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Protection of Minors and Audiovisual Content On-Demand

2012-6

LEAD ARTICLE

The Protection of Minors in the Case of New (Non-Linear) Media

European Legal Rules and their National Transposition and Application

- Background and challenges
- EU legal rules on youth protection
- The treatment of on-demand audiovisual services in national law and the relevant youth protection systems
- Conclusion

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Protection of Minors and Audiovisual Content On-Demand

Foreword

On-demand services with audiovisual content are continuing to be more and more popular among users. One of the world's best known platforms is no doubt YouTube, which, according to Matthew Glotzbach, the company's EMEA Managing Director, currently has 800 million users a month who upload 72 hours of film material every minute and watch videos totalling 4 billion hours every month (figures quoted from www.heise.de/newsticker/meldung/Medienwoche-Sender-und-Google-kaempfen-um-die-TV-Hoheit-1697883.html). As can be gathered from the European Commission's First Report on the application of the Audiovisual Media Services Directive (COM(2012) 203 final), there are a wide variety of video-on-demand (VoD) services, such as television broadcasters' catch-up TV offerings, which normally enable viewers to access via their websites (a selection of) audiovisual content for up to seven days after it has been aired. In addition, programmes stored on a continuous basis, or at least for a long period, are available from broadcasters' media libraries. In most cases, these services can be used free of charge because private providers in particular finance them through revenues from commercial communications.

More and more paid video services are being introduced, including offerings like Netflix, LOVEFiLM or HBO Nordic, the launch of which was announced in early September 2012. Comparable to the traditional renting of a video cassette or DVD from a video rental shop, the user downloads a video file that can be watched within a specified timeframe. These services normally place the emphasis on (commercially particularly successful) cinema productions. On the other hand, private TV stations also offer payment-based video portals that provide access not only to cinema productions but also, and especially, series and TV movies (in some cases their own productions). Companies whose origins lie in the telecommunications field are increasingly endeavouring to tempt their customers with IPTV offerings comprising more and more on-demand audiovisual content and now even sometimes provide access via mobile terminals (smartphones, notebooks with a wireless Internet broadband connection). Newspaper and magazine publishers are also operating on the market for on-demand audiovisual content, having in the last few years extended their Internet services, which traditionally consisted of a combination of text and photographs and now include more and more (in most cases short) video clips.

Finally, there are a large number of services that do not originate from classical media companies (although some of them offer their content). These include so-called aggregators, which either enable users to access content (only) available at the providers' individual websites – and therefore scattered across the Internet – or function as providers of technical and marketing services for various TV broadcasters. A number of examples of this were analysed in our IRIS *plus* 2010-5 (pp. 10 ff.). However, some users focus particularly on websites with erotic or even pornographic content. These and numerous other diverse offerings make it necessary to assess content according to whether it is suitable for everyone, for no one or

only for specific age groups. With regard to content that is unacceptable in general, or at least for minors in particular, and content that might impair or harm the development of minors in specific age groups and is therefore prohibited in their case, the spotlight necessarily falls on the protection of these individuals. Content prohibited for all or some age groups may entail risks considered to be high by parents and others responsible for bringing up children. This is shown with considerable regularity by various studies based on surveys of adults, not least because the Internet is extremely attractive for children and young people: contacts with acquaintances from the "real world" are maintained and new "friends" are cultivated at social networking sites, Internet research is often necessary in order to do school homework, virtual game worlds are enjoying undiminished popularity and, finally, the Internet "is where it all happens".

The European Commission also discusses this problem in a recent report (COM(2011) 556 final) and adds that "parents often have difficulties in carrying out their responsibilities in relation to new technology products and services that are usually less known to them than to their children. We must therefore ask the question whether current policies are still suitable and adequate to ensure a high level of protection for minors throughout Europe."

The lead article of this IRIS *plus* examines the current situation regarding the protection of children and young people in the context of on-demand audiovisual media services, focusing in particular on content that might seriously impair a minor's development, and discusses both the provisions of EU law and the legal bases of, and actual rules applying in, various national systems for the protection of minors.

The discussion in the lead article is complemented by the first part of the Zoom section, which picks up on the idea, enshrined in the European rules, of a level of protection that varies according to the type of service involved. It describes the distinction drawn in the case of audiovisual media services between linear services, which provide more protection for minors, and on-demand services, which provide less protection, and between such services and other on-demand audiovisual services, which provide even less protection. The discussion is concluded with an overview of other European and national initiatives for strengthening the protection of minors. Measures taken are directed at the elimination of harmful content, at the provision of content suitable for children and at strengthening media competence.

The second part of the Zoom section provides a short overview of the chronology of rules for the protection of minors in the Russian Federation. As a result of amendments to the law, that protection, which originally focused on traditional audiovisual media services, now seems gradually to include online services.

The fact that the protection of minors, especially in the case of on-demand audiovisual media services, is an important and perhaps even difficult subject is shown by the contributions to the related reporting section: this time, it was hard to make the selection owing to the wide range of recent articles available.

Strasbourg, November 2012

Susanne Nikoltchev
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European Audiovisual Observatory

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European Legal Rules and their National Transposition and Application

Alexander Scheuer and Cristina Bachmeier
Institute of European Media Law (EMR), Saarbrücken/Brussels

I. Background and challenges

1. The protection of minors – an obligation common to all states

The protection of minors from harmful media influence is a matter of concern for parents and an important subject of media and child protection policy. States and the international community as a whole accept, at least in principle, that they have a particular responsibility to ensure the healthy mental, spiritual and physical development of children and young people. A "positive obligation to provide protection" can be inferred from the national constitutional law of many Council of Europe member states and from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[1] It is also explicitly laid down in Article 24(1), 1st sentence, of the Charter of Fundamental Rights of the European Union. The idea of state responsibility is also laid down at the level of the United Nations: Article 17 of the Convention on the Rights of the Child (UN Children's Rights Convention – UNCRC)[2] deals with children's access to media and with the protection of children and young people. In it, the Contracting States recognise the important role of the mass media and undertake to ensure that children have access to information and material from a wealth of national and international sources, especially those aimed at the promotion of their well-being and health. At the same time, the Contracting States agreed to "encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being". Account is taken here both of the child's right to freedom to receive and impart information (Article 13 UNCRC) and the parent's right to bring their child up (Article 18(1), 2nd sentence, UNCRC).

1) European Court of Human Rights, judgment of 2 December 2008, K.U. v. Finland, Application No. 2872/02.
2) www2.ohchr.org/english/law/crc.htm . The term "child" refers to all persons under 18 unless the age of majority is attained earlier under national law.

Both in Europe and worldwide there is a broad consensus that certain communicative content must not be tolerated for compelling reasons relating to the public interest even though it falls within the scope of freedom of expression and freedom of the media. Accordingly, its dissemination, even if it is only distributed to adults, is never permissible. For example, the Council of Europe's Convention on Cybercrime (Article 9)[3] and its Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Article 20)[4] as well as the EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography (Article 21)[5] prohibit the production, acquisition and possession of child pornography as well as various ways of (publicly) disseminating such material.

However, the obligation to protect children and young people from harmful content goes beyond the aforementioned examples of content that must also not be made accessible to adults.[6] In the case of audiovisual content of a mass media nature, the EU member states have laid down rules for television programmes and on-demand audiovisual media services in the Audiovisual Media Services Directive (AVMSD).[7] The provisions applying to on-demand services with moving images are an important subject for discussion in section II of this article. In order to understand them, it will be very helpful first of all to examine the traditional conception of the protection of minors from harmful media influence, which formed the basis for example of national youth protection law in the case of the cinema and of the Television Without Frontiers Directive (TWFD),[8] the predecessor of the AVMSD, in the case of television.

2. Traditional youth protection models for offline media and television

In principle, the protection of minors from harmful media influence is based on shared responsibility between providers and parents/guardians. For example, the legal systems of some European states provide for a ban on showing films in cinemas if an examination of their content has not previously established their general suitability and harmlessness for children and young people from a certain age. Access to the film is checked at the cinema box office if age restrictions have been imposed. As an exception, however, in certain countries children or adolescents below the age specified may be admitted if they are accompanied by an adult responsible for them. This reflects the balance struck between state-decreed youth protection (primarily the provider's responsibility) and the recognition of the parents' right to bring up their child: subject to certain limits, it is the parents who decide whether it is harmful for their child to see a film classified for a higher age group.

There is a comparable access control model for the dissemination of audiovisual works on physical media: in retail or rental outlets, videos and DVDs may only be sold/rented on the basis of an age classification and only to persons who prove they have reached the minimum age required.[9]

In the case of television, on the other hand, it is not possible for the provider to protect minors from unsuitable content by carrying out personal checks on their age and it is primarily the duty

3) http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm
4) http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=201&CL=ENG
5) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:335:0001:0014:EN:PDF
6) A ban on broadcasting programmes that contain incitement to hatred is to be found, for example, in the EU's Audiovisual Media Services Directive (see fn. 7) (cf. Article 6).
7) 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 (codified version), OJ L 95 of 15 April 2010, p. 1.
8) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298 of 17 October 1989, p. 23, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, OJ L 202 of 30 July 1997, p. 60.
9) On the refusal in Germany, and recognised by the CJEU, to allow a buyer established there to sell by mail order a DVD banned in Germany although it has an age rating issued by the relevant authority of another EU member state, see Alexander Scheuer, "Konvergenz der Medien, Divergenz im europäischen Jugendmedienschutz? – Zur Harmonisierungskraft der Binnenmarktregeln", *tv diskurs*, (Heft 2) 2008 (No. 44), pp. 10 ff.

of the broadcaster to ensure that the content is only transmitted at a time when it can be assumed that children and young people are not watching television. It is then the parents' responsibility to comply with youth protection rules since the provider itself cannot enforce them. If parents/guardians consider a particular programme unproblematic, they can allow their child to watch it. In the light of continuous technological progress, this approach is based on a pretence: it is pretended that there are neither video recorders nor receivers (such as set-top boxes) equipped with hard disks to record programmes or other ways of viewing time-shifted programmes, that is to say watching them other than at the original transmission time. Here, parental responsibility therefore also includes either preventing an unsuitable programme from being recorded or limiting its consumption to members of the household who, in the parents' estimation, will not be caused any developmental problems. However, technical progress does not just entail risks for television. On the contrary, providers and politicians or media regulators have for some time been seeking ways of using protection functions made possible by technology in order to protect young people from unsuitable media content.

One approach in this connection was the so-called V-chip technology, which enabled certain types of content to be blocked and was supposed to be compulsorily installed in every television set. With the help of a V-chip, content that corresponded to the "V" rating to be assigned by the broadcaster because it contained violence was automatically filtered out. However, the experience gained was not particularly encouraging, not least because the use of the technology at home seemed too complicated for many parents.[10] In particular, the increase in pay-TV and the digitisation of TV broadcasting led to different approaches based essentially on the encryption of content by the provider. Individual programmes or entire channels are blocked in advance to prevent the display of the content concerned if the user does not unblock the programme by entering a code ("youth protection pin").[11] Ideally, only adult members of a household should possess the code. The use of this technology enables existing watersheds to be partially or completely ignored but it presupposes that the code works reliably and that parents handle it responsibly.

Article 22(2) TWFD (now Article 27(2) AVMSD) summarised the situation accordingly: member states are obliged to take the appropriate measures in respect of broadcasters subject to their jurisdiction. These measures should guarantee that television broadcasts do not contain programmes that might impair the physical, mental or moral development of minors. Exceptions apply when it is ensured by selecting the time of the broadcast or by employing technical measures that minors in the transmission area will not normally hear or see such broadcasts.[12]

3. Challenges resulting from the Internet

In view of the large number of offers of audiovisual content normally to be found free of charge directly or indirectly on the Internet and regarded as dubious or dangerous within the meaning of youth protection legislation, traditional ideas on the protection of minors, and therefore the effectiveness of the work of (state) regulators, face serious challenges.

Some of the factors that are at least partly the cause of this are as follows:

- *the websites of new providers*. For them, the existing European youth protection system has little importance because, firstly, in many cases they are not subject to the jurisdiction of an

10) See Marina Benassi, European Commission: Report on Parental Control of Television Broadcasting, http://merlin.obs.coe.int/iris/1999/4/article4.en.html, with further references. Other reasons were in particular the member states' different culturally based approaches to the classification of audiovisual content and the concern that the V-chip technology would quickly be obsolete with the digitisation of television and the growing importance of the Internet as a distribution channel. Cf. also Article 22b TWFD as amended in 1997, op. cit. (fn. 8).

11) See Alexander Scheuer, "Germany: Protection of Minors on Digital Television", http://merlin.obs.coe.int/iris/2000/5/article9.en.html

12) In the case of content "likely" to impair development, Article 22(3) TWFD (now Article 27(3) AVMSD) stated that its transmission in unencrypted form must be preceded by an acoustic warning or identified throughout its duration by the presence of a visual symbol.

