacje/analiza2002\\_01.pdf](http://www.krrit.gov.pl/Data/Files/_public/pliki/publikacje/analiza2002_01.pdf) (the text of the agreement is enclosed with this document, see p. 4 and ff.).

<sup>262</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 11.06.2005, L 149/22.

<sup>263</sup> Dz.U. of 2007, No 171, item 1206; consolidated text: Dz.U. of 2017, item 2070. The English translation by the Competition Authority (UOKiK) is available at: [https://www.uokik.gov.pl/consumer\\_protection.php](https://www.uokik.gov.pl/consumer_protection.php).



*dobrej praktyki*) as “a set of rules of conduct, in particular ethical and professional standards, of traders who undertook to be bound by them in relation to one or more commercial practices”. Failure to follow a code of conduct, which was voluntarily signed by the trader, if the trader informs, as part of his/her commercial practice, that he/she is bound by the code of conduct, may constitute unfair commercial practice by misleading action (Article 5.2, point 4 of the UCP Act). A trader claiming that he/she has undertaken to be bound by a code of conduct, when he/she has not, and claiming that a code of conduct has been endorsed by a public or other body, when it has not, shall be regarded in all circumstances as misleading action (Article 7, points 1 and 3 of the UCP Act). Creating (by an entity responsible for preparing and implementing or for the surveillance of compliance with the code) and/or using a code of conduct, the provisions of which are contrary to law, shall also be regarded as an unfair commercial practice (Article 11 of the UPC Act). The Act provides for sanctions: civil remedies in the case of unfair commercial practices, including the discontinuation of a practice; the removal of its consequences; an appropriate statement; damage redress; the invalidation of a contract; and payment in support of a social cause related to culture, national heritage or consumer protection. Claims may be brought by consumers whose interests have been jeopardized or violated, as well as by the Ombudsman, the Financial Ombudsman, consumer protection organisations or district consumer ombudsmen (Article 12). Unfair commercial practices, including those related to codes of conduct, may be regarded as a practice infringing collective consumer interests if detrimental to such interests, and, in consequence, be subject to sanctions, namely orders and administrative penalties applied by the competition authority – President of the Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów – UOKiK), including a fine of up to 10% of the previous financial year’s turnover.<sup>264</sup>

Legal provisions on self- and co-regulation in the field of audiovisual media were introduced by two revisions of the Broadcasting Act<sup>265</sup> implementing the Audiovisual Media Services Directive, adopted respectively in 2011 (with respect to television broadcasting)<sup>266</sup> and 2012 (regarding on-demand audiovisual media services).<sup>267</sup> On this basis, the provision of Article 3a was added to the Broadcasting Act:

*Article 3a 1. With a view to performing the obligations set out in this Act, in particular in Art. 14a, Art. 16b.3a, Art. 18a, Art. 47e and Art. 47g, media service providers may develop and accede to codes of conduct, as defined in the Act on (...) Unfair Market Practices (...).*

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<sup>264</sup> The Act of 16 February 2007 on the accessibility of programme services to people with visual and hearing disabilities, Competition and Consumer Protection, Dz.U. of 2007, No. 50, item 331; consolidated text: Dz.U. of 2019, item 369; see in particular Articles 24-28, 100-105, 106-113. English translation by UOKiK: [https://www.uokik.gov.pl/consumer\\_protection.php](https://www.uokik.gov.pl/consumer_protection.php).

<sup>265</sup> The Broadcasting Act of 29 December 1992, Dz.U. of 1993, No. 7, item 34; consolidated text: Dz.U. of 2019, item 361, 643. English translation by KRRiT: [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/angielska/Documents/Regulations/ustawa-o-radiofonii-i-telewizji-2016-eng\\_en.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/angielska/Documents/Regulations/ustawa-o-radiofonii-i-telewizji-2016-eng_en.pdf).

<sup>266</sup> The Act of 25 March 2011 amending the Broadcasting Act, Dz. U. of 2011, No. 85, item 459; it entered into force on 23 May 2011.

<sup>267</sup> The Act of 12 October 2012 amending the Broadcasting Act, Dz.U. of 2012, item 1315; it entered into force on 28 February 2013.



*2. Acting in favour of on-demand audiovisual media services, the National Broadcasting Council, in cooperation with the minister responsible for information technology, will initiate, support and promote the development of codes of conduct as referred to in paragraph 1.*

The provisions referred to in paragraph 1 of Article 3a, as the most important fields for the potential application of self-regulatory instruments, concern respectively:

- the identification of programme services and broadcasters (Article 14a);
- commercial communications for unhealthy food accompanying children's programmes (Article 16b.3a);
- the accessibility of programme services and on-demand audiovisual media services to people with visual and hearing disabilities (Article 18a and Article 47g);
- measures to protect minors regarding the contents of on-demand audiovisual media services (Article 47e).

However, these fields are listed only as examples (*in particular*), hence other obligations regulated by the Broadcasting Act, if fulfilment of them constitutes "commercial practice", in particular other aspects of commercial communications and the protection of minors, may also be subject to self-regulation.

Together with the addition of Article 3a, the statutory list of the National Broadcasting Council's tasks was broadened by its role in initiating and supporting self-regulation and co-regulation in the area of the provision of media services (Article 6, paragraph 2, point 12). Furthermore, KRRiT's monitoring competences were broadened by the fact that its chairperson was empowered to require a media service provider to provide materials, documentation and information to the extent necessary to supervise the provider's compliance also with the provisions of any self-regulatory instruments binding upon it; previously, this had only concerned compliance with the Broadcasting Act and the licence to broadcast (Article 10, paragraph 2).

The relation between quoted provisions (Article 3a, Article 6, paragraph 2, point 12, and Article 10, paragraph 2) is not entirely clear. On the one hand, the legislator uses the term code of conduct (*kodeks dobrej praktyki*) with reference to the UCP Act, which is an instrument of self-regulation, with the role of KRRiT being to initiate, support and promote the development of such codes, along with some competences to monitor compliance with self-regulation; on the other hand, KRRiT is empowered to initiate and support not only self-, but also co-regulation. The latter is not defined, nor does the law provide for measures to apply it. In consequence, KRRiT assumes that there is no sufficient legal basis for the development of co-regulatory instruments given KRRiT's role.<sup>268</sup> Neither has it been determined how KRRiT's "cooperation" with the relevant minister (competent for IT) regarding codes of conduct for on-demand services should be implemented and what form it should take (for example, agreements, opinions, or consultations). It is understood in

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<sup>268</sup> A. Ogródowczyk, L. Żebrowska, E. Murawska-Najmiec, K. Twardowska, *Samoregulacja i współregulacja jako metoda rozwiązywania napięć w relacjach rynek-regulator*, KRRiT, Warszawa 05.2018, available at: <http://www.krrit.gov.pl/dla-mediow-i-analitykow/publikacje/analizy/>.

doctrine that this cooperation may be of an *ad hoc* nature or may be more systematic (for example, leading to administrative agreements). The initiative for such cooperation should be taken by KRRiT, as tasks regarding codes of conduct are attributed to this body.<sup>269</sup>

The methodology used by the Polish legislator in the Broadcasting Act to encourage self-regulation consists, in most cases, of four elements: 1) the general obligation under the law for media service providers to achieve certain public policy objectives; 2) the possibility of self-regulation through codes of conduct in general, but with listed examples of where it would be particularly welcome; 3) KRRiT's role to initiate, support and promote such codes of conduct, together with monitoring instruments; 4) an optional legislative delegation for KRRiT to issue a regulation setting more detailed rules for the fulfilment of the obligation under the law (in case of lack of satisfactory self-regulation). This methodology has so far proved to be quite effective in encouraging self-regulation and allowing for its monitoring by KRRiT.

In effect, in recent years, the following self-regulatory instruments have been adopted by audiovisual media service providers, initiated, supported and promoted by KRRiT:

- The broadcasters' agreement of 5 June 2013 on accessibility measures for visually- or hearing-impaired persons in television programmes;<sup>270</sup>
- The code of conduct on 26 June 2014 containing detailed rules for the protection of minors in on-demand audiovisual media services;
- The agreement between television broadcasters on 29 October 2014 setting the principles of broadcasting advertisements and the identification of sponsors concerning foods and beverages containing ingredients of which excessive intakes in an everyday diet are not recommended.

## 3.7.2. Self-regulation in the area of advertising

In the field of advertising, self-regulation in Poland has been developed both at the general/horizontal level and at the sector-specific level with regard to the television broadcasting of commercial communications for certain products.

### 3.7.2.1. Code of ethics in advertising

As already mentioned, the horizontal Code of Ethics in Advertising (CEA) was adopted and is applied within the *Rada Reklamy* (Union of Associations Advertising Council). The existing

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<sup>269</sup> S. Piątek in: S. Piątek (Ed.), W. Diomdziora, K. Wojciechowski, *Ustawa o radiofonii i telewizji. Komentarz*, Warszawa 2014, p. 30.

