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Director of publication - Susanne Nikoltchev, Executive Director

Editorial supervision - Maja Cappello, Head of Department for Legal Information

Editorial team - Francisco Javier Cabrera Blázquez, Sophie Valais

European Audiovisual Observatory

Authors

Francisco Javier Cabrera Blázquez, Maja Cappello, Sophie Valais
European Audiovisual Observatory

Amélie Lépinard, Jurist

Translation / Proofreading

Christina Angelopoulos, Aurélie Courtinat, Johanna Fell, Erwin Rohwer, Anne-Lise Weidmann

Editorial assistant - Michelle Ganter

Marketing - Markus Booms, markus.booms@coe.int

Press and Public Relations - Alison Hindhaugh, alison.hindhaugh@coe.int

European Audiovisual Observatory

Publisher

European Audiovisual Observatory
76, allée de la Robertsau F-67000 STRASBOURG
<http://www.obs.coe.int>
Tel. : +33 (0)3 90 21 60 00
Fax : +33 (0)3 90 21 60 19
iris@obs.coe.int

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The protection of minors in a converged media environment

Francisco Javier Cabrera Blázquez

Maja Cappello

Amélie Lépinard

Sophie Valais



Foreword

As media converge, the issue of protection of minors is becoming multifaceted and obliges especially parents and carers to become acquainted with a kit of different tools. Some of these are set by legislators and regulators, others rise from autonomous initiatives, but all of them demand a solid dose of empowerment.

The notion of empowerment did not belong to the media world until recently. In general terms it is understood as a means to “give someone the authority or the power to do something” (the Oxford Dictionaries). In the business world the concept is enriched with more articulated nuances and implies a “management practice of sharing information, rewards, and power with employees so that they can take initiative and make decisions to solve problems and improve service and performance” (the Business Dictionary).

Applying this to the media means treating parents and carers as if they were employees, so as to provide them with the necessary resources and competences – which accompany the concept of media literacy – that will enable them to be in a better position when they have to make sure that the minors who fall under their responsibility are not exposed to harmful content.

Media literacy consists of many components and involves a various range of players. The concept already found itself in the spotlight of the European Audiovisual Observatory (EAO) in 2011.¹ As clearly appeared from the debate that emerged during a workshop organised in Strasbourg jointly with the European Platform of Regulatory Authorities (EPRA) in December 2014,² the topic of “users’ empowerment” deserves further deepening in a separate study. Consequently, media literacy will not be specifically touched upon in this publication.

Another field that will be left out is the protection of minors with regard to commercial communications. This topic has partly been dealt with in a publication following a workshop organised in Saarbrücken by the EAO jointly with the Institute of European Media Law (EMR) in April 2014,³ where especially the challenges deriving from targeted advertising were explored.

The following chapters will therefore concentrate on the protection of minors from harmful editorial content delivered over electronic communication networks.

This means that all types of audiovisual content will be considered, even if distributed by subjects that do not qualify as audiovisual media service providers, but as information society services delivered over unmanaged networks in the free Internet. This delimitation of scope implies that both traditional broadcasting and on-demand services will be covered and this at all levels of regulation: from the international level to the national, with a particular focus on the European regulatory framework, namely on Articles 12 and 27 of the Audiovisual Media Services Directive (2010/13/EU), currently under evaluation by the European Commission (so-called REFIT exercise). On the other hand, the Internet does not remain unregulated, but falls under the lighter framework

¹ Nikoltchev S. (Ed.), *Media Literacy*, IRIS plus 2011-3, European Audiovisual Observatory, Strasbourg, 2011, www.obs.coe.int/shop/allpub/-/asset_publisher/A8yB/content/iris-plus-2011-3.

² A summary of the results of the workshop on “Empowering Users: Rating Systems, Protection Tools and Media Literacy across Europe”, European Audiovisual Observatory-EPRA, Strasbourg, 2014, http://publi.obs.coe.int/documents/205595/8166225/Workshop_OBS_EPRA_15122014.pdf.

³ Cappello M. (Ed.), *New Forms of Commercial Communications in a Converged Audiovisual Environment*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2014, www.obs.coe.int/shop/allpub/-/asset_publisher/A8yB/content/iris-special-2014-new-forms-of-commercial-communications.



in terms of responsibility of the providers set by the E-Commerce Directive (2000/31/EC) in cases of provision of audiovisual content over their networks.

Since converged services are the result of strong technological development, the protection of minors should also involve a high degree of participation of the industry itself. Self- and co-regulatory instruments will therefore also be investigated, with a particular focus on the various technical solutions and tools, including labelling systems that are being developed across Europe. Especially for services not falling under the editorial responsibility of audiovisual media providers, the role of self-regulation appears to be particularly relevant and various examples of codes of conduct will be provided.

Another aspect to consider is that national perceptions of what is to be considered “harmful” vary from country to country and this is the reason why the European regulatory framework has refrained from introducing a harmonised definition, but rather relies on national interpretative criteria and protection standards. This also explains why there is little case-law at the European level, while most issues are dealt with by national courts.

Considering the variety of solutions provided – regarding what is harmful content and which minors are to be protected – and the different levels of protection ensured according to the type of service, it can be questioned whether there is a need of alignment. In this regard it is worth noting that the responses to the recent Green Paper⁴ of the EU Commission show a certain consensus on the fact that more could be done, whereas the level of disagreement is quite high on the means that would be necessary to achieve this result. This publication aims at helping to set the scene for a discussion among involved stakeholders and institutions.

This IRIS *plus* is the first issue of a new series, which will cover a selection of topics that are high on the European regulatory agenda. Starting with outlining the economic and technological backdrop (chapter 1), it looks into the international and European regulatory framework (Chapter 2) and the national implementation of these provisions (chapter 3) before finally making incursions into self- and co-regulation (chapter 4) case-law (chapter 5) and recent trends (chapter 6). The tables published in the IRIS *bonus* “Comparative tables on the protection of minors in audiovisual media services”⁵ will hopefully be a useful tool for our readers.

We are very grateful to the participants to our Christmas workshop for having contributed with their insights to the development of this first experiment. A warm thank you goes to Emmanuelle Machet, secretary to the EPRA, and Natali Helberger, professor in Information Law at the University of Amsterdam, for their very valuable feedback during the drafting process of the publication.

Strasbourg, March 2015

Maja Cappello

IRIS Coordinator

Head of the Department for Legal Information

European Audiovisual Observatory

⁴ Green Paper of the European Commission, “Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values”, COM(2013) 231 final of 24 April 2013, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:PDF>.

⁵ Valais S., *Comparative tables on the protection of minors in audiovisual media services*, Iris Bonus, European Audiovisual Observatory, Strasbourg, 2015, <http://www.obs.coe.int/documents/205595/8234567/Comparative+tables+on+the+protection+of+minors+in+audiovisual+media+services.pdf>.



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1. Setting the scene

Until recently the main gateway for audiovisual content at home was the TV set and that remains the preferred device for watching audiovisual content: for example, in France, during the first semester of 2014, children between the ages of 2-14 years had a monthly Internet video consumption of 4 hours and 2 minutes on average, compared to the daily average of 2 hours of watching TV for children between the ages of 4-14 years.⁶

However, Internet use by children does not only entail watching videos, but also reading webpages, interacting on social networks, chatting, etc. According to the EU Kids Online survey:⁷

- 9-16-year-old Internet users spend 88 minutes per day online, on average;
- 93% of 9-16-year-old users go online at least weekly (60% go online every day or almost every day);
- The most common location for Internet use is the home (87%), followed by school (63%);
- 49% go online in their bedroom and 33% go online via a mobile phone or handheld device;
- 59% of 9-16-year-olds have a social networking profile – including 26% of those aged 9-10, 49% of those aged 11-12, 73% of those aged 13-14 and 82% of those aged 15-16;
- Among social network users, 26% have public profiles.

In a traditional single-screen setting it is fairly easy for parents to oversee what their children can watch. The available regulatory instruments are also transparent and easy to implement. With regard to traditional TV broadcasting, the law may impose a “watershed” – that is, a period of the evening when programmes not suitable for children may be shown – and/or the labelling of content according to suitability for various age groups.⁸ Indeed, those systems can only work if there is strong awareness of the rules on the parents’ side. But nowadays things are a bit more complicated. We live in a connected, multi-screen environment, which is unregulated to a great extent. Beyond watersheds and labelling there are various technological measures that can be introduced to TV and regulated VoD services designed to restrict children’s access to certain broadcast and on-demand content.⁹

- Initial age verification can be done through an ID-check at the point of physical delivery (e.g. store), via in-depth checks of documentation and database “footprints” or through a simple self-declaration;

⁶ Eurodata TV Worldwide, “Kids TV Market : between Changes and Creativity”, Press Release, 17 September 2014, <http://www.mediakwest.com/production/item/le-marche-tv-jeunesse-entre-bouleversements-et-creativite.html>.

⁷ The EU Kids Online survey is the result of a unique, detailed, face-to-face survey in homes with 9-16 year old Internet users from 25 countries conducted by the EU Kids Online network. 25,142 children and their parents were interviewed during 2010. See Livingstone, S., Haddon, L., Görzig, A., Ólafsson, K. “Risks and Safety on The Internet: the Perspective of European Children: Summary”, EU Kids Online, Deliverable D4, EU Kids Online Network, London, UK, 2011, <http://eprints.lse.ac.uk/33731/>.

⁸ With regard to the theatrical exhibition of films, there are many ways of protecting children from harmful content, such as prohibiting entrance to children under a recommended age, requiring that children can be accompanied by parents, introducing time limits for certain films or even not showing certain films during holidays.

⁹ For a detailed overview of protection measures in Europe see, Machet E., “Comparative Background Document (EPRA/2013/02b) for Plenary session 1 on The Protection of Minors in a Connected Environment”, 37th EPRA meeting in Kraków, May 2013. Final amended version of 21 June 2013, http://epa3-production.s3.amazonaws.com/attachments/files/2195/original/protectionofminors_final_publicversion.pdf?1372087443.



- Day-to-day verification can be done through a Personal Identification Number (PIN code), i.e. a secret code (usually a four-digit number) requested by the provider in order to prevent unauthorised users from accessing certain content, or through a paywall, i.e. a request of payment with a credit card before the provision of the service;
- Broadcasting services can be provided with the help of encryption technologies. These are technical procedures whereby audiovisual content is provided in such a way that only certain users (e.g. subscribers of a pay-TV service) in possession of a decryption key (e.g. a decoder with a personal decryption card) can watch it;
- Technical filtering systems can be implemented at the software or device level in such a way as to block access to certain content.

Obviously, no technology is flawless and each method has its advantages and disadvantages. An IFFOR-sponsored White Paper¹⁰ that studies systems aimed at limiting online activity by age provides the following summary of the methods used in the UK for age verification, the sectors in which they are used and their challenges and limitations:

Table 1 – Methods of age verification in the UK

Method of age verification	Sector	Issues
Self-affirmation	Alcohol advertising Some adult content	Spoofing (i.e. IP or e-mail impersonation)
Content filtering	Adult content Mobile	Parental controls to manage filters in house only Household level Can be circumvented by teenagers
Delivery point validation	Delivery of age-restricted physical goods	Driver required to perform check – get signature Not an expert on ID No liability
Credit/debit card	Online alcohol sales Restricted media and content	Cannot differentiate cards held by children, such as pre-paid cards
Electronic checks of age verification databases and ID documents	Online gambling Restricted media and content	70-80% demographic coverage of adult population Open to impersonation Cost

Source: Emma Lindley, Ian Green and Rob Laurence, Innovate Identity Limited

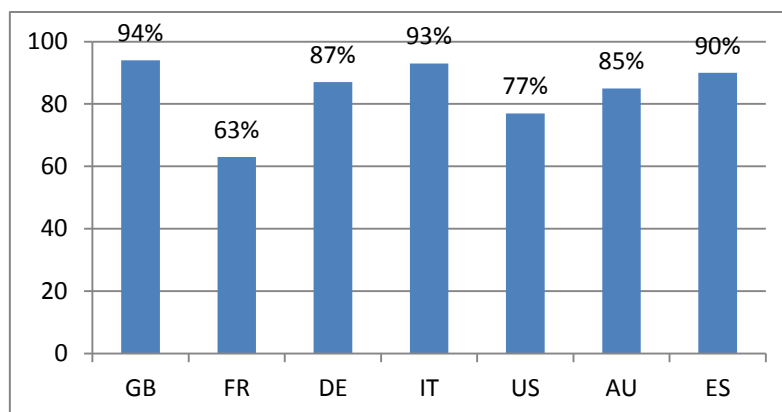
In any event, the more complicated the media environment is, the more difficult it is for parents to navigate devices and protection measures. For example, according to research carried out by the

¹⁰ Lindley E., Green I. and Laurence R., "Age Verification within the Internet infrastructure - Bringing Trust and Safety to the Global Online Community", White Paper sponsored by the International Foundation for Online responsibility, <http://iffor.org/sites/default/files/age-verification-white-paper.pdf>.



British regulator Ofcom,¹¹ the vast majority of parents are aware of the TV watershed. But another study¹² commissioned by Ofcom found that there is a very limited understanding of how regulatory arrangements vary by viewing platform and that tools such as PIN protections, programme scheduling, technical controls and availability of channels on the electronic programme guide (EPG) are not enough in isolation, so that information is required to guide which content items are controlled with which tools.

Fig. 1 – Awareness of the watershed (All respondents with a TV)



Source: Ofcom Research October 2014

Clearly, children cannot be left to their own devices, especially when their devices are Wi-Fi enabled. In this new connected world, the parents' role in protecting and empowering children is both fundamental and more demanding. The protection of children based on their parents' awareness and involvement can however lead to a so-called "protection divide". That is, children with well-educated, technology-savvy parents might be better protected than those with less prepared parents. Moreover, even the best of parents are not omnipotent: how can parents control their children's digital activities when they are not at home (at school, with friends, etc.) or when they are alone in their bedrooms? According to the already mentioned EU Kids Online survey:

- 12% of European 9-16-year-olds say that they have been bothered or upset by something on the Internet;
- 50% of 11-16-year-olds "find it easier to be [themselves] on the Internet", helping to explain why 30% have had contact online with someone they haven't met face-to-face. But only 9% have met an online contact offline and very few found this a problematic experience;
- Public anxiety often focuses on pornography, "sexting", bullying and meeting strangers, especially for young children. But there are other risks that worry children, including many teenagers, especially those associated with user-generated content (e.g. hate, pro-anorexia, self-harm, drug-taking or suicide).

The EU Kids Online survey also shows that many parents underestimate the risks that their children encounter when going online:

¹¹ Ofcom, *International Communications Market Report 2014*, "3. Television and Audio-Visual", http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr14/icmr/ICMR_3.pdf.

¹² "Protecting Audiences in an Online World", deliberative research report prepared for Ofcom by Kantar Media, http://stakeholders.ofcom.org.uk/binaries/research/tv-research/protecting-audience-online/Protecting_audiences_report.pdf.



- 40% of parents whose child has seen sexual images online claim that their child has not seen them;
- 56% of parents whose child has received nasty or hurtful messages online claim that their child has not;
- 52% of parents whose child has received sexual messages claim that their child has not;
- 61% of parents whose child has met offline with an online contact claim that their child has not.

Technology can help parents in controlling their children's activities on the Internet, filtering what content they are allowed to access on their multiple screens. According to Stephan Dreyer,¹³ technology (re-)enables parents to implement their own educational concept in digital environments. Moreover, it grants parents, users and children more power and influence options as regards participation in the area of protecting children.

Technological solutions are helpful in achieving the following goals:

- compensating the limitations of traditional legal measures;
- supporting parents in their fundamental role of controlling children's activities online;
- protecting children specifically (if implemented correctly).

But technology that tells people what is allowed and what is not allowed might have an impact on the end user's privacy rights, as it can also:

- show overspill in areas protected by human rights;
- interfere with net infrastructures and principles;
- be intransparent to those who are affected/those who use them;
- be misused by those who control them;
- be circumvented by the protected target group;
- left unused by their intended users (parents, ISPs, manufacturers).

Dreyer's conclusion is that "technical solutions only will have a significant impact where media literacy measures, awareness campaigns and parent-oriented support will be provided in parallel". Moreover, the availability of technical solutions and parental awareness is not enough, as shown by an Ofcom report on strategies of parental protection for children online.¹⁴ Parents in the UK can choose among many parental control tools, including filtering systems developed by private manufacturers. Despite this fact, around two in five parents of 5-15-year-olds with broadband at home do not use any particular technical tool to manage their child's access and use. They say that this is because they talk to their child and use other types of mediation; a similar proportion says it is because they trust their child. Moreover, close to half of parents who do not use tools to manage app installation and use say this is because they trust their child to be sensible/responsible, with around a third saying that this is because they prefer talking and other forms of mediation. The main reason given by parents for not installing parental controls on a games console was that they trust their child, followed by the fact that their child is always supervised. The study also mentions the

¹³ Dreyer S., "User Empowerment in Child Protection by and through Technology", presentation made at the workshop "Empowering Users: Rating Systems, Protection Tools And Media Literacy across Europe" jointly organised by the European Audiovisual Observatory and EPRA, Strasbourg, 15 December 2014, http://publi.obs.coe.int/documents/205595/8166225/14_Dreyer_OBS_EPRA_ws_empowering_users_tools_HBI_2014.pdf/cbc1cab5-5d47-4960-af19-ef570d374fd5.

¹⁴ Ofcom, "Report on Internet Safety Measures – Strategies of Parental Protection for Children Online", 12 January 2015, http://stakeholders.ofcom.org.uk/binaries/Internet/third_Internet_safety_report.pdf.



reluctance or inability among parents to engage with technology and the fact that the risks of the Internet are not necessarily top-of-mind for parents.