EU member state since they often operate from states where EU youth protection legislation does not apply. These providers accordingly cannot be reached by regulatory means. Secondly, some of these new providers are hardly or not at all familiar with established ideas on youth protection, so there is a danger that any concerns expressed will fall on deaf ears;

- *the anonymity or deliberate concealment of its identity by a service provider that makes content available that is either illicit or harmful to the development of minors*. This leads to problems for media regulators that are extremely difficult to solve, even when regulators outside Europe are in principle willing to co-operate and would also be legally in a position to take action against the providers concerned;

- *the permanent availability of content problematic from the youth protection point of view*. The result is that there is practically no point in using watersheds on the Internet. Unlike in the traditional world of television, the user is not tied to the transmission times scheduled by the broadcaster;

- *the ease with which content unsuitable for children, often in the immediate vicinity of content designed for children and young people or at least harmless to them, can be accessed*. Through the (targeted) use of general or specialised search engines or links to social media platforms or by enabling material to be located by clicking on a link in a spam mail, minors gain access to content that poses a risk of impairing their development. Information on what audiovisual services are available on the Internet goes far beyond the details provided in a television listings magazine on an electronic programme guide (EPG). Conversely, Internet users are less and less dependent on the content offered by the traditional providers such as television broadcasters in their linear programme;

- *the separation of offerings from their original providers, and therefore from the youth protection instruments originally linked to the content concerned*. This comes about because (in many cases without the necessary copyright and/or neighbouring rights) audiovisual content is reproduced by many different service providers – or "users" in the case of portals such as YouTube – and made available at various locations on the Internet. In this way, the advance blocking formerly linked to a specific programme on digital television or the description of content as likely to impair an individual's development below a certain age may no longer be possible, thus thwarting the intention to provide youth protection.

All these factors taken individually or collectively illustrate why it is difficult to try to apply traditional mechanisms to regulate the protection of minors with regard to audiovisual on-demand services. However, if we look at the actual habits of children and young people, we find that they mainly seem to use the on-demand services of traditional (TV) providers, albeit in a different form, namely at any time and place and (at the moment still) predominantly away from the TV set. Consequently, it is necessary to put into perspective many a pessimistic assessment that children cannot be given any protection on the Internet since a substantial number of the aforementioned problem factors do not apply to the content made available on demand by these providers or do not apply to the extent described.

Users/parents generally acknowledge that it is to some extent necessary and sensible for their children to deal with the "new media" but are at the same time aware of the dangers that this may involve.[13] Studies have shown that many parents feel largely left to their own devices in their search for the appropriate way to address the risks: on the one hand, they lack the necessary technical support and information and on the other hand, they realise that they are unable to actively help their children. The reason for this is that surfing the Internet is increasingly taking place in situations where they have no opportunity to provide support either physically/spatially (the child's PC is in its room) or in terms of time (the child has its smartphone on it when visiting

13) This article does not discuss risks that have no direct connection to the content of the audiovisual media disseminated on the Internet, for example cyberbullying, grooming, identity theft, spying out behavioural patterns, etc. Parents, politicians and youth protection organisations are now paying increasing attention to such dangers.

a friend). Another aspect is their own insecurity in dealing with the many different Internet offerings.

To what extent the law of the EU and its member states already contains provisions for protecting underage users of on-demand audiovisual services, how these provisions are to be understood and, if and when the occasion arises, applied and enforced is the subject of the following two sections (II. and III.) of this article. Finally (in section IV.), a cautious assessment of the current situation is made regarding the protection of children and young people in the case of new on-demand audiovisual services. Looking to the future, this assessment also takes account of so-called "connected TV" (smart TV).

II. EU legal rules on youth protection

For non-linear audiovisual media services, Article 12 AVMSD states the following with respect to the protection of minors:[14]

> "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 regard to linear services (i.e. television), Article 27(1) AVMSD provides that "television broadcasts by broadcasters under [the member states'] jurisdiction [must] 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".

A criterion common to both regulatory approaches to the protection of minors is that the offering must pose a risk of "serious impairment".[15] Different legal consequences result from the existence of such content in services or programmes: while the content may not be shown on television, the only obligation in the case of on-demand services is to ensure that it cannot be seen or heard by minors, so it is important to distinguish between the two types of audiovisual media service. How that is done has already been discussed in an earlier European Audiovisual Observatory publication.[16] If the service belongs neither to the one nor the other category, for example because a specific feature of the "audiovisual media service" is lacking, then other EU legal instruments may be applicable. The criteria for classifying the various audiovisual services into television, on-demand audiovisual media services and other on-demand services and the rules applying to the latter group are the subject of the first ZOOM section of this IRIS *plus*. We focus here on the regulatory scope of Article 12 AVMSD, which applies to non-linear audiovisual media services.

In order to understand this provision, it is first necessary to point out that the directive neither defines "seriously impair the development" nor provides any explanations. Nonetheless, it may be concluded from a comparison with Article 27(1) AVMSD that pornographic content and gratuitous violence (i.e., the – non-exhaustive – examples of unacceptable content applying to television) could at any rate be considered covered by this term. However, the drafting history of this rule suggests otherwise: the European Parliament proposed including the examples of content that poses the risk of seriously impairing development, in the words of Article 12 AVMSD, but was unable to persuade the European Commission and the Council to accept this. The EU (and especially the Com-

14) This article does not discuss the directive's youth protection rules with regard to commercial communication, cf. Article 9(1)(e) and (g), para. 2 AVMSD.
15) Recital 61 of the AVMSD makes it clear that unlawful content (in this case, child pornography – see above at fn. 4) may on no account be made available by audiovisual media services.
16) See the detailed discussion in *The Regulation of On-demand Audiovisual Services: Chaos or Coherence?*, IRIS *Special*, European Audiovisual Observatory, 2011. On the details of the definitions, see in particular Mark D. Cole in the same publication: "The European Legal Framework for On-demand Services: What Directive for Which Services?", pp. 40 ff.

mission[17]) thus recognises that the member states still have a considerable amount of discretion in various areas. This applies in particular in the case of culturally or morally sensitive issues.[18] It follows from this that there may be significantly different ideas in the EU member states as to what type of content is regarded as seriously impairing development (examples can be found in section III). However, the Court of Justice of the European Union (CJEU) can interpret the term for the EU as whole.[19]

Secondly, it may be pointed out that the directive imposes no conditions on on-demand media services for content that is "likely" to impair development – in contrast to television broadcasts (Article 27(2) and (3) AVMSD).

A third aspect that can potentially also lead to a lower degree of harmonisation is the "minors" criterion, the meaning of which is also determined by the EU member states. However, in most cases the age of majority of 18 years recommended in Article 1 UNCRC applies.

Fourth and finally, the requirements concerning the measures necessary to prevent[20] minors from viewing content that might seriously impair their development are not specified in detail in the directive. However, Recital 60 AVMSD does mention examples of measures, namely the use of personal identification codes (PIN codes), labelling and filtering systems. The first two clearly rely on the shared responsibility between providers and parents: the purpose of mechanisms for checking an individual's age by means of PIN numbers is to unblock and provide access to content otherwise blocked by the provider. The use of labelling by a provider – for age rating purposes and/or in order to make the risk inherent in the content clear – presupposes an examination and classification by the provider (or a body commissioned for this purpose).[21] It serves to guide parents/guardians on whether the programme is suitable for the children and young people in their charge. If labels are made available in machine-readable form (for example as so-called service information in the transport stream of the audiovisual signal), then filtering systems can use them to suppress the display of content not desired by the user. In addition, and independently of this, filtering systems are designed, on the basis of their own analysis of content, to recognise and exclude certain unacceptable or harmful material and prevent it from being seen or heard. Their use can if need be "user-defined", that is to say parents can define categories of undesirable content in the system. Here, too, there is a considerable degree of parental responsibility, while the filtering technology does not necessarily have to rely on the provider's co-operation. Recital 60 also draws attention to the Recommendation of the European Parliament and of the Council on the protection of minors,[22] which recognises the importance of labelling and filtering systems.

In order to round off this section, the following three points need to be considered.

- According to Article 4(1) AVMSD, EU member states can require media service providers under their jurisdiction to comply with stricter or more detailed rules. A large number of countries

17) See Commission Report, op.cit. (fn. 10), and 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 – Audiovisual Media Services and Connected Devices: Past and Future Perspectives –, COM(2012) 203 final, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0203:FIN:EN:HTML , p. 3.

18) See CJEU, C-244/06, Dynamic Media Vertrieb v. Avides Media [2008], I-505, para. 44 f., and EFTA Court, E-8/97, TV 1000 Sverige v. Norway, www.eftacourt.int/images/uploads/8-97_Advisory_Opinion.pdf , paras. 24 ff.

19) See most recently CJEU, judgment of 22 September 2010, joined cases C-244/10 and C-245/10, Mesopotamia Broadcast and Roj TV v. Germany, para. 40.

20) To be precise, the services must be provided "in such a way as to ensure that minors will not normally hear or see [them]". As no technical system can provide 100% protection against circumvention ("code cracking" or "hacking"), the qualification "normally" must be understood to mean that no absolutely reliable protection is demanded. Rather, an effective state-of-the-art system must be employed. See below III. 1.1.2 and 6.6.2 on examples of such requirements and additional details of the state of the discussion.

21) For a detailed discussion, see Carmen Palzer, "Horizontal Rating of Audiovisual Content in Europe. An Alternative to Multi-level Classification?", IRIS *plus*, European Audiovisual Observatory, 2003-10.

22) 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, OJ L 378 of 27 December 2006, pp. 72-77.

already traditionally make use of this power while others are determined only to transpose the directive's minimum requirements into national law. However, the Commission is sceptical since this would run counter to the principle in the directive of providing for different degrees of stringency (for example, the rules applicable to television in Article 27 are more stringent that those applicable to on-demand audiovisual services in Article 12).[23]

- Article 3(4) to (6) AVMSD enables states in exceptional cases – among other things on youth protection grounds – to derogate from the principle of free retransmission laid down in paragraph 1 of that Article (or from the principle enshrined in Article 2(1) of the – exclusive – supervision by the state to whose jurisdiction the media service provider is subject).

- Article 4(7) AVMSD encourages the use of co-regulation to pursue the objectives set out by the directive.[24]

III. The treatment of on-demand audiovisual services in national law and the relevant youth protection systems

Most EU member states have now transposed the provisions of the AVMSD into their domestic law. For the purposes of this article, we are first of all interested in how the scope of the rules concerning on-demand audiovisual services was established, because the type of service subject to these provisions depends on the answer to this question. There are two other questions that need to be answered: firstly, on the basis of what criteria are non-linear audiovisual media services distinguished from other (audiovisual) on-demand services? Secondly, what systems apply for the protection of minors against content that might harm or impair their development? The following overview discusses these questions with respect to a selection of member states and focuses as far as possible on the provisions that apply to on-demand audiovisual media services within the meaning of the directive.

1. Germany

In Germany, both the Federation and the *Länder* are responsible for the transposition of the AVMSD. The federal provisions are to be found in the Telemedia Act (*Telemediengesetz* – TMG),[25] while the provisions enacted by the *Länder* are primarily contained in the Inter-State Agreement on Broadcasting and Telemedia (*Staatsvertrag für Rundfunk und Telemedien* – RStV)[26] and the Inter-State Agreement on the Protection of Human Dignity and the Protection of Minors in Broadcasting and Telemedia[27] (*Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien* – JMStV).[28]

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23) For example, the Commission considers disproportionate the application of youth protection provisions comparable to those in Article 27(2) and (3) AVMSD to on-demand services. See the Minutes of the 35th meeting of the Contact Committee established by the Audiovisual Media Services Directive, Brussels, 23 November 2011, Doc CC AVMSD (2011) 6, p. 2 (para. 4, 5th indent), http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact_comm/35_minutes_en.pdf

24) On the criteria for a specific system, see Recital 44(2) of the AVMSD, and on the application in the member states see p. 22 f. of the Commission Staff working paper accompanying the Commission's report COM(2011) 556 final on "Protecting children in the digital world". This report concerns "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" and is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0556:FIN:EN:PDF. The Commission staff working paper is available at http://ec.europa.eu/avpolicy/docs/reg/minors/2011_report/swp_en.pdf

25) www.gesetze-im-internet.de/tmg/BJNR017910007.html

26) Available in English at www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/13._RStV-englisch.pdf

27) Available in English at www.kjm-online.de/files/pdf1/_JMStV_Stand_13_RStV_mit_Titel_english.pdf

28) See Alexander Scheuer, "Germany: Selected Aspects of Commercial Communications Regulation as regards On-demand Audiovisual Services", in *The Regulation of On-demand Audiovisual Services: Chaos or Coherence?*, op. cit. (fn. 16), pp. 69 ff., 74 f.

1.1. "TV-like telemedia" as non-linear audiovisual media services

According to section 58(3) RStV, so-called "telemedia" also include non-linear audiovisual media services within the meaning of the directive. They are described as "TV-like telemedia".[29] According to section 2(1) TMG, the provider of such services is "any individual or legal entity that effectively controls the selection and organisation of the content offered". TV-like telemedia must generally be distinguished from television (television being a subdivision of broadcasting) and other telemedia directed at the public within the meaning of broadcasting law. At the same time, they must be distinguished from other telemedia that is to say all other types of electronic information and communications services within the meaning of the Telemedia Act.[30] No licence or registration is required to provide telemedia (section 54(1), 1st sentence, RStV; section 4 TMG). In order for them to be certain that their services do not constitute broadcasting (for which stricter rules apply in addition to the requirement to obtain a licence), providers can apply for a "no objection certificate" (*rundfunkrechtliche Unbedenklichkeitsbescheinigung*) (section 20(2), 3rd sentence, RStV).

With regard to the protection of minors from media that might harm or impair their development, the relevant rules are to be found in the JMStV, which, in addition to broadcasts, defines the content of (any type of) telemedia as "offerings" (section 2(2)(1) JMStV) and applies to them the relevant prohibitions and requirements. Apart from exceptions in individual provisions, in the case of electronic (online) media the three-way division in EU law into linear and non-linear audiovisual media services and information society services (other on-demand services) plays no role for German law on protecting minors from harmful media influence.