<sup>270</sup> As of 1 January 2019, the provision of the Broadcasting Act on accessibility for visually- or hearing-impaired people (Article 18a) has been amended and supplemented by detailed regulation by KRRiT. New rules provide for higher standards to be progressively implemented, going beyond the self-regulation of 2013, and in doing so, making it obsolete.



text of the Code dates from 19 January 2018,<sup>271</sup> however, it is partially based on earlier texts. Broad acceptance of the Code by the main stakeholders is ensured by the fact that sectoral organisations representing different participants in the Polish advertising market are members of the Advertising Council: advertisers, advertising agencies, media houses and the media.<sup>272</sup> Some of the main stakeholders are present among advertisers, namely producers of food, including chocolate and sweets; beverages; cosmetics and detergents; and beer and spirits. However, the biggest advertisers' sector in Poland – the pharmaceutical sector – does not participate in the system. Self-regulation in the area of advertising functions through a system of certificates, confirming the obligation to comply with the Code. Participants who adhere to self-regulation end up with an Advertising Council licence agreement to use the signs “I advertise ethically” (*Reklamuję etycznie*) and “Signatory of the CEA” (*Sygnatariusz KER*); the agreement determines the rights and obligations of the signatories, and also includes a description of the procedure applied in cases dealt with by the Commission of Advertising Ethics. The system of self-regulation in the area of advertising is financed by stakeholders (individual advertisers, agencies, and media organisations, rather than members of the Advertising Council, which is made up of associations representing the advertising industry) through payments for certificates, depending on advertising expenses or revenues.

The Code of Ethics in Advertising includes basic principles of advertising (a ban on discrimination, incitement to violence, invoking anxiety or fear, abusing the public trust and misleading the public; a duty of identification; rules on comparative advertising, etc); principles of advertising aimed at children; and advertising which includes ecological information, sponsorship, direct marketing, and sales promotion. In addition, there are two sector-specific annexes: 1) standards for the advertising of beer; 2) standards for food advertising aimed at children.

The monitoring and evaluation of the fulfilment of standards set by the Code is guaranteed by the system of complaints and copy advice.

Complaints may be made by consumers and competitors. Complaints by consumers and by members are handled free of charge. Complaints by other enterprises are subject to a fee. Having received a complaint, the Council of Advertising invites the advertiser concerned to respond within 10 days. After this period, the case is referred to an

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<sup>271</sup> The English text is available at:

[https://www.radareklamy.pl/images/Dokumenty/CODE\\_OF\\_ETHICS\\_IN\\_ADVERTISING\\_19.01.2018.pdf](https://www.radareklamy.pl/images/Dokumenty/CODE_OF_ETHICS_IN_ADVERTISING_19.01.2018.pdf).

<sup>272</sup> Association of Marketing Communication SAR (*Stowarzyszenie Komunikacji Marketingowej SAR*), International Advertising Association Polska, Union of Employers of Brewing Industry in Poland Polish Breweries (*Związek Pracodawców Przemysłu Piwowarskiego Browary Polskie*), Association of Employers of the Internet Industry Interactive Advertising Bureau (IAB) Polska (*Związek Pracodawców Branży Internetowej IAB Polska*), Polish Federation of Food Industry Union of Employers (*Polska Federacja Producentów Żywności Związek Pracodawców*), POLBISCO Association of Polish Producers of Chocolate and Sweets (*Stowarzyszenie Polskich Producentów Wyrobów Czekoladowych i Cukierniczych*), Polish Association of Cosmetics and Detergent Industry (*Polskie Stowarzyszenie Przemysłu Kosmetycznego i Detergentowego*), Polish Union of Cosmetics Industry (*Polski Związek Przemysłu Kosmetycznego*), Union of Private Media Employers (*Związek Pracodawców Prywatnych Mediów*).



adjudication panel (3 persons) of the Committee of Advertising Ethics.<sup>273</sup> It delivers an adjudication within 30 days on average.<sup>274</sup> Appeals are handled by the appeal panel. If the advertisement which is the subject of the complaint does not originate from a signatory of the Code of Ethics, the enterprise in question is asked whether it agrees to adjudication as for signatories. If not (or in case of no response within 10 days), the proceedings are continued without the participation of the enterprise and the adjudication panel enacts only an opinion.

Sanctions are rather indirect. The adjudication panel may set a deadline for the advertiser to change the advertisement or stop its dissemination. The panel also informs the agency that prepared the advertisement and the media disseminating it of the adjudication, if they are signatories to the system, with the demand that the advertiser be called to implement the adjudication. In case of persistent or manifest infringements of the Code, the panel may decide to suspend or deprive the advertiser of the certificate of ethical advertising. The panel may also decide to publish its adjudication in the sectoral media if justified by consumers' interest or other substantial public interest.

In 2017, 323 complaints were submitted to the Council of Advertising concerning 246 advertisements, while in 2016, there were 707 complaints on 169 advertisements; most of the complaints in 2017 were made by consumers, only 3 were made by enterprises. The complaints mainly concerned advertising on: the Internet (105 cases, 127 complaints, compared with 69 cases in 2016); television (67 cases, 81 complaints); outdoor (35 cases, 73 complaints); and radio (15 cases, 17 complaints). The dynamics of complaints/cases per type of media show the growing importance of the Internet. Complaints concerned mainly social responsibility, including discrimination and the protection of minors (45% of cases in 2017, 42% in 2016) and misleading the public (28% of cases in 2017, 42% in 2016). As regards categories of products and services, the highest number of complaints in 2017 concerned dietary supplements (41) and entertainment services (38). Of the cases adjudicated in 2017, the panels found that a third of them infringed the Code, and two thirds of the complaints were dismissed.<sup>275</sup>

Copy advice is a non-binding opinion that may include recommendations on the conformity of an advertisement with the Code of Ethics, given by the secretariat of the Council of Advertising, which is composed of at least 2 persons, including the director general or his/her deputy. Copy advice is free for members and paying for others. It is given within 2-3 days. The Committee of Ethics is not bound by copy advice, though the adjudication panel is informed about it.

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<sup>273</sup> The Committee has 30 regular members elected by the General Assembly of the Council of Advertising.

<sup>274</sup> According to information on the website of the Council of Advertising: <https://www.radareklamy.pl/english>.

<sup>275</sup> According to the most recent statistics publicly available on the website of the Council of Advertising: <https://www.radareklamy.pl/aktualnosci/co-nas-razi-w-reklamie>.

### 3.7.2.2. Self-regulation of television broadcasters on the advertising of unhealthy foods

On 29 October 2014, the major television broadcasters<sup>276</sup> concluded an agreement on the broadcasting of advertisements and sponsorship identification concerning foods and beverages containing ingredients of which excessive intakes in the everyday diet is not recommended. The agreement was initiated by KRRiT, as is noted in its preamble, although the regulator is not a signatory of it.

The products covered by the agreement are defined in “Criteria of nutrition for self-regulation on foods advertising aimed at children below the age of 12 in Poland”, which was accepted by the Institute of Foods and Nutrition (Instytut Żywności i Żywienia) and the Ministry of Health.

The following products, irrespective of their specific contents, are subject to a limitation on advertising accompanying children’s programmes: 1) sugar and sugar-based products, including chocolate, jams or marmalade, and non-chocolate sweets; 2) non-alcoholic beverages; 3) potato chips and snacks based on potatoes or pastry products. Other food products are subject to the limitation, if, according to the criteria, they meet the conditions regarding calories and the presence of sodium, trans-fatty acids and sugars.

According to the agreement, television broadcasters shall demand from advertisers a declaration on the compliance of every advertisement and sponsorship identification with the Criteria of nutrition, to be broadcast before, during or after children’s programmes. Such programmes are defined as programmes that, in view of the broadcasting hours (between 6 a.m. and 8 p.m.) and content, are aimed primarily at a public (children) aged between 4 and 12 years of age. The definition in the agreement is more precise than the one in the Broadcasting Act (Article 4, point 15), as the latter does not determine those broadcasting hours which are decisive for the qualification of a programme aimed at children, nor does it define the age threshold for “children”.

With regard to the monitoring and evaluation of the fulfilment of the obligations provided for in the agreement, its text refers to cooperation with KRRiT regarding the supervision of broadcasters’ activities. According to Article 16b, paragraph 3a of the Broadcasting Act: Children’s programmes must not be accompanied by commercial communications for foods or beverages containing ingredients of which excessive intakes in the everyday diet are not recommended. Although this provision was adopted with a view to setting more specific principles through a self-regulatory code of conduct (Article 3a), the obligation established in the quoted provision is of a statutory nature. Consequently, the Chairperson of KRRiT may not only require a broadcaster to provide the materials, documentation and information necessary to supervise compliance with the Broadcasting

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<sup>276</sup> ITI Neovision, Polsat, TVP, Telewizja Puls, TVN, VIMN Poland, The Walt Disney Company. The agreement is open to other broadcasters who may join it by making a declaration. It was done by ATM Rozrywka on 5 November 2014. The Council of Advertising is among the signatories and it has contributed to the system by delivering decisions taken on the basis of standards for the advertising of foods aimed at children – annex to the Code of Ethics in Advertising.