Table 2 – UK parents of 5-15-year-olds with a home broadband connection who are aware of each tool. Reasons for not using each type of online technical tool: 2014

	Content filters (Parental control software)	Content filters (ISP network level home filtering)	Parental controls built into the device by the manufacturer	Safe search enabled on search engine websites	YouTube safety mode enabled
% of those with BB at home who are aware of but do not use this feature	30%	29%	23%	20%	15%
I prefer to talk to my child and use supervision and rules	43%	42%	38%	40%	39%
Trust my child to be sensible/ responsible	40%	38%	38%	41%	33%
Child is always supervised/ always an adult present	21%	19%	18%	20%	20%
Too complicated/ time consuming to install/ administer	6%	3%	6%	3%	3%
Child learns how to be safe on the Internet at school	6%	11%	7%	8%	7%
Don't know how to do this/ didn't know this was possible	5%	6%	6%	7%	6%
Filters block too much/get in the way	4%	7%	2%	3%	2%
Wouldn't work /They would find a way round the controls	2%	3%	1%	3%	5%

Source: Ofcom research, fieldwork carried out by Saville Rossiter-Base in April to June 2014

Raising a child is indeed a delicate balancing act. It means providing the right mix between setting necessary boundaries and allowing enough trust and freedom for the child to become gradually independent. On the way to adulthood there are too many obstacles and hurdles and parents simply cannot control every moment of their children's lives, especially in the media-obsessed world of today. Therefore, State legislative intervention is required to at least contribute to the creation of a media environment in which children are, as much as possible, out of harm's way. This requirement will be analysed in the next sections. Legislation concerning the protection of minors on TV has a long and successful history and there is a widespread agreement on its ground rules. Nevertheless,



according to a study carried out by the French CSA,¹⁵ the issue of which means are to be used to ensure the protection of minors on the Internet is a more contentious one. The protection of minors is perceived by some as a serviceable excuse to tighten control over the Internet by the state. If a generalised control over the Internet is not realistic, the real objective according to the CSA would be the creation of a “space of freedom”, where the youth sensibility is protected and the empowering of all stakeholders (content providers, adult and youth) is ensured. This would require a pragmatic view of the Internet and could be done a.o. by creating a closer link between members of the Internet industry and civil society.

¹⁵ Conseil supérieur de l’audiovisuel, “La protection des mineurs à l’heure de la convergence des médias audiovisuels et d’internet”, March 2012, <http://www.csa.fr/content/download/20592/342842/file/Protection+des+mineurs+et+internet.pdf>.



2. International and European legal framework

2.1. The international framework

Since the 1990s, the United Nations and various regional bodies, such as the Council of Europe, OECD or the EU, have adopted instruments, which provide guidance on addressing and responding to the protection of minors in a converged environment. These texts provide for legally binding obligations for State parties to take specific measures in this field and establish important benchmarks and standards for other countries.

2.1.1. The UN Convention on the Rights of the Child

While under international law, States have the primary responsibility to ensure the respect, promotion and protection of children's rights, the United Nations Convention on the Rights of the Child (UNCRC)¹⁶ and additional instruments hold the issue of the protection of minors in audiovisual services as a priority at an international level and recognise that other actors – such as parents, civil society, private sector service providers and businesses – also have a responsibility in this regard.¹⁷ Article 5 of the UNCRC is especially relevant, as it refers to the rights and duties of parents or other persons legally responsible for the child to offer appropriate guidance to the child and protect him/her from information and material injurious to his/her well-being. Protection of children is placed alongside other rights particularly relevant in the information society, such as freedom of expression, the freedom to seek information and freedom of association.

Many texts adopted by other international organisations (see Table 3) over the last decade emphasise the crucial need for the empowerment of children through education, including digital literacy. This is especially true when it comes to the protection of young persons in new media services and on the Internet. Governments generally consider international cooperation essential for protecting children on such a global medium as Internet and are involved in an international dialogue on these issues.

¹⁶ United Nations, Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49 (UNCRC), www.ohchr.org/Documents/ProfessionalInterest/crc.pdf.

¹⁷ See UNCRC, Articles 12 and 13 on the right of freedom of expression of children; Article 16 of right to privacy of children; Article 17 on the access of children to good quality mass media.



Table 3 – Examples of international cooperation in the field of empowering young persons in the online environment

The Asia-Pacific Economic Cooperation (APEC) has placed the protection of children online on the agenda of many symposiums and projects, mainly oriented at the sharing of best practices between member States.

The International Telecommunication Union (ITU) works on child online protection at policy level through the Child Online Protection (COP) Initiative,¹⁸ a multi-stakeholder initiative of ITU membership to create awareness and to develop practical tools and resources to help mitigate risks. On an operational level, ITU has also set a Council Working Group on Child Online Protection (CWG-CP),¹⁹ which acts as a platform of exchange on these issues for member States, sector members and external experts.

The Organisation for Economic Co-operation and Development (OECD) has worked on the impact of the Internet on children and on increasing cross-border co-operation of governments and enforcement authorities in the area of protecting minors. On February 2012, the OECD Council adopted a Recommendation on “The Protection of Children Online”,²⁰ in which States recognise the role of the empowerment of all stakeholders to make a safer online environment for children and that policies to protect children online should empower children and parents to evaluate and minimise risks and engage online in a secure, safe and responsible manner.

The United Nations International Children’s Emergency Fund (UNICEF) has focused its work on the protection of children from violence, exploitation and abuse, including in the converged online/offline environments. This is the case for example with the Innocenti Research Centre (IRC) report on “Child Safety Online, Global Challenges and Strategies”.²¹

The World Summit on the Information Society (WSIS) took strong commitments on the protection of children online, while its successor, the Internet Governance Forum (IGF) set up the Dynamic Coalition for Child Online Safety,²² which provides an annual international and multi-stakeholder platform to exchange views on children and young people, among others.

2.1.2. The Council of Europe framework

At regional level, the Council of Europe has achieved a high degree of policy coordination on the protection of minors against harmful content in the media and on developing children’s media literacy skills. The core provision at European level is Article 10 of the European Convention on Human Rights (ECHR)²³ on the right of everyone to freedom of expression, whose exercise comes with certain duties and responsibilities that are necessary in a democratic society.²⁴ In addition, many conventions of the Council of Europe have set legal obligations for the State parties in relation to the protection of minors in audiovisual media services and in new converged environments.

¹⁸ Child Online Protection (COP) Initiative, www.itu.int/en/cop/Pages/default.aspx.

¹⁹ Council Working Group on Child Online Protection, www.itu.int/en/council/cwg-cop/Pages/default.aspx.

²⁰ OECD Council, “The Protection of Children Online”, report on risks faced by children online and policies to protect them, 2012, www.oecd.org/sti/ieconomy/childrenonline_with_cover.pdf.

²¹ UNICEF, Innocenti Research Centre (IRC), “Child Safety Online, Global challenges and strategies”, www.unicef-irc.org/publications/pdf/ict_eng.pdf.

²² Internet Governance Forum, “Dynamic Coalition for Child Online Safety”, <http://intgovforum.org/cms/dynamiccoalitions/54-dynamic-coalitions/dc-meetings-2008/79-child-online-safety>.

²³ Convention for the Protection of Human Rights and Fundamental Freedoms, 3 September 1953, www.echr.coe.int/Documents/Convention_ENG.pdf.

²⁴ Article 8 ECHR on the right to respect for private life and family life is also relevant for the protection of children in mass media.



With regard to the protection of minors in linear broadcasting services, the European Convention on Transfrontier Television²⁵ provided, back in 1989, for the responsibilities of broadcasters in stating that:

“... all items of programme services which are likely to impair the physical, mental or moral development of children and adolescents shall not be scheduled when, because of the time of transmission and reception, they are likely to watch them” (Article 7).

The Council of Europe has addressed, in other conventions, the question of empowering minors against harmful content in the online environment and has created some obligations for State parties in relation to criminal offenses on the Internet,²⁶ calling governments to take general measures to protect and empower children.²⁷

On a not legally-binding level, the Council of Europe has also played a pioneering role for the protection of minors and the empowerment of users on new audiovisual media services and on the Internet, through the adoption, in the last two decades, of several recommendations and declarations from the Parliamentary Assembly (PACE) and the Committee of Ministers (CM). It thus stressed, in 2003, that the freedom of communication on the Internet should not prejudice the dignity of the fundamental rights and freedom of others, especially children.²⁸ A few years later, it went into details about the risk of harm from content and behaviour in the new media services which, though not illegal, is capable of adversely affecting the physical, emotional and psychological well-being of children.²⁹ Online pornography, the portrayal and glorification of violence and self-harm, demeaning, discriminatory or racist expressions or apologia for such conduct, solicitation (grooming), bullying, stalking and other form of harassment were identified as the main risks encountered online. In response to these, the Council of Europe has promoted information literacy tools³⁰ for children and educators and stressed the need to balance the right to freedom of expression and information with the right to private life.

A new approach has thus slowly emerged for the protection of minors in new converged services, based on concepts such as “enabling” children and “empowering” users, with new strategies focused on “awareness-raising” campaigns and multi-stakeholder approaches between governments and the private sector, including civil society actors, as key catalysts in promoting the human rights dimension of the information society. In accordance with this tendency, the Council of Europe adopted in 2007 concrete guidelines³¹ aimed at, among other things, empowering individual users, in which member states, the private sector and civil society were encouraged to develop common standards and transparency in relation to the protection of children against potentially

²⁵ European Convention on Transfrontier Television, 5 May 1989, <http://conventions.coe.int/Treaty/en/Treaties/Html/132.htm>.

²⁶ Convention on Cybercrime, 23 November 2001, <http://conventions.coe.int/Treaty/EN/treaties/Html/185.htm>.

²⁷ See in Council of Europe Convention on the protection of Children against Sexual Exploitation and Sexual Abuse, 25 October 2007 (the “Lanzarote Convention”), Article 31, <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>

²⁸ Council of Europe Committee of Ministers, Declaration on freedom of communication on the Internet, adopted by the Committee of Ministers on 28 May 2003, <https://wcd.coe.int/ViewDoc.jsp?id=37031>.

²⁹ Council of Europe Committee of Ministers, Recommendation Rec(2006)12 of the Committee of Ministers to member states on empowering children in the new information and communications environment, adopted by the Committee of Ministers on 27 September 2006, <https://wcd.coe.int/ViewDoc.jsp?Ref=Rec%282006%2912&Language=lanEnglish&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

³⁰ See for example: www.wildwebwoods.org/popup_langSelection.php.

³¹ Council of Europe Committee of Ministers, Recommendation CM/Rec (2007)11 of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communication environment, adopted by the Committee of Ministers on 26 September 2007, <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec%282007%2911&Language=lanEnglish&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.



harmful content in the online environment. Along the same lines, the Council of Europe developed in 2008 in cooperation with the European Internet Services Providers Association (EuroISPA) its “human rights guidelines for Internet service providers”,³² which sets benchmarks for Internet service providers (ISPs) in order that they may become aware of the human rights impact that their activities can have, in relation notably with the rights of users to privacy and freedom of expression.

It is also worth mentioning a Recommendation of 2009 “on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment”,³³ through which the Council of Europe calls member states, in cooperation with private sector actors and civil society, to provide safe and secure spaces for children on the Internet. It encouraged the development of pan-European trustmark and labelling systems to protect children from harmful content – e.g. promoting initiatives such as the Internet Content Rating Association, part of the Family Online Safety Institute (FOSI) and PEGI Online, part of the Pan-European Game Information (PEGI) plus system – and to promote Internet skills and literacy for children, parents and educators. More recently, the Council of Europe has focused on the need for the protection of children and youngsters against harmful content and behaviour on social networking services,³⁴ encouraging self- and co-regulatory mechanisms, as well as the promotion of best practices.

Protecting and empowering children and young people is part of the main priorities of the Council of Europe’s Internet Governance Strategies for 2012-2015.³⁵ International cooperation and mutual assistance, the development of common criteria for labelling systems, the sharing of best practices on secure and age-appropriate spaces for children on the Internet and awareness-raising activities are seen as key objectives in this field. This is also one of the goals of the Council of Europe’s Strategy for the Right of the Child for 2012-2015,³⁶ which works towards the empowerment of children in the media environment, as well as the promotion of self-regulation and the governmental regulation of Internet providers, social networks and the media in compliance with the rights of the child.

³² Human rights guidelines for Internet service providers, developed by the Council of Europe in co-operation with the European Internet Services Providers Association (EuroISPA) (2008), www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf%282008%29009_en.pdf.

³³ 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 by the Committee of Ministers on 8 July 2009, <https://wcd.coe.int/ViewDoc.jsp?id=1470045>.

³⁴ See Recommendation CM/Rec(2012)4 of the Committee of Ministers to member states on the protection of human rights with regard to social networking services of the Committee of Ministers, adopted by the Committee of Ministers on 4 April 2012, <https://wcd.coe.int/ViewDoc.jsp?id=1929453>.

³⁵ See Internet Governance – Council of Europe Strategy 2012-2015, Ministers’ Deputies CM Documents CM(2011)175 final, 15 mars 2012. The Council of Europe’s Internet Governance Strategy for 2016-2019, currently under preparation also inscribes the empowering of children and young people as one of its priorities, www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/Documents/Internet%20Governance%20Strategy/Internet%20Governance%20Strategy%202012%20-%202015.pdf.

³⁶ Council of Europe Strategy for the Right of the Child (2012-2015), Ministers’ Deputies CM Documents CM(2011)171 final, 15 February 2012, www.coe.int/t/DGHL/STANDARDSETTING/CDcj/StrategyCME.pdf.



Table 4 – Main Recommendations of the Council of Europe in relation to the protection of minors and adolescents in the mass media³⁷

Recommendation	Subject
Recommendation 963 (1983) of PACE	on cultural and educational means of reducing violence
Recommendation 1276 (1995) of PACE	on the power of the visual image
Resolution 1165 (1998) of PACE	on the right to privacy
Recommendation 1466 (2000) of PACE	on media education
Recommendation No. R (89) 7	on the principles of distribution of videograms having a violent, brutal or pornographic content and its Explanatory Memorandum
Recommendation No. R (90) 10	on cinema for children and adolescents
Recommendation No. R (92) 19	on video games with a racist content
Recommendation No. R (97) 19	on the portrayal of violence in the electronic media and its Explanatory Memorandum
Recommendation No. R (97) 20	on “hate speech” and its Explanatory Memorandum
Recommendation No. R (97) 21	on the media and the promotion of a culture of tolerance and its Explanatory Memorandum
Recommendation No. R (2001) 8	on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services)
Declaration CM (2003)	on freedom of communication on the Internet
Recommendation (2006) 12	on empowering children in the new information and communications environment
Recommendation CM/Rec (2007)11	on promoting freedom of expression and information in the new information and communications environment
Recommendation CM/Rec(2008)6	on measures to promote the respect for freedom of expression and information with regard to Internet filters
Declaration CM (2008)	on protecting the dignity, security and privacy of children on the Internet
Recommendation 1882 (2009)	on the promotion of Internet and online media services appropriate for minors
Recommendation CM/Rec(2009)5	on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment
Recommendation CM(2011)171 final	on the Council of Europe Strategy for the Right of the Child (2012-

³⁷ Links to all Recommendations mentioned in Table 4 can be found in the bibliography at the end of this publication. For an overview of the Council of Europe’s standard setting activity see also Nikotchev S. and McGonagle T. (Eds), IRIS Themes, Freedom of Expression and the Media: Standard-setting by the Council of Europe, (I) Committee of Ministers, European Audiovisual Observatory, Strasbourg 2011, http://publi.obs.coe.int/documents/205595/2667238/ebook_committeeministers-coeEN.pdf/552e0e32-6b1d-4b03-bbc2-0ea0515019e7 and Nikotchev S. and McGonagle T. (Eds), IRIS Themes - Freedom of Expression and the Media: Standard-setting by the Council of Europe (II) Parliamentary Assembly, European Audiovisual Observatory, Strasbourg 2011, http://publi.obs.coe.int/documents/205595/2667238/ebook_ParliamentaryAssemblyEN.pdf/f64db8ef-0d4d-4ef7-a3a5-c650eb6c1cb6.



(2012)	2015)
Recommendation CM/Rec(2012)3	on the protection of human rights with regards to search engines
Recommendation CM/Rec(2012)4	on the protection of human rights with regard to social networking services
Recommendation CM/Rec(2014)6	on a Guide to human rights for Internet users

2.2. The European Union framework

At EU level, the protection of minors in the media environment has been debated for many years. It has become in recent times a recurrent topic, with the convergence of digital technologies and the increasing use of mobile devices by children, including on-demand media services on the Internet and online video games. The ways to limit and prohibit the spread of illicit and harmful media content in relation to young people requires the EU regulator to find a delicate balance between different fundamental rights and to put in place appropriate regulatory instruments. In particular, the right of freedom of expression of content providers should be balanced with the public interest objective of protecting minors, which is often accompanied by control, filtering tools and censorship. The question of protecting minors in audiovisual and online services has been therefore addressed at various levels of the EU legal order, from the primary legislation in the Treaty on the European Union (TEU)³⁸ and the Charter of Fundamental Rights of the European Union (CFREU),³⁹ to secondary legislation, through various directives and recommendations.

The main provision in this regard is Article 6(3) TEU on the freedom of expression, which incorporates into the EU legal framework Article 10 of the ECHR. The right of expression is also included in Article 11 of the CFREU, which also incorporates fundamental freedoms of the ECHR in its Article 53. Article 24 of the CFREU addresses the rights of the child and establishes that children shall have the right to such protection and care as is necessary for their well-being and that in all actions relating to children taken by public authorities or private institutions, “the child’s best interest must be a primary consideration”. Finally, Article 7 of the CFREU states that everyone has the right to respect for his or her “private life, home and communication”.