1.2. The protection of minors in the case of non-linear (audiovisual) services

In order to gain an overall understanding of the provisions of the JMStV and the German system for the protection of minors in the case of on-demand audiovisual services, the provisions of the federal Youth Protection Act (*Jugendschutzgesetz* – JuSchG)[31] are outlined below.

The Youth Protection Act applies in principle only to the exhibition of audiovisual works in cinemas and to the distribution/sale of media, i.e. "media with ... images ... on physical carriers that can be passed on or viewed immediately or are installed in a player or games device",[32] such as feature film DVDs or computer games on mini-discs. If it has not already been found that a medium is likely to be harmful to minors ("indexation") and if the audiovisual product does not carry the risk of having such an effect on minors, then an age rating can be carried out on the basis of the assumed degree of possible impairment of development ("labelling"). The age classifications are "No age restriction", "From age 6", "From age 12", "From age 16" and "X-rated" (*keine Jugendfreigabe*), i.e. not for individuals under 18. The bodies responsible for labelling are the Supreme Regional Youth Authorities (*Oberste Landesjugendbehörden*), but they are supported by two voluntary self-regulatory bodies under a co-regulation system. These are the Voluntary Self-Regulatory Organisation of the Film Industry (*Freiwillige Selbstkontrolle der Filmwirtschaft* – FSK) in the case of films and the Voluntary Self-Regulatory Organisation of the Entertainment Software Industry (*Unterhaltungssoftware Selbstkontrolle* – USK) in the case of video games. The *Länder* adopt as their own decision the result of the examination carried out by these bodies under a joint agreement. Age ratings under the Youth Protection Act are important for the distribution of films

29) "Telemedia with content similar to television in form and content and made available by a provider for individual access on demand at a time chosen by the user from a catalogue of content determined by the provider (on-demand audiovisual media services)". An almost identically worded definition of on-demand audiovisual media services (as telemedia) is contained in section 2(6) TMG.

30) They must also be distinguished from telecommunications services and telecommunications-based services. See on this Sebastian Schweda, Germany, in *Converged Markets – Converged Power?, Regulation and Case Law*, IRIS *Special*, European Audiovisual Observatory Strasbourg 2012, I. *2.2.* a).

31) www.gesetze-im-internet.de/juschg/BJNR273000002.html

32) Section1(2) JuSchG goes on: "disseminating, handing over, offering or making accessible telemedia in physical form is equivalent to disseminating, handing over, offering or making accessible content in electronic form unless it constitutes broadcasting within the meaning of section 2 of the Inter-State Agreement on Broadcasting."

or other audiovisual programmes on television or in telemedia, for example on video-on-demand (VoD) platforms (see below).

The JMStV first of all stipulates that content such as scenes that violate human dignity, which are in most cases also likely to be breaches of the criminal law, is never allowed. For other material, such as content that obviously might seriously harm young people or "simple pornography", the "relatively unacceptable" rule applies, which means that, subject to strict conditions, it may not be made available on television or radio but may be offered in telemedia (more on this later).

Content likely to impair development may only be disseminated or made accessible in such a way that children or young people in the age groups concerned cannot normally see or hear it. It is presumed that such a likelihood exists when an age rating for the item has been issued pursuant to the Youth Protection Act. The providers of such content can meet their obligation to prevent minors from accessing it by choosing an appropriate time to broadcast it (for example from 10pm for 16+ rated films) or by employing technical means (such as encryption, blocking or the use of youth protection programs). Telemedia providers must make content that is (basically) identical to that of image media already examined accessible by reference to the existing classification. Furthermore, providers may only offer content unsuitable for children (defined as minors under 14) in a section of their service strictly separate from the one with content directed at children.

In all other cases a technical or other means can, as already mentioned, be employed to make it extremely difficult for children and young people to watch unsuitable content because it might impair their development. In this connection, we would mention youth protection programs, the prerequisites of which are described in the JMStV as follows: a provider can program its content for a recognised so-called youth protection programme (a piece of software) by classifying (labelling) it by means of a rating system in order to enable users (parents/guardians) to block it with the aid of an activated youth protection programme to which they have access. The provider can, however, also install such a programme upstream by only making the classified content accessible when the protection software is activated or by only making it available to users who have themselves activated a programme capable of reading the labels linked to the content.

The criteria relating to the efficiency requirements for youth protection programmes were revised in 2011, and the first two software solutions were recognised in February 2012 as suitable subject to certain conditions. The Voluntary Self-Regulatory Organisation of Multimedia Service Providers (*Freiwillige Selbstkontrolle Multimedia-Diensteanbieter* – FSM) has developed age rating software for telemedia content, which enables providers to classify their material.[33] Telemedia content labelled in this way is recognised by youth protection programmes, i.e. the label is read and displaying the content is suppressed in accordance with the programme settings. In addition to this function, a youth protection programme must also be able to recognise and apply so-called blacklists and whitelists[34] as well as details of age-differentiated access.

It is necessary to distinguish these possibilities of disseminating content that might impair the development of minors from the requirements that apply to making content that is actually illicit accessible in telemedia. For telemedia, the provider must set up a closed user group in respect of which there is a guarantee that the content concerned can only be viewed by adults because an effective age check is carried out.

The JMStV, too, sets up a co-regulation system for the dissemination of audiovisual content by commercial providers: in addition to official supervision by the regional regulators (*Landesmedienanstalten*) and their body responsible for these matters, the Commission for the Protection of Young People from Harmful Media Influence (*Kommission für Jugendmedienschutz* – KJM), there are so-called Recognised Self-Regulatory Organisations (*Anerkannte Einrichtungen der Freiwilligen*

33) See www.altersklassifizierung.de
34) These lists are in principle based on content being classified by a qualified person as harmful (black) or suitable for minors (white).

Selbstkontrolle), which undertake age classifications in their particular areas of responsibility or examine the organisation of services, especially for their members. The KJM has recognised the Voluntary Self-Regulatory Organisation of Television Broadcasters (*Freiwillige Selbstkontrolle Fernsehen* – FSF), to which the major private German television broadcasters belong, and FSM, the membership of which consists of the major telemedia providers.[35] On 7 February 2012, the KJM ruled in favour of an application to recognise the FSF also as a self-regulatory organisation pursuant to the JMStV for television-like telemedia as defined in section 58(3) RStV.

In addition, in September 2011 the FSK and the USK were recognised pursuant to the JMStV. The main reason for this decision was that it was not possible to pass an already drafted amendment to the JMStV at the end of 2010 owing to the failure to meet the requirement that all German regional (*Land*) parliaments must agree to it.[36] With this planned reform[37] it would have been possible to bring about convergence between the Youth Protection Act and the JMStV by enabling greater mutual transfer between the respective classification decisions. The self-regulatory organisations operating in accordance with the JuSchG would also have been responsible both for some telemedia ("mainly games programs and films produced for the cinema ... when these games programs and films are offered on the Internet for downloading") and for self-regulatory organisations recognised under the Inter-State Agreement.

The substantive provisions described above for the protection of children and young people also apply to the (television and) online services of the public service broadcasters in Germany. However, the system is not based as in the case of the private providers on the co-operation of internal youth protection commissioners, self-regulatory bodies and the KJM but on an internal monitoring procedure. The Broadcasting Council (*Rundfunkrat*) at the regional broadcasters (*Landesrundfunkanstalten*) that belong to the Union of German Public Service Broadcasters (*Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* – ARD)[38] and the Television Council (*Fernsehrat*) at Germany's second television channel *Zweites Deutsches Fernsehen* (ZDF) monitor youth protection practice, for which responsibility primarily lies with the broadcasters' youth protection commissioners.

2. Finland

The transposition of the AVMSD into Finnish law took place via several individual pieces of legislation, including the amendment to Act No. 744/1998 on Radio and Television Broadcasting (*Laki televisio- ja radiotoiminnasta*) (the "Broadcasting Act"),[39] Acts nos. 306/2010 and 712/2011[40] and Act no. 710/2011 on audiovisual programmes (*Kuvaohjelmalaki*) (the "Audiovisual Programmes Act").[41]

2.1. "Expression of opinion", "network message", "audiovisual programme"

The Broadcasting Act defines audiovisual media services as television programmes and subscription-based programme services offered to the public against payment (section 2(5)). On-demand audiovisual media services therefore do not appear to fall within its scope.

35) See Alexander Scheuer, op. cit. (fn. 27), pp. 73 ff.
36) See Anne Yliniva Hoffmann, "KJM Recognises Two New Self-Regulatory Authorities", IRIS 2011-9/16.
37) See Thomas Kleist/Alexander Scheuer, "Die neue Architektur des Jugendmedienschutzes – Zur Novelle des JMStV", in Holznagel/Scheithauer/Thaenert (eds.), *Vom Bau des digitalen Hauses – Festschrift für Norbert Schneider*, Berlin 2010, pp. 193 ff.
38) The ARD's programme advisory committee (*Programmbeirat*) also deals with youth protection issues relating to "Das Erste", the national programme produced jointly by the regional broadcasters.
Cf. www.daserste.de/service/organisation-struktur/ard-programmbeirat/wir-ueber-uns/ard-programmbeirat-rechtsgrundlagen100.html
39) www.finlex.fi/en/laki/kaannokset/1998/en19980744.pdf
40) www.meku.fi/images/act_712_2011_en.pdf
41) www.meku.fi/images/kuvaohjelmalaki_710_2011_en.pdf

The basic legal framework for on-demand services is Act no. 458/2002 on the provision of information society services (*Laki tietoyhteiskunnan palvelujen tarjoamisesta*),[42] which transposes the directive on electronic commerce (E-Commerce Directive) and is complemented by Act no. 460/2003 on the exercise of freedom of expression in mass media (*Laki sananvapauden käyttämisestä joukkoviestinnässä*) (the "Freedom of Expression Act").[43]

The Freedom of Expression Act is applicable to publications and broadcasting (section 3). It employs the umbrella term "network message", which it defines as information, an opinion or other message made available to the public by means of radio waves, via an electronic communications network or by other technical means (section 2(1)(2)). According to the Act, a "programme" is a connected set of network messages expressed in sound and moving images (section 2(1)(3)). The term "publication" in the Act cannot be applied to non-linear audiovisual media services because, although it includes the range of network messages directed at the public, it excludes programmes from its scope (section 2(1)(7)). On-demand services governed by the AVMSD could consequently only fall within the scope of the Freedom of Expression Act if a broad definition of "broadcasting", which is defined as the provision of programmes (section 2(1)(8)), were applied. Whether that is the case can remain an open question because pursuant to section 3(4), 1st sentence, of the Act, the Freedom of Expression Act does not affect the provisions on the classification of image content.

In our context, on the other hand, the relevant law is the Audiovisual Programmes Act, which has horizontal and cross-media application and has as its purpose the protection of minors. Section 3(1) of this Act defines "audiovisual programmes" as films, television programmes, games or other content designed to be viewed as moving images by means of technical devices. The "provision" of such programmes means making them publicly available for viewing (section 3(3)). The provider of audiovisual content is generally required to notify its activities to the Finnish Centre for Media Education and Audiovisual Programmes (*Mediakasvatus- ja kuvaohjelmakeskus*) ("the Centre") if its programmes are to be offered for commercial purposes on a regular basis (section 4(1)). Exceptions from the obligation to notify are provided for with reference to sections 9 to 11 of the Audiovisual Programmes Act, which exclude audiovisual programmes from the obligation to obtain classification if there are grounds for doing so, such as their content (e.g., educational), the purpose of their publication (they are provided as part of a service that offers programmes made by people for private use and the content was produced by a private individual as a hobby) or the possession of a permit, such as one issued for a specific event like a film festival.

2.2. Horizontal youth protection approach for all audiovisual programmes

The Audiovisual Programmes Act governs the classification and labelling of various types of audiovisual content. According to section 16(1), the age ratings are as follows: "Any age", "From age 7", "From age 12", "From age 16" and "From age 18". Audiovisual programmes issued with the highest age rating may not be made accessible to minors unless the broadcast is either shown at a time when under 18-year-olds normally do not watch television or as a service whose reception requires the use of a decryption device (section 6(1) and (2)). Programmes clearly intended for adults only may not be rated (section 16(2), 1st sentence). Section 6(3) of the Audiovisual Programmes Act governs the distribution of audiovisual programmes rated for the 7, 12 and 16 age groups. According to this provision, access by children and young people who have not yet reached the age concerned can be prevented through the choice of the broadcast time or, more generally, through the use of technical means or other means of age verification. When distributed, or in connection with its distribution, content must be labelled using age and content pictograms (section 5(1)).

The application and enforcement of these provisions is the responsibility of the Centre, which was set up by Act no. 711/2011 (*Laki Mediakasvatus- ja kuvaohjelmakeskuksesta*).[44] Finland has also decided in favour of a co-regulation system for protecting minors from media influence, since the providers of audiovisual programmes play an important role in the implementation of the rules.

42) www.finlex.fi/en/laki/kaannokset/2002/en20020458.pdf
43) www.finlex.fi/en/laki/kaannokset/2003/en20030460.pdf
44) www.meku.fi/images/meku_laki_711_2011_en.pdf

The Centre keeps a register of individuals responsible at a media provider for rating audiovisual programmes. It also has a statutory duty to make available and further develop the software necessary for ratings and oversees the rating practice of audiovisual programme providers.

3. France

Since it was amended by the Act of 5 March 2009 on audiovisual communication and the new public television service, the Freedom of Communication Act (*Loi relative à la liberté de communication*) ("the Act") of 30 September 1986[45] has contained the most important principles in French law governing public service and commercial broadcasting and on-demand media services. They are supplemented *inter alia* by the "descriptions of duties and terms of reference" (*cahiers de mission et des charges*) agreed with the public audiovisual service providers and by the agreements concluded with the private television broadcasters when their licences were issued.