Act and/or self-regulatory instrument binding upon it (Article 10.2), but also call a broadcaster to cease infringing practices (Article 10.3) and issue a decision ordering them to cease (Article 10.4), and, in case of failure to carry out such a decision, impose a fine (Article 54.1).<sup>277</sup>

According to the Broadcasting Act, KRRiT may issue a regulation defining the types of foods or beverages with ingredients not recommended for an everyday diet, as well as the manner of inserting commercial communications for these products into programme services so that they do not accompany children's programmes (Article 16b, paragraph 3b). This statutory delegation is facultative. KRRiT has not issued a regulation on this (optional) basis.

The practical effects of the self-regulation of the advertising of unhealthy foods were noted by KRRiT as early as 2015.<sup>278</sup> In its report for 2016, the regulator stated that in programme services for children, the advertising of products had been adjusted to the self-regulatory agreement.<sup>279</sup> In the report for 2017, however, KRRiT noted problems with the advertising of unhealthy foods accompanying children's programmes in generalist programme services, which, according to KRRiT, was related to differences on the definition of such programmes in universal channels. KRRiT also saw a problem with the advertising of fast-food products (mainly the "happy meal" offer of a well-known fast-food brand); even if advertisers did comply with the broadcasters' declarations of compliance with the nutrition criteria, KRRiT worried that the mere advertising of fast-food brands might establish bad nutritional habits in children.<sup>280</sup> Some of these problems were resolved with further practice. In general, the self-regulation of the advertising of unhealthy food is seen as a positive example of cooperation between public authorities, the advertising sector and broadcasters.

### 3.7.2.3. Advertising of dietary supplements – attempts at self-regulation

While the advertising of medical products is regulated in detail in the Pharmaceutical Law,<sup>281</sup> to which the Broadcasting Act refers,<sup>282</sup> there is no specific regulation that addresses

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<sup>277</sup> It should be noted however, that sanctions in case of infringements of Article 16b, paragraph 3a are not regulated coherently, as this provision is omitted in Article 53, which provides for sanctions for broadcasters who fail to comply with the listed obligations, while it is listed in Article 53c, which provides for sanctions for providers of on-demand services.

<sup>278</sup> Report on the activities of KRRiT in 2015 (*Sprawozdanie KRRiT z działalności w 2015 r.*), Warszawa 2016, p. 55-56, [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/komunikaty/spr-info-krrit-2015/sprawozdanie--krrit-z-dzialalnosci-w-2015-r..pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/komunikaty/spr-info-krrit-2015/sprawozdanie--krrit-z-dzialalnosci-w-2015-r..pdf).

<sup>279</sup> Report on the activities of KRRiT in 2016 (*Sprawozdanie KRRiT z działalności w 2016 r.*), Warszawa 2017, p. 43, [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/sprawozdania/spr-i-inf-2016/sprawozdanie-krrit-2016.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/sprawozdania/spr-i-inf-2016/sprawozdanie-krrit-2016.pdf).

<sup>280</sup> Report on the activities of KRRiT in 2017 (*Sprawozdanie KRRiT z działalności w 2017 r.*), Warszawa 2018, p. 34, [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/sprawozdania/spr-i-inf-2017/sprawozdanie\\_26\\_03.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/sprawozdania/spr-i-inf-2017/sprawozdanie_26_03.pdf).

<sup>281</sup> Act of 6 September 2011 Pharmaceutical Law, Dz.U. of 2001, No. 126, item 1381; consolidated text: Dz. U. of 2019, item 499; in particular, Article 2, point 32, Articles 52-64.

<sup>282</sup> Article 16b, paragraph 1, point 4 of the Broadcasting Act: 'It is prohibited to broadcast commercial communications: (...) 4) for medicinal products, to the extent regulated in the Pharmaceutical Law (...)'.



the advertising of dietary supplements. This is a matter of concern for public authorities, as commercial communications for such products have often been disseminated with a fast growth rate in recent years<sup>283</sup> and their sales are on a large scale.<sup>284</sup> Several problems concerning the advertising of dietary supplements were identified, including that of misleading the public by suggesting that they have a therapeutic effect.

Following the initiatives of public authorities, including discussions on possible legislative amendments, four organisations representing producers of health products adopted a Code of conduct on the advertising of dietary supplements at the end of 2016, however UOKiK and KRRiT assessed it as insufficient.

In response to KRRiT's initiative in 2018, television broadcasters prepared a draft self-regulatory agreement on principles concerning the broadcasting of advertisements for dietary supplements in which some solutions from the earlier Code of conduct were used. The draft agreement states, among other things, that the advertising of these products may be broadcast only if the advertisement includes the warning: *A dietary supplement does not have therapeutic properties*. Broadcasters would also commit to not broadcasting such advertisements near children's programmes. Such advertisements should not include images of persons (real or fictional) representing medical professions or their recommendations, or show places related to the pursuit of such professions. Moreover, according to the draft, an advertisement for a dietary supplement may not point out the therapeutic properties of the product, suggest its impact on the improvement of one's health, or mention the possibility of using it instead of a medical consultation or a balanced diet. KRRiT noted in its 2018 report that the draft was valuable in the light of a lack of statutory obligations for broadcasters in this field in the Broadcasting Act. According to the report, the group of major television broadcasters who initiated the work on the draft agreement, after consultations with producers of dietary supplements, encourages other broadcasters to join the initiative, which is necessary if self-regulation is to be effective. KRRiT also announced its actions to encourage radio broadcasters to take part in the agreement.<sup>285</sup>

#### 3.7.2.4. Possible self-regulation regarding the protection of children in advertising

In response to the initiative taken by KRRiT and some other public institutions, the Council

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<sup>283</sup> According to KRRiT, between 1997 and 2015, the amount of advertising for health products and medicines in general (including dietary supplements) increased twentyfold, while the total amount of advertisements tripled. While in 1997, advertisements for health products constituted 4.6% of all adverts, in 2015, 24.7% of advertising on the 4 main TV channels was for such products. KRRiT, *Leki a suplementy diety w reklamach*, 25.04.2016, <http://www.krrit.gov.pl/krrit/aktualnosci/news.2265.leki-a-suplementy-diety-w-reklamach.html>.

<sup>284</sup> According to the Supreme Audit Office (*Najwyższa Izba Kontroli* – NIK), in 2015, Poles spent PLN 3.5 billion on dietary supplements, buying 190 million packages.

<sup>285</sup> Report on the activities of KRRiT in 2018 (*Sprawozdanie KRRiT z działalności w 2018 r.*), Warszawa May 2019, p. 27-28, [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/sprawozdania/spr-2018/sprawozdanie-2018---projekt-z-28.05\\_iii\\_korekta.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/sprawozdania/spr-2018/sprawozdanie-2018---projekt-z-28.05_iii_korekta.pdf).



of Advertising prepared the draft Code on the protection of the image of children in advertising as a possible annex to the Code of Ethics in Advertising. The draft was presented to KRRiT at the end of 2018. The regulator expects the Code to be adopted with some suggested modifications.<sup>286</sup>

### 3.7.3. Self- and co-regulation in the area of the protection of minors in the audiovisual media

Following the unsatisfactory application of the first self-regulatory instrument in the field of the protection of minors in television – the TV broadcasters’ “Friendly Media” agreement of 1999 – the lawmaker introduced stricter statutory rules on the protection of minors in TV programme services. This was completed by KRRiT’s detailed regulation on the classification of programmes according to their potential harmful effect upon minors, and the classification of minors into age groups with the relevant graphic symbols. Consequently, the Broadcasting Act does not specifically foresee the development of self-regulation (codes of conduct) in the area of the protection of minors in television programmes. In consequence, the protection of minors in television is not listed among the examples of areas where codes of conduct could specifically be developed (Article 3a). Although this does not preclude self-regulation by broadcasters, it has not been developed, and the provisions of the Broadcasting Act and the regulation by KRRiT alone set the standards for the protection of minors in television programme services.

However, with regard to on-demand audiovisual media services, Article 3a, paragraph 1 of the Broadcasting Act explicitly lists the protection of minors through the application of technical security measures or other appropriate measures designed to prevent minors from receiving seriously harmful programmes, as one of the areas for self-regulation. In this field, KRRiT, in its role of initiating, supporting and promoting the development of codes of conduct, should, according to Article 3a, paragraph 2 of the Broadcasting Act, act in cooperation with the minister responsible for information technology (Minister of Digital Affairs).