At the secondary legislation level, the protection of minors on audiovisual and online services has been addressed by the EU in many directives and recommendations. Rules on privacy and the protection of personal data are laid down in the EU Data Protection Directive⁴⁰ and the Directive on Privacy and Electronic Communications,⁴¹ which both apply to online content and concern equally adults and children. With respect to the protection of minors in audiovisual media services, the main provisions are set out in the Audiovisual Media Services Directive⁴² (AVMSD),

³⁸ Consolidated version of the Treaty on European Union, OJEU 2010/C 83/01, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2010:083:FULL&from=en>.

³⁹ Charter of Fundamental Rights of the European Union (2010/C 83/02), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>.

⁴⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJEU No. L 281/31, 23 November 1995, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:0031:0050:EN:PDF>.

⁴¹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJEC L 201/37, 31 July 2002, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:201:0037:0047:EN:PDF>.

⁴² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services (Audiovisual



which establishes some minimum standards and mutual recognition in this field, covering both linear and non-linear audiovisual services. Under Article 4(8) AVMSD, all other services delivered over electronic communications networks are covered by the E-Commerce Directive⁴³ as information society services.⁴⁴ The E-Commerce Directive only allows member states to restrict services which “prejudice” or “present a serious and grave risk of prejudice” to the protection of minors. It exempts, on the other hand, those services which are excused from responsibility under certain circumstances (e.g. mere conduits, caching and hosting services) from fulfilling obligations imposed by member states, limiting in this way the impact of other legal instruments in the field of the protection of minors in information services. In this context, traditional approaches are increasingly considered as limited to regulating the protection of young viewers and new measures, such as self- and co-regulation and education instruments, have been gradually called for by the EU legislator as necessary complementary tools for user empowerment.

2.2.1. A two-tier legal approach for linear and on-demand services under the AVMSD

Linear broadcasting services are today challenged by new convergent audiovisual forms, which bring together games, advertising and information. The editorial model of increased personal choice for a selection from a wide range of TV programmes is shifting towards an individual communication model in online services. The availability of harmful content on these new platforms and products requires new solutions for material labelling through increased parental control, using new digital methods to protect minors. The Audiovisual Media Services Directive,⁴⁵ which entered into force on 19 December 2007 as Directive 2007/65/EU and had to be transposed by the member states by 19 December 2009 – later codified in 2010 as Directive 2010/13/EU – extended the standards for the protection of minors from traditional broadcasting programmes⁴⁶ to non-linear services.

The AVMSD covers both services, which are now referred to under the generic term of “audiovisual media services”, as they are both “mass media, that is, [...] are intended for reception by, and which could have a clear impact on, a significant proportion of the general public”.⁴⁷ However, laxer provisions are set forth with regard to on-demand audiovisual media services, due to the higher degree of control and choice exercised by users on these services and considering the different impact they have on society. Under this two-tier regulatory system, Article 12 AVMSD provides the following, with respect to the protection of minors on non-linear audiovisual media services:

Media Services Directive, AVMSD), OJEU L 95/1, 15 April 2010, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0013&from=EN>.

⁴³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJEC L 178/1, 17 July 2000, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>.

⁴⁴ According to Article 4(8) AVMSD, “[i]n the event of a conflict between a provision of Directive 2000/31/EC and a provision of this Directive, the provisions of this Directive shall prevail, unless otherwise provided for in this Directive”.

⁴⁵ 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 (the AVMS Directive), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007L0065&from=EN>.

⁴⁶ 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, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989L0552&qid=1423754574697&from=EN>.

⁴⁷ Recital 21 AVMSD.



“Member states shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously 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 such on-demand audiovisual media services.”

With regards to linear services (i.e. television broadcasting), Article 27(1) AVMSD provides that:

“Member states shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.”

The common criteria retained in both approaches is that the service or programme has to be “seriously impairing” to the development of minors. While these programmes are prohibited in broadcasting services, they may be made available in on-demand services, in such a way that minors will not normally hear or see them. This can be done in practice by the use of PIN codes or other more sophisticated age verification systems.

On the other hand, programmes that might simply be “harmful” to minors can be transmitted in linear services when it is ensured – by selecting the time of the broadcast or by any technical measures (e.g. encryption) – that minors will not normally hear or see them. In addition to that, when such programmes are not encrypted, they must be preceded by an acoustic warning or made clearly identifiable throughout their duration by means of a visual symbol. Those services are allowed without restriction in on-demand services according to the Directive.

Table 5 – Harmful content in traditional TV services and on on-demand audiovisual services

	Content which might seriously impair minors	Content which is likely to impair minors must...
Linear (TV) services Article 27 AVMSD	Total ban	...ensure, by selecting the time of the broadcast or by any technical measure (e.g. encryption), that minors in the area of transmission will not normally hear or see such broadcasts
Non-linear (via Internet or on-demand) services Article 12 AVMSD	...only be made available in such a way that ensures that minors will not normally hear or see such on demand audiovisual media services	No restrictions

The AVMSD does not harmonise the definitions of certain key concepts it refers to, such as “minors”, “might seriously impair”, “likely to impair” or even “pornography”. It only gives examples of some possible “seriously impairing” content in the linear environment, such as “pornography or gratuitous violence”, thus leaving some margin of interpretation to the member states during the implementation of the Directive, based on their national cultural backgrounds and social identities.



The AVMSD also puts great emphasis on co-regulatory and self-regulatory instruments, considering that the active support of service providers is necessary to achieve public interest objectives in the field of the protection of minors in new audiovisual media services and that this approach allows for more flexibility that can accommodate the different legal traditions of the member states.

2.2.2. An innovative approach for all audiovisual and online information services under the 1998 and 2006 EU Council recommendations

The legal obligations set by the AVMSD in relation to the protection of minors in audiovisual media services are complemented by two important Council Recommendations of 1998 and 2006 related to the protection of minors and human dignity. They follow up on the Green Paper “on the protection of minors and human dignity in audiovisual and information services”,⁴⁸ which opened the debate on the ethical parameters of the information society and audiovisual services at pan-EU level in 1996. The Green Paper pushed forward some guidelines for the provision of a more flexible regulatory framework capable of accounting for the characteristics of new audiovisual media services and the need for a right balance between freedom of speech and public interest considerations.

In addition, the European Commission adopted in the same year a Communication “on Illegal and Harmful Content on the Internet”,⁴⁹ which gives some valuable insight into the scope of key concepts, such as “illegal” and “harmful” content. Thus, the Communication clearly distinguishes illegal content, which is defined in the Green Paper as content that may be banned for everyone, regardless of the age of the potential audience or the medium used (e.g. child pornography, extreme gratuitous violence and incitement to racial or other hatred, discrimination, and violence), from harmful content which refers to content that is legal, but liable to harm minors by impairing their physical and mental development,⁵⁰ meaning that access to it can be allowed only for adults.⁵¹ According to the Communication, the key difference between harmful and illegal content is that harmful content is subject to personal choice, based on one’s religious beliefs, ethical standards or social and cultural differences, while illegal content is a matter of national decision. This distinction is essential if the different objectives and problems raised by each type of content and the distinct solutions chosen in each case are not to be confused. With regard to illegal content, the States decide which content should be considered illegal and what consequences should be linked to this classification (for instance, prohibition of publication and distribution). When dealing with harmful content, on the other hand, it is argued that the State should create an environment that “enables” citizens to decide for themselves (and possibly for their children) which content they consider suitable and worth accessing. Moreover, the Communication reiterates that, in this case, a balance must be struck between possible harm to minors and the preservation of freedom of expression.

Following these preliminary developments, the Council adopted in 1998 a Recommendation “on the development of competitiveness of the European audiovisual and information services

⁴⁸ Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services, COM (96) 483 final, 16 October 1996, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51996DC0483&from=EN>.

⁴⁹ Communication on illegal and harmful content on the Internet, COM(96) 487 of 16 October 1996, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1996:0487:FIN:EN:PDF>.

⁵⁰ Recommendation 98/560/EC, whereas 17, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31998H0560&from=FR>.

⁵¹ Later, the Safer Internet Action Plan added to this classification unwanted material, such as spam or undesired commercial communications.



industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity".⁵² This Recommendation was the first legal instrument at EU level concerning the content of online audiovisual and information services covering all forms of delivery from broadcasting to the Internet. The 1998 Recommendation was also the first important instrument calling for European and international cooperation in order to enable minors to make responsible use of online audiovisual and information services and to encourage a more systematic coordination between governments, industries and stakeholders so as to improve the level of awareness among parents, educators and teachers about the potential of the new services. It also emphasised the role of self-regulation and provided the principles on which a self-regulatory intervention should be based: involvement of all interested parties, definition of the objectives in the codes of conduct, cooperation at community level and regular evaluation of the measures taken.

The second important Recommendation in this field was adopted in 2006 and relates to the "protection of minors and human dignity and on the right of reply".⁵³ This Recommendation updated the 1998 Recommendation and served the same objective of adopting relevant rules for all audiovisual and online information services. However, the 2006 Recommendation focused more specifically on the Internet, highlighting the need to use it in a positive way and to combat all illegal activities which may be harmful to minors, in order to make the Internet a safer medium. This recommendation recognises the importance of filtering systems and labelling and includes a number of possible measures for the benefit of minors, such as systematically supplying users with an effective, updatable and easy-to-use filtering system when they subscribe to an access provider or equipping services specifically intended for children with automatic filtering systems. In terms of technical tools, parental control measures, filtering and other age verification systems were already addressed in the 1998 Recommendation; the 2006 Recommendation adds the rating or classification of audiovisual content, it encourages self-commitments from service and content providers and highlights the importance of codes of conduct for content providers, with measures promoting positive and appropriate content for minors, which keep them away from harmful content, as well as content labelling. The 2006 Recommendation also confirms the approach of the 1998 Recommendation, stressing the "need to raise awareness among parents, educators and teachers of the potential of the new services and of the means whereby they may be made safe for minors" and addressing actions to improve media literacy. The importance of media literacy in all sections of society is also stressed in the AVMSD, which incorporates an obligation for the European Commission to follow progress in this field closely and to include it in the report on the application of the Directive.

2.2.3. Other EU initiatives in relation to the protection of minors against impairing content in a converging environment

In view of the rapid growth in the European video games market and the increasing risk of exposure of young video game users to illegal or harmful content, the EU Council addressed in 2002 the

⁵² Council Recommendation 98/560/EC of 24 September 1998 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 (98/560/EC, OJ L 270, 07 October 1998, p. 48–55), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998H0560&from=EN>.

⁵³ Recommendation 2006/952/EC of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry (2006/952/EC, OJ L 378, 27 December 2006, p.72–77), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006H0952&from=EN>.



question of the protection of consumers, through the labelling of certain video and computer games according to age group,⁵⁴ promoting self-regulation as an adequate means to achieve this goal.⁵⁵

With regards to the Internet, it is worth noting that since 1999 the European Commission funds the “Safer Internet Programmes”⁵⁶ (SIP), which aims at empowering and protecting children and young people online and fighting illegal and harmful online content and conduct. The SIP identifies areas for concrete measures on which the Community resources should be focused. The 1999 Action Plan defines four specific objectives: the creation of a safer environment through a network of hot-lines and the adoption of codes of conduct, the development of a filtering and rating system, the encouragement of awareness-raising actions and other supporting actions e.g. the assessment of legal implications and coordination with other similar international initiatives.

After the positive outcome of this four-year plan,⁵⁷ the Commission proposed, in 2005, a new mandate for an extended Safer Internet Action Plan (so called IAP-Plus),⁵⁸ which was again extended and widened in 2009 to “take into account currently unknown future developments in the online environment”. The 2009-2013 Action Plan⁵⁹ includes actions in relation to the promotion of a safer online environment and public awareness raising campaigns based on self-regulatory principles. These actions are framed to encompass a better “user-empowerment”, not only for parents and carers, but also for children and young people and to stimulate stakeholders to take responsibility, cooperate and exchange experiences and best practices at European and international level. Moreover, the Action Plan acknowledges the need to create and build up an adequate knowledge-base for addressing both existing and emerging uses, risks and consequences and mapping both quantitative and qualitative aspects in this context. The SIP focuses on the creation of a safer online environment and the fight against illegal and harmful content. It includes actions such as the introduction of the Safer Internet Day⁶⁰ and the Safer Internet Centre, which support the development and implementation of codes of self-regulation and codes of conduct. The SIP is also the basis for the support of the European Commission to a number of other self-regulatory initiatives in this field.⁶¹

⁵⁴ Council Resolution on the protection of consumers, in particular young people, through the labelling of certain video and computer games according to the appropriate user age group, 2002/C 65/02, 1 March 2002, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002G0314%2801%29&from=EN>.

⁵⁵ See Chapter 4 of this IRIS PLUS on self- and co-regulatory instruments.

⁵⁶ European Parliament and European Council, Decision 276/1999/EC of 25 January 1999 adopting a Multi-annual Community Action Plan on promoting safer use of the Internet and new online technologies by combating illegal and harmful content primarily in the area of the protection of children and minors (OJ L 33, 6 February 1999, p.1) as amended by Decision 1151/2003/EC of the European Parliament and of the Council of 16 June 2003 (OJ L 162, 1 July 2003, p. 1), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999D0276&from=EN>.

⁵⁷ See the Communication from the Commission to the Council, the European parliament, the European economic and social committee and the Committee of the regions concerning the evaluation of the multi-annual community action plan on promoting safer use of the Internet and new online technologies by combating illegal and harmful content primarily in the area of the protection of children and minors, COM (2003) 653 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003DC0653&from=EN>.

⁵⁸ Decision N° 854/2005/EC of the European Parliament and of the Council, Decision of 11 May 2005 establishing a multiannual Community programme on promoting safer use of the Internet and new online technologies, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005D0854&from=EN>.

⁵⁹ Decision N° 1351/2008/EC of the European Parliament and of the Council of 16 December 2008 establishing a multiannual Community programme on protecting children using the Internet and other communicating technologies, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008D1351&from=EN>.

⁶⁰ Available at www.saferinternetday.org/web/guest;jsessionid=FF236CF5A2A47A1CCF893439088FDFE9.

⁶¹ For more details on self-regulatory initiatives, see paragraph 4.2.1. of this IRIS Plus.



The European Commission reiterated in a Communication of 2011 on "An EU Agenda for the Rights of the Child"⁶² its commitment to support member states and other stakeholders in strengthening prevention, empowerment and the participation of children to make the most of online technologies and counter cyber-bullying behaviour, exposure to harmful content and other online risks, namely through the Safer Internet Programme and in cooperation with the industry through self-regulatory initiatives. However, an evaluation report⁶³ in the field of social networking services (SNS) carried out in 2010 stressed the need for improvement in terms of effectiveness and implementation of some of these self-regulatory initiatives.

On the other hand, the European Commission proposed in 2012 a "strategy for a better Internet for children",⁶⁴ with a work programme focused on increased awareness at school, wider use of technological solutions – reporting tools, age-appropriate privacy settings, wider use of content classification, wider availability and use of parental controls, etc. – and the fight against child sexual abuse, based on self-regulation. Collective results and engagements were made public, including recommendations for best practices by the biggest players of the market.

All the European interventions in this field have a non-binding character. Moreover, they all support the development and the implementation of technical tools and, among legal tools, they recommend mainly self-regulation as the best regulatory solution. This option is not only due to the fact that technical tools and self-regulation can have a higher level of flexibility and can better fit the needs of an ever-changing environment, but also the general argument – clearly stated in IAPs decisions – that "[r]eaching international agreement on legally binding rules is desirable but will be a challenge to achieve and, even then, will not be achieved rapidly. Even if such agreement is reached, it will not be enough in itself to ensure implementation of the rules or to ensure protection of those at risk".

⁶² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "An EU Agenda for the Rights of the Child", COM(2011) 60 final, http://ec.europa.eu/justice/policies/children/docs/com_2011_60_en.pdf.

⁶³ Staksrud, E and Lobe, B., "Evaluation of Implementation of the Safer Social Networking Principles for the EU: General Report. European Commission Safer Internet Programme" (2010) Luxembourg, http://ec.europa.eu/danmark/documents/alle_emner/information/100209_3final_report_en.pdf.

⁶⁴ Safer Internet – A multi-annual union programme on protecting children using the Internet and other communication technologies, Work Programme 2013, C(2013) 1954, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=1964.



3. National implementation in the EU member states

The AVMSD had to be transposed by the EU member states by December 2009. The first report from the European Commission on the application of the Directive⁶⁵ was presented in May 2012 and the second one is due in May 2015. According to the first Application Report, all member states have introduced rules in relation to the protection of minors in audiovisual media services. However, the implementation of these rules differs significantly between member states. This Chapter describes some examples of the implementation of Articles 27 and 12 AVMSD in various EU member states and presents the different approaches taken at national level towards “impairing” content, especially as regards non-linear audiovisual media services. In this field, the absence of a definition of certain key concepts in the Directive in relation to potentially harmful content has resulted in different definitions at national level, which can be traced back to pre-existing national concepts and classifications and to distinct levels of protection.

Although certain countries have opted for a transversal approach across services for the protection of minors, this is still the exception and the majority of countries have preferred a graduated approach with lighter obligations for on-demand services. However, the convergence between traditional forms of media consumption and new connected services and devices adopted by children and young people and the increasing blurring of boundaries between traditional broadcasting and on-demand services raise new challenges for the effectiveness of the AVMSD in protecting minors. The AVMSD extends only to media service providers, whereas new types of content, such as user-generated content, are not subject to any regulatory supervision, except under terms of service applied by Internet service providers. The same question can be raised for content from outside the European Union, which can represent a potential source of harm for minors.