3.1. "Audiovisual services" as a (comprehensive) umbrella term of media regulation

According to section 2(3) of the Act, on-demand audiovisual media services (as well as television services) fall within the scope of the term "audiovisual communication".[46] On-demand audiovisual media services are defined in section 2(6), 1st sentence. The 2nd sentence contains the criteria set out in the recitals of the AVMSD with respect to when a service is not to be regarded as an audiovisual media service. The 3rd sentence also makes it clear that mixed services are only subject to the provisions of the law in respect of the component containing an audiovisual media service. There is nothing to suggest that the Act imposes an obligation for providers of on-demand audiovisual media services to notify them.

Section 1(2), sections 3-1(1) and (5) and section 15 of the Act provide that the media regulator *Conseil supérieur de l'audiovisuel* (CSA) shall ensure freedom of communication but that this may be subject to restrictions on grounds of protecting minors. The CSA can lay down such measures by making recommendations to the providers and distributors of audiovisual communications services. These recommendations must be published in the Official Gazette. The CSA last made use of this power in respect of on-demand audiovisual services in its Deliberation of 20 December 2011.[47]

3.2. Protection of minors from media influence in the case of on-demand audiovisual media services

The provisions contained in this CSA deliberation lay down the protection of minors in respect of on-demand audiovisual media services. The French system is also based on the interplay of the content providers' responsibility and downstream monitoring by the supervisory authority. It provides for the division of audiovisual content into various age groups: Category I (all ages), Category II (from 10 years), Category III (from 12 years), Category IV (from 16 years) and Category V (unsuitable for children and young people under 18). It also imposes an obligation to show the rating by means of a pictogram, including each time the programme is just mentioned (e.g. in the catalogue or in advertising messages).

A VoD provider that offers its service to everyone must reserve a section of its catalogue for content meant for all age groups, i.e. content that can be viewed by families and minors. Category IV content must only be made accessible between 10.30pm and 5am, unless the user's access is dependent on the payment of a charge. Content exclusively for adults may only be made available as part of a service offered against payment, i.e. either a subscription must be acquired or each viewing must be paid for separately (pay-per-view). Here, too, content must be held in a separate

45) www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000512205&fastPos=1&fastReqId=1969735545&categorieLien=cid&oldAction=rechTexte
46) Section 1(3) of the Act uses the broad umbrella term "audiovisual services", which comprises audiovisual communications services within the meaning of section 2 and any other service that – irrespective of the nature of its provision – makes audiovisual works (films or radio programmes) available to all or some of the public.
47) http://merlin.obs.coe.int/iris/2012/2/article21.en.html

section. This obligation also applies to the advertising of certain films, whether it be by means of images, descriptions, extracts, trailers or other advertising measures. Since 1 July 2012, adult content has had to be access-protected at all times. It may be offered "around the clock". Access control is activated by means of a secure personal code when the service is unblocked for the first time. Before 1 July 2012, Category V content could only be disseminated at specific times. The activation of a service required an age check to be carried out by sending in a copy of the user's identity card.

4. Netherlands

Dutch law has been adapted to the transposition requirements of the AVMSD in particular by means of amendments to the Media Act (*Mediawet*)[48] in 2008 and 2009.

4.1. Development of the criteria for non-linear AVMS in the form of detailed guidelines

Section 1(1) of the Media Act sets out by means of a complex system of legal definitions the terminology defining the scope of the Act, *inter alia* with regard to non-linear audiovisual media services within the meaning of the directive.[49]

On 22 September 2011 the media regulator *Commissariaat voor de Media* (CvdM) published a set of guidelines on determining commercial non-linear audiovisual media services.[50] These guidelines explain the following main criteria deriving from the AVMSD:

1. The audiovisual content is provided as part of a catalogue

2. The main part of the service consists in the provision of video content

3. The selection and organisation of the video content are subject to the service provider's editorial responsibility

4. The service constitutes a mass medium

5. The service constitutes an economic activity.

The guidelines also provide additional definitions on individual features of these main criteria, such as "moving image content", "catalogue" and "video".

Providers of services that meet the legal criteria must be registered with the CvdM. The regulator's decision-making practice to date[51] provides a good overview of the application of the criteria to various types of on-demand audiovisual services, most of them VoD services in the form of online film video libraries.

4.2. First steps towards extending the co-regulation approach to non-linear services

The Media Act (section 4(1) to (6)) contains the youth protection provisions applicable to public service and private television as well as to the on-demand audiovisual media services that they both provide. A co-regulation system has been established for the majority of the providers mentioned and for most of the content they distribute. It consists of a self-regulatory body supported by the television broadcasters and overseen by the CvdM. The self-regulation tasks, especially the establishment of an age rating system and the monitoring of ratings undertaken by the provider,

48) www.cvdm.nl/content.jsp?objectid=8835
49) For a detailed discussion, see Marcel Betzel, "Finetuning Classification Criteria for On-demand Audiovisual Media Services: the Dutch Approach", European Audiovisual Observatory, op. cit. (fn. 16), pp. 59 ff.
50) www.cvdm.nl/dsresource?objectid=12335&type=org
51) Cf. decisions in 2012: www.cvdm.nl/content.jsp?objectid=6871&action=submit

have been entrusted to the Dutch Institute for the Classification of Audiovisual Media (*Nederlands Instituut voor de Classificatie van Audiovisuele Media* – NICAM), which began its work in 2001. The NICAM system only applies to content that might be unsuitable for minors under 16.

NICAM's members include publishers of feature films and retailers that sell media with audiovisual content, as well as public service and private television broadcasters. They were joined at the end of 2011 by a major provider of VoD services. It follows from the provisions of the Media Act that NICAM's rules and regulations apply to the public service broadcasters' on-demand services but are only binding on commercial providers if they submit to them following an autonomous decision they have taken as a result of their membership of NICAM.

NICAM has set up a system that enables specially trained staff of the media service providers (so-called "coders") to assess whether an item is subject to the law on the protection of minors by filling in an online questionnaire. The software program generates the relevant age rating ("Safe for all ages", "From 6 years", "From 9 years", "From 12 years", "From 16 years") for the audiovisual content on the basis of the information provided by the coder and at the same time one or more pictograms symbolising the risks associated with the content.

The television broadcasters affiliated to NICAM may not broadcast any other material than content that is only "likely" to impair development. The same restriction applies to public-service providers of on-demand media services. On the other hand, commercial providers of non-linear audiovisual media services may in principle make items available that might seriously impair the development of children and young people but have to guarantee that they can normally be neither seen nor heard by these groups that need to be protected.

In the Netherlands, this "seriously harmful content" category comprises items that are unsuitable for children and young people under 16 but are not prohibited under the criminal law. The CvdM has recently begun to consult the Advisory Commission on Serious Harm (*Adviescommissie Ernstige Schade*) if decisions have to be taken on cases where there is doubt as to whether content is seriously harmful.

Content that might involve the application of the criminal law is governed by the Criminal Code (*Wetboek van Strafrecht*). In Chapter XIV (Articles 239 to 254a), acts that are obscene or violate sexual self-determination (e.g., child pornography) are punishable offences. Article 240a prohibits the delivery, distribution or showing to a minor of a pictorial representation (or a data carrier containing a pictorial representation) with content that may be assumed to impair the minor's development. In this connection, "simple" pornography also counts as an obscene representation. Other criminal provisions impose penalties for pornography involving animals.

5. Slovakia

On 15 December 2009, Act no. 498/2009 (the number in the official collection of laws) amending Act no. 308/2000 on television broadcasting and retransmission (*Zákon o vysielaní a retransmisii*) (the "Media Act")[52] came into force. In implementation of the AVMSD, it extended its scope to non-linear audiovisual media services. Provisions on public service broadcasting are contained in Act no. 532/2010 on radio and television in Slovakia (*Zákon o Rozhlase a televízii Slovenska*),[53] which was last amended by the Act of 21 October 2011.

5.1. Application of the criteria for audiovisual media services in an individual case

The Media Act defines an "on-demand audiovisual media service" in Article 3(b) as a "non-linear service that is primarily commercial in nature and is made available for reception at a time chosen

52) www.zbierka.sk/sk/predpisy/498-2009-z-z.p-33325.pdf ; an English translation is available at: wwwen.uni.lu/content/download/31318/371622/file/Slovakia_translation.pdf
53) www.rvr.sk/sk/spravy/index.php?aktualitaId=1146

by the user and on demand from a catalogue of programmes compiled by the media service provider. The purpose of these on-demand services is to provide the viewer with information, entertainment or educational programmes". On-demand services are not subject to authorisation since notification by the provider is sufficient for them to be effectively monitored. The provider must let the Council for Broadcasting and Retransmission ("the Council") have the necessary information no later than the day on which the service is first made available. The information serves both the purpose of regulation and of determining whether the operator is subject to the jurisdiction of the Slovak Republic. The Council informs the operator if its services are not governed by the Media Act.[54]

The Council took its first decision on the obligation for providers to notify on-demand audiovisual media services at the end of 2011.[55] The name of the service to be assessed was "Internet television of the town of Trenčin" and mainly consisted of short video clips, most of them on subjects of relevance to the town. While there was no doubt as to the audiovisual character of the material, a discussion took place concerning the editorial responsibility of the presumed provider. The website did not contain any clear information on this, but the name of a lawyer residing in Slovakia (referred to as a "participant") was given under the heading of "Production" and the Council contacted him. He referred it to an unnamed American company to which the content suppliers located in Slovakia sent their material and which was to be regarded as an operator based outside the EU. In the Council's opinion, neither the location of the server hosting the service nor that of the owner of the Internet domain was important. Rather, the provider was the person or company responsible for selecting and organising the content. Various indications were considered for this: in the entire service, all contact details (for example "Production", "Distribution and Marketing" "Audiovisual Production") referred to individuals with Slovakian telephone numbers and there was no reference to the American company. The advertising referred exclusively to companies operating in Slovakia (most of them in the Trenčin area, such as the local radio station, cafés, etc.). The participant himself was mentioned in the section headed "Production", a term that in Slovakian means "(artistic) creation of (artistic) works or compilation of artistic works". Under these circumstances, the Council said, it could confidently be assumed that "Production" actually referred to the selection and organisation of the content and it accordingly classified the participant as a provider of an on-demand audiovisual media service.

In a decision issued on 10 July 2012, the Council again dealt with the classification of a service as a non-linear audiovisual media service and, in particular, with the question of whether the main purpose of the Internet offering of a newspaper publisher constituted the distribution of audiovisual content.[56] The service in question contains a separate section with video material that can also be accessed directly via the user's own IP address and is also available as an App via a television manufacturer's smart-TV platform. Since the Council first looked at the service (in April 2010), the audiovisual offering of the subsidiary service had been significantly further developed. In particular, the former link between the videos offered and the journalistic texts from the electronic edition of the newspaper had been abolished. The professional quality of the content production had increased and the newspaper publisher was identified more strongly with the videos through the use of its logo and the equipment employed, which was clearly its own. The Council therefore ruled that the main purpose of the service was the provision of audiovisual content. A particularly interesting aspect is the way the App is presented: the same content can in principle be accessed via the App as at the Internet site, but calling up the service via the smart-TV platform automatically launches a selection of the seven latest clips, which are shown one after the other. Here, the question arose as to whether this "Intro" might not be a linear offering, but the Council decided that it was not, giving as its reason the fact that users still had a certain amount of control over the display as they could move backwards and forwards within the list and jump to the next video in line. On the other hand, the technical design was such that the provider was unable to exercise very much control since the order of the items was laid down by a random sequence generator, i.e. not according to a "programme schedule". The Council therefore also considered this App trailer video as an on-demand service and adjudged the App to be a non-linear audiovisual media service.

54) See Jana Markechova, "Amendment of the Act on Broadcasting and Retransmission", IRIS 2010-5/39.
55) See Juraj Polak, "Identifying Media Service Provider", IRIS 2012-5/37.
56) See Juraj Polak, "Slovakia: tvsme Considered On-demand Audiovisual Media Service", IRIS 2012-9/38.

5.2. Age rating and labelling also in the case of non-linear audiovisual media services

Section 20 of the Media Act contains some provisions on the protection of minors. It also refers to the more detailed rules in Act no. 343/2007 on conditions for the registration, public broadcasting and archiving of audiovisual works, multimedia works and sound recordings of artistic performances (*Zákon o podmienkach evidencie, verejného šírenia a uchovávania audiovizuálnych diel, multimediálnych diel a zvukových záznamov umeleckých výkonov*)[57] (the "Audiovisual Law"), which was supplemented by Decree 589/2007 of the Ministry of Culture on the uniform labelling of audiovisual works (*Vyhláška ktorou sa ustanovujú podrobnosti o jednotnom systéme označovania audiovizuálnych diel, zvukových záznamov umeleckých výkonov, multimediálnych diel, programov alebo iných zložiek programovej služby a spôsobe jeho uplatňovania*)[58] (the "Labelling Decree").