The Association of Employers of the Internet Industry Interactive Advertising Bureau (IAB) Polska (Związek Pracodawców Branży Internetowej IAB Polska), in cooperation with KRRiT, prepared the Code of Conduct on Detailed Principles of the Protection of Minors in On-demand Audiovisual Media Services, which was adopted on 26 June 2014.<sup>287</sup> The Code was signed by the main stakeholders in the VOD sector,<sup>288</sup> with an estimated combined market share of over 80%.<sup>289</sup> The objective of the Code is to define the detailed requirements for technical security measures and/or other appropriate measures to protect minors against the reception of programmes or other contents which could threaten their

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<sup>286</sup> Report on the activities of KRRiT in 2018, p. 30-31.

<sup>287</sup> The text of the Code of Conduct is available at [https://www.iab.org.pl/wp-content/uploads/2014/07/iab\\_kdp\\_vod\\_maloletni\\_2014.pdf](https://www.iab.org.pl/wp-content/uploads/2014/07/iab_kdp_vod_maloletni_2014.pdf).

<sup>288</sup> Cineman, Cyfrowy Polsat, Ipla.tv, Iplex, Onet.pl Group, Wirtualna Polska Group, TVP.

<sup>289</sup> Report on the activities of KRRiT in 2018, *op.cit.*, p. 25.



physical, mental or moral development, in particular those containing pornography or exhibiting gratuitous violence (referred to in the Code as “inappropriate contents”). The Code of Conduct provides for that the provision to the public of an on-demand audiovisual media service containing such contents may take place only with the use of measures effectively verifying the age (maturity) of the user. The suggested measures involve verifying the user’s age using data from a credit card or through payment at the stage of the first attempt to access inappropriate contents. The service provider may choose another system which makes a user’s access to inappropriate contents dependent on the effective verification of his/her maturity. This is in line with the assumption of service providers’ freedom to choose a system of security measures and/or create their own measures, provided that these measures are effective in verifying the user’s age. In cases where other such measures are used, the Code provides for the duty to inform IAB Polska. Service providers, depending on technical possibilities, may set a security mode which filters inappropriate contents, the deactivation of which is possible only after verification of the user’s maturity. This should follow the entry of a PIN code or an equivalent solution. The user whose age has been verified in one of the manners described may have access to inappropriate contents in any payment model offered within the on-demand service.

Each signatory of the Code is obliged to comply with its applicable provisions and to evaluate the effectiveness of the applied measures at least once every 2 years.

The Code of Conduct is administered and monitored by IAB Polska. In case the organisation finds a serious infringement of the Code, it shall inform the signatory concerned and set the deadline to respond to and/or withdraw from the infringement. The Code provides for jurisdiction in case of infringements of the Court of Friends (Sąd Koleżeński) within IAB Polska.

Independently of the monitoring procedure within IAB, KRRiT is competent to monitor; request documents, materials and/or explanations; call on or order offenders to cease certain actions; and apply sanctions in case of infringements of Article 47e, paragraph 1 of the Broadcasting Act by providing the public with the on-demand audiovisual media service which has included seriously harmful contents for minors without applying technical security measures or any other appropriate measure to prevent minors from receiving that content. In doing so, KRRiT may refer to the agreed industry standards for such measures in the Code of Conduct.

Furthermore, as the self-regulation referred to constitutes the Code of Conduct in the meaning of the Act on Unfair Commercial Practices, sanctions provided for in it may be applied; moreover, if the scale of non-compliance with the Code results in an infringement of the collective interests of consumers, sanctions under the Act on the Protection of Consumers and Competition could also be applicable.

Article 47e, paragraph 3 of the Broadcasting Act provides for that KRRiT (in consultation with the minister responsible for IT) may issue a regulation determining the detailed conditions for the use of technical security measures or other appropriate measures aimed at preventing minors from receiving any seriously harmful content available in the catalogues of on-demand audiovisual media services. Given the level of self-regulation in this area, KRRiT has not found it necessary to issue such a regulation.

The qualification and methods of identification of programmes and other contents that may be harmful to minors (to a lesser extent than seriously harmful content such as pornography and gratuitous violence) in on-demand services for the different age categories of minors is regulated in detail in the KRRiT regulation issued under Article 47e, paragraph 4 of the Broadcasting Act. In this area, KRRiT was obliged to issue a regulation, rather than might do so – as in the case of technical measures. Thus, the lawmaker has not left much space here for self-regulation.

### 3.7.4. New challenges for video-sharing platforms

Given the state of progress of works on the implementation of the revised AVMSD in Poland (see 3.1.4 below), it is too early to envisage the shape of solutions based on Article 28b of the Directive and the challenges related to it. However, taking into account the complexity of the matter, and the reference to self-/co-regulation in the Directive, as well as Polish experiences with the legislative methodology used to effectively encourage self-regulation in audiovisual media, it seems that one possibility would be to use existing solutions concerning the advertising of unhealthy foods and the application of technical measures to protect minors against the harmful content of on-demand services as models. Such a method would be based on statutory provisions setting obligations for VSP providers which correspond to those provided for in the Directive, supplemented by the possibility of and encouragement for self-regulation with regard to more detailed rules, and the optional empowerment of KRRiT to issue regulations on these more detailed rules (in case effective self-regulation is not adopted). Another option could be to provide for a new set of horizontal rules concerning co-regulation, including its definition and instruments, as suggested by KRRiT in its analysis on self- and co-regulation of 2018.<sup>290</sup> These new rules could probably give KRRiT more tools in the process of setting standards for cooperation between stakeholders in different areas. The concrete proposal for or concept of such rules has not yet been presented. Thus, the existing methodology, which has already proved to be quite effective, may seem more likely, especially since the existing solutions have allowed KRRiT to develop experience of cooperation with relevant stakeholders and their organisations.

### 3.7.5. State of implementation of the new AVMSD rules

Analytical works are being carried out both by the Ministry of Culture and National Heritage and by KRRiT with the aim of implementing the revised AVMSD in time. The first public consultations are envisaged for the second half of 2019. No official draft or concept of implementation has been published at the moment of writing.

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<sup>290</sup> A. Ogródowczyk and others, *Samoregulacja i współregulacja*, [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/publikacje-krrit/samo--i-wspolregulacja--krrit-05.2018.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/publikacje-krrit/samo--i-wspolregulacja--krrit-05.2018.pdf).



## 3.8. SK - Slovakia

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### 3.8.1. Introduction

Slovakia has a twenty-year tradition of self-regulation in advertising, about a decade of experience in self-regulation in the print sector and less than a decade of experience in the self-regulation (as well as public regulation) of specific online content. The results of these efforts are mixed at best, and mostly not very transparent for the public. However, the last two years have brought new structural changes in all areas of self-regulation. Yet this transformation in self-regulation continues, by and large, due to changes brought about by the revised AVMSD.

There is no common approach to establishing self- and co-regulatory mechanisms in Slovakia. There was even very little cooperation among key stakeholders in this area until a few years ago, and in one key area (advertising) there is no cooperation at all, even though the law explicitly expects cooperation between the Board for Broadcasting and Retransmission (Rada pre vysielanie a retransmisiu, RVR), the National Regulatory Authority (Úrad pre reguláciu elektronických komunikácií a poštových služieb - NRA), and the Advertising Standards Council (Rada Pre Reklamu, ASC), a self-regulatory body for advertising. Yet it is the RVR that tackles issues related to advertising or commercial communication (as it is defined by the law). For example, in 2018, the RVR fined the commercial broadcaster TV JOJ EUR 5 000 for illegal self-promotion that was, moreover, not “decent”<sup>291</sup>. The RVR fined public broadcaster RTVS EUR 4 000 for a hidden commercial communication broadcast in 2017.<sup>292</sup>

On the positive side, since 2018, there has been some cross-sectoral coordination of self-regulation in advertising under the umbrella of the ASC.

The radio and television sector has not even officially attempted any self-regulation, except in the advertising sector.

A somewhat bizarre situation exists: in almost every ruling that tackled media commercial communication (that is, advertising), the Administrative Senates of the Supreme Courts mentioned that the court could not consider a possible sanction issued by a self-regulatory authority, since such a body does not exist.<sup>293</sup> However, section 5 of the Act on Broadcasting and Retransmission (Act 308/2000)<sup>294</sup> assumes that the NRA “shall cooperate with self-regulatory authorities in the area of broadcasting, retransmission and

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<sup>291</sup> Decision RP/12/2018 of 18 November 2017, available at <http://www.rvr.sk/penalty?decisionnumber=RP%2F12%2F2018>.

<sup>292</sup> Decision RP/40/2017 of 29 May 2017, available at <http://www.rvr.sk/penalty?decisionnumber=RP%2F40%2F2017>.