3.1. Different regulatory mechanisms across the EU in relation to the protection of minors from “impairing” content

Different regulatory schemes have been put in place among the EU member states to implement the provisions on protecting minors in audiovisual media services. Some member states have implemented almost verbatim the Directive into their law. However, in most European countries primary legislation sets out only the minimum requirements and the regulatory authorities are in charge of the elaboration of the rules and measures permitting audiovisual media services providers to fulfil their legal requirements under primary law. Regulation in this field is also often based on a shared responsibility between national regulatory authorities (or other relevant bodies), the industry/service providers and the parents or guardians, through co- and self-regulatory instruments, which are used in varying degrees.⁶⁶

⁶⁵ First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU “Audiovisual Media Services Directive – Audiovisual Media Services and Connected Devices: Past and Future Perspectives”, COM (2012) 203 final, 4 May 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0203&from=EN>.

⁶⁶ See chapter 4 on self and co-regulatory instruments.



Table 6 – Examples of regulatory approaches across the EU⁶⁷ in relation to the protections of minors in audiovisual media services

	Regulatory Mechanism
BE (Fr)	The SMA Decree, as modified – Art. 9.2 a) and b) ⁶⁸ and an Order of the Government ⁶⁹ of 2013 provide the legal basis for the protection of minors. The regulator has developed these through both self- and co-regulation.
BG	The Radio and Television Act, ⁷⁰ as amended in 2014, regulates the protection of minors in linear broadcasting and on-demand services. Regulatory authorities have issued rules and general guidance for the protection of minors on audiovisual media services, whether linear or on-demand.
DE	A co-regulatory system applicable to both linear and non-linear services. Legal basis for restrictions is established by the legislator, while its interpretation and the organisation of the system fall under the responsibility of the Commission for the Protection of Minors in Electronic Media ⁷¹ (KJM) and the media authorities. The German Interstate Treaty on the Protection of Minors ⁷² (JMStV) states that content that is likely to impair the development of minors can only be provided with protections.
ES	The Spanish General Law 7/2010 of Audiovisual Communication ⁷³ regulates the protection of minors in audiovisual services. This has been developed by Regulatory Authorities through rules and codes. It includes a code of conduct by TV broadcasters regarding the protection of minors from harmful content. Non-compliance with self-regulatory codes constitutes a breach of administrative law and operators can be penalised accordingly.
FR	Restrictions on “likely to impair” content imposed by the Law of 30 September 1986 and developed by the regulator in a Deliberation of the CSA of 20 December 2011 ⁷⁴ on the protection of young audiences, deontology and the accessibility of programme on on-demand audiovisual media services.
GB	The Broadcasting Act 1996 ⁷⁵ and the Communications Act 2003 ⁷⁶ are complemented by several Audiovisual Media Services Regulations on harmful material and on-demand audiovisual media services. A fully-fledged self- and co-regulatory system is implemented specifically for on-demand audiovisual media services. For linear broadcasting services, the regulator is required by law to draw up a code for TV and radio addressing the protection of youngsters under 18 from harmful content.

⁶⁷ For an explanation of the country codes, see: <https://www.iso.org/obp/ui/#search/code/>.

⁶⁸ Available at http://www.csa.be/system/documents_files/1440/original/D%C3%A9cret%20SMA%20coordonn%C3%A9%20au%2012%20mars%202015.pdf?1431957507.

⁶⁹ Available at www.csa.be/system/documents_files/2070/original/Arr%C3%AAt%C3%A9%20CF%2020130221%20protection%20des%20mineurs.pdf?1373028304.

⁷⁰ Available at www.cem.bg/files/1403167764_zrt.pdf.

⁷¹ Available at www.kjm-online.de/die-kjm.html.

⁷² Available at www.kjm-online.de/fileadmin/Download_KJM/Recht/JMStV_Stand_13_RStV_mit_Titel_deutsch3.pdf.

⁷³ Available at www.boe.es/boe/dias/2010/04/01/pdfs/BOE-A-2010-5292.pdf.

⁷⁴ Available at www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000025062182.

⁷⁵ Available at www.legislation.gov.uk/ukpga/1996/55/contents.

⁷⁶ Available at www.legislation.gov.uk/ukpga/2003/21/pdfs/ukpga_20030021_en.pdf.



HU	Act CLXXXV of 2010 ⁷⁷ on Media Services and Mass Media provides the legal basis for the protection of minors in linear broadcasting and on-demand services. Some elements of self- and co-regulation complement the law. The media regulator issues recommendations regarding effective technical solutions.
IE	The Audiovisual Media Service Regulations 2010 ⁷⁸ provides the legal basis for the protection of minors in linear broadcasting and on-demand services. A self- and co-regulatory system is implemented specifically for on-demand AVMS. The Broadcasting Authority of Ireland (BAI) does not regulate on-demand AVMS beyond approving draft codes of implementation of the AVMSD for these services. A voluntary Code of Conduct ⁷⁹ was drafted in May 2011 by the self-regulatory body On-Demand Audiovisual Services Group ⁸⁰ (ODAS) and approved by the BAI.
IT	Primary and secondary legislation ⁸¹ adopted by the Communications Authority (AGCOM), especially with regard to technical measures ⁸² and the classification of programmes. ⁸³ The Italian AVMS Code, ⁸⁴ as revised in July 2014. Self-regulatory provisions were defined in the TV and Minors Code ⁸⁵ in 2002.
NL	Legislation introduced via the Dutch Media Act 2008 ⁸⁶ affects public service broadcasters, which are not permitted to show sexually explicit content that they consider is likely to impair on VOD without access restrictions. In the Netherlands there is a shared responsibility between the Dutch Media Authority (CvdM) and NICAM (the Netherlands Institute for the Classification of Audiovisual Media).
SI	The Audiovisual Media Services Law ⁸⁷ provides the legal basis for the protection of minors in linear broadcasting and on-demand services, as complemented by the General Legal Act of 2013. ⁸⁸ Some elements of self- and co-regulation for linear and for non-linear services, in relation to the classification and labelling of content and the development of technical measures to prevent minors from accessing harmful content.

3.2. No common definitions of “impairing” content across Europe

Different types of approaches regarding impairing content, as well as a great variety of technical measures, often combined with each other, can be distinguished. However, the standards and guidance developed in relation to concepts and tools vary significantly in their level of detail and make a comparative assessment of the situation in the member states difficult. The analysis below is not an attempt to compare all the national approaches and initiatives, but rather to distil key trends with an eye to some national examples.

⁷⁷ Available at http://hunmedialaw.org/dokumentum/153/Mttv_110803_EN_final.pdf.

⁷⁸ Available at www.bai.ie/wordpress/wp-content/uploads/SI-258-2010.pdf.

⁷⁹ Available at www.bai.ie/wordpress/wp-content/uploads/Code-of-Conduct-On-Demand-Audiovisual-Media-Services.pdf.

⁸⁰ Available at www.bai.ie/index.php/odas-code-of-conduct-for-media-service-providers-of-on-demand-audiovisual-media-services/.

⁸¹ Available at www.agcom.it/tutela-dei-minori.

⁸² Available at www.agcom.it/documents/10179/540051/Delibera+51-13-CSP/e5e897fd-4913-4a35-a9e9-d6493c59642a?version=1.0.

⁸³ Available at www.agcom.it/documents/10179/540051/Delibera+52-13-CSP/4802efd5-e6fb-484d-8556-2c8d67d06edb?version=1.0.

⁸⁴ Available at www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-07-31;177!vig=

⁸⁵ Available at http://www.sviluppoeconomico.gov.it/images/stories/mise_extra/codice-tv-minori-pdf.pdf.

⁸⁶ Available at <https://zoek.officielebekendmakingen.nl/stb-2009-552.html>.

⁸⁷ Available at www.uradni-list.si/1/objava.jsp?urlid=201187&stevilka=3715.

⁸⁸ Available at www.akos-rs.si/files/APEK_eng/Legislation/Statues/General-Act-on-the-Protection-of-Children-and-Minors-in-Television-Programs-and-Audiovisual-Media-Services-on-Demand.pdf.



3.2.1. Different interpretation of “seriously impairing” content among the member states

As mentioned in paragraph 2.2. of this IRIS *plus*, the AVMSD does not harmonise certain key concepts in relation to the protection of minors in audiovisual media services, leaving this task to the member states. With regard to “seriously impairing” content, the Directive only gives some examples, by referring to “pornography or gratuitous violence”. Yet, these are merely non-exhaustive examples of unacceptable content applying to linear broadcasting services (Article 27(1) AVMSD). During the adoption process of the Directive, the European Parliament had proposed including in the wording of Article 12 AVMSD these two examples of content that could seriously impair the development of minors in non-linear audiovisual media services. However, the European Commission and the Council did not accept this proposal.⁸⁹ Member states therefore enjoy a great deal of discretion in the implementation of the Directive in this field, which may be particularly relevant in the case of culturally or morally sensitive issues, as the protection of minors is typically a sensitive area characterised by a diversity of cultural perceptions at national level.

In practice, most countries have implemented the AVMSD provisions concerning the regulation of material, which “might seriously impair” minors by adopting the wording of Articles 27(1) and 12 AVMSD in their national provisions. The banning of such material in linear broadcasting services seems to be a common rule across the EU. However, there are some important differences among the member states as to the practical implementation of these restrictions. In fact, in most countries, there is no formal or detailed definition of “seriously impairing” content and, in practice, a case-by-case approach⁹⁰ is applied. When there is a definition of “seriously impairing” content, national laws generally stick to the examples provided in Article 27(1) AVMSD, by referring to “pornography and gratuitous violence”. This is the case, for example, in Austria, Belgium, Croatia, the Czech Republic, Hungary, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Portugal and Slovakia.

Table 7 – Examples of “seriously impairing” content across the EU

	Example of content that “might seriously impair” the development of minors across the EU
AT	Pornography/gratuitous violence
BE (Fr)	Pornographic scenes/unnecessary violence
CZ	Pornography, gross gratuitous violence
DE	Illegal material/pornography, certain listed content and content which seriously impairs minors (e.g. violence, sexual scenes)

⁸⁹ See Scheuer A. and Bachmeier C., “The Protection of Minors in the Case of New (Non-Linear) Media European Legal Rules and their National Transposition and Application”, in Nikoltchev S. (ed.), *Protection of Minors and Audiovisual Content On-Demand*, IRIS *plus* 2012-6, European Audiovisual Observatory, Strasbourg, 2012, <http://www.obs.coe.int/documents/205595/865104/IRIS+plus+2012en6LA.pdf>.

⁹⁰ See Ofcom, “Sexually Explicit Material and Video on Demand Services – A Report to DCMS by Ofcom”, 4 August 2011, p. 22, <http://stakeholders.ofcom.org.uk/binaries/Internet/explicit-material-vod.pdf>.



DK	Pornography/unnecessary violence
EE	Pornography, promotion of violence or cruelty
ES	Pornography, gender violence, mistreatment
FR	Criminally unlawful material (attempt to interfere with human dignity: violence, sexual perversion, degradation of the human person; child pornography; hard-core violence)
GB	Illegal content, extremely violent pornography, R18+, hard-core porn R18, material likely to incite hatred based on race, sex, religion or nationality
HU	Pornography, extreme and/or unnecessary scenes of violence
IT	Pornographic scenes/gratuitous, insistent or brutal violence
LT	Physical or psychological violence or vandalism
LU	Pornography, gratuitous violence
MT	Gratuitous violence, pornography
PL	Very strong and explicit violence, racist comments, bad language, erotic scenes
SE	Includes “child pornography and the illegal portrayal of violence”
SI	Pornography, gratuitous violence; includes “paedophilic and necrophilic material, pornography with scenes of sodomy, sadomasochistic pornography and all other forms of pornography which include scenes of immediately recognised abusive sexual activity”

3.2.2. Illegal content versus “seriously impairing” content

Many member states have transposed the provisions of the Directive related to the protection of minors using pre-existing national concepts and classifications in this field. This is particularly true when it comes to the articulation of the difference between illegal and “seriously impairing” content.⁹¹ The possibility offered by Article 12 AVMSD of making this kind of content available on on-demand audiovisual services, provided that they are not accessible to children, has obliged these countries to review their classifications in force.

Thus, for instance, the UK had to review its former classification of content banned on television. This content included content considered as illegal⁹² under general legislation (see for example obscene or extremely pornographic material) and content that did not receive an approval certificate from the British Board of Classification, namely R18+ material (extremely violent pornography) or R18 content (hard-core porn). A balance had to be found in order to find a definition that would allow a certain degree of freedom of expression and information for VOD services and, at the same time, would not lower excessively the level of protection of minors on these services compared to the stricter approach adopted for broadcasting services. In the end, the Audiovisual Media Services Regulations 2014⁹³ provided for a restrictive definition of “seriously

⁹¹ See Machet E., in EPRA Plenary Session 1, “The Protection of Minors in a Connected Environment” Comparative Background Document, 21 June 2013, , p. 3, http://epra3-production.s3.amazonaws.com/attachments/files/2195/original/protectionofminors_final_publicversion.pdf?137208744.

⁹² Illegal content because of intellectual property reasons would not fall under these restrictions.

⁹³ Available at <http://legislation.data.gov.uk/cy/uksi/2014/2916/made/data.htm?wrap=true>.



impairing” content, which includes illegal content, extremely violent pornography, R18+ and R18 material likely to incite hatred based on race, sex, religion or nationality. This content is banned on both broadcasting and VOD services. On the other hand, content which is “likely to impair” the development of minors includes in its definition material which might seriously impair the physical, mental or moral development of persons under the age of 18 and is allowed on VOD services with some form of access protection.

In Germany, the definition of “seriously impairing” content also includes illegal content together with pornography, certain listed content and content which “seriously impairs” minors (e.g. violence, sexual scenes, etc.). However, illegal content is banned in broadcasting and “telemidia services”,⁹⁴ whereas the other “seriously impairing” content included in the definition is allowed on VOD by means of closed user groups and age verification systems.

Other countries, like France or Belgium, have defined content that might “seriously impair the development of minors” as criminally unlawful material (e.g. harmful to human dignity, including violence, sexual perversion, content degrading to the human person, child pornography, hard-core violence) and have banned them both on broadcasting and VOD services.

3.2.3. No common definition of content “likely to impair” across Europe

Content that is “likely to impair the physical, mental or moral development of minors” can be transmitted in linear broadcasting services when it is ensured that minors will not normally hear or see it. This type of content is allowed without restriction on on-demand services according to the AVMSD. The Directive does not provide for a definition of content “likely to impair” the development of minors. Member states are thus free to define it according to their own national sensibility and traditions. As a result, differences of approach among member states are notable in the EU. In many countries, it is up to the national regulator to issue guidelines with specific criteria for the classification and age rating of such content. Most countries refer to violence, pornography, erotic or sexual material as harmful content. However, each country has its own criteria to assess what is a harmful content (e.g. violent or “very violent” scenes; pornography, “soft” pornography or erotic material). Some countries also add to the list of potentially harmful content some specific elements, such as war themes or rude language (e.g. Poland), fear and anxiety, drugs, discrimination, racism and xenophobia, uncivil behaviour (e.g. Spain).

⁹⁴ According to Art 2 (1) of Germany’s Interstate Treaty on Broadcasting and Telemedia, “Telemedia” means “all electronic information and communications services, as far as they are not telecommunications services pursuant to Article 3 no. 24 of the Telecommunications Act, which consist entirely in the conveyance of signals across telecommunications networks or telecommunications-supported services pursuant to Article 3 no. 25 of the Telecommunications Act, or broadcasting pursuant to sentences (1) and (2).” See *Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV)* (Interstate Broadcasting Treaty), in the version of the 15th Amendment to the Interstate Broadcasting Treaties, available in English at: www.kjm-online.de/fileadmin/Download_KJM/Recht/15_RStV_01-01-2013_englisch_1.pdf.



Table 8 – Examples of content “likely to impair” across the EU

	Examples of “likely to impair” content
AT	e.g. not “family friendly” programmes
BE (Fr)	e.g. repeated scenes of physical or psychological violence, erotic or very violent scenes, pornographic scenes
DE	e.g. depiction of violence, “soft” pornography, erotic or sexual content
DK	e.g. sexually explicit content
ES	e.g. violence, sex, fear and anxiety, drugs, discrimination, racism and xenophobia, rude language, uncivil behaviour and values
FR	e.g. erotic material, violent content, repeated physical or psychological violence, pornographic and extremely violent scenes
GB	material which might seriously impair the development of persons under 18
IT	e.g. sex or violence
PL	e.g. war themes, stronger violence, very strong violence, bad language, erotic situations, explicit violence, racist comments
PT	e.g. “soft” pornography, erotic or sexual content
SI	e.g. “soft” pornography, erotic or sexual content

3.3. Requirements for linear service providers

Content which is likely to impair the development of minors can only be transmitted on linear broadcasting services provided that, first, it is ensured, by selecting the time of the broadcast or by any technical measures, that minors will not normally hear or see it. In addition, when such programmes are not encrypted, they must be preceded by an acoustic warning or made clearly identifiable throughout their duration by means of a visual symbol. Appropriate scheduling and observance of the watershed, combined with age labelling and on-screen/acoustic symbols are the traditional requirements for linear service providers.

3.3.1. Different conception of minors and age rating across Europe

First and foremost, it is worth observing that the concept of a “minor” is not interpreted in the same way across Europe. The legal terminology describes under this expression a person under a certain age, usually the age of majority, which legally separates childhood from adulthood. This age of majority depends upon jurisdiction and application, although in most States the age of majority is fixed at 18 years, as recommended in Article 1 UNCRC. However, the expression “minors” may also be used in contexts not related to the overall age of majority (e.g. drinking age, age of consent, voting age, age of criminal responsibility, etc.) with reference to age limits which are often different from the age of majority. It appears thus that this concept is not precisely defined in most jurisdictions and may cover, as far as the protection of minors is concerned, many different realities between the member states. These different approaches to which minors should be protected from



impairing content are reflected in the content age rating applied for TV watersheds across the EU. Certain countries classify content in 4 categories, from “all public” until “-18”, going through “-12” or “-13”, whereas others only apply one unique age classification “+16” or “+18”, as shown in the table below:

Table 9 – Examples of age rating applied in the EU for TV watersheds⁹⁵

	Age classification
BE (Fr)	-10 / -12 / -16 / -18
CY	12 / 15 / 18
DE	-16 / 18
DK	+16
ES	All / 7 / 12 / 16 / 18
FI	16 / 18
FR	-10 / -12 / -16 / -18
GB	-15 / -18
HR	12 / 15 / 18
IE	18 (“mature audience”)
IT	All / +14 / +18
LT	-7 / -14 / +18
LU	10 / 12 / 16 / 18
NL	All / 6 / 9 / 12 / 16
PL	All / 7 / 12 / 16 / 18
PT	16 / 18
RO	All / 12 / 15 / 18 / 18+
SI	12 / 15 / 18
NO	All / 6 / 9 / 12 / 15 / 18

⁹⁵ A more comprehensive table of the various watersheds is available at <http://www.obs.coe.int/documents/205595/8234567/Comparative+tables+on+the+protection+of+minors+in+audiovisual+media+services.pdf>.