According to section 20(2) of the Media Act, providers of on-demand audiovisual media services generally have the obligation to ensure that content that might impair development, especially material containing pornography, coarse or vulgar language (the decree refers to "profane language or obscene verbal expressions") or gratuitous violence, is only made accessible in such a way that minors normally cannot see or hear it.[59] According to subsection 4, such providers must also use the age rating label specified on the basis of the Audiovisual Law. Apart from this labelling obligation imposed in general terms by the Media Act, there seems to be a lack of certainty, possibly for technical reasons to do with the wording of the law, with regard to the extent to which the Audiovisual Law and the Labelling Decree are applicable to providers of non-linear audiovisual (media) services: on the one hand, the Audiovisual Law (as amended in 2009) provides in principle that the decree, and therefore the uniform labelling system, also applies to the providers under discussion here (section 12(1)(3)(c)); on the other hand, it excludes on-demand audiovisual media service providers from the definition of the term "distributor of an audiovisual work" and therefore from the personal scope defined in section 2 (end of subsection 17).[60]

Slovakia distinguishes between the following age groups with regard to the protection of minors: "From 0 years", "From 7 years", "From 12 years", "From 15 years" and "From 18 years". The age classification is always the task of the producer of the audiovisual work or, if it has not provided a rating, the company that distributes it (section 13 Audiovisual Law). This Law defines the expression "audiovisual works for adults only" in section 2(4) as works whose nature or content might impair the development of a person under 18 years of age, especially works that contain pornography or extreme or gratuitous violence. According to section 20(9) of the Media Act, the depiction of gratuitous violence means the presentation of reports, verbal utterances or images where violent content is unnecessarily highlighted in relation to their context.

6. United Kingdom

In the United Kingdom, the regulation of commercial[61] on-demand audiovisual media services has changed significantly as a result of the transposition of the AVMSD through the Communications Act 2003 (as amended in 2009 and 2010).[62] Prior to that, there was no clear responsibility for the British

57) www.culture.gov.sk/legdoc/58/
58) www.culture.gov.sk/legdoc/57/
59) According to section 19(1)(g) of the Media Act, the presentation of child pornography or pornography containing perverse sexual practices is absolutely prohibited.
60) The term "distributor" is taken to refer to the public distribution (free of charge) of copies of the audiovisual work or making it available for a fee. The version of the rule applying before 2009 already excluded from the definition of this term distributors that procure individuals ownership of a copy that they acquire (especially in the form of retails sales). A provider that makes copies of the work available for purchase through on-demand audiovisual media services is therefore not a "distributor" according to this definition. It can be inferred from this that the exception does not apply to the provision of content for other purposes in on-demand services and that, furthermore, providers of on-demand media services accordingly meet the criteria of what constitutes the definition of a "distributor" in section 2(17) of the Audiovisual Act.
61) Rules on the acceptability of the BBC's offerings of non-linear audiovisual media services follow from its Charter and Agreement.
62) See www.legislation.gov.uk/uksi/2010/419/contents/made

regulator Office of Communications (Ofcom) for services other than those made available using the traditional distribution channels (terrestrial, cable, satellite) on a uni-directional basis. Since 2009, Ofcom has been responsible for regulating on-demand programme services (ODPS) but has been able to (partially) relinquish this task through the establishment of a co-regulation system. Today, recognised self-regulatory bodies are responsible for regulation but Ofcom has retained a "regulatory back-stop power" with respect to their activities.

6.1. Classification as non-linear AVMS in the context of co-regulation

In the present context, the Authority for Television On Demand (ATVOD) is the relevant self-regulatory body to which ODPS providers have to notify their services. ATVOD has published in its *Guidance on who needs to notify*[63] the criteria that determine whether a particular service is an ODPS, thus making the provider obliged to notify it. The criteria specify the features of on-demand media that are contained in section 368A of the Communications Act and draw on the key elements of the definitions in the AVMSD (and extend them to take account of UK jurisdiction). They are supplemented by the definition of "television programme (services)".

ATVOD has established the obligation to notify in a number of "determinations" concerning various on-demand services. In response to appeals lodged by some of the providers concerned, Ofcom examined those decisions and in some important instances substituted them by ruling in the appellants' favour that the service was not an ODPS and therefore not subject to the notification requirements. As far as can be established, the principal issue to be decided in these cases was whether the main focus of the service in question was on the provision of audiovisual content and who could be regarded as the service provider with editorial responsibility.

One case concerned the distribution of various types of content of the media company Viacom's television channels Nickelodeon, Comedy Central and MTV on the VoD platform of the telecommunications provider Virgin Media.[64] The first issue in contention was whether the platform operator or the content provider was to be regarded as the person – within the meaning of section 368A – making the service available to the public. The channels argued that Virgin Media was closer to the customers, concluded contracts with them and provided the technical support. The content offered, they said, therefore initially did not reach the public at the instigation of the television broadcasters. Ofcom pointed out in response that the use of the term "available for use by members of the public" served to distinguish the mass media dissemination of content from merely making material available for private purposes. The fact that the customer relationship lay with the platform operator had no influence on the fact that the intention was to disseminate the content in such a way that it ultimately reached the general public. Rather, the decisive factor was who had editorial responsibility, which was the second issue in contention. In general terms, according to Ofcom, this consists in effective control over programme selection and it arises in connection with the manner in which these programmes are organised in the range offered. In the instant case, the media company's providers had general control over what content they made available to the platform operator, but it was the latter that decided what items to offer its users. Both also made significant contributions to the arrangement of the content. For Ofcom this was another ground for assuming that editorial responsibility was shared: the Viacom channels provided data on a specific programme's membership of a genre and a reference to a broadcaster and thus created the basis for cataloguing the material, while Virgin Media produced the catalogue in a user-friendly form. In this unclear situation, Ofcom finally considered the contractual agreements between the parties, in which they stated that the broadcasters should retain editorial responsibility for the content and notify their services to ATVOD, while the platform operator's responsibility should be limited to any advertising to be inserted. As these contractual arrangements did not seem to be either contradictory or unreasonable given the facts on the ground, Ofcom confirmed ATVOD's determination that editorial responsibility lay with the broadcasters.

63) www.atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed_3.2_June_2012.pdf
64) www.atvod.co.uk/uploads/files/Ofcom_decision_-_appeal_of_ATVOD_determinations_-_Viacom_channels.pdf

There was a different outcome to the appeal of BBC Worldwide, the commercial arm of the public service broadcaster BBC, against an ATVOD ruling on its co-operation with the Premium platform, which belongs to the Mediaset group and is directed at customers in Italy.[65] The case was comparable to the one just described: the provider Mediaset had the final say over programmes distributed via the platform, but it was not clear from the agreements between the parties who should have editorial responsibility. However, the contract contains an obligation for Mediaset to obtain any licence required for the VoD service from the Italian regulator. As this did not obviously contradict the circumstances on the ground, Ofcom ruled that the Mediaset platform was to be regarded as having editorial responsibility.

In contrast to the Slovakian regulator's decision described above, Ofcom came to the conclusion in another case that the section of a newspaper's website in which video content can be accessed is not to be regarded as a service having the principal purpose of providing audiovisual material.[66] In this case, too, the short video clips were originally part of the electronic version of the newspaper, i.e. they were incorporated into pages predominantly made up of text and photographs. Ofcom criticised ATVOD's approach for placing too much focus on the video section without taking sufficient account of the whole of what was provided on the website by the newspaper. In the present case, it said, the service to be considered was in fact the entire Internet presence, which ultimately led it to conclude that the service was not an on-demand audiovisual media service.

6.2. The treatment of different kinds of pornography as an example of establishing what content is to be regarded as likely to "seriously impair the development" of minors

A description of the system for protecting minors from media influence in the case of non-linear audiovisual services must begin with section 368E(2) of the Communications Act (comparable to Article 12 AVMSD), which calls for the prevention of access by minors to content that might seriously impair their development. This requirement is also to be found in Rule 11 of the Rules and Guidance of May 2012[67] published by ATVOD, the authority forming part of the British co-regulation system and first of all responsible for regulating aspects of the protection of children and young people.

The transposition of the directive into British law was accompanied by an intense discussion on the importance of the provision on the protection of minors in on-demand audiovisual media services. The enquiry to Ofcom drawn up on behalf of the British Government by the Department for Culture, Media and Sports (DCMS) in April 2010 provided an opportunity to examine the most important issues arising in the context of section 368E(2). In particular, the classification of different categories of pornographic content and the suitability of technical measures to restrict access to adults[68] were considered in detail. Ofcom's analysis[69] continues to provide assistance for regulatory practice (in the absence of subsequent policy initiatives) by forming a basis for decisions relating to youth protection law.

In order to understand the discussion of the Ofcom report below, the following conclusion drawn from its interpretation of the classification of an item that might "seriously impair minors" is crucial: VoD providers can make material that might be seriously harmful to minors available ("only") when sufficient technical measures are in place, unless the dissemination of such content is not permissible under other provisions, especially the criminal law. This results in the following dilemma: a particularly encompassing interpretation, oriented towards the "top of the scale", of what constitutes content that might *seriously* impair development could on the one hand directly provoke the inclusion of sexually explicit content in on-demand media services – at any rate as long as the material is not prohibited for other reasons. On the other hand, as the distribution in on-demand audiovisual media services of content that is "likely" to impair development is not subject to restrictions either under the AVMSD or under British media law, the "over-inclusive" interpretation

65) www.atvod.co.uk/uploads/files/BBCW_Ofcom_Decision_Final_For_Publication.pdf
66) www.atvod.co.uk/uploads/files/Ofcom_Decision_-_SUN_VIDEO_211211.pdf
67) www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf
68) For reasons of space, it is not possible to discuss this here.
69) http://stakeholders.ofcom.org.uk/binaries/internet/explicit-material-vod.pdf (in the following: "Ofcom report")

of the word "seriously" to cover less problematic content would bring about restrictions on the providers' right to freedom of expression and on the users' right to freedom of information, all of which could hardly or no longer be justified.

The assessment under the criminal law and media law[70] of the (un)lawfulness of the distribution or dissemination of pornography varies according to the type of content:[71]

- *Obscene material*. Making obscene material available is not permissible and is subject to criminal prosecution. This ban covers pornography showing abuse and/or violence. The British Board of Film Classification (BBFC) may not issue an age rating for such content and selling it would be illegal even in licensed sex shops;

- *Extremely pornographic material*. Possession is a criminal offence. This ban covers content that is both pornographic and extreme, by which is meant an image that portrays an act in an explicit and realistic way, for example one that threatens a person's life or shows sodomistic practices. Here, too, the BBFC may not undertake a classification;

- *R 18 plus (the term used by Ofcom[72])*. Unacceptable but not necessarily illegal pornographic material. This may not be classified by the BBFC either;

- *Hard core pornography*. Under certain circumstances, pornographic content can be classified by the BBFC as "R18". This is in particular possible when it (still) consists of explicit portrayals of sexual acts between consenting adults solely or mainly for the purpose of sexual stimulation. The consequence of this classification is that the film may only be exhibited in specially licensed cinemas and the "work" may only be supplied as a carrier medium in licensed sex shops. It was in particular unclear how such content and comparable material should be treated when distributed via ODP services;[73]

- *Soft core pornography*. "Adult content" refers to a category of erotic audiovisual material that is clearly of a sexual nature and is likely to provide sexual stimulation but is not explicit. According to the Ofcom Broadcasting Code, such programmes may only be broadcast between 10pm and 5.30am, provided that this is done on premium subscription services or pay per view/night services.

In order to prepare its response to the enquiry from the DCMS, Ofcom commissioned a meta-study to review the scientific data on the question of whether "R18" or comparable content should be regarded as material likely to seriously impair an individual's development. The results of this review do not differ significantly from those already consulted by Ofcom in 2005 when a comparable question was asked in respect of television programmes.[74] In short: not least owing to the existing ethical-methodological restrictions on any research in this area, no reliable statement can be made that specific content is likely to seriously impair a minor's development. On the other hand, it could not be proved that "R18" or similar content does not pose such a risk. In this *non liquet* situation, Ofcom "decided" for various reasons[75] that the certainty sought in the legal treatment of the material in question could not be provided at the present time and recommended that the government introduce new legislation.

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70) A concise explanation of the key content of the relevant provisions (especially with regard to the law applicable to videos/DVDs) can be found at the BBFC website www.bbfc.co.uk/classification/the-bbfc-uk-law/
71) The term "pornographic" is legally defined in section 63 of the Criminal Justice and Immigration Act 2008.
72) Examples can be found in the Ofcom report, op. cit. (fn. 69), p. 13 (para. 3.9.).
73) When the Broadcasting Code, which contains rules on the content of television programmes, was drafted, Ofcom came to the conclusion in 2005 that "R18" content did not meet the criteria for material that might seriously impair the development of minors (within the meaning of Article 22(1) TWFD, now Article 27(1) AVMSD) and that it ought therefore in principle to have been allowed to show it in television programmes. However, as Ofcom considered the technical measures available at that time to be insufficient, it nonetheless ultimately ruled that the distribution of such content on television was prohibited. Cf. Ofcom report, op. cit. (fn. 69), p. 9 (paras. 2.13. f.).
74) See above (fn. 73).
75) Ofcom report, op. cit. (fn. 69), pp. 50 ff. (paras. 7.4. ff.).

The British Government then stated in response that it would be making the issue a key element of the planned reform of the Communications Act to be drafted in 2011. However, it did not leave the ball passed to it by Ofcom in its own half but passed it back and involved ATVOD at the same time. Subject to the need to enact legislation at short notice, it asked both to bear in mind that there were good reasons for pursuing a cautious approach and ensuring that minors continued to be given appropriate protection on the basis of the ATVOD Rules. ATVOD presumably understood or at least saw no alternative but to classify "R18" content as likely to seriously impair an individual's development.[76] The result as far as legal consequences are concerned was the obligation for providers to set up an effective content access control system (CACS).