<sup>293</sup> Cf. for example, Decisions 2S/102/2017 of 20 February 2019, ECLI:SK:KSBA:2019:1017200751.1; 6Sž/7/2015 of 14 December 2016, ECLI:SK:NSSR:2016:9015010053.1.

<sup>294</sup> An English version is available at [http://www.culture.gov.sk/extdoc/3626/308\\_aj\\_342](http://www.culture.gov.sk/extdoc/3626/308_aj_342).



the provision of on-demand audiovisual services to establish efficient self-regulatory systems.” In fact, there is a self-regulatory authority in the area of advertising: the ASC. However, despite its long-standing existence – over twenty years – the judiciary was not aware of its existence, and the RVR did not enter into cooperation with the ASC, even though the law that expected this to happen had been passed almost twenty years ago. There is no reference to this issue in the most recent annual report of the NRA either.

Indeed, the ASC only adopted an Optional Protocol to the Ethical Code of Advertising<sup>295</sup> in spring 2018. This was done at the request of the Association of Independent Television and Radio Stations (Asociácia nezávislých rozhlasových a televíznych staníc - ANRTS). This Protocol should tackle all ethical aspects of media commercial communication (that is to say, advertisements in television and radio broadcasts).

Furthermore, the role of the Press-Digital Council (Tlačová rada Slovenskej republiky - TRSR) is rather unimportant from the perspective of the judiciary. For example, the Regional Court in Nitra issued a verdict<sup>296</sup> in which it stated that a decision issued by the TRSR on a breach of the Code of Ethics by a journalist had no independent impact on the court’s deliberation. At best, it could be considered along with other evidence.

The TRSR’s work is not very effective. Its decision making is slow, and punishments are, obviously, only symbolic. The media and news agencies, by and large, do not report on the TRSR’s activities and verdicts. Ironically, publishers – indirectly, one of the founding members of the TRSR – showed significant interest in the TRSR’s work too. Although it went against the principles of self-regulation, some print media sometimes published their counter-statements (rebuffals) together with official statements from the TRSR. There has been some slow improvement in support for the TRSR among publishers in recent years, but it is not that promising. Part of the problem is that the second key founding member of the TRSR is the Slovak Syndicate of Journalists, which itself does not have a good reputation among many journalists.

### 3.8.2. Self- and co-regulation in the area of advertising

As already mentioned, an Advertising Standards Council (ASC) exists. Among its members is the umbrella ANRTS (its members include mostly radio broadcasters and two key TV commercial broadcasters as well as a TV news channel similar to CNN, RT, etc.) and the major private TV Markíza (which is thus a member of the ASC twice, indirectly). In total, the ASC has 31 members, including 21 independent legal entities, seven associations and three honorary members. The main aim of the ASC is to promote honest, appropriate, decent, legal and truthful advertising.

A Code of Ethics for Advertising Practice exists. However, these ethical principles are only binding for members. The fulfilment of objectives is supervised by the Arbitration

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<sup>295</sup> Available at <http://www.rpr.sk/sk/eticky-kodex>.

<sup>296</sup> Decision 25Co/351/2012 of 31 January 2013, ECLI:SK:KSNR:2013:4211205677.1.



Commission (AK RPR). The composition of AK RPR membership should guarantee that findings made by the AK RPR are independent and professional. The AK RPR has at least seven members. Currently, it has 13 members; these include three lawyers, a psychologist, a sociologist, a direct marketing company representative, one representative from each of the IT, finance, digital advertising and general advertising sectors, as well as two "customer" representatives (big companies that pay for advertisements). Their term of duty is three years, however, two thirds of them usually have their term prolonged. These members are selected by the General Assembly at the proposal of the Presidium of the ASC.

The ASC issues annual reports, however, these annual reports are not freely available – but it is possible to receive them on request. Yet this information is not publicly known.

The ASC, or the AK RPR respectively, tackled 79 advertisements (of which about a third were defined as breaching the ethics) which were challenged by 89 complainants in 2018. Eight complaints concerned media commercial communication (that is, advertisements broadcast in the media), however, none of them was seen as breaching ethical rules.

If we compare the number of complaints for both 2017 and 2018, an identical number of complaints were reported, but this number was about 50% less than in the period 2011-2013.

An individual or an institution can lodge an appeal against a finding. However, this step includes a fee (between EUR 30 and EUR 300). The rules on enforcement and sanctioning are only very "soft", for example, withdrawing controversial ads, and in cases where the same rule has been breached, there is an option whereby the offender is asked to upload such a finding on its website. There is no information available about monitoring procedures or the evaluation of objectives.

The Interactive Advertising Bureau Slovakia (IAB Slovakia) is, with 39 members, the biggest association on the Slovak digital market. It has been active for about a decade (under another name). The IAB has issued a Code of Ethics for Electronic Media<sup>297</sup> as well as the Code of Copying Data from the Internet<sup>298</sup> (updated in May 2019).

The first code is comprehensive: it covers all electronic media, goes beyond the requirements stated by law, is open to all complainants and is primarily focused on commercial communication. The code defines electronic media as 'any medium which ensures electronic interactive communication through the Internet.' The code is open to non-members of the IAB. There is no report on how it is monitored.

The second code tackles the most pressing issue of intellectual property rights in the digital world. Although it was written in 2015, there were neither symbolic nor real sanctions for breaching the code. Currently, any reference to another online source must be mentioned within the first five sentences.

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<sup>297</sup> Available at <https://www.iabslovakia.sk/samoregulacia/eticky-kodex-elektronickych-medii/>.

<sup>298</sup> Available at <https://www.iabslovakia.sk/samoregulacia/kodex-preberania-obsahu-na-internete/>.



Compliance with the second code is monitored by the Commission of Ethics of IAB Slovakia. Between 2016 and June 2019, it reported 38 complaints, of which 22 cases were considered as justified. There is not much more information. The Commission of Ethics promised to make public all complaints from June 2019 onwards. The recommendations made by the Commission of Ethics of the IAB are only of a non-binding nature. However, if a member of the IAB does not respect a recommendation, it can be expelled from the association. This also means exclusion from the online monitoring IABmonitor. Similarly, if an online company breaches the Code of Copying Data from the Internet three times in a semester, it can be prevented from using data from the IABmonitor. This can have a significant impact on future profitability since the IABmonitor is used by companies to calculate the reach of their advertising and to carry out a cost-benefit analysis.

In the press sector, the Press-Digital Council (TRSR) has been operating for almost two decades, with temporary breaks, and with a change of name and a change in its scope of activities. It deals with advertisements, both in theory and practice, but only very briefly and randomly. The Code of Ethics for Journalists requests that “ads and paid announcements must be transparently marked as such. In case of commercial text, a contribution cannot create the illusion that it is the independent creative work of a journalist. Journalists and the media have rights and a duty to reject hidden advertisements.”

In 2017, the IAB joined the founding body of the then TRSR, which, since then, has become the Press-Digital Council (TRSR). In other words, the TRSR has become more involved in online publishing. As a result, the Ethical Code for Journalists has changed too. It is mentioned that the aims of the Ethical Code for Journalists includes “assuring that all content published in print or on the Internet should be in line with generally binding Slovak legislation and good manners”. The Code also states that it should serve as a guideline “regardless of the technological platform”. Moreover, it is explicitly mentioned that the Code for Copying Content from the Internet issued by the IAB is binding for all journalists. However, the Ethical Code for Journalists is still binding only for those who explicitly sign up to it.

The TRSR has only discussed two interesting complaints about advertisements. In 2017, a complainant was unhappy that a regional weekly refused to run his advertisement. This complaint was dismissed.<sup>299</sup>

In 2013, the TRSR discussed an issue regarding the right to reply related to advertisements. The issue was whether a person has the right to reply when the controversial text is published in the form of a paid advertisement. The TRSR considered that this issue had been tackled neither in theory nor in practice. The TRSR argued that legal arguments allowing the publisher to reject the request to publish a correction or a reply are defined in sections 7 and 8 of the Press Act. This list of choices is fixed, meaning that it is legally impossible to expand on it, however, it does not mention data published as part of advertising. On the other hand, according to section 5, subsection 3: ‘a periodical press publisher does not bear any responsibility for the truthfulness of information published in the correction, reply, additional announcement, or advertisement, as well as

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<sup>299</sup> Decision number 04/2017, available at <https://trsr.sk/rozhodnutie-042017/>.



in misleading or comparative ads. These exemptions do not refer to published adverts in which the periodical press promotes its own people, activities, services or products'. Thus, the TRSR reviewed its own previous similar verdicts<sup>300</sup> and came to the conclusion that, in the case of advertisements, there is a duty to publish a reply/correction. The TRSR defended its position on the grounds that the publisher (who can reject an advertisement) contributes to the breach of the third person's rights when disseminating the advertisement. Finally, the TRSR argued that if the lawmaker preferred to exclude such options from the list, it would have to include that case among the exemptions. The right to reply or to correction does not correlate with such activity (refer to sections 7 and 8).