3.3.2. Different watersheds and technical measures applied across Europe

In the same way, different watersheds are applied in different EU member states (e.g. after 19:00 / 20:00 / 20:15 / 22:00 / 22:30 / 23:00 / 24:00 / or before 05:00 / 06:00, etc.). Most of the countries which require watershed-based restrictions also require on-screen icons or acoustic warnings by law, sometimes accompanied by other technical filtering devices or software used by broadcasters.

Table 10 – Examples of protection tools required of linear service providers⁹⁶

Watershed restrictions + age rating / on-screen icons	Technical access restrictions (filtering, PIN code, paywalls, other age verification systems)
AT, BE (Fl, Fr), BG, CZ, DE, DK, EE, ES, FI, FR, GB, GR, HU, HR, IE, IT, LT, LU, LV, NL, PL, PT, RO, SE, SI, SK	AT, BE (Fr), BG, CY, DE, ES, FR, HR, IT, LV, RO, SE, SI

3.3.3. National examples related to linear services

In the UK, television broadcasters must ensure that they comply with the rules as set out in the Ofcom Broadcasting Code.⁹⁷ According to Section 1 of the Code (to be read in conjunction with Section 2 on harm and offense), broadcasters must protect children (under 15) by appropriate scheduling and observe watersheds.

In Ireland, the Broadcasting Authority of Ireland (BAI) has adopted a revised Code of Programme Standards⁹⁸ which sets out principles aiming at promoting responsible broadcasting. One of the principles deals with the protection of minors and is accompanied by requirements with which broadcasters must comply. In particular, broadcasters are required to “take particular care when scheduling programming material that is broadcast either side of programmes that are likely to be watched or listened to by children, such as after the watershed, during school runs, and during school holidays”.

The National Audiovisual Council (CNA) of Romania also issued rules⁹⁹ in March 2013 for linear services which address the use of images of minors in programmes and lay down criteria regarding appropriate scheduling and watersheds.

With regard to content labelling, France played a precursor role, with the introduction in 1996 by the regulatory authority (Conseil supérieur de l’audiovisuel) of a rating system of audiovisual content (“*signalétique jeunesse*”)¹⁰⁰ for programmes likely to impair minors. The French system is

⁹⁶ A more comprehensive table of the various watersheds is available at <http://www.obs.coe.int/documents/205595/8234567/Comparative+tables+on+the+protection+of+minors+in+audiovisual+media+services.pdf>

⁹⁷ Ofcom Broadcasting Code, <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.

⁹⁸ BAI Code of Programme Standards (2015), www.bai.ie/index.php/code-of-programme-standards/.

⁹⁹ Decizie nr. 141 din 28 martie 2013 pentru modificarea și completarea Deciziei Consiliului Național al Audiovizualului nr. 220/2011 privind Codul de reglementare a conținutului audiovizual, cu completările ulterioare (Amending Decision No 220/2011 of the National Audiovisual Council on the Code for the regulation of audiovisual content), www.cna.ro/Decision-No-141-of-28-March-2013.html.

¹⁰⁰ Recommandation du Conseil supérieur de l’audiovisuel du 7 juin 2005 aux éditeurs de services de télévision concernant la signalétique jeunesse et la classification des programmes (Recommendation of 7 June 2005 to the editors of television services broadcasting concerning age ratings and programme classification), <http://www.csa.fr/Espace-juridique/Deliberations-et-recommandations-du->



composed of five categories of warning symbols, accompanied by access restrictions (on-screen icons for the duration of the programme) and watersheds, as follows:

Fig. 2 – Content labels employed in France



Not allowed in programmes for children.



Not allowed on general channels before 22:00; exceptionally (16 max.) allowed at 20:30, but never on Tuesdays, Fridays, Saturdays and on the eve of public holidays (for the films prohibited under 12: 4 max. per year and per channel). For movie channels: not allowed on Wednesdays before 20:30.



Not allowed on general channels before 22:30 and 20:30 on movie channels respectively.



Not allowed on general channels. Allowed on certain satellite and cable channels between midnight and 5:00.

Within non-EU members, some countries, such as the Former Yugoslav Republic of Serbia, have already transposed the AVMS Directive in relation to the protection of minors from programmes that might harm their physical, mental or moral development¹⁰¹.

In Bosnia-Herzegovina, the Communications Regulatory Agency (CRA) adopted in 2011 a set of by-laws transposing the provisions of the AVMS Directive into the national regulatory framework. The Bosnian Code on Audiovisual and Radio Media Services sets out standards for programming covering in particular the requirements of the Directive concerning the protection of minors. For the first time, a uniform system for audiovisual content classification and rating was introduced, together with scheduling restrictions for each category. More relaxed rules apply to on-demand services that do not have to obey with scheduling restrictions but have the obligation to indicate the appropriate visual symbol in their catalogues.¹⁰²

In Macedonia, based on the Act on Broadcasting Activity, the Broadcasting Council adopted in 2007 a Rulebook on the protection of minors from programmes that might harm their physical, mental or moral development.

[CSA/Recommandations-et-deliberations-du-CSA-relatives-a-la-protection-des-mineurs/Recommandation-du-7-juin-2005-aux-editeurs-de-services-de-television-concernant-la-signaletique-jeunesse-et-la-classification-des-programmes.](http://www.parlament.gov.rs/upload/archive/files/cir/pdf/zakoni/2014/2512-14.pdf)

¹⁰¹ Available at <http://www.parlament.gov.rs/upload/archive/files/cir/pdf/zakoni/2014/2512-14.pdf>.

¹⁰² See European Audiovisual Observatory, IRIS 2012-1/9, <http://merlin.obs.coe.int/iris/2012/1/article9.en.html>.



3.4. Specific rules for on-demand services

3.4.1. Different degree of restriction to access to content “likely to impair” on VOD services

Content “likely to impair” is allowed without restriction on on-demand services according to the Directive. This is the case in certain countries, such as in Austria, Belgium (Flemish-speaking community), Cyprus, Denmark, Estonia, Spain (Andalucía), Greece, Italia, Luxemburg, Latvia, Sweden and Slovakia. However, most of the member states require VOD service providers to offer such material with some form of protection. This is the case, for example, in Belgium (French community), Bulgaria, the Czech Republic, Germany, Spain (Catalonia), France, the UK, Hungary, Croatia, Ireland, Lithuania, the Netherlands, Poland, Portugal, Romania and Slovenia. The most common protection used on VOD services for this kind of content are access codes, such as pre-locking/PIN codes or parental codes, other age verification systems (based on identification and authentication), filtering techniques and on-screen icons on electronic programming.

3.4.2. Graduated approach towards “seriously impairing” content on VOD services

Whereas content which “might seriously impair” the development of minors is prohibited on linear broadcasting services in all EU member states, as required by the AVMSD (Article 27(1)), it may be made available on on-demand services in such a way that minors will not normally hear or see it. The majority of countries have chosen to implement such a graduated approach. This is the case, for example, in Austria, Belgium (Flemish community), the Czech Republic, Germany, Denmark, Spain, Finland, the UK, Greece, Croatia, Ireland, Italy, Malta, the Netherlands, Portugal, Romania, Slovenia and Slovakia. In addition, certain countries, such as the Netherlands, Spain, Italy, Romania and Malta, apply stricter rules for public service broadcasters than for commercial providers and prohibit them from broadcasting this type of content on VOD services.

Most countries which allow “seriously impairing” content on non-linear services require by law that the providers of these services put in place some form of access restrictions in relation to such content. The requirements concerning the technical measures necessary to prevent minors from viewing content that might seriously impair their development are not specified in the AVMSD. However, Recital 60 of the Directive mentions the use of personal identification numbers (PIN codes), filtering systems or labelling and refers to the 2006 Council Recommendation on the protection of minors and human dignity and on the right of reply (see paragraphs 2.2.2. of this IRIS plus), which emphasises the importance of labelling and filtering systems.

National laws are generally flexible as to the choice of protection tool to be used. Different forms of access restriction are available across Europe for VOD services. The majority of countries seem to privilege the techniques coming from the 2.0 world (e.g. filtering tools, PIN codes, paywalls, other age verification systems). This is the case in Belgium (Flemish community), Cyprus, the Czech Republic, Germany, Spain, Greece, Italy, Latvia, Portugal and Slovenia. For example, in Portugal, access restriction is based on a voluntary system, according to which on-demand audiovisual media services work with a PIN access code sent to the client. The PIN code restricts access to content according to a graduated classification (high-average-low restrictions/unrestricted). By default, all TV boxes are delivered to clients with a low level of active constraints, i.e. with access to all content except content for adults. Conversely, certain countries, such as Denmark, have adopted a different



approach towards access to “seriously impairing” content on VOD services which relies on the role of parents and educators to restrict the access of children to this type of content.

3.4.3. National examples related to non-linear services

In Slovenia the Agency for Communication Networks and Services (AKOS) adopted rules on the protection of children and minors on television and on-demand audiovisual media services in October 2013.¹⁰³ On-demand service providers must limit inappropriate content for persons under 18 and seriously impairing content to a specific section of their catalogue. If such content is protected by a technical measure, no transmission restrictions are necessary. Furthermore, content that might seriously harm the development of children and minors which is available on on-demand audiovisual media services must be protected by a PIN code. In addition to the rules established by AKOS, the Ministry of Culture issued in 2014 technical guidance¹⁰⁴ on the shape and display of requirements for acoustic and visual warnings applicable to content which is not suitable for children and teenagers.

In France, in addition to the Recommendation of 7 June 2005, the CSA adopted on 20 December 2011 a Deliberation on the protection of young audiences, deontology and the accessibility of programmes on on-demand audiovisual media services, replacing the deliberation of 14 December 2010,¹⁰⁵ which lays down specific rules for on-demand services. Under these rules, content unsuitable for children under 16 should not be made available to the public on free-to-air services, except between 22:30 and 5:00, while new specific technical arrangements for programmes in Category V, i.e. “cinematographic works that may not be viewed by persons under 18 years of age, and pornographic or extremely violent programmes that may only be viewed by an informed adult public” are set. Providers of on-demand services have to create two distinct areas on the service: a trust zone that hosts programmes that are suitable for all viewers and a locked zone dedicated to adult programmes which is only available with a PIN code.

Under Spanish law (Act 7/2010 of 31 March 2010¹⁰⁶ modified by Act 6/2012 of 1 August 2012) and in Slovenia on-demand services are required to develop separate sections in their catalogues for content that might seriously impair the physical, mental or moral development of

¹⁰³ General Legal Act on the Protection of Children and Minors in Television Programs and Audiovisual Media Services on Demand (Official Gazette RS no 84/2013), unofficial translation, www.akos-rs.si/files/APEK_eng/Legislation/Statues/General-Act-on-the-Protection-of-Children-and-Minors-in-Television-Programs-and-Audiovisual-Media-Services-on-Demand.pdf.

¹⁰⁴ Available at http://www.akos-rs.si/files/APEK_eng/Legislation/Statues/General-Act-on-the-Protection-of-Children-and-Minors-in-Television-Programs-and-Audiovisual-Media-Services-on-Demand.pdf.

¹⁰⁵ Délibération du 20 décembre 2011 relative à la protection du jeune public, à la déontologie et à l’accessibilité des programmes sur les services de médias audiovisuels à la demande (Deliberation on the protection of young audiences, deontology and the accessibility of programmes on on-demand audiovisual media services, replacing the deliberation of 14 December 2010, on 20 December 2011), www.csa.fr/Espace-juridique/Deliberations-et-recommandations-du-CSA/Recommandations-et-deliberations-du-CSA-relatives-a-la-protection-des-mineurs/Deliberation-du-20-decembre-2011-relative-a-la-protection-du-jeune-public-a-la-deontologie-et-a-l-accessibilite-des-programmes-sur-les-services-de-medias-audiovisuels-a-la-demande.

¹⁰⁶ Ley 6/2012, de 1 de agosto, de modificación de la Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual, para flexibilizar los modos de gestión de los servicios públicos de comunicación audiovisual autonómicos (Act 7/2010 of 31 March 2010 modified by Act 6/2012 of 1 August 2012), <http://www.boe.es/boe/dias/2012/08/02/pdfs/BOE-A-2012-10385.pdf>. More information available at <http://merlin.obs.coe.int/iris/2012/8/article20.en.html>.



minors. In Croatia, according to a bylaw¹⁰⁷ issued by the Agency for Electronic Media (AEM), a similar requirement applies to the provision of content “likely to impair” (Article 14 of the bylaw).

In Germany, the *Jugendmedienschutz-Staatsvertrag*¹⁰⁸ (Interstate Treaty on the protection of minors – JMStV) introduced a certification of technical systems for the protection of minors (parental control software) as a specific instrument for the protection of minors regarding so-called telemedia content which could impair minors. According to Art. 11 of the JMStV, telemedia service providers may fit content “which is suited to impair the development and education of children and adolescents with a technical system which has been certified as suitable for the protection of minors” or install such a system upstream of the telemedia content. Certification is made by the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media – KJM).¹⁰⁹ These certified systems aim at permitting German providers to distribute content that could impair the development of children in telemedia services, thereby providing them with legal security.

Table 11 – Examples of type of content affected by restrictions on VOD services in the EU¹¹⁰

	Countries
Access restrictions for content likely to “seriously impair”	AT, BE (Fl), FR, CY, CZ, DE, ES, GR, HU, HR, IE, IT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK
Access restrictions for content “likely to impair”	BE (Fr), BG, CZ, DE, ES, FR, GB, HU, HR, IE, LT, NL, PL, PT, RO, SI

3.5. Towards a common approach for all audiovisual service providers

Several countries, for example Bulgaria, Belgium (French community), Croatia, France, Hungary, Lithuania, Latvia, Poland and Sweden, have opted for a common approach towards “seriously impairing” content through a general prohibition of such content on both linear and VOD services.

When it comes to classification and age ratings symbols, only a few countries have introduced a uniform system used both on TV and on-demand services.

In Croatia, for example, the AEM is cooperating with the Croatian Audiovisual Centre (HAVC)¹¹¹ with the aim of reviewing the current rating system and harmonising it for all distribution

¹⁰⁷ Ordinance on the protection of minors issued by the Council for Electronic Media, 13 May 2010, www.e-mediji.hr/files/legal/Rules_-_protection_of_minors_332.pdf.

¹⁰⁸ *Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien* (Jugendmedienschutz-Staatsvertrag – JMStV) (Interstate Treaty on the protection of minors – JMStV), in the version of the 11th Treaty for amending the Interstate Treaties with regard to broadcasting law (13th Interstate Broadcasting Treaty) in force since 1 April 2010, available in English at: www.kjm-online.de/fileadmin/Download_KJM/Recht/JMStV_Stand_13_RStV_mit_Titel_english.pdf.

¹⁰⁹ More information available at www.kjm-online.de/en/the-kjm.html.

¹¹⁰ A more comprehensive table of the various protection tools for on-demand services is available at <http://www.obs.coe.int/documents/205595/8234567/Comparative+tables+on+the+protection+of+minors+in+audiovisual+media+services.pdf>.

¹¹¹ More information available at www.havc.hr/eng/.



platforms.¹¹² In Bulgaria, the Council for Electronic Media (CEM) and the State Agency for Child Protection issued in October 2011 criteria¹¹³ for the assessment of content that is adverse to or might potentially damage the mental, moral and/or social development of children, in compliance with the Radio and Television Act. The guidance applies to all audiovisual media services and requires the use of a watershed and appropriate labelling in compliance with the classification implemented by the National Film Rating Committee. In Spain, as to technical access restrictions, all audiovisual media service providers (including on-demand) are obliged to use digital encoding systems for their content ratings that allow parental control, according to Act 7/2010 of 31 March 2010. These digital encoding systems must be approved by the regulatory authority.

Within the EEA members it is worthwhile mentioning the case of Norway, where the Parliament has adopted an act¹¹⁴ that will come into force no earlier than 1 July 2015, establishing new rules applying to any audiovisual content regardless of the platform used. The act will introduce a system of classification of content with age limits valid for 10 years. Age limits for cinema films will be set by the Norwegian Media Authority (NMA), whereas age limits for other audiovisual content will be decided by the providers on the basis of guidelines provided by the NMA.

¹¹² More information about this initiative can be found in the 2014 EPRA country report on Croatia available at [http://epra3-production.s3.amazonaws.com/attachments/files/2463/original/Tbilisi%20-%20Country%20Report%20-%20HR%20\(AEM\)%20.pdf](http://epra3-production.s3.amazonaws.com/attachments/files/2463/original/Tbilisi%20-%20Country%20Report%20-%20HR%20(AEM)%20.pdf) and in the presentation of Damir Hajduk made at the workshop “Empowering users: rating systems, protection tools and media literacy across Europe” jointly organised by the European Audiovisual Observatory (OBS) and the European Platform of Regulatory Authorities (EPRA), Strasbourg, 15 December 2014, www.obs.coe.int/documents/205602/8166194/6_Hajduk_OBS_EPRA_ws_empowering_users_regulatory_obligations_research_2014.pdf.