How ATVOD classifies pornographic content in a specific case and what kind of CACS it regards as inadequate is shown in its decision in the "Bootybox.tv" case.[77]

The BBFC also provides a service for classifying and labelling content distributed via the Internet or wireless mobile telephone networks. It covers the sale or rental of works exclusively available online or before the market launch on DVD/Blu-ray, via VoD, digital rental and sales, streaming or in applications for hybrid television.[78]

IV. Conclusion (comparative overview)

With regard to the protection of minors in the case of (on-demand) audiovisual services, EU law does not impose any uniform, technology-neutral requirements based solely on the risk potential of content. In laying down different levels of protection, the AVMSD already distinguishes between linear and non-linear audiovisual *media* services. In the relationship of audiovisual services, which are media services, to other *on-demand audiovisual services* there is a new variation in the level of protection:[79] the E-Commerce Directive does not lay down a standard for the protection of minors and those measures suggested in the Recommendations are, owed to the non-binding character of recommendations, ultimately not enforceable.

In classifying different types of on-demand service as non-linear audiovisual media services, media regulation in the selected EU member states generally pursues a more or less identical approach. If the law provides for an obligation to notify/register an audiovisual media service, the provider is known to the national (media) regulator, which can take concrete action in the event of breaches of the law on the protection of minors (that come to light as a result of its own monitoring or of complaints received).

Some of the countries selected have extended their rules on the protection of children and young people to include other (on-demand) audiovisual services. Their general approach is to go beyond the minimum level of regulation called for by the AVMSD for non-linear audiovisual media services. They have introduced rules for content that is "likely" to impair development or obliged other non-linear audiovisual services to comply with the provisions for "services that might seriously impair the development of minors".

There is relatively broad agreement on what content, at any rate when considered in the abstract, is definitely likely "seriously" to impair the development of children and young people. Both pornographic content (differences have become apparent regarding the legal criteria concerning

76) Examples of other content that probably falls into this category are mentioned by the Guidance in respect of Rule 11, op. cit. (fn. 67), p. 12 f.
77) See David Goldberg: United Kingdom: On-Demand Adult Programme Service Censured, http://merlin.obs.coe.int/iris/2012/3/article23.en.html; the ATVOD Determination, www.atvod.co.uk/uploads/files/Bootybox_tv_Determination_091211.pdf ; and the authority's annual report with more detailed information on comparable measures and their consequences, www.atvod.co.uk/news-consultations/news-consultationsnews/20120817-annual-report-2012
78) www.bbfc.co.uk/digitalservices/
79) For further details, see the first ZOOM section of this IRIS *plus*.

the type of pornography or acts depicted) and gratuitous (or extreme) violence are among the forms of presentation that fall within the law, in individual cases also coarse or vulgar language.

Many systems for protecting children and young people specify age groups where it is assumed that no audiovisual service with the relevant classification is likely to have the effect of impairing the development of a minor. The age groups applying in the various countries are more or less identical. (However, this does not mean that there are no differences in the way classifications are issued.) In many cases, providers themselves are obliged to label content that poses problems from the youth protection point of view, and this can be done by means of pictograms. On-demand audiovisual services often require the age rating to be stated in the catalogue made available by the provider, that is to say before the content is accessed.

The technical measures provided for by member states (for content that might seriously impair the development of minors) in order to prevent children from normally accessing such material can be used in addition to labelling but are not the only means of restricting access to adults. The necessary restrictions can also be put in place by means of encryption and channel blocks specifically designed to protect minors and only unblocked when the user provides proof of being an adult, this proof being subject to varying conditions.

Almost all member states have a system of co-regulation that involves the sharing of responsibility between the provider (or a non-governmental body commissioned by it to monitor the protection of minors) and the (media) regulator.

To return to the point made at the beginning of this section, it is becoming more and more difficult to determine in precise and watertight terms the scope of EU provisions on the protection of minors given the constant technical and economic developments taking place in the (on-demand) audiovisual services sector.[80] This may ultimately lead to differences in the law in this area, which would in fact be hard to comprehend. With the increasing use of smart TVs,[81] which enable both the television signal (in real time) and other (on-demand) audiovisual services to be displayed and also permit access to Internet services, serious additional questions arise both for users – with respect to the retention of, or at least understandable reduction in, the level of youth protection with which they are familiar from the "world of TV" – and for broadcasters or on-demand audiovisual media service providers – who want a level playing field for unregulated material, some of which raises considerable issues concerning the protection of minors. The first ZOOM section of this IRIS *plus* discusses the youth protection instruments now becoming relevant.

80) For the overall relationship between audiovisual media services and other on-demand audiovisual services, the conflict of provisions clause in Article 4(8) AVMSD, according to which (in the event of a conflict with provisions of the E-Commerce Directive) the provisions of the AVMSD shall prevail, is therefore not very helpful. The same demarcation problem arises when differentiating between linear and non-linear audiovisual media services.

81) Connected TV (smart TV) is mentioned here as representative of various terminal devices designed as platforms for accessing traditional television services and other audiovisual content available via the Internet (for example GoogleTV, AppleTV, games consoles and Blu-ray players).

Workable Youth Protection

The European Commission's first report, of 4 May 2012, on the application of the Audiovisual Media Services Directive (COM(2012) 203 final, see on this IRIS 2012-6/5) makes little mention of how the member states have implemented the directive's provisions on the protection of minors. The data provided are limited to commercial communication, in respect of which the report states, *inter alia*, that "the Directive's provisions on the protection of minors in advertising were seldom contravened".

However, the fact that all that glitters is not gold follows from a Commission announcement of 23 July 2012 stating that it had asked four member states for information on the implementation of the Directive and on their rules on protecting minors (see IRIS 2012-9/7). In addition, on 21 June 2012 the Commission announced its intention to take action against another member state owing to the incomplete implementation of the Directive's provisions on on-demand audiovisual media services (see IRIS 2012-8/6).

The Directive only sets out minimum requirements concerning the protection of minors and it is perhaps for this reason that the first report on its application does not focus on the actual transposition of these provisions into national law, whereas the related reporting section of this IRIS *plus* does the opposite. On the basis of the last four issues of our IRIS newsletter (http://merlin.obs.coe.int/newsletter.php), this section looks at seven EU member states in which new youth protection rules have been passed or important judicial decisions on content harmful to minors have been handed down. These reports are complemented by information on the critical assessment by the Albanian Broadcasting Council and the United States Supreme Court of content broadcast on television.

Furthermore, in future issues of our IRIS newsletter you will be able to read how highly topical the protection of minors in on-demand media services is. A (free) subscription will enable the information on "workable youth protection" contained in this IRIS *plus* to be continuously updated.

An Operational Protection of Minors

Spain

Audiovisual Act Amended

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 1 August 2012, an amendment to the Audiovisual Act 7/2010 was adopted by the Spanish parliament, introducing a new legal framework for regional public service broadcasters, which aims at allowing regional public service broadcasters greater flexibility in the provision of their audiovisual media services. It also modifies the regulation of protection of minors.

[…]

The Act also amends the regulation of protection of minors included in the Audiovisual Act. It is forbidden to broadcast audiovisual content that might seriously impair the physical, mental or moral development of minors. In particular, those programmes that involve pornography, child abuse, domestic violence or gratuitous violence are forbidden.

Content that could be harmful to the physical, mental or moral development of minors may only be broadcast unencrypted between 10 pm and 6 am and must always be preceded by an audible and visual warning. The visual warning must be shown throughout the entire programme. When this type of content is broadcast via a conditional access system, the service have to incorporate a parental control system.

The Act establishes three time slots considered to be of "enhanced protection": between 8 and 9 am and between 5 and 8 pm, in the case of weekdays and between 9 and 12 am during the weekend and holidays. Contents rated +13 shall not be broadcast during these time slots.

Programmes devoted to gambling and betting may be broadcast only between 1 am and 5 am, and those with content related to the esoteric and "parascience", may be broadcast only between 10 pm and 7 am. Service providers shall be subsidiary liable for frauds incurred through these programmes.

During the child protection watershed, providers of audiovisual media service can not insert commercial communications that promote the cult of the body and the rejection of one's image.

In the case of on-demand audiovisual media services provided through a catalog of programmes, providers must develop separate catalogs for content that might seriously impair the physical, mental or moral development of minors and establish parental control systems to allow the blocking harmful content for children.

- *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 6/2012 of 1 August 2012, amending Act 7/2010 of 31 March 2010)
  http://merlin.obs.coe.int/redirect.php?id=16036

IRIS 2012-8/20

Finland

Act on Audiovisual Programmes and Act on the Finnish Centre for Media Education and Audiovisual Media

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In June 2011, the Finnish Parliament adopted *Kuvaohjelmalaki 710/2011* (Act on audiovisual programmes) and *Laki Mediakasvatus- ja kuvaohjelmakeskuksesta 711/2011* (Act on the Finnish Centre for Media Education and Audiovisual Media). The Acts entered into force on 1 January 2012.

The Act on audiovisual programmes restricts the provision of audiovisual programmes in order to protect children. The Act applies to audiovisual programme provision and its supervision in Finland, if the programmes are provided by television operations or by on-demand services subject to the Act on Television and Radio Operations (744/1998), or by other providers who operate/function in Finland.

According to the Act on audiovisual programmes, an audiovisual programme provider must notify *Mediakasvatus- ja kuvaohjelmakeskus* (the Finnish Centre for Media Education and Audiovisual Media – MEKU) when beginning to provide audiovisual programmes. The notification must be submitted if programmes are provided for economic purposes and on a regular basis. No notification is needed if the programmes provided are exempt from classification.

The supervision of audiovisual programme provision and the coordination and promotion of national media education are handled by MEKU, which is subject to the Ministry of Education and Culture.

The Finnish Centre for Media Education and Audiovisual Media shall:

1) promote media education, children's media skills and the development of a safe media environment for children in cooperation with other authorities and corporations in the sector;

2) act as an expert in the development of the children's media environment and promote research related to the sector, as well as monitor international development in the field;

3) distribute information about children and the media;

4) take charge of the education and refresher training of audiovisual programme classifiers;

Audiovisual programmes supplied in Finland must be classified unless exempt from classification. An audiovisual programme may only be classified by a classifier trained and approved by MEKU as well as by MEKU´s officials. Programmes exempt from classification are for example those that include only educational material, music, sport, cultural events, religious services or other similar events or topical news issues.

Audiovisual programmes are considered to be detrimental to the development of children if, by virtue of violent or sexual content or elements causing anxiety or any other comparable features, they are likely to detrimentally affect children's development. When assessing the detrimental nature of a programme, the context and manner in which the programme's events are described must be taken into consideration. If an audiovisual programme is detrimental to the development of children, it shall be classified according to an age limit of 7, 12, 16 or 18, depending on the programme's content, and be given a symbol that describes the programme content. If there is no reason to consider the programme to be detrimental to the development of children, it shall be classified as suitable for all ages.

- *Kuvaohjelmalaki 17.6.2011/710* (Act on Audiovisual Programmes, Act No. 710, of 17 June 2011) http://merlin.obs.coe.int/redirect.php?id=15958

- *Laki Mediakasvatus- ja kuvaohjelmakeskuksesta 17.6.2011/711* (Act on the Finnish Centre for Media Education and Audiovisual Programmes, Act No. 711, of 17 June 2011) http://merlin.obs.coe.int/redirect.php?id=15959

IRIS 2012-7/21

Italy

Italian AVMS Code Amended

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On 28th June 2012 the Italian Government adopted Legislative Decree no. 120/2012 amending the Italian AVMS Code (Legislative Decree no. 177/2005, already amended in 2010, when the AVMS Directive was implemented into Italian legislation: see IRIS 2010-2/25 and IRIS 2010-4/31).

This Decree has been adopted with the aim of amending some provisions on the protection of minors and trailers of cinematographic works adopted in 2010 at the time of the implementation of the AVMS Directive and which led to some remarks by the European Commission (see IRIS 2011-5/5). With regard to trailers of cinematographic works of European nationality, the challenged provision did not calculate their duration within the total time allocated to advertising. Concerning the protection of minors, the Italian transposition did not properly take into account the different provisions regarding minors between linear and non-linear media services.

Following the observations received from the Commission, the Italian Government took steps to amend the concerned articles, while taking also the chance to regulate some issues not specifically falling under the scope of the AVMS Directive, but still coherent with its underlying purpose, introducing some new provisions with regard to European works and sanctions against local AVMS providers.

Article no. 1 introduces major changes to Article no. 34 of the AVMS Code, regarding the protection of minors, to ensure a more consistent implementation of the provisions of the Directive so as to take ensure more restrictive rules for linear services and less severe rules for non-linear ones. It is now clearly stated that audiovisual content that seriously impairs the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence, including cinematographic works classified as unsuitable for minors under 18 years, may never be broadcast on linear services, but can be made available in on-demand catalogues in such a way that minors will not normally hear or see such services and in any case provided that a parental control system is activated. AGCOM (the Italian Communications authority) is charged to adopt the implementing measures. As to programmes which are likely to impair the physical, mental or moral development of minors, they may be broadcast when it is ensured that minors in the area of transmission will not see or hear them and in any case together with an informative symbol during the whole transmission time. Cinematographic works classified as not suitable for minors under 14 years or films showing sex or violence may be broadcast only during the night, between 23 and 7, unless appropriate technical measures are available.

[...]