The TRSR does publish annual reports; however, these reports do not mention how its verdicts have been reached. Nevertheless, in most cases, there is reluctant compliance with TRSR decisions. Obviously, in case of self-regulation, the acceptance of sanctions is sometimes seen as unfair if too few stakeholders are involved.

### 3.8.3. Self- and co-regulation in the area of the protection of minors in the audiovisual media

All of the above-mentioned organisations pay attention to the protection of children in their specifically designated areas. However, as mentioned, the TRSR monitors neither the audiovisual media nor social media. Theoretically, it could still discuss such cases if they were related to an unethical piece of work by a journalist involving a child, or a hidden advertisement referring to children, available on the Internet.

The ASC, as mentioned above, deals with the protection of minors in commercial advertisements, including those broadcasts on the TV and radio.

All the above-mentioned details of the operations of both bodies are valid here too.

Public service media have their own internal guidelines and policies. There is the Statute of Programme Workers and Co-Workers of RTVS. It is a rather extensive document (28 pages). It covers and forbids hidden advertising (section 3.11) and tackles the protection of minors (in particular in section 3.5).

In case of controversies related to the Status of Programme Workers and Co-Workers of RTVS or the Code of Ethics for Journalists, or any other relevant guidelines (for example, the Code of Ethics for Communication via Internet) there is the Commission of Ethics of RTVS. Half of its members are appointed *ex officio*, the other half by the Director General. The Commission of Ethics of RTVS is an independent advisory body of the Director General.

Moreover, the key mobile phone operators signed a National Code of Mobile Operators on Safe Use of Mobile Services in 2008 (implemented in late 2009).<sup>301</sup> This agreement protects children against unsuitable content when using smartphones. Since

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<sup>300</sup> See, for example, Decision No. 14/2013.

<sup>301</sup> Národný kódex mobilných operátorov, available at <https://www.orange.sk/orange-slovensko/spolocenska-zodpovednost/dokumenty/kodex-mobilnych-operatorov/>.



2009, there has been a default blocking of all unlawful content for fixed lines and mobile Internet (WiFi). In addition, telecom operator Slovak Telecom offers an option to block selected TV channels individually, or to block access to services for adults provided by third parties via smartphones. The telecom operator Orange prefers a technological solution and offers a Family Security Pack (for Android only).

The RVR has traditionally played a major role in the protection of minors in the audiovisual media. The RVR is actually neither totally a state body, nor a fully autonomous body, but defined by law as a *sui generis* body. Until now, the protection of minors was actually among its priorities. The RVR has issued quite a lot of sanctions in this area, including financial ones. For example, in January 2018, Rádio Anténa Rock was fined EUR 1 000 for broadcasting a programme unsuitable for minors under 18 years of age without labelling it as such.<sup>302</sup> Similarly, the commercial TV JOJ was fined EUR 1 500 for an almost identical breach made in the summer of 2017<sup>303</sup>, as well as EUR 7 000 for a similar breach made in spring 2017.<sup>304</sup>

Since the revised AVMSD in this particular area should be based on prevention rather than on repression, the current strict approach should change. Thus, it can be expected that the role of co-regulation with regard to the protection of minors in the audiovisual sector will become more important in Slovakia. Moreover, work is ongoing on the merger or coordination of the administrative supervision of the Unified System of Descriptors (USD). The USD provides a label of age accessibility/suitability with regard to audiovisual works (including, for example, those shown in film theatres). Currently, in addition to the Ministry of Culture and the Board for Broadcasting and Retransmission, the Slovak Trade Inspection is also involved in this procedure. Public professional discussion suggests that Slovakia may possibly find inspiration in the Dutch Kijkwijzer system.<sup>305</sup>

### 3.8.4. New challenges for video-sharing platforms

The particularity of the Slovak market is that, in addition to some international video-sharing platforms, there is an option to register videos with linguistically closer and rather more liberal Czech platforms. In other words, it is more difficult to register abroad with international or foreign-language platforms due to the language barrier. However, since Slovaks are bilingual, they can easily register at Czech-language platforms. This has another negative side effect – this makes it easy for Czech-language programmes or Czech-dubbed programmes, including for minors, to penetrate the Slovak market, whereas the Czech Republic uses a less strict and less categorised labelling system for programmes aimed at minors.

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<sup>302</sup> Decision RP/26/2018 of 25 January 2018, <http://www.rvr.sk/penalty?decisionnumber=RP%2F26%2F2018>.

<sup>303</sup> Decision RP/5/2018 of 27 August 2017, <http://www.rvr.sk/penalty?decisionnumber=RP%2F5%2F2018>.

<sup>304</sup> Decision RP/33/2017 of 3 March 2017, <http://www.rvr.sk/penalty?decisionnumber=RP%2F33%2F2017>.

<sup>305</sup> <https://www.kijkwijzer.nl/>.



Based on the previous revision of the AVMSD, some video-sharing platforms (audiovisual services on demand), as well as those exclusively broadcast via the Internet, must already register with the RVR.

The RVR received a number of complaints about both types of online services in 2018. In the majority of complaints about mostly political reporting, it did not identify a breach of the law, nor could it find evidence to reach a verdict. The RVR reported just one administrative proceeding which is still ongoing, and in just one case (the sponsoring of news and current affairs programmes via a commercial subject in an online broadcast), it issued a sanction: a warning. This begs the question of whether there is a lack of effective reporting and monitoring, or a general lack of experience in dealing with the monitoring and managing of complaints of this type.

### 3.8.5. State of implementation of the new AVMSD rules

There have been two international workshops in Slovakia that tackled co-regulation and the protection of minors, and the implementation of the new AVMSD rules – in late 2018 and early 2019, respectively. Although the Ministry of Culture is working on the implementation of these new rules, there are no drafts available for public discussion. A draft is expected to be submitted for inter-ministerial review in the fall of 2019.

It should be mentioned that the 11th Plenary meeting of the European Regulators Group for Audiovisual Media Services (ERGA) that took place in Bratislava in June 2019 focused on the results of the monitoring of the 2019 European elections campaign on social media and the related areas of political advertising and the possible involvement of non-transparent actors. ERGA is working on its reform in order to be able to effectively carry out the new tasks stemming from the AVMSD.





## 4. Comparative Analysis

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### 4.1. Introductory remarks

As already pointed out, the above country reports focus both on the audiovisual media sector and on thematic areas resulting from the transposition of the AVMSD. The reports cannot, therefore, cover all forms of self- and co-regulation in EU member states and in particular, either do not mention the press, or only do so cursorily. Nonetheless, they do show a cross-section of different approaches, and the selection of states chosen as examples makes it possible to compare those that have a long tradition of liberal media regulation and the legal systems, especially in Eastern European member states, in which this liberal traditional is only now emerging. The country reports also enable a comparison to be made between different self- and co-regulation models and traditions, especially between states like Germany, where self-regulation institutions are among the principal media regulation organisations, and others like France and Austria, where media regulation is centred on a single strong regulatory authority and therefore does not provide for any extensive inclusion of additional institutions of this type.<sup>306</sup> In addition to these states, this publication also contains reports on Belgium, Italy, Poland, Hungary and Slovakia.

A comparison of these states reveals the following picture: on the one hand, there are recurrent elements to be found in all or most states, while on the other hand, there is no standard framework for the structure of self- and co-regulation instruments, which explains the big differences in the scope and effectiveness of these instruments. Significant differences can also be observed with regard to constitutional derivation, legal classification and the influence of national regulatory authorities on self-regulation instruments. The fact that there is no standardisation of laws and only partial legal harmonisation makes it hard to compare systems because different criteria are applied in individual states when it comes to including an instrument in the different categories (self-, co- or “regulated self-regulation”). This is not only due to the partially different use of terminology but also to the fact that pure self-regulation with no connection to state action whatsoever only rarely exists and concrete forms are to be found not so much in a set of fixed steps as in a “continuum” along which regulation is more or less formalised.<sup>307</sup> It also needs to be borne in mind that not only voluntary initiatives by purely private players are

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<sup>306</sup> On the system of media regulation in Germany and France, see also Jenny Weinand, *Implementing the EU Audiovisual Media Service Directive*, pp. 255 and 264.

<sup>307</sup> On the basic classification of self- and co-regulation systems, see also Jenny Weinand, *op. cit.*, pp.138 ff. with further references for discussion.



described as self-regulation but also those that (over time) have been accorded a kind of legal legitimacy by the national legislature or the regulatory authorities.