¹¹³ Критерии за оценка на съдържание, което е неблагоприятно или създава опасност от увреждане на физическото, психическото, нравственото и/или социалното развитие на децата (Criteria for the assessment of content that is adverse to, or potentially damages, the mental, moral and/or social development of children), <http://www.cem.bg/download.php?id=3351>.

¹¹⁴ More information can be found on the EPRA website at: www.epra.org/news_items/protection-of-minors-norway-adopts-platform-independent-legislation.



4. Self- and co-regulatory instruments

It is often claimed that self- and co-regulation can offer complementary approaches to legal provisions, in particular in relation to the protection of minors in an online context. The role of self- and co-regulation in the field of audiovisual media regulation is recognised by the AVMSD. Indeed, Article 4(7) encourages member states to use co-regulatory and/or self-regulatory regimes “in the fields coordinated by th[e] Directive to the extent permitted by their legal systems”. In most countries, such regimes are explicitly encouraged by law and they are often one of the pillars for the protection of minors against harmful content on audiovisual services.

The directive defines “self-regulation” as a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves. On the other hand, co-regulation is defined as creating, 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 the field of the protection of minors, self-regulation is a concept that grew during the 1990s and is generally taken to refer to protective measures relating to content that is legal, but can possibly be harmful to children and young people. Co-regulation is a rather new approach that consists of more than just a combination of State regulation and self-regulation. It includes a variety of different approaches within different countries and different sectors. There is a growing interest in this approach on the supranational level.

The success of the implementation of self-and co-regulation systems largely relies on different conditions. The AVMSD sets two conditions for their implementation:

- They must be broadly accepted by the main stakeholders in the member states concerned.
 - In addition, they must provide for effective enforcement.
 - On the other hand, the industry needs sufficient incentives to support such a regime.
- Transparency and openness are also found to be vital to build trust in the mechanisms.

This chapter describes some examples of self- and co-regulatory models applying to providers of audiovisual media services (linear and non-linear) in various EU member states that help implement the obligations included in the AVMS Directive concerning the protection of minors. It also presents some initiatives at national and international level that aim at protecting children on the Internet.

4.1. Self- and co-regulatory instruments in the case of audiovisual media services (linear and non-linear)

4.1.1. Belgium

In many countries, media service providers are usually in charge of the classification of content. For instance, in the French-speaking community of Belgium, the Decree on the protection of minors in television programmes which might impair their physical, mental or moral development adopted in



February 2013¹¹⁵ prescribes the creation of an internal viewing committee by the providers. The provider decides, at its sole discretion, on the composition of the Committee. However, it must notify the creation and any change in the composition of the Committee to the regulatory Authority (*Conseil supérieur de l'audiovisuel*)¹¹⁶ within 10 days. The same requirement applies also in France.¹¹⁷

4.1.2. Germany

The *Jugendmedienschutz-Staatsvertrag* (Interstate Treaty on the protection of minors – JMStV) introduced a regime applicable to electronic information and communication media (broadcast and telemedia services). Under Article 5 of the JMStV, providers are required to ensure that children and teenagers do not see or hear content that might impair their development by the use of technical means or scheduling restrictions. The KJM coordinates the work of the State Media Authorities at the national level in this field and ensures that the providers act in compliance with the JMStV. The German system combines regulation and self-regulation. Self-regulatory bodies certified by the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media – KJM) ensure that their members respect the legal requirements of the JMStV. The KJM can only take legal action against a provider affiliated with a voluntary organisation if the latter has exceeded its legal discretionary power with its decision or lack of decision. The KJM has certified four voluntary organisations, which together cover the broadcasting and telemedia industry: *Freiwillige Selbstkontrolle Fernsehen* (FSF),¹¹⁸ FSK online,¹¹⁹ USK online,¹²⁰ and *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter* (FSM).¹²¹

4.1.3. Ireland

On-demand services are not regulated by the regulatory authority. As required under Section 13(1) of the Audiovisual Media Services Regulations 2010,¹²² a voluntary Code of Conduct¹²³ was developed by ODAS, a self-regulatory body including representative bodies of the advertising industry, broadcasters, telecommunications companies and other on-demand service providers. The Code lays down the minimum standards required for the provision of on-demand services and

¹¹⁵ Arrêté du Gouvernement de la Communauté française relatif à la protection des mineurs contre les programmes télévisuels susceptibles de nuire à leur épanouissement physique, mental ou moral (Decree on protection of minors in television programmes which might impair the physical, mental or moral development adopted in February 2013), www.csa.be/documents/2070.

¹¹⁶ More information available at <http://www.csa.be/>.

¹¹⁷ Article 2 of the "Recommandation du 7 juin 2005 aux éditeurs de services de télévision concernant la signalétique jeunesse et la classification des programmes", www.csa.fr/Espace-juridique/Deliberations-et-recommandations-du-CSA/Recommandations-et-deliberations-du-CSA-relatives-a-la-protection-des-mineurs/Recommandation-du-7-juin-2005-aux-editeurs-de-services-de-television-concernant-la-signalétique-jeunesse-et-la-classification-des-programmes.

¹¹⁸ FSF is the voluntary self-regulation of the television industry, more information available at www.fsf.de.

¹¹⁹ FSK (*Freiwillige Selbstkontrolle der Filmwirtschaft*) is the voluntary self-regulation of the film industry, which operates the German film classification and labelling system in accordance with the Law for the Protection of Youth in Public Places (JuSchG), www.fsk.de/?seid=2&tid=2.

¹²⁰ USK (*Unterhaltungssoftware Selbstkontrolle*) is the voluntary self-regulation of entertainment software which operates the German games age rating system, www.usk.de/en/.

¹²¹ FSM is a voluntary self-regulation of multimedia service providers, www.fsm.de/en.

¹²² Audiovisual Media Services Regulations 2010, www.bai.ie/wordpress/wp-content/uploads/SI-258-2010.pdf.

¹²³ ODAS Code of Conduct, www.bai.ie/index.php/odas-code-of-conduct-for-media-service-providers-of-on-demand-audiovisual-media-services/.



prescribes the creation of a complaints mechanism. Service providers are required to ensure that minors will not normally hear or see content which might seriously impair their physical, mental or moral development, namely to set technical restrictions arrangements.

4.1.4. Italy

When it comes to the elaboration of rules on technical measures, Article 34 of the Italian AVMS Code¹²⁴ provides for a co-regulatory approach. According to this principle, the Italian Communications Authority (*Autorità per le Garanzie nelle Comunicazioni – AGCOM*¹²⁵) has established a Committee,¹²⁶ composed of all stakeholders involved in the provision of on-demand services, aiming at the development of technical measures to prevent minors from viewing on-demand content that “might seriously impair” their development, including programmes that involve pornography or programmes with scenes of gratuitous, insistent or brutal violence and cinematographic works classified as unsuitable for minors under 18. Following the conclusions of the Technical Committee, AGCOM adopted two deliberations in May 2013. AGCOM Deliberation no. 52/13/CSP¹²⁷ lays down criteria for the classification of programmes. The adopted classification system introduces thematic areas and main ways of representation. AGCOM Deliberation no. 51/13/CSP¹²⁸ establishes the technical tools (PIN code) for the prevention of children from watching seriously impairing programmes on on-demand services.

Industry self-regulation also exists in Italy. In 2002, all Italian broadcasting companies signed the TV and Minors Self-Regulation Code,¹²⁹ which is referred to in primary legislation since 2004 as binding also for non-signing broadcasters. According to the Code, broadcasters are required not to broadcast at certain hours any content which might impair the physical, mental or moral development of minors.

4.1.5. The Netherlands

In the Netherlands, potentially harmful audiovisual content is subject to a co-regulatory regime. Public service media and private media that intend to broadcast linear audiovisual content are legally obliged to join the Netherlands Institute for the Classification of Audiovisual Media (NICAM).¹³⁰ NICAM has established and coordinates a cross-media classification system called

¹²⁴ *Decreto legislativo 31 luglio 2005, n.177*, available at: www.arpa.emr.it/cms3/documenti/cem/normativa/dl177_05.pdf.

¹²⁵ More information available at <http://www.agcom.it/>.

¹²⁶ More information available at <http://merlin.obs.coe.int/iris/2012/10/article18.en.html>.

¹²⁷ Allegato A alla delibera n. 52/13/CSP del 3 maggio 2013, “Regolamento sui criteri di classificazione delle trasmissioni televisive che possono nuocere gravemente allo sviluppo fisico, mentale o morale dei minori di cui all’articolo 34, commi 1, 5 e 11 del decreto legislativo 31 luglio 2005, n. 177, come modificato e integrato in particolare dal decreto legislativo 15 marzo 2010, n. 44 e dal decreto legislativo 28 giugno 2012, n. 120”, www.agcom.it/documents/10179/0/Documento/4bd15718-b0bd-4240-9e59-072391322150.

¹²⁸ Allegato A alla delibera n. 51/13/CSP del 3 maggio 2013, “Regolamento in materia di accorgimenti tecnici da adottare per l’esclusione della visione e dell’ascolto da parte dei minori di trasmissioni rese disponibili dai fornitori di servizi di media audiovisivi a richiesta che possono nuocere gravemente al loro sviluppo fisico, mentale o morale ai sensi dell’articolo 34 del decreto legislativo 31 luglio 2005, n. 177, come modificato e integrato in particolare dal decreto legislativo 15 marzo 2010, n. 44, come modificato dal decreto legislativo 28 giugno 2012, n. 120”, <http://www.agcom.it/documents/10179/540051/Delibera+51-13-CSP/e5e897fd-4913-4a35-a9e9-d6493c59642a?version=1.0>.

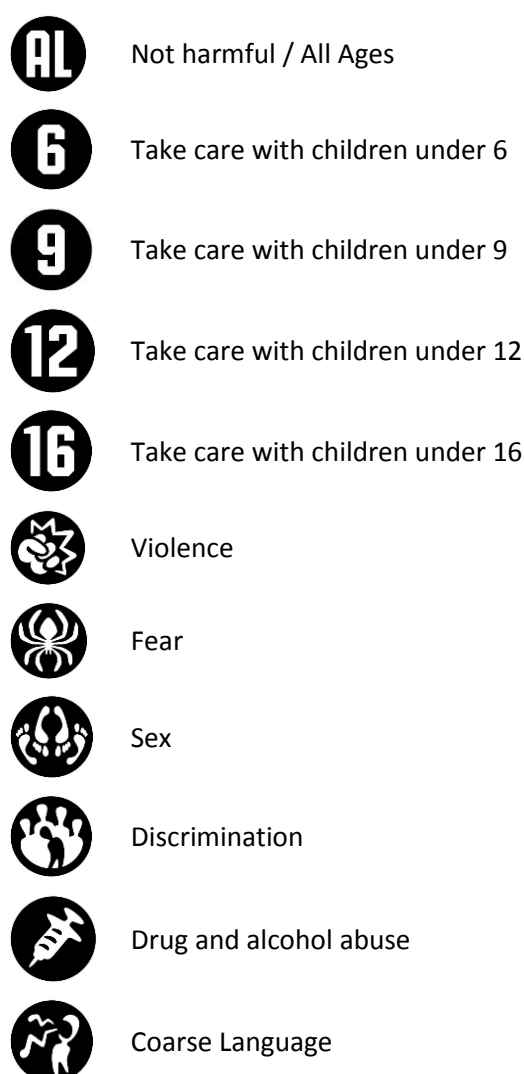
¹²⁹ Available at www.comitatotveminori.it/.

¹³⁰ More information available at www.kijkwijzer.nl/nicam.



Kijkwijzer. Providers themselves assume responsibility for ensuring a uniform classification and information system with age indicators and content descriptors for television, cinema and DVD. NICAM provides for a consumer complaints mechanism. The quality of the classification is supervised by the Dutch regulatory Authority (*Commissariaat voor de Media – CvdM*). This regime does not apply to the provision of on-demand services. However, in October 2014, VODNED,¹³¹ the association of video-on-demand providers in the Netherlands, entered into an agreement with NICAM according to which members undertake to use the Kijkwijzer¹³² age symbols and descriptors on the content they distribute as follows:

Fig. 3 – Content labels employed in the Netherlands



¹³¹ More information available at www.vodned.nl/english/.

¹³² Kijkwijzer is a rating system coordinated by NICAM for feature films, DVDs or television programmes, more information available at www.kijkwijzer.nl/about-kijkwijzer.



4.1.6. Poland

According to its statutory prerogatives laid down in Article 6 of the Broadcasting Act,¹³³ the national broadcasting Council (KRRiT) has to initiate and support self- and co-regulation in the area of the provision of media services. In June 2014, a Code of Conduct¹³⁴ was signed by six on-demand service providers, which committed themselves to taking effective technical measures to prevent minors from accessing harmful content in order to comply with their obligations under Article 47e of the Broadcasting Act. The Code¹³⁵ was prepared by IAB Polska in cooperation with KRRiT. It recommends the use of age verification tools such as pay walls.

4.1.7. United Kingdom

The 2003 Communication Act¹³⁶ gives Ofcom power to delegate regulatory functions with regard to on-demand services which fall within the Act to an appropriate regulatory authority, the Authority for Television On-Demand (ATVOD).¹³⁷ Providers of on-demand services are required to notify ATVOD. Where a service provider is found to be in contravention of the applicable requirements, ATVOD will issue enforcement notifications. In order to help service providers in the implementation of their statutory requirements, ATVOD has issued non-binding guidance.¹³⁸ For material which might seriously impair the physical, mental or moral development of persons under the age of 18, ATVOD recommends the use of “effective Content Access Control System (“CAC System”) which verifies that the user is aged 18 or over at the point of registration or access by the mandatory use of technical tools for age verification” and when necessary “mandatory security controls such as passwords or PIN numbers” (Rule 11).

4.2. Self- and co-regulatory instruments in the case of services outside the scope of the AVMS directive

The intervention of the EU also covers services that are not included in the scope of the AVMS Directive. The action of the EU in relation to these services mainly consists of initiatives of non-binding character, aimed at empowering and protecting children and young people online, as well as fighting against illegal and harmful content and conducts. The actions proposed support the development and the implementation of technical tools and promote flexible approaches through self-regulation, in order to better fit with the needs of an ever-changing environment.

¹³³ Consolidated version of the Broadcasting Act of 29 December 1992, www.krrit.gov.pl/Data/Files/_public/Portals/0/angielska/Documents/Regulations/broadcasting_act_28022013.pdf.

¹³⁴ Available at www.krrit.gov.pl/Data/Files/_public/Portals/0/angielska/press-releases/code-of-good-practice-on-the-protection-of-minors-in-on-demand-audiovisual-media-services.pdf.

¹³⁵ More information available at www.krrit.gov.pl/en/for-journalists/press-releases/news_1630_protection-of-minors-online--code-of-good-practice.html.

¹³⁶ The Communications Act 2003, as amended by the Audiovisual Media Services Regulations 2009, the Audiovisual Media Services Regulations 2010 and the Audiovisual Media Services Regulations 2014. The Audiovisual Media Services Regulations 2014 are available at www.legislation.gov.uk/uksi/2014/2916/pdfs/uksi_20142916_en.pdf.

¹³⁷ More information available at www.atvod.co.uk/.

¹³⁸ Available at www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.1_February_2014.pdf.



4.2.1. Self- and co-regulatory initiatives at EU Level

4.2.1.1. Safer Internet Programme

Within the framework of the European Commission's "Safer Internet Programme" (SIP),¹³⁹ the European Commission supports many self-regulatory initiatives.¹⁴⁰ For example, the European Framework for Safer Mobile Use by Younger Teenagers and Children¹⁴¹ was developed by the European mobile industry in 2007 to ensure that children can safely access content on their mobile phones and was implemented through national codes of conduct in the member states. In the same way, the biggest providers of social networking services (SNS) (e.g. Facebook, Google, Netlog, Yahoo, Dailymotion, Microsoft) developed in 2009, as part of the IAP Plus, in consultation with the European Commission and a number of NGOs, a set of pan-European principles to provide good practice recommendations for the providers of social networking and other interactive sites, to enhance the safety of children and young people using their services. The Safer Social Networking Principles for the EU¹⁴² include some guidance for SNS, as they seek to minimise potential harm to children and young people, and recommend a range of good practice approaches which can help safeguard those principles. They were implemented directly by its 21 signatories. In line with these initiatives, in 2011 the European Commission put together 28 leading companies to form a coalition to make a better and safer Internet of children. According to the statement of purpose of the Coalition to Make the Internet a Better Place for Kids,¹⁴³ the initiative aims at providing simple and robust tools for the reporting of harmful content, for ensuring that privacy settings are age-appropriate, for offering wider use of content classification – e.g. the development of a valid approach to age-rating, which could be used across sectors and provide parents with understandable age categories – wider availability and use of parental control – e.g. user-friendly tools – and for the effective takedown of child abuse material.

4.2.1.2. PEGI

In 2003, the self-regulatory Pan-European Games Information System¹⁴⁴ (PEGI) was adopted after close consultation with the industry and civil society, including parental and consumer associations. PEGI is a voluntary system designed to ensure that minors are not exposed to games that are unsuitable for their particular age group. It replaced a large number of existing national rating systems with a single system used throughout the EU countries. In 2007, PEGI Online¹⁴⁵ was launched and co-funded by the Safer Internet Programme, as the logical development of the PEGI system to adapt to the online environment. The European Commission welcomed the success of PEGI and PEGI Online in a Communication on the protection of consumers, in particular minors, in

¹³⁹ See footnote 55.