- *Decreto legislativo 28 giugno 2012, n. 120 - "Modifiche ed integrazioni al decreto legislativo 15 marzo 2010, n. 44, recante attuazione della direttiva 2007/65/CE relativa al coordinamento di*

determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l'esercizio delle attività televisive. (GU n. 176 del 30-7-2012)" (Legislative Decree 28 June 2012, no. 120 - Amendments to legislative decree 15th march 2010, no. 44, implementing directive 2007/65/CE 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://merlin.obs.coe.int/redirect.php?id=16064

IRIS 2012-8/32

Romania

Decision on the Provision of On-demand Audiovisual Media Services

Eugen Cojocariu
Radio Romania International

On 29 May 2012, the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council – CNA) adopted Decision no. 320 on the provision of on-demand audiovisual media services. The Decision, adopted in order to further the transposition of the Directive 2010/13/EU (Audiovisual Media Services Directive), was published in the Official Journal of Romania no. 434 of 30 June 2012 (see IRIS 2009-3/30).

[…] The Decision covers the activity of all providers under Romanian jurisdiction and contains provisions for on-demand audiovisual services through electronic communications networks ("video-on-demand" and "video replay").

[…] At the same time, the CNA has established the deadline of 3 September 2012 for all providers to notify the CNA of any intention to offer on-demand audiovisual services. Such a notification must be made at least seven days prior to the launch of such a service.

The Decision does not apply to web services which do not compete with the on-demand audiovisual media services or websites that provide audiovisual content generated by private users, such as sharing platforms, private correspondence, online gambling, electronic versions of newspapers/ magazines or internet search engines.

The provision of on-demand audiovisual media services through digital terrestrial television frequencies is possible only under a digital terrestrial broadcasting license, issued by the CNA. Applicants may begin transmitting on-demand audiovisual media services only after having obtained a provision note from the CNA. The rights stipulated in the provision note may not be transmitted to third parties. The provision note may be withdrawn by the CNA for any breach of the Audiovisual Act, following termination of the holder's right to provide such services or at the holder's request. The Public Register of on-demand audiovisual services providers will be available on CNA's website.

[…]

Programmes classified "18" may be transmitted only if the access restriction measures of the Audiovisual Code are implemented (see IRIS 2011-5/38). Programmes classified "18+", as well as the audiovisual content which is illegal under Romanian law, such as pornographic materials involving minors, are forbidden from being transmitted by audiovisual media service providers within Romania's jurisdiction. Persons whose rights or interests are harmed or compromised under these provisions may exercise a right to restitution up to 15 days from the date of viewing or accessing the offending material.

A failure to comply with the Decision is subject to penalties under the provisions of the Broadcasting Act.

- *Decizie nr. 320 din 29 mai 2012 privind furnizarea serviciilor media audiovizuale la cerere* (Decision no. 320 with regard to the provision of on demand audiovisual services)
  http://merlin.obs.coe.int/redirect.php?id=16047

IRIS 2012-8/34

Final Rejection of the Modification of the Act on Preventing and Fighting Pornography

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On 19 June 2012, the Romanian Chamber of Deputies (lower Chamber of the Parliament) rejected by a large majority a Bill on the revision and modification of Law no. 196/2003 on preventing and fighting pornography. The Bill was rejected by 184 votes to 6, with two abstentions. On 26 April 2011, the Bill had been rejected by the Romanian Senate (upper Chamber), although the Chamber of Deputies took the final decision (see IRIS 2003-1/27, IRIS 2004-2/36, and IRIS 2011-6/28).

The bill had been proposed by the Romanian Government in January 2011. It aimed to amend and supplement the legal framework on pornographic activities and to impose regulatory and control measures on access to pornographic material available through computer systems.

The Government intended to fill the gaps in the 2003 Act in respect of online content and to restrict the access of minors to pornographic websites by obliging the creators of such websites to introduce a password-protected access system. At the same time, the Bill sought to place responsibility for links to pornographic content on Internet Service Providers (ISPs). This would have been done under the provisions of Act no. 365/2002 on electronic commerce and been subject to a financial penalty for contravention.

The Government also tried to define pornography both more strictly and widely. The owners of a domain name intending to use it for a pornographic website only, would have been required to notify the Ministry of Communications and Information Society (the Ministry) of that intention. The Bill aimed to oblige those operators to place a warning on their websites as to their content, that is visible at initial access to the site in question. The Bill also aimed to give more powers to the Ministry to enforce the obligations imposed by law.

Six Romanian human rights and mass media freedom Non Governmental Organisations (NGOs) considered the provisions of the Bill to be unclear, to restrict freedom of expression, to endanger the right to privacy and potentialy to transform ISPs into a "digital police force". The Association for Technology and Internet, (ApTI), along with the five other NGOs, proposed many amendments to the Bill and considered that the Bill's aim should not have been to prevent and oppose content that is legal yet harmful to children. It should instead be to protect children from the possible access to such content. The NGOs added that any measure that blocks internet access through ISPs represents a censorship measure. They warned that a Romanian law can be applied only to Romanian natural or legal persons, which could lead to the hosting outside of Romania of sites with pornographic or other harmful content. They recommended to the Parliament that it refrain from any legislative measure in the field which would be, in their opinion, useless and would not achieve its aims. The primary solution proposed by the six NGOs was the education of children on the dangers and advantages of the internet.

- *Proiect de lege pentru modificarea şi completarea Legii nr.196/2003 privind prevenirea şi combaterea pornografiei* (Bill on the modification and completion of Act no. 196/2003 on preventing and fighting pornography)
  http://merlin.obs.coe.int/redirect.php?id=16014

IRIS 2012-8/35

Albania

Regulatory Authority Criticises TV Stations after Monitoring on Ethics

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In the first months of 2012 the National Council of Radio and Television (NCRT) has monitored some of the programmes on the two national commercial TV stations, TV Klan and Top Channel TV. The NCRT reported that the monitoring was carried out after complaints by citizens about these programmes. According to the outcome of the monitoring process, the satirical weekly programme broadcast by Top Channel TV, "Portokalli", used vulgar language, with an undue amount of allegations. The statement said that in spite of the humorous nature of the programme, the choices were not always justified. In addition, the monitoring group observed that some of the spots on the show also contained discrimination based on origin regarding different regions of the country.

Meanwhile, the monitoring of TV Klan noted that two of the programmes also violated ethical norms in terms of language used and the norms of communication. The first programme is "Zone e Lire", a talk show. This show was rebroadcast at a time when children could watch it, which makes the situation even more serious. Moreover, NCRT stressed that it is not the first time this programme has violated ethical norms. In addition, the second programme, "Aldo Morning Show", used allegations of homosexual conduct, with words and gestures that were not appropriate to the morning time slot. The NCRT has sent messages to both TV stations, indicating their opinion of the unethical conduct of these programmes.

- *Njoftim për Media, Tiranë më, 21.05.2012* (News release of the National Council of Radio and Television, 21 May 2012)
  http://merlin.obs.coe.int/redirect.php?id=15942

IRIS 2012-7/7

Bulgaria

Judgment on the Show "The Price of Truth"

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On 27 February 2012 the Administrative Court in Sofia confirmed penal decree No. 63/17.11.2009 issued by the chairperson of the Council for Electronic Media (CEM). The penal decree imposed a penalty in the amount of BGN 8,000 on the private national television Nova Broadcasting Group. The

reason for the penalty was a violation of good morals in "The Price of Truth" which was broadcast on 16 September 2009 on the channel Nova TV. The anchorman of the show had posed questions to the female contestant in the presence of her 16-year old son about her relationship with a 19-year old man, including questions about having sex without condoms and about abortions she had had.

Representatives of the media concerned claimed that the show "The Price of Truth" was one of the most attractive television formats where personal questions have been asked, always aiming that the answers should correspond with the truth. The media referred in its appeal to the opinion that showing the whole truth may not prejudice good morality.

The thesis of the Nova Broadcasting Group was dismissed by the second, the final court. The court shared the arguments of the first-instance District Court in Sofia, which had held that, according to the interpretation of the constitutional provision on freedom of expression (Art. 39, para. 2) in its Decision No 7/1996, the Constitutional Court allows some intervention and restrictions in order to protect morality. The Court considered the broadcast frames as publicly unacceptable and inconsistent with generally accepted standards of propriety.

- *АДМИНИСТРАТИВЕН СЪД СОФИЯ–ГРАД, XII КАСАЦИОНЕН СЪСТАВ, 27.02.2012 г.* (Decision of the Administrative Court in Sofia of 27 February 2012)
  http://merlin.obs.coe.int/redirect.php?id=15805

IRIS 2012-6/11

Czech Republic

Constitutional Court Rules on Freedom of Expression in Broadcasting

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On 8 March 2012, the Constitutional Court rejected the complaint of FTV Prima Ltd. against the judgment of the Supreme Administrative Court of 14 September 2011, the judgment of the Municipal Court in Prague of 17 March 2011 and the decision of the Council for Radio and Television Broadcasting of 22 June 2010.

In the constitutional complaint delivered to the Court the petitioner sought the annulment of the above decisions, because of a breach of the constitutionally guaranteed fundamental right to freedom of expression, as protected by Art. 17 of the Charter of Fundamental Rights and Freedoms and Art. 10 of the European Convention on Human Rights and Fundamental Freedoms. The complainant alleged in particular the violation of editorial freedom and independence of the media. FTV Prima stated that both the Council for Radio and Television Broadcasting and subsequently the ordinary courts applied the standard sub-constitutional law, particularly §32 para. 1 pt. g) of Act No. 231/2001 Coll. on radio and television broadcasting, without duly considering the constitutional dimension of this case. The general courts opposed these objections and did not recognise any interference arising from their decisions with the constitutionally protected rights of the petitioner.

In the present case the complainant was punished for a report about the group Jackass Praha, whose behaviour is generally as well as in terms of aesthetic (and in some cases even of moral) values hardly acceptable. The complainant was convinced that the inclusion of reports showing the performance of the above-mentioned publishing and editorial work belongs to a democratic state and independent media and is generally covered by the freedom of speech. A fine in the amount of

CZK 3,000,000 (EUR 120,000) could therefore undoubtedly be regarded as intervention in the legal sphere of the complainant.

After having examined the files, evidence and legal status the Constitutional Court concluded that the petition was clearly unfounded since the alleged infringement of constitutionally guaranteed rights by the institutions mentioned had obviously not occurred. The Supreme Administrative Court had agreed with the opinion of the Council for Radio and Television Broadcasting that showing instances of gambling with one's own health and life, the endangerment of the health of other persons and the inadequate presentation of hazards and risks by the complainant was contrary to the general ethical values as accepted by most of Czech society, and that therefore the report was capable of endangering the physical, mental and moral development of minors. The Constitutional Court on the objection of the petitioner noted that the matter was not an evaluation of the broadcast from the perspective of journalistic ethics, nor of journalistic resources and techniques. The law empowered the administrative authority to examine the content of reports only from the perspective of its impact on the physical, mental or moral development of minors as defined in §32 para. 1 pt. g) of Act No. 231/2001 Coll. because it was a show broadcast during the period from 6 am to 10 pm at a time when television is subject to the above-cited provision. The petitioner did not state any other facts that would justify the alleged violation of constitutionally guaranteed rights. Given that the Constitutional Court found no violation of the fundamental rights of the complainant, the relevant constitutional law or international agreements binding the Czech Republic, the complaint was rejected.

- *Rozhodnutí Ústavního soudu č. I. ÚS 3628/2011 z 8. března 2012* (Decision of the Constitutional Court No. I. US 3628/2011 of 8 March 2012)
  http://merlin.obs.coe.int/redirect.php?id=15850

IRIS 2012-6/13

France

Conseil d'Etat Cancels Rating Certificate for Film by Lars von Trier

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Légipresse

In a decision handed down on 29 June 2012, the *Conseil d'Etat* (France's highest administrative jurisdiction) has cancelled for a second time the rating certificate for Lars von Trier's film *Antichrist,* which prohibited showing it to anyone under 16 years of age.

In France, the showing of films in cinema theatres is subject to obtaining a rating certificate (*visa d'exploitation*) from the Minister for Culture, on the opinion of the Film Rating Board (*Commission de Classification des Oeuvres Cinématographiques*). The Board may issue a certificate authorising the showing of a film to any audience, a certificate prohibiting showing to anyone under 12 years old, or a certificate prohibiting showing it to anyone under 16 years of age. The Minister may also decide to ban the showing of the cinematographic work completely. Lastly, a film listed as pornographic or such as to incite violence may not be shown to anyone under 18 years of age. Article L. 211-1, paragraph 2 of France's Cinema and Animated Image Code states that "the certificate may be refused or its issue made subject to compliance with a number of conditions for reasons based on the protection of children and young people or respect for human dignity". Additionally, according to Article 2 of the Decree of 23 February 1990, as amended, "any opinion [delivered by the Film Rating Board] in favour of a decision including a restriction of any kind on the showing of a cinematographic work may only be given in plenary session. In this case, the reasons for the opinion must be explained and may be made public by the Minister with responsibility for Culture".

In the case at issue, the film *Antichrist* had been referred to the Film Rating Board, which in May 2009 delivered its opinion recommending that the film should not be shown to anyone under 16 years of age because of its violent nature; the opinion was adopted by the Minister for Culture of the time. The certificate was cancelled on 25 November 2009 by the *Conseil d'Etat* for lack of explanation of the reasons for the rating, then granted once again by the Minister for Culture. The applicant association, Promouvoir, which has as its aim "the promotion of Judeo-Christian values in every area of social life", requested a further cancellation of the ministerial decision granting the certificate. In its decision of 29 June 2012, the Conseil d'Etat noted that the Film Rating Board had merely referred to the "violent climate" of the film as justification of its opinion in favour of banning showing the film to anyone under 16 years of age, without stating how the violence justified the proposed ban. As the Conseil d'Etat had indeed already noted in its decision of 25 November 2009, such an opinion could not be deemed "adequately explained" as required by Article 2 of the Decree of 23 February 1990, as amended.