However, despite the differences, all the states mentioned have in common a development towards more self- and co-regulation in the area of audiovisual media. This development, which is ongoing in the context of the transposition of the revised AVMSD by the member states, currently taking place, is heavily influenced by European law. Although there is already a long tradition of self- and co-regulation in some states, not only in the press but also more generally, with an impact on the audiovisual sector too – or specifically in the case of the latter – it is the fact that it has been brought about by EU law that has strengthened these instruments and models. For the transposition of provisions on the protection of minors, this approach was already contained in the European Union's recommendation on this subject,<sup>308</sup> according to which the member states should promote the involvement of the industry in the “regulation”, irrespective of the type of medium. This approach became more legally binding with the AVMSD in particular, which expressly recommended to the member states that they provide for this form of regulation for various fields in their transposition of the Directive.<sup>309</sup> It is therefore unsurprising that all states mentioned here provide for such models at least to some extent, even though, as pointed out above, the degree to which they do so varies widely.

## 4.2. States' approaches to the regulation of advertising

In the first instance, the country comparison consciously covered the issues relating to the regulation of advertising, where, irrespective of the type of medium, the approach involving the autonomous regulation of specific (potential) matters of contention by the industry concerned has been widespread for some time. The result of the comparison confirms that the longest tradition of self- and co-regulation can mainly be seen in the field of advertising (cf. IT, HU, SK). In some cases, this goes back to the establishment of self-regulatory organisations in the 1960s and 1970s (cf. BE, DE, IT) who drew up guidelines and codes that relate to the design and delivery of advertising but which are only generally (initially) binding on the companies in the industry concerned that have signed these documents.

In most states, the self-regulation organisation is made up of representatives of the advertising industry, for example, advertising agencies, trade associations and

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<sup>308</sup> Council Recommendation 98/560/EG on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, of 24 September 1998, OJ L 270 of 07.10.1998, pp. 48 ff., available at

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31998H0560&from=EN>.

<sup>309</sup> Since 2007, the promotion of self- and/or co-regulation has been a component of the AVMSD in Article 3(7) and Recital 36, Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332 of 18 December 2007, pp. 27–45, available at

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007L0065&from=EN>.



representatives of media providers, who are involved both in drawing up codes of ethics and providing complaints review panels, which can sometimes rule on disputes in individual cases (BE, HU, AT) or issue recommendations (FR, BE), which can also have an impact on individual cases.

Their powers mostly cover the entire field of advertising, irrespective of the medium concerned, but some states have set up additional organisations to handle specific tasks. One example is Italy, where the Institute for Advertising Self-Regulation (Istituto dell'Autodisciplina Pubblicitaria, IAP), which has general jurisdiction, exists alongside the Permanent Observatory on Product Placement (Osservatorio permanente dedicato al Product Placement), which was specifically set up to deal with this particular question.<sup>310</sup> This country comparison reveals that the scope of responsibility only applies along different types of media in Slovakia, where, in the field of advertising, there are several self-regulatory institutions with partially overlapping and partially separate responsibilities for the fields of broadcasting, the press and online media.

The self-regulatory organisations often also provide ex-ante monitoring for advertisers, whereas regulatory authorities operating in the same field only conduct ex-post checks (BE, FR). In some states, this results in a comparatively simple “preliminary procedure” conducted by the self-regulatory institutions being a very appealing way of avoiding any potential problems if an ex-post check is carried out by the relevant authority. Accordingly, the French advertising regulator ARPP, for example, examines 20 000 questions a year submitted by its members on the permissibility of advertising. However, the number of cases dealt with by the self-regulatory organisations differs significantly from one state to another and is, in some instances, less than a hundred a year (cf. SK).

The codes of ethics drawn up by the self-regulatory institutions contain rules of conduct on the way advertisements are designed. They comprise rules against the denigration of and discrimination against individuals, rules concerning advertising for and with children and young people or commercial communications for food, alcoholic beverages and games of chance (comprehensive provisions exist, for example, in DE as well as in AT and PL).<sup>311</sup> In particular, advertising for unhealthy foods has played a more prominent role in the last few years (cf. AT, PL), not least due to the incorporation of a specific target in the AVMSD in 2007.

Overall, the relationship of self-regulatory institutions with regulatory authorities in the field of advertising varies considerably. In Hungary, for example, an official administrative agreement was signed in 2011 between the regulator and the Hungarian Self-Regulatory Board for Advertising on the basis of the Media Services and Mass Media Act.<sup>312</sup> This incorporates self-regulation into the legal framework and assigns powers and responsibilities. Similar models can also be found in the field of advertising in other states in which statutory provisions or the relevant regulatory authorities at least recognise self-regulatory institutions in principle or in detail or adopt an open-minded approach towards them, albeit typically without granting them public-power rights. However, there are also

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<sup>310</sup> Cf. the country report on Italy and fn 252.

<sup>311</sup> As an example of the list of rules, see the report on Germany. See also fn 177.

<sup>312</sup> See fn 229.



states in which these two areas are clearly separated. In France, for example, no consultation takes place in an individual case between the regulator CSA and the self-regulatory institution ARPP. These bodies only conduct an exchange of information. This strict separation can also involve areas of substantive law. For example, in Austria, the role of the Advertising Standards Council (Werberat) is limited to areas of ethics and morals that extend beyond the provisions of substantive law.

The enforceability of a decision following examination by self-regulatory instruments in the field of advertising and the possible penalties are usually based on the naming, shaming and blaming principle, which means either by means of a public reprimand or the revocation of the certification issued by the relevant association. In spite of the comparatively lenient penalties available, the decisions and codes of these institutions generally meet with broad approval. For example, more than 90 percent of the demands of the Advertising Standards Council are complied with. Other, more stringent enforceability instruments have become established in a number of states. Notable in this connection is the system in Poland, where non-compliance with a code of conduct voluntarily signed by a business owner can constitute an unfair practice under competition and consumer protection legislation and therefore trigger civil remedies.<sup>313</sup> It is also worth mentioning the model of the Slovakian industry association IAB, which can punish breaches of the code of ethics in the digital sphere by excluding the perpetrator from access to the association's audience measurements, thus resulting in economic disadvantage.

### 4.3. States' approaches to the protection of minors

As far as the protection of minors in the case of audiovisual media is concerned, regulators can be seen to be exerting stronger influence, so alongside their supervisory activities as public bodies we find instruments of co-regulation in almost all cases – if there is any evidence at all of the beginnings of self-regulation. A clear distinction has emerged in this area between states with a strong tradition of self- and co-regulation and those with highly centralised media regulation.

In France, for example, the supervision and monitoring of the protection of minors in audiovisual media is the exclusive, centralised responsibility of the regulator CSA. However, media services themselves are responsible for the proper application of the guidelines issued by the CSA in the form of recommendations and the CSA only conducts ex-post checks. Similar restraint concerning voluntary self-regulation systems with regard to the protection of minors in audiovisual media can be observed in Austria and in the Wallonia-Brussels Federation in Belgium. In the latter, an advisory council consisting of industry representatives and the regulator has been authorised since 2010 to draw up rules for approval by the Wallonia-Brussels Federation government.<sup>314</sup>

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<sup>313</sup> See fn 267

<sup>314</sup> Cf. the report on Belgium and fn 142.



In the area of the protection of minors, too, there is a more extensive classification of instruments based on media types (cf. DE, HU, PL, SK). In Germany, for example, there are autonomous institutions for the film industry, entertainment software, television and multimedia service providers. Some countries only provide self- and co-regulation institutions for individual media types. In Italy, for example, the Monitoring Committee for the implementation and enforcement of the self-regulation code relating to the media and the protection of minors is exclusively responsible for the field of broadcasting, while media law in Poland only provides for a self- and co-regulation system for the protection of minors in non-linear media. A number of countries mentioned provide for separate supervision – in some cases predominantly organised as pure self-regulation – and separate guidelines for the protection of minors in public service media (cf. AT, DE, SK).

The aim of most of the co-regulation systems described is to draw up guidelines for media providers, which involves regulators and representatives of the industries concerned working together, *inter alia*, to establish age-rating systems or watersheds for specific programme content. Thematically, this is done not only with regard to the protection of minors from harmful media content but also with regard to the protection of minors in the media.

The interlinking of the work of sector companies and regulators is based in many cases on the flexibility of media legislation towards institutions and codes. Non-governmental co-regulation bodies are assigned a supervisory function in individual cases in only a few countries. It is worth highlighting the system in Germany, under which so-called self-regulation institutions can, after being certified by the regulator, independently conduct checks and reviews of individual items and the regulator may only take action against the provider if the self-regulation organisation institution has exceeded its margin of discretion when conducting its assessment. For the most part, the regulator has powers of supervision over the certified voluntary self-regulation bodies, which can accordingly be described as regulated self-regulation.