¹⁴⁰ See for example "Net Children 2020 – Growing up with Media", in collaboration with klicksafe, the EU Initiative for Safer Internet, <http://bmfsfi-veranstaltungen.bafza.de/en/net-children-2020-growing-up-with-media/home.html>. See also klicksafe's awareness campaign, promoting media literacy and adequate handling of the internet and new media. Fields of action of the project include content qualification, marketing and public campaign, as well as networking with partners and stakeholders, <http://www.klicksafe.de/>.

¹⁴¹ See: www.gsma.com/publicpolicy/wp-content/uploads/2012/03/Safer_Mobile_Flyer.pdf.

¹⁴² See https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/sn_principles.pdf.

¹⁴³ See https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/ceo_coalition_statement.pdf.

¹⁴⁴ See www.pegi.info/en/.

¹⁴⁵ See www.pegionline.eu/en/.



respect of the use of video games.¹⁴⁶ It also called for better advertising and promotion of PEGI by the industry, regular review of ratings and the criteria applied, wider adoption of PEGI Online and the development and implementation of a code of conduct by video game retailers in order to decrease "underage" sales.

4.2.1.3. You Rate It

NICAM and the British Board of Film Classification (BBFC)¹⁴⁷ have developed a self-rating tool for user generated content called "You Rate It".¹⁴⁸ This tool is currently being tested on the Italian user-generated content (UGC) platform "16 mm". It was launched in 2011.¹⁴⁹ The system combines the rating provided by the uploaders with the perception of the viewers and thus allows for an experimental classification system of the degree of harmfulness of the posted content.

4.2.2. Self- and co-regulatory initiatives at international level

4.2.2.1. International Age Rating Coalition (IARC)

At the international level, content rating authorities around the world introduced in 2013 the International Age Rating Coalition (IARC)¹⁵⁰. The IARC provides a single submission process for assigning ratings with regional outputs. Through this system developers can obtain multiple age and content ratings, one for each participating territory's local cultural and social norms, based on the developer's answers to a single set of questions about their product's content.

4.2.2.2. MIRACLE Project

Also worth mentioning is MIRACLE (Machine-readable and Interoperable Age Classification Labels in Europe),¹⁵¹ a European pilot project which aims at making age classification labelling cross border, readable and interoperable. This aim should be achieved by providing a common technical specification for the machine-based exchange of existing and future classification data.

The project's first step is the development of a common data model for electronic content labels that includes all necessary categories and fields for content-specific classification information.

¹⁴⁶ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the protection of consumers, in particular minors, in respect of the use of video games COM(2008)207 final, 22.04. 2008, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0207&from=EN>.

¹⁴⁷ See www.bbfc.co.uk/.

¹⁴⁸ See www.yourateit.eu/.

¹⁴⁹ The presentation of Federico Sircana at the joint EPRA-EAO workshop on "Empowering users" held in December 2014 provides more information on the Italian project, www.obs.coe.int/documents/205602/8166194/12_Sircana_OBS_EPRA_ws_empowering_users_you_rate_it_IT_2014.pdf.

¹⁵⁰ See <https://www.globalratings.com/>.

¹⁵¹ See <http://www.miracle-label.eu/>.



As a second step, five partners will have to implement MIRACLE-based APIs¹⁵² and labels as a way to access existing classification data. In a third step, the provided data will be used by third-party software and services to show possible fields of application of interoperable data and its added value for all stakeholders, e.g. classification bodies, content providers, online services, filter software providers and users.

4.3. Self- and co-regulatory initiatives at national level

4.3.1. Germany

In 2005, the main German search engine providers developed together with the FSM a code of conduct (*Selbstkontrolle Suchmaschinen*)¹⁵³ under which they committed themselves to applying technical measures to protect children and young people from harmful content. For this purpose, they use a technical tool developed in cooperation with the *Bundesprüfstelle für jugendgefährdende Medien* (BPjM),¹⁵⁴ which ensures that Internet addresses (URLs) which have been placed by the BPjM on the index of media harmful to young people will no longer be shown on the lists of results produced by the search engines (the so-called BPjM-Module).¹⁵⁵ The decision to delete search results is taken by the BPjM.

In addition, the JMStV has introduced the certification of technical systems for the protection of minors (parental control software) as a specific instrument for the protection of minors regarding telemedia content which could impair minors. According to Art. 11 JMStV, Telemedia providers may filter content “which is likely to impair the development and education of children and adolescents with a technical system which has been certified as suitable for the protection of minors or by installing such a system upstream of the telemedia content”. Certification is done by the KJM.¹⁵⁶ These certified systems aim at permitting German providers to distribute content that could impair the development of minors on telemedia services, thereby providing them with legal security, while ensuring a satisfactory level of protection.

So far, the KJM has certified technical systems for the protection of minors¹⁵⁷, such as: the *Kinderschutz* software of the *Deutsche Telekom*¹⁵⁸ and the youth protection programme of JusProg e.V.¹⁵⁹ These systems consist in principle of a number of components:

- Blacklists (lists of generally inadmissible web sites, e.g. BPjM-Module);
- White lists (lists of generally unproblematic sites suitable for children, e.g. fragFINN);¹⁶⁰

¹⁵² An Application Programme Interface (API) is a “set of routines, protocols, and tools for building software applications. The API specifies how software components should interact and are used when programming graphical user interface (GUI) components”. See <http://www.webopedia.com/TERM/A/API.html>.

¹⁵³ See: www.fsm.de/voluntary-commitments/search-engines?set_language=en.

¹⁵⁴ Federal Department for Media Harmful to Young People, <http://www.bundespruefstelle.de/>.

¹⁵⁵ See: www.fsm.de/voluntary-commitments/search-engines/bpjm-module.

¹⁵⁶ See: www.kjm-online.de/en/the-kjm.html.

¹⁵⁷ See www.kjm-online.de.

¹⁵⁸ See: http://tarife-und-produkte.t-online.de/mit-kinderschutz-software-surfen-ihre-kinder-sicher-im-Internet-/id_12727562/index.

¹⁵⁹ See: www.jugendschutzprogramm.de/.

¹⁶⁰ See: www.fsm.de/adults-and-children/fragfinn.



- Extensive lists of age-differentiated content (admissible according to the age level in the software);
- Ability to detect technical age labels, corresponding to the common standard (age-de.xml¹⁶¹).

Finally, the JMStV also integrated into the system for the protection of minors the “*Jugendschutz.net*”,¹⁶² which (operating under the supervision of the KJM) is the organisation set up in 1997, in charge of monitoring websites to detect harmful content for minors. In case of potential infringement, the “*jugendschutz.net*” is obliged to notify the provider and inform the certified voluntary self-regulatory organisations and the KJM.

4.3.2. Slovenia

The biggest national mobile operators and Internet service providers signed a code of conduct which lays down content classification requirements that providers must comply with in order to ensure the protection of children using their services. Originally signed in 2009, the code was renewed in 2013.¹⁶³ This initiative has been supported by AKOS, the Slovenian Information Commissioner, universities and research networks.

4.3.3. United Kingdom

When it comes to the promotion of the use of technologies in order to protect children, the British government has taken a proactive stance by entering into an agreement with the UK's four largest ISPs (BT, Sky, TalkTalk and Virgin Media), whereby they have committed to offering all new customers family-friendly network level filtering.¹⁶⁴ These filters apply to all devices in the home, allowing the account-holder to choose to block web-based content that might be inappropriate for children at a network level. Account-holders have to make an “unavoidable choice” as to whether to turn the family-friendly network level filtering on or off. Filters can only be changed by the account holder, who has to be an adult.¹⁶⁵

Most of the ISPs have chosen to use a URL blocking system, based on blacklists and whitelists. Some filtering categories are common to all ISPs (suicide and self-harm, pornography, file sharing, as are crime, drugs, violence and hate), whereas some of the ISPs also feature supplementary categories in their filtering services (e.g. alcohol and tobacco, media streaming, fashion, search engines and portals). In order to avoid the unfair treatment of content providers, all the ISPs provide ways to report potential miscategorisation of sites, but currently none of the ISPs' filtering services allow the sharing of identified miscategorisations with other ISPs.¹⁶⁶

¹⁶¹ See: www.age-label.de/.

¹⁶² See: <http://jugendschutz.net/>.

¹⁶³ See: www.ris.org/uploadi/editor/1360137260Kodeks_ravnania_za_zascito_uporabnikov_2013.pdf.

¹⁶⁴ See: www.gov.uk/government/speeches/the-Internet-and-pornography-prime-minister-calls-for-action.

¹⁶⁵ Ofcom, “Report on Internet safety measures – Internet Service Providers: Network level filtering measures”, 22 July 2014, http://stakeholders.ofcom.org.uk/binaries/Internet/Internet_safety_measures_2.pdf.

¹⁶⁶ The ISPs are all members of the UK Council for Child Internet Safety (UKCCIS) working party on over-blocking, where they can share experiences on categorising and blocking activities.





5. Case law and interpretative issues

The issues underpinning the rules concerning the protection of minors on audiovisual media services show a considerable range of topics. Whereas at EU level existing jurisprudence is not particularly significant, national courts have produced a substantial variety of case law. This chapter explores both areas and aims at defining the main aspects of the interpretative issues that have emerged so far.

5.1. European and national case law

Besides the jurisprudence specifically devoted to the AVMSD and its predecessors, some relevant case law has been developed by the European Court of Human Rights. It is worth mentioning the judgment of 2011 in the case of *Karttunen v Finland*,¹⁶⁷ where no illegitimate restriction to freedom of expression was found with regard to child pornography in an art exhibition, and the *Sigma Radiotv* case,¹⁶⁸ where it was stated that the national provisions with regard to the fines and the procedures applicable in the case of protection of minors must abide by the principle of proportionality.

After the judgment of the Court of Justice of the European Communities in the *De Agostini* case¹⁶⁹ in 1997 and the Opinion of the EFTA court in the *TV1000* case¹⁷⁰ in 1998, where the TWFD¹⁷¹ was interpreted as to the possibilities open to the receiving countries with regard to the restriction of the reception of programmes originating from other member states pursuant to Article 22a of the TWFD (now Article 3 of the AVMSD) on the grounds that the content was seriously impairing to the physical, mental or moral development of minors, no further specific case law has originated at European level. The judgment of the European Court of Justice in the *Roj TV* case¹⁷² in 2011 indeed dealt with the application of the same Article 22a of the TWFD as amended,¹⁷³ but originated from a case of incitement to hatred and did not specifically concern issues of protection of minors.

¹⁶⁷ Judgment of the ECHR of 10 May 2011, *Karttunen v Finland*, Application no. 1685/10, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104816>.

¹⁶⁸ Judgment of the ECHR of 21 July 2011, *Sigma Radio Television Ltd v Cyprus*, Applications no. 32181/04 and 35122/05, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105766>.

¹⁶⁹ Judgment of the CJEU of 9 July 1997, *KO v De Agostini and TV Shop*, in joined cases C-34/95, C-35/95 and C-36/95, ECR 1997, I-03875, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61995CJ0034&from=EN>.

¹⁷⁰ Advisory opinion of the EFTA Court of 12 March 1998, *TV 1000 Sverige v Norwegian Government*, in case E-8/97, OJEC of 27 August 1998, C 268/12, www.eftacourt.int/uploads/tx_nvcases/8_97_Advisory_Opinion_EN_01.pdf.

¹⁷¹ 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 of 17 October 1989, L 298/23, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989L0552&from=EN>.

¹⁷² Judgment of the ECJ of 22 September 2011, *Mesopotamia Broadcast A/A METV and Roj TV v Republic of Germany*, in joined cases C-244/10 and C-245/10, ECR 2011, I-8777, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=113917&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=507776>.

¹⁷³ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 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, OJCE of 30 July 1997, L 202/60, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997L0036&from=en>.



No case law is to be reported on the AVMSD, but it is worth mentioning a judgment on the application of the E-Commerce Directive originating from a request for a preliminary ruling in a German case concerning age labelling by national self-regulation bodies. In *Dynamic Medien*,¹⁷⁴ the CJEU stated that a re-labelling may be justified if the procedure is readily accessible and can be completed within a reasonable period.

Considering that the aim of EU legislation first in the field of broadcasting and then in the field of audiovisual media services is to harmonise certain issues, such as quantitative limits for advertising or advertising bans and limitations for tobacco, alcohol and medical products, while others, such as the protection of minors, have been left to the discretion of the member states, which are in charge of putting in place rules according to national traditions and circumstances, the scarcity of case law at EU level is not surprising.

At national level there are many judiciary interventions that may be mentioned. Just to show how relevant of Article 22 TWFD (now Article 3 AVMSD) might be considered, it is worth remembering that the Flemish Parliament established in 2001 a specific council to guarantee the protection of minors in application of this Article, a decision that was challenged by the Flemish broadcasting organisation VTM and then confirmed by the Belgian Arbitration Court.¹⁷⁵

When it comes to the substantial concepts, the issue of the qualification of content unsuitable for minors has often come under scrutiny.

With regard to pornography, the Bavarian Administrative Court held in 2002 that the TV broadcasting of such content could only be acceptable if minors were prevented from seeing it by means of effective barriers, such as encryption with additional PIN codes.¹⁷⁶ Similar issues were dealt with by the German Federal Court in 2008, ruling that the mere entry of identification cards or passport numbers is not sufficient to ensure that minors do not access pornographic content.¹⁷⁷ In France, the Court of Appeal of Versailles held in 2004 that in order to ban the broadcast of pornographic and violent content, two conditions should be fulfilled, namely that the material was shown to young people below the required age and that the message would seriously impair human dignity.¹⁷⁸ In 2009 and 2011 the French Supreme Administrative Court confirmed the legitimacy of the restrictions on the broadcasting of films of a pornographic¹⁷⁹ and violent¹⁸⁰ nature. In the UK, the regulator Ofcom decided in 2011 on the first appeal against determinations of the ATVOD (the Authority for Television On Demand) in the case of *Playboy TV*, finding that content delivered over adult websites is TV-like in the sense of the AVMSD.¹⁸¹

The boundaries on what might impair minors depend very much on national traditions.

¹⁷⁴ Judgment of the ECJ of 14 February 2008, *Dynamic Medien Vertriebs, GmbH v Avides Media AG*, C-244/06, ECR 2008, I-505, <http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0244&lang1=en&type=TXT&ancre=>.

¹⁷⁵ See Voorhoof D., "New Council for Guaranteeing the Protection of Minors Is Not in Breach with Article 10 ECHR", IRIS 2001-1/9, European Audiovisual Observatory, 2001, <http://merlin.obs.coe.int/iris/2001/1/article9.en.html>.

¹⁷⁶ See Palzer C., "Admissibility of Pornographic Broadcasts", IRIS 2002-10/9, European Audiovisual Observatory, 2002, <http://merlin.obs.coe.int/iris/2002/10/article9.en.html>.

¹⁷⁷ See Baranowski A., "Requirements with Respect to Links to Pornographic Websites", IRIS 2008-1/12, European Audiovisual Observatory, 2008, <http://merlin.obs.coe.int/iris/2008/1/article12.en.html>.

¹⁷⁸ See Zérah C., "Broadcasting Programmes Not to Be Shown to People Under the Age of 18 or to Children Below Certain Age", IRIS 2004-1/23, European Audiovisual Observatory, 2004, <http://merlin.obs.coe.int/iris/2004/1/article23.en.html>.

¹⁷⁹ See Courtinat A., "Appeal Against Authorisation Prohibiting Showing of a Violent and Pornographic Film to Anyone under the Age of 18 Years", IRIS 2009-1/16, European Audiovisual Observatory, 2009, <http://merlin.obs.coe.int/iris/2009/1/article16.en.html>.

¹⁸⁰ See Blocman A., "Conseil d'Etat Cancels Rating Certificate for Film by Lars von Trier" IRIS 2013-9/23, European Audiovisual Observatory, 2013, merlin.obs.coe.int/iris/2012/9/article23.en.html.

¹⁸¹ See Goldberg D., "Should the Form and Content of 'Hardcore' Sex Videos Made Available on Websites be Considered 'TV-Like'?", IRIS 2011-7/24, European Audiovisual Observatory, 2011, <http://merlin.obs.coe.int/iris/2011/7/article24.en.html>.



A line of case law has been developed with regard to reality shows. The Czech Supreme Administrative Court upheld in 2008 fines issued by the Broadcasting Council against broadcasters in the case of reality programmes showing vulgar behaviour, obscenity and tobacco and alcohol addiction and this ruling was also confirmed by the Constitutional Court in 2008¹⁸² and in 2010.¹⁸³ Reality shows were found to impair morality also in Bulgaria, where in 2012 the Administrative Court of Sofia considered such broadcasts as publicly unacceptable,¹⁸⁴ and in Romania, where in 2013 the national regulator fined various commercial broadcasters for the use of insulting language and instigation to violence.¹⁸⁵ In 2014 the administrative Court of Hannover held that a reality show had breached human dignity in showing a mother hitting her children.¹⁸⁶ With regard to news, in Switzerland the Federal Court held in 2012 that reports showing excerpts of extremely violent films were incompatible with the goal of youth protection, even though they had been preceded by warnings and longer extracts were freely available over the Internet.

Labelling is another relevant issue. In this context, the Court of Lisbon decided in 2008 that bullfighting could not be broadcast during the daytime without identifying symbols advising the viewers of the violent nature of the content and this despite the fact that Portugal is a country with a long tradition of bullfighting.¹⁸⁷ In Slovakia, the Supreme Court upheld the fines issued by the national regulator because of inappropriate labelling of content of a pornographic character.¹⁸⁸

5.2. Interpretative issues

The various reports of the Commission on the application of the TWFD and the only, to date, report on the application of the AVMSD of May 2012 do not indicate any major interpretative issue with regard to the protection of minors.¹⁸⁹ The need highlighted by the EU Commission is to “maintain a consistent level of protection across different media environments while taking into account their respective specificities”. And since “foreseeable technological development might blur the boundaries between broadcasting and over the top delivery of audiovisual content [...] as a result, the current regulatory framework set by the AVMSD may have to be tested against evolving viewing and delivery patterns taking into account related policy goals such as consumers’ protection and the level of media literacy”. Major concern is reported with regard to commercial communications, as

¹⁸² See Fučík J., “Supreme Administrative Court on Danger to Minors Caused by Reality Shows”, IRIS 2008-8/12, European Audiovisual Observatory, 2008, <http://merlin.obs.coe.int/iris/2008/8/article12.en.html> and “Constitutional Court Rules on Youth Protection on Television”, IRIS 2009-3/8, European Audiovisual Observatory, 2009, <http://merlin.obs.coe.int/iris/2009/3/article8.en.html>.