Overall, the enforcement of assessment decisions by regulators when breaches are found is more stringent than in the field of advertising owing to the particularly sensitive nature of the protection of minors. These decisions range from the imposition of fines and “black screens” – the prohibition/suspension of the publication or of the broadcasting/distribution of the programme or parts thereof – to a ban on further items or, as a last resort, the revocation of the broadcasting licence – if the prerequisites for this exist (cf. DE, FR, SK). The more forceful role played by the regulators in this area can also be explained by the need for effective enforcement of the law.

Technical systems to protect children from unsuitable content are also playing an increasingly important role as forms of self-regulation with regard to access to content in a digitised media world. These systems are not only made available by the media services themselves but also in some cases by telecommunications providers or in connection with cross-platform filtering software systems. Although some of these programs for the protection of minors are currently offered on a voluntary basis,<sup>315</sup> they are subject to

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<sup>315</sup> Cf. Slovakia and fn 305 of this publication.



regulated self-regulation under the statutory provisions on the protection of children and young people from harmful media, as is the case in Germany.

#### **4.4. Approaches and outlook concerning video-sharing platforms**

As far as new challenges in the case of video-sharing platforms (VSPs) are concerned, there are many of a general nature that not only relate to self- and co-regulation. They include, for example, the inherently transnational character of many platforms with wide coverage, the frequent inability to call people responsible for content to account, or the question of the appropriateness of extending the existing rules on audiovisual media services to these platforms.

So far, there are no long-established approaches concerning the role of self- and co-regulation instruments as far as the regulation of platforms is concerned because some of these platforms are just getting started. However, it is already possible to identify certain self- and co-regulation instruments that information society services have signed up to, and some VSPs have entered into such agreements (cf. HU).

The prevention of the dissemination of hate speech and content punishable under criminal law plays a prominent role in the regulation of social media – including potentially VSPs – the main aim being to swiftly prevent the (further) distribution of such content. Discussions are currently also underway on the rules on liability in the case of hosting platforms. In Germany, for example, the so-called Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG) has entered into force. It is aimed at providers of electronic information and communications services that operate for-profit Internet platforms designed to enable users to share any content they wish with other users or make it available to the public. In France, a draft law on “combating cyberhate” is currently being discussed. Both laws will also have an impact on the regulation of VSPs insofar as the latter fall within their scope. Overall, as can be seen throughout the country comparison, further developments are to be expected in these areas in the course of the transposition of the new AVMSD rules. This applies irrespective of the fact that it has been stressed on several occasions that few member states will actually have to deal with the question of regulating VSPs because the most important providers operate from within their borders. Nonetheless, member states will have to enact rules transposing the AVMSD even if these rules will hardly be relevant or be less often relevant than in some other member states.<sup>316</sup>

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<sup>316</sup> Cf. see also section 3.1.4 of the country report on Austria.



## 4.5. State of the transposition of the revised AVMSD

On the state of the transposition of Directive (EU) 2018/1808, it can be established that, as yet, no actual draft law has been submitted in most of the states compared. Important developments on this are expected in or from autumn 2019. Only the Hungarian Government has tabled draft amendments to specific laws on the regulation of media services (in June 2019). Parts of these amendments are intended to transpose the new AVMSD rules. They do not relate to video-sharing platforms but in most cases to rules concerning on-demand audiovisual media services. Here, too, existing co-regulation approaches are to be applied.

## 4.6. Conclusions from the country comparison

All in all, it can be said that self- and co-regulation instruments have gained widespread acceptance in the field of audiovisual media in all countries, irrespective of the form they take, and that they have proved themselves to be an effective and cost-saving alternative or complement to public authority supervision. However, one ground for criticism mentioned in some cases is the possible danger of “self-censorship”; lower costs and “softer” sanctions perhaps persuading media providers to accept the rules of a self-regulation institution that go beyond the statutory provisions and this might result in tighter restrictions than mere ex-post content monitoring by a public authority.<sup>317</sup> Notwithstanding the concerns expressed in an individual case, there is both a clear trend throughout towards extending the areas with active elements of self- and co-regulation and reinforcing the formalisation of such elements. Here, it is generally expected that this trend will continue and become still more diversified because the revised AVMSD focuses heavily on this regulatory approach, especially in the case of its enlarged scope of application.

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<sup>317</sup> See also the reference in the country report on Hungary under point 3.4.1.





## 5. Conclusion

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We are witnessing a hybridisation of the law through the interaction between public authorities (the legislator) and private actors (civil society). There may even be some cross-fertilisation when certain codes of conduct or self-regulation initiatives inspire the legislator, who can incorporate them into law. This leads us on to the concept of “multi-level regulation” from the global to the national, via the EU level, down to regional level, particularly for countries with a federal structure where local and regional authorities have real powers, as in the German *Länder* or Spanish *comunidades autónomas*. But beyond this, it is also the role of self-regulation in a twenty-first century characterised by the interpenetration of economies and production lines and by “legal porosity”. Because of its pragmatic approach, self-regulation may, in a way, transcend traditional legislation, but with constraining parameters such as checks and the imposing of sanctions if breaches occur.<sup>318</sup>

While in theory self-regulation norms may complement or crystallize into legal norms, in practice, the gains of self-regulation and even co-regulation often come at the expense of public norms, “push[ing] the once-central ‘official’ or state law to the global edge”.<sup>319</sup> Self-regulation and co-regulation often “operate as a substitute for public regulation”, and, more than that, companies strategically deploy them “with a clear objective to pre-empt and avoid public regulation”.<sup>320</sup> In the digital context of the Internet, there is no shortage of possibilities for self- or co-regulation. On the contrary. There are also individual examples of the recognition of social and democratic responsibilities within systems of self- and co-regulation. But many gaps remain, and companies can take advantage of opportunities to evade legal requirements. It is therefore not surprising that the effectiveness of self- and co-regulation is in deficit from the point of view of many users in the digital context.<sup>321</sup>

The right balance between media regulation and self-regulation depends not least on the nature of the political regime in place as well as journalistic traditions and cultures. Thus, the collective accountability of journalists through self-regulation can promote and defend media freedom, provided that safeguards exist to limit the opposite risk of the

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<sup>318</sup> See *European Economic and Social Committee*, *European Self- and Co-Regulation*, p. 17.

<sup>319</sup> *Muir Watt*, *Private International Law Beyond the Schism*, *Transnational Legal Theory* 2 (2011), 347 (352); See also *Bakan*, *The Invisible Hand of Law: Private Regulation and the Rule of Law*, *Cornell International Law Journal* 48 (2015) 279 (281).

<sup>320</sup> *Cafaggi & Renda*, *Public and Private Regulation: Mapping the Labyrinth*, 2012, p. 7.

<sup>321</sup> See *Hoffmann-Riem*, *Regulierte Selbstregulierung im digitalen Kontext*, 2015, p. 26 (available at [https://www.law-school.de/fileadmin/content/law-school.de/de/units/unit\\_affil\\_riem/pdf/407\\_Regulierte\\_Selbstregulierung\\_im\\_digitalen\\_Kontext.pdf](https://www.law-school.de/fileadmin/content/law-school.de/de/units/unit_affil_riem/pdf/407_Regulierte_Selbstregulierung_im_digitalen_Kontext.pdf)).



professional instrumentalisation of the system. In the digital age, there is also the danger of the self-regulation of the Internet, which tends to entrust intermediaries with control over content, leading to the privatisation of censorship outside the control of judicial institutions.<sup>322</sup>

Self-regulation and co-regulation initiatives in the field of media law may progress all the more smoothly and productively when everyone stands to gain from their success:<sup>323</sup>

- the legislators, as a result of being able to concentrate on more focused and higher quality legislation, whilst ensuring the ongoing monitoring of complementary self-regulation and co-regulation;
- the regulatory authorities, as a result of being able to concentrate their financial and personal powers on the development of guidelines and the monitoring and sanctioning of evident and/or serious failures of self-regulation and co-regulation;
- media companies, especially media service providers and video-sharing platform providers, who will benefit from greater economic freedom, from improved partnerships with public authorities and other civil society players, and from rules governing their activities that more accurately match their needs;
- users of the media, media platforms and media intermediaries, who will enjoy more secure access to products and services due to simpler and often more effective rules, which are themselves monitored both by associations and by public authorities;
- the Digital Single Market, which will move further towards true completion on the ground as a result of the increase in these initiatives.

The phenomenon of multilevel regulatory processes and, more particularly, the various interactions between global, EU and national levels of media policy and rule making are gradually becoming recognised in both legal communities and in international and state practice.

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<sup>322</sup> See *Hulin*, *Autorégulation et liberté des médias en Europe. Impact, perspectives et limites*, 2015

<sup>323</sup> See *European Economic and Social Committee*, *European Self- and Co-Regulation*, p. 35, [https://www.eesc.europa.eu/resources/docs/auto\\_coregulation\\_en--2.pdf](https://www.eesc.europa.eu/resources/docs/auto_coregulation_en--2.pdf).

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