¹⁸³ See Fučík J., “Constitutional Court rules on Reality Show Fine”, IRIS 2011-1/14, European Audiovisual Observatory, 2011, <http://merlin.obs.coe.int/iris/2011/1/article14.en.html>.

¹⁸⁴ See Nikolova R., “Judgment on the Show ‘The Price of Truth’”, IRIS 2012-6/11, European Audiovisual Observatory, 2012, <http://merlin.obs.coe.int/iris/2012/6/article11.en.html>.

¹⁸⁵ See Cojocariu E., “Severe Sanctions for more Romanian TV Stations”, IRIS 2013-1/33, European Audiovisual Observatory, 2013, <http://merlin.obs.coe.int/iris/2013/1/article33.en.html>.

¹⁸⁶ See Bachmeier C., “Hanover Administrative Court rules that 2011 Episode of ‘Die Super Nanny’ breached Human Dignity”, IRIS 2014-8/20, European Audiovisual Observatory, 2014, <http://merlin.obs.coe.int/iris/2014/8/article20.en.html>.

¹⁸⁷ See Sousa H., “Bullfighting Excluded from Daytime TV”, IRIS 2008-7/29, European Audiovisual Observatory, 2008, <http://merlin.obs.coe.int/iris/2008/7/article29.en.html>.

¹⁸⁸ See Polak J., “Violation of the Rules on Protection of Minors in Video on Demand”, IRIS 2013-6/32, European Audiovisual Observatory, 2013, <http://merlin.obs.coe.int/iris/2013/6/article32.en.html>.

¹⁸⁹ First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU “Audiovisual Media Services Directive”, COM(2012) 203 final of 4 May 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0203&from=EN>.



highlighted in the accompanying staff working document,¹⁹⁰ but, as previously stated, these aspects are left out of this publication.

The already mentioned European Commission Report¹⁹¹ of 2011 on the application of the 1998 and 2006 Recommendations concluded that the protection levels achieved in the member states in tackling illegal or harmful content still differ significantly between the member states, although there is convergence with regard to the usefulness of the promotion of self-regulatory measures (codes of conduct). The Report encourages the integration of media literacy and awareness-raising initiatives across Europe. In terms of age rating and the classification of content, it considers that this is an area of most extreme fragmentation between the member states, including in relation to the understanding of what is necessary and useful. Overall, the European Commission acknowledged that there is a consensus that technical measures alone cannot protect minors from harmful content and that they can only be one element in a bundle of measures. For instance, although member states agree that they can improve their age rating and classification systems, there is no consensus on the feasibility and need of cross-media and/or pan-European classification systems for media content. Against this background, the European Commission recommends reflecting upon innovative rating and content classification systems that could be used more widely across the ICT sector, while allowing the necessary flexibility for national interpretations of what content is appropriate.

When it comes to the reactions of the European Parliament,¹⁹² the self-initiative report of May 2013 pays particular attention to the blurring boundaries between linear and non-linear services, recommending that the Commission give self- and co-regulation “a greater role in the protection of minors in the media and in the regulation of advertising without, however, eschewing public-authority regulation or supervision” and “examine, in the event of any review of the AVMSD, to what extent, if any, uncertainties in the definitions have led to difficulties in implementation in the member states, so that these issues can be resolved in the context of this review”. The protection of children is mentioned as one of the priorities when it comes to connected or hybrid television, while the Parliament also “calls on the Commission to consider how the basic requirements of the AVMSD applicable to non-linear services can be extended to other online content and services which are currently out of its scope, and what steps need to be taken to create a level playing field for all operators”.

The Conclusions adopted by the Council of the European Union in November 2014, with regard to the regulatory framework, invite the Commission, when carrying out the review of the AVMS, to “ensure a high level of protection of minors across all audiovisual media services”.¹⁹³

These documents don't deal specifically with the merit of one single interpretative issue. What they have in common is a constant reference to a future review process. Some basic

¹⁹⁰ Commission Staff Working Document attached to the First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU “Audiovisual Media Services Directive”, SWD(2012) 125 final of 4 May 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0125&from=EN>.

¹⁹¹ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of the Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity and of the Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and online information services industry, “Protecting children in the digital world”, SEC(2011) 1043 final, and Accompanying Staff Working Paper, www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282011%290556_/com_com%282011%290556_en.pdf.

¹⁹² European Parliament resolution of 22 May 2013 on the implementation of the Audiovisual Media Services Directive (2012/2132(INI)), www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0215+0+DOC+PDF+V0//EN.

¹⁹³ Council conclusions on the European Audiovisual Policy in the Digital Era of 25 November 2014, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/145950.pdf.



questions, as will be illustrated below, have indeed been raised by the Commission in the Green Paper¹⁹⁴ adopted in April 2013, when it launched a public debate on the main issues brought forward by the process of convergence between television and services distributed via the Internet and accessible through the same devices.¹⁹⁵

A set of questions was specifically devoted to the topic of the protection of minors in the public consultations that was subsequently launched: Q20) asked if the current rules of the AVMSD are appropriate to address the challenges of protecting minors in a converging media world; Q21) which mechanism would be desirable to make parents aware of parental control tools, considering that take-up of such tools appears limited so far; Q22) what measures would be appropriate for the effective age verification of users of online audiovisual content; Q23) if the AVMSD should be modified to address, in particular, content rating, content classification and parental control across transmission channels; Q24) if users should be better informed and empowered as to where and how they can comment or complain concerning different types of content and if current complaints handling mechanisms appropriate and Q25) if the means by which complaints are handled (funding, regulatory or other means) are appropriate to provide adequate feedback following reports about harmful or illegal content, in particular involving children.

The executive summary of the contributions to the public consultation shows a significant variety of positions, especially when it comes to the dilemma of more vs less harmonisation, whereas a more general agreement is to be seen with regard to issues such as media literacy, awareness, and information.¹⁹⁶ In the feedback paper a more detailed description of the various answers can be found.¹⁹⁷ What appears particularly significant is the concern for audiovisual content provided by subjects outside the scope of the AVMSD, such as content aggregators and technology companies, and the growing function of self- and co-regulatory tools. Considering the national character of the provisions related with the protection of minors, no major issues are highlighted as to the application of the AVMSD nationally, but the situation becomes quite different when it comes to content delivered from providers established outside the EU.

National regulators have started to closely follow the revision process in order to express common positions.¹⁹⁸ To mention a selection of these, Ofcom has, for example, highlighted the concerns with regard to providers which offer so-called “adult tube sites” monetising hard-core material by offering free, unrestricted access to porn clips, as well as the problems deriving from the relocation of providers within the EU because of different interpretations of the “might seriously impair” test.¹⁹⁹ Another issue raised by the British regulator is the role of platform operators and intermediaries in supporting the protection of minors from the risk of exposure to harmful content, especially when it comes to the provision of clear information to consumers as to the distinction between the protected space of regulated services provided on managed networks and unregulated services provided through the free Internet.

¹⁹⁴ Green Paper of the European Commission, “Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values”, COM(2013) 231 final of 24 April 2013, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:PDF>.

¹⁹⁵ See Scheuer A., “Convergent Devices, Platforms and Services for Audiovisual Media”, in Nikoltchev S. (ed.), *Converged Media – Same Content, Different Laws?*, IRIS plus 2013-3, European Audiovisual Observatory, Strasbourg, 2013, www.obs.coe.int/documents/205595/865106/IRIS+plus+2013en3+LA.pdf.

¹⁹⁶ Executive Summary of contributions to the public consultation launched by the Green Paper, COM(2013) 231 final, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=6762.

¹⁹⁷ Summaries of the replies to the public consultation launched by the Green Paper, COM(2013) 231 final, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=6761.

¹⁹⁸ See ERGA Work Programme 2015, which points to the production of common conclusions on the topic of protection of minors, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=7342.

¹⁹⁹ Ofcom response to the European Commission Green Paper, COM(2013) 231 final, <http://stakeholders.ofcom.org.uk/binaries/international/international-responses/green-paper-sep13.pdf>.



The issue of the risks deriving from the high degree of national character applied by the member states to the definition of the key concepts, such as “minors”, “content which might seriously impair” or “content suitable for minors”, has been raised in particular by the Spanish regulator, which suggests improving convergence of the criteria used for the application of the symbols that serve as a guide to audiovisual content and age categories.²⁰⁰ A different view is presented by the German regulators, which claim that the qualification of content should remain in national hands.²⁰¹

The need for a more comprehensive approach was pushed by the French regulator, which stated that European regulation is not sufficiently based on a global approach aiming at involving all devices, so as to facilitate a single regulatory framework applicable to all cultural services, such as broadcasting, on-demand services and videogames.²⁰² The Belgian regulator also considered the two options of levelling up (to the stricter rules applicable to linear services) or down (to the softer rules applicable to non-linear services), stressing the need of an alignment of the two different regulatory frameworks.²⁰³

²⁰⁰ CAC response to the European Commission Green Paper, COM(2013) 231 final, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=3979.

²⁰¹ DLM response to the European Commission Green Paper, COM(2013) 231 final, www.die-medienanstalten.de/fileadmin/Download/Positionen/Europa/Stellungnahme_der_Medienanstalten_zum_EU-Gr%C3%BCnbuch_vom_24_04_2013_COM_2013_231.pdf.

²⁰² CSA (FR) response to the European Commission Green Paper, COM(2013) 231 final, www.csa.fr/content/download/41934/471929/file/R%C3%A9ponse%20CSA%20LV%20finale.pdf.

²⁰³ CSA (BE) response to the European Commission Green Paper, COM(2013) 231 final, www.csa.be/system/documents_files/2135/original/CSA_reponse_Livre_vert_texte_integral_et_resume.pdf?1381998867.



6. State of play of the decision-making process

6.1. The REFIT exercise of the EU Commission

Whereas no major initiatives are to be reported on the international level, following the conclusion of the public consultation on the abovementioned Green Paper, the EU Commission has announced a REFIT exercise to be carried out, with specific coverage of the issues of simplification and burden reduction.²⁰⁴ Through REFIT, the Commission will identify burdens, gaps and inefficient or ineffective measures, including possibilities for simplification or repeal of existing regulation according to the REFIT Communication.²⁰⁵

To become SMART (Standardised, Measurable, Actionable, Reliable and Transparent), the regulatory process has to be reviewed in its whole policy cycle – from the design of a piece of legislation, to implementation, enforcement, evaluation and revision – and must remain a shared responsibility of the European institutions and of member states, while reflecting the views of those most affected by regulation.²⁰⁶

A review of the AVMSD is foreseen in the EU Commission's Work Programme 2015, in order to "modernise" EU legislation on audiovisual media services.²⁰⁷ Annex 3 to the Work Programme explicitly mentions that an "evaluation" of the AVMSD is on-going and that results are expected in 2016.²⁰⁸ How this process will develop was still unclear at the time of writing, but it is being closely followed by regulators and stakeholders and many crucial questions arise.

6.2. Managed networks vs free internet

A major issue of concern for most stakeholders is the distinction between linear and non-linear services,²⁰⁹ as it affects the level of protection on TV-like services on managed networks, where the level of expectation from the users as to the protection they are likely to receive is particularly high. It might be questioned whether the line should be drawn higher or lower, but the situation is quite

²⁰⁴ Commission Staff Working Document, "Regulatory Fitness and Performance Programme (REFIT): Initial Results of the Mapping of the Acquis", SWD(2013) 401 final of 1 August 2013, http://ec.europa.eu/smart-regulation/docs/reg_fitn_perf_prog_en.pdf.

²⁰⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "EU Regulatory Fitness", COM(2012) 746 final of 12 December 2012, http://ec.europa.eu/smart-regulation/better-regulation/documents/com_2013_en.pdf.

²⁰⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Smart Regulation in the European Union", COM(2010) 543 final of 8 October 2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0543:FIN:EN:PDF>.

²⁰⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Commission Work Programme 2015 – A New Start", COM(2014) 910 final of 16 December 2014, http://ec.europa.eu/atwork/pdf/cwp_2015_en.pdf.

²⁰⁸ Annex 3 to COM (2014)910 final of 16 December 2014, http://ec.europa.eu/atwork/pdf/cwp_2015_refit_actions_en.pdf.

²⁰⁹ See Scheuer A. and Bachmeier C., "The Protection of Minors in the Case of New (Non-Linear) Media", in Nikoltchev S. (ed.), *Protection of Minors and Audiovisual Content On-Demand*, IRIS plus 2012-6, European Audiovisual Observatory, Strasbourg, 2012, www.obs.coe.int/documents/205595/865104/IRIS+plus+2012en6LA.pdf.



different from the case of the free Internet, where studies show that the expectations vary according to the provider.²¹⁰

Then comes the free Internet, where the E-Commerce Directive applies as regard the limits to the liability of intermediaries. Here other tools are available. Article 3 provides for a set of derogations from the principle of the single market and the country of origin, where such derogation measures are:

- “necessary” for, among other objectives, the protection of minors;
- “taken against a given information society service” which prejudices or presents a serious and grave risk of prejudice to minors;
- “proportionate” to those objectives;

and provided that before restricting the single market by adopting a restrictive measure, the receiving member state has:

- asked the country of origin to adopt such measures and the latter didn’t provide or adopted inadequate measures; and
- notified the Commission and the country of origin of its intention to take such measures.

This derogation procedure has been applied very rarely, around 30 times in the last decade, mainly to deal with measures for the protection of consumers, and the Commission has never declared a measure incompatible with EU law,²¹¹ thanks in part to the activities carried out by the Consumer Protection Co-operation Network (CPC-Network).²¹² Considering the similar challenges that audiovisual content is facing online and the fact that the E-Commerce Directive would be the reference regulatory framework in both cases, some source inspiration as to the type of cooperation could indeed be found in the field of consumer protection, notwithstanding that in the field of online audiovisual content there is no harmonisation when it comes to the protection of minors and that this aspect, in itself, poses some limitations as to possible forms of cooperation among national authorities.

6.3. Responsibility, liability and accountability: self- and co-regulation

The issue of enforcement is of course crucial when no liability can be connected to subjects without editorial responsibility, as is the case of Internet service providers in their different functions of mere conduit, caching or hosting. The consolidated systems of self- and co-regulation present in the member states in most cases appear to work well, but they do have the disadvantage of not being enforceable in case of violation.

²¹⁰ Kantar Media, “Protecting Audiences in an Online World”, Deliberative research report prepared for Ofcom, December 2014, http://stakeholders.ofcom.org.uk/binaries/research/tv-research/protecting-audience-online/Protecting_audiences_report.pdf.

²¹¹ Commission Staff Working Document, “Online services, including e-commerce, in the Single Market”, SEC(2011) 1641 final of 11 January 2012, http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf, accompanying Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, “A coherent framework for building trust in the Digital Single Market for e-commerce and online services”, COM(2011) 942 final of 11 January 2013, http://eur-lex.europa.eu/resource.html?uri=cellar:87375c7c-1bd0-445d-b251-60599af8c73b.0009.03/DOC_1&format=PDF.

²¹² See: http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/index_en.htm



In a system where all stakeholders, the State and users included, are part of a more complex value chain with mixed duties as a result of the interdependencies that develop,²¹³ one could also imagine that issues of empowerment and awareness may develop into new forms of shared commitment. This would not be the classical *ex ante* responsibility with subsequent passive liability for the actions put in place, but rather a form of active accountability.

The most recent initiatives developed on the national level have been described in paragraph 3. They all point to the development of new forms of regulatory mixes, where the provider's responsibilities go hand in hand with the user's empowerment.²¹⁴

6.4. Final remarks

In a converged media environment the overall picture as to the protection of minors appears quite fragmented. Depending on how audiovisual content is distributed, the regulatory framework is subject to quite significant shifts, meaning that the same video can be treated differently when watched through different means: so, content that is seriously harmful, may be prohibited or allowed, subject to certain watersheds, on traditional television, allowed with or without pin codes in the case of on-demand services, and be freely visible on the free internet.

Considering that for most youngsters the access to audiovisual content has become very easy and that many of them operate in a multi-screen environment, where the differences among the various means of access are not always easy to perceive, it might be questioned if such distinctions reflect the effective reality of their consumption behaviours and if the different levels of protection ensured by the current regulatory framework effectively satisfy what is expected for the so-called "television-like" content.

It is well-known that the interpretative tool for what is television-like is currently Recital 24 of the AVMSD, according to which the "TV-likeness" is there if the on demand services "compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection". The cruciality of this interpretative tool appears clear, as the same recital continues by stating that "in the light of this and in order to prevent disparities as regards free movement and competition, the concept of 'programme' should be interpreted in a dynamic way taking into account developments in television broadcasting".

Exactly this dynamicity is what these pages have tried to catch and it's this and many other questions that will now face the REFIT exercise.

²¹³ See Nooren P. *et al.*, "Regulation in the converged media-Internet-telecom value web", TNO Report R11428, October 2014, <http://publications.tno.nl/publication/34611843/NhocfJ/TNO-2014-R11482.pdf>.

²¹⁴ See contributions to the workshop co-organised by EPRA and the European Audiovisual Observatory on "Empowering users: rating systems, protection tools and media literacy across Europe", Strasbourg, 15 December 2014, www.obs.coe.int/legal/-/asset_publisher/U5nla9g8kPUq/content/dli-workshop-obs-epra-empowering-users.