The *Conseil d'Etat* found that this irregularity deprived the Minister of a crucial element in determining the choice of the various possible restrictions that could be imposed on showing the work, in the light of the need to protect children and young people, to show respect for human dignity, and to uphold freedom of expression. Moreover, the lack of explanation was also likely to deprive the public of an element of information regarding the circumstances taken into consideration by the Minister in issuing the certificate. Thus the inadequate explanation of the reasons for the Rating Board's opinion was likely to influence the Minister's decision and to deprive the various parties concerned of a guarantee regarding the limitations on the freedom of expression constituted by any measure restricting the showing of a cinematographic work. As a result, the new rating certificate for the film *Antichrist*, granted in the light of the same inadequately explained opinion, was therefore the conclusion of a flawed irregular procedure, and this justified its cancellation once more.

- *Conseil d'Etat, 29 juin 2012 - Association Promouvoir, n° 335771* (Conseil d'Etat, 29 June 2012 - Association 'Promouvoir', no. 335771)

IRIS 2012-9/23

United States

Supreme Court on Indecency

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On 21 June 2012, the Supreme Court issued a much-commented decision on indecency.

The Federal Communications Commission (FCC) recently amended its indecency policy to find fleeting expletives and fleeting nudity actionably indecent. In 2009, the US Supreme Court (the Court) in Fox v. FCC upheld the amended policy and remanded the challenge by Fox Television Stations Inc. (Fox) to the Second Circuit for further proceedings consistent with its holding (see IRIS 2009-6/32). On 21 June 2012, the Court resolved the case by invalidating penalties levied against Fox for airing fleeting expletives and invalidating fines levied against ABC Television (ABC) for airing fleeting nudity, while leaving the indecency policy unchanged. The Court held that the FCC was prohibited from penalizing Fox and ABC for the broadcasts by the Due Process Clause of the Fifth Amendment of the US Constitution ("Fifth Amendment") because Fox and ABC had not received Fair Notice or guidance of what was prohibited. The Court found that Fox and ABC were unable to know what was required of them, as required by the Fifth Amendment, because the FCC based its authority for the penalties on a policy it established after the broadcasts were aired, while

it made clear at the time of the broadcasts that "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."

Even though the FCC conceded that, "Fox did not have reasonable notice at the time of the broadcasts that the FCC would consider non-repeated expletives indecent," it argued that the issue of due process is moot because the FCC only threatened to fine Fox and agreed to refrain from imposing sanctions and considering a station's record of airing indecent broadcasts when considering whether to renew its license. The Court rejected that argument because it found that due process was established to ensure that regulated parties are not left "at the mercy of *noblesse oblige*". It also found the FCC's assurances were not persuasive because it had already taken actions contrary to those assurances, namely by finding it was "not inequitable to hold Fox responsible for [the 2003 broadcast]" and that, "it has the statutory authority to use its findings to increase any future penalties". The Court noted that even if the FCC forebears from levying fines, a finding of wrongdoing can also harm a broadcaster's reputation with viewers and advertisers because that finding will be widely publicized.

The FCC argued that the fines it levied against ABC did not violate the Fifth Amendment because it provided ABC sufficient notice of the change in the policy via a 1960 FCC decision that had declared that, "televising of nudes might well raise a serious question of programming contrary to 18 U. S. C. §1464." The Court rejected this argument because it found the statement ambiguous and inconsistent with the FCC's prior decisions that isolated and brief moments of nudity are not actionably indecent. The Court also rejected the government's assertion that the shower scene at issue "contains more shots or lengthier depictions of nudity" than other broadcasts the FCC deemed were not indecent, because such an assertion ran contrary to a prior FCC determination that a broadcast by ABC of 30 seconds of nude buttocks was "very brief" and not actionably indecent in the context of the broadcast.

Thus, even though the Court indicated when it remanded the case that it might resolve the First Amendment implications of the FCC's indecency policy "perhaps in this very case", it instead resolved the case on more limited, non-constitutional grounds and left the First Amendment implications unresolved.

- Federal Communications Commission et al. v. Fox Television Stations, Inc., et al. - Certiorari to the United States Court of Appeals for the Second Circuit, No. 10-1293. Argued on 10 January 2012 - Decided on 21 June 2012
  http://merlin.obs.coe.int/redirect.php?id=16007

IRIS 2012-8/38

Additional Youth Protection Measures in the European Union – Filters, Children's Networks, Media Literacy

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I. Different EU measures for different types of audiovisual service

The lead article of this IRIS *plus* (see chapters II. and IV.) considers how provisions for the protection of minors from inappropriate media content differ according to whether they concern linear or on-demand audiovisual media services. A further distinction can be drawn between measures for audiovisual media services and those applicable to other kinds of (on-demand) audiovisual services. For the latter category, the Parliament and Council merely "recommend" youth protection measures (see I.2, below). This further distinction brings with it not only different protection mechanisms, but also different degrees of obligation to comply with the relevant EU legal instruments. The Audiovisual Media Services Directive (AVMSD) lays down minimum standards, which the member states are obliged to meet, and which are ultimately binding on media service providers; however, the recommendations of the Parliament and of the Council are known as *soft law* and therefore depend on the political persuasiveness of the underlying arguments. After briefly summarising the rules differentiating between the various categories of audiovisual services, this chapter describes the legal framework governing the protection of minors outside the AVMSD. The binding effect of the different legal instruments plays an important role, which is examined in the final section.

1. Distinction between non-linear and linear audiovisual media services

The concept of "audiovisual media service" is defined in Article 1(1)(a) of the AVMSD. As well as "audiovisual commercial communication",[1] it means

1) Article 1(1)(h) AVMSD: "Images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement."

> "a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility[2] of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC[3]. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph".[4]

The primary characteristic of a television broadcast is that the provider (television broadcaster) determines the order of programmes in its schedule, which are received simultaneously by all viewers ("on the basis of a programme schedule", see Article 1(1)(e) AVMSD). An on-demand audiovisual media service, on the other hand, is characterised by the fact that the user decides which programmes to watch and when by selecting them from a catalogue made available by the provider ("for the viewing of programmes … on the basis of a catalogue of programmes selected by the media service provider", see Article 1(1)(g) AVMSD).

Recital 27 of the AVMSD lists examples of television broadcasting: analogue and digital television, live streaming, webcasting and near-video-on-demand. According to recital 24, "it is characteristic of on-demand audiovisual media services that they are 'television-like', i.e. that they 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 within the scope of this Directive."[5] If an audiovisual media service contains both linear and non-linear elements, the (different substantive) provisions of the AVMSD are applied individually to the service concerned in accordance with this recital.

2. Rules on the protection of minors from other on-demand audiovisual services

The AVMSD therefore does not apply to a specific on-demand service with audiovisual content if, for example, its provider does not exercise editorial responsibility within the meaning of this Directive,[6] if its content is not "television-like"[7] or if – subject to the latter criterion being met – the main purpose of the service is not to provide such programmes.[8] In such cases, the service is

2) According to Article 1(1)(d) AVMSD, a media service provider is "the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised", and editorial responsibility means "the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services" (Article 1(1)(c) AVMSD).
3) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108 of 24 April 2002, p. 33-50, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ L 337 of 18 December 2009, p. 37.
4) Regarding the details of the definition and the questions discussed below, see in particular Mark D. Cole, "The European Legal Framework for On-demand Services: What Directive for Which Services?", in: European Audiovisual Observatory (EAO) (ed.), *The Regulation of On-demand Audiovisual Services: Chaos or Coherence?*, IRIS *Special* 2011, p. 40 *et seq*.
5) Note, however, recital 58 of the Directive: "On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society … . This justifies imposing lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive." This rather (strongly) qualifying statement is offset, however, by the subsequent recital 59 as far as the topic we are discussing in this article is concerned: "The availability of harmful content in audiovisual media services is a concern for legislators, the media industry and parents. There will also be new challenges, especially in connection with new platforms and new products. Rules protecting the physical, mental and moral development of minors as well as human dignity in all audiovisual media services … are therefore necessary."
6) See recital 26 and the so-called "UGC" or "YouTube" clause in recital 21 of the AVMSD.
7) See recital 22 of the AVMSD.
8) See recitals 22, 28 and 21 of the AVMSD. Recital 22 mentions search engines as an example of services where "any audiovisual content is merely incidental to the service and not its principal purpose."

defined as a different kind of on-demand audiovisual service, for which the E-Commerce Directive[9] provides the legal framework.

However, the E-Commerce Directive itself does not set out any legal requirements concerning the protection of minors. The regulations of interest here can be divided into three categories.

Firstly, in Articles 12 to 15, it establishes a liability regime for the relevant service providers that creates a series of exemptions, known as "safe harbour" provisions. The service providers (including "intermediaries") protected by these provisions include providers of Internet storage ("host providers") and Internet access providers. For example, a host provider is, in principle, not liable for content stored by its customers. This applies on condition that the provider "does not have actual knowledge of illegal activity or information" (see Article 14(1)).

Secondly, the E-Commerce Directive states that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation (Article 4(1)).

And thirdly, the Directive recognises the member states' right, in exceptional cases, for example for the protection of minors, to derogate from the "country of origin" principle also enshrined in the Directive, if the measures concern a service which "prejudices the objectives referred to … or which presents a serious and grave risk of prejudice to those objectives" (Article 3(4) to (6)).[10]

On account of the lack of substantive provisions on the protection of minors in the E-Commerce Directive, the Council's Recommendations of 1998[11] and 2006[12] (the latter was issued jointly with the Parliament) are relevant for audiovisual services and information services to which the AVMSD does not apply. These recommendations, the second of which states that it complements the first, deal with all sorts of measures relevant to the protection of minors that should be taken by the member states in partnership with the industry and, if necessary, with the European Commission's support:[13]

- Adoption of guidelines for the creation of national co- and/or self-regulatory systems for the protection of minors in the media;[14]

- Drawing up of codes of conduct at national and Community level in co-operation with professionals, regulatory authorities and other interest groups (e.g. parents' or consumer organisations);

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9) Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178 of 17 July 2000, p. 1-16, (E-Commerce Directive); see Mark D. Cole, *op. cit.* (footnote 4), p. 44 *et seq.*, concerning the criteria that must be met by a so-called "information society service", to which the E-Commerce Directive therefore applies.

10) The provisions on the possible grounds for derogation and the procedure to be followed served as a model for Article 3(4) to (6) of the AVMSD (see lead article, end of section II.).

11) 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, OJ L 270 of 7 October 1998, p. 48-55.

12) 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, OJ L 378 of 27 December 2006, p. 72-77.

13) For information on the drafting of the 2006 Recommendation and its final content – including in comparison with the AVMSD, which was negotiated partly in parallel by the Parliament, Council and Commission – see Alexander Scheuer, "*Co-Regulierung im europäischen Jugendmedienschutz*", in: *tv diskurs*, (vol. 1) 2006 (no. 35), p. 8 *et seq.*, and "*Jugendschutz in europäischen elektronischen Medien – Klassifizierungen, Filtersysteme, Medienkompetenz*", in: *tv diskurs*, (vol. 2) 2007 (no. 40), p. 4 *et seq.*, both available at: http://fsf.de/publikationen/tv-diskurs/

14) See European Commission, Public consultation on a "Code for Effective Open Voluntarism", http://ec.europa.eu/digital-agenda/en/news/public-consultation-code-effective-open-voluntarism-good-design-principles-self-and-co; the initiative is based on the Communication "A renewed EU strategy 2011-14 for Corporate Social Responsibility", COM(2011) 681 final of 25 October 2011, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:HTML, p. 12 (para. 4.3).

- Co-operation and sharing of best practices between regulatory bodies and self- and co-regulatory authorities;
- Support for the fight against all illegal activities harmful to minors on the Internet;
- Development of filters that prevent the transmission of hard-core pornography via Internet services;
- Increase in the use of content labelling systems;
- Measure to be taken by television broadcasters: (at least experimental) use of new parental control systems based on digital technology (such as PIN numbers, filtering software or hardware-based micro-technology);
- Measure to be taken by Internet access providers: encourage the development of codes of conduct so that existing legal provisions can be clarified and applied more effectively;
- Provision of safe areas on the Internet and measures to provide and make it easier to find high-quality content particularly suitable for children and teenagers;
- Initiatives to teach minors about responsible use of audiovisual and online information services, particularly through media literacy programmes.

3. Relevance of the recommended measures for the protection of minors from on-demand audiovisual services

Directives and recommendations have different legal effects. The self- and co-regulatory systems, mentioned earlier, examplify these differences. In order to meet obligations of a directive member states may resort to co- but not to self-regulation. As is the case in the framework of the AVMSD and in respect of the regulation of other on-demand audiovisual services under the E-Commerce Directive, self-regulatory systems cannot provide the same level of legal certainty – at least from an EU law perspective (and the providers' point of view). To the extent that recommendations are concerned, the member states can also rely on self-regulation. Bearing this limit of self-regulation in mind, the advantages that are (generally) associated with both self- and co-regulation should not be underestimated: the instruments can be used quickly and flexibly. In addition, since the providers concerned play a leading role in developing these systems, or are even exclusively responsible for creating and adopting them, there is generally considered to be a high degree of obligation to adhere to them. Last but not least, they are able to "transcend boundaries" in the best sense of the phrase, since unlike national legislation they do not fall under the jurisdiction of an individual state.

II. European and national initiatives to strengthen the protection of minors

The lead article deals with some of the instruments mentioned in the Recommendations for the protection of minors, including the various *national* co- or self-regulatory bodies set up to protect minors from (seriously) harmful content found on television, in on-demand audiovisual media services and in other on-demand audiovisual services. It also devotes considerable attention to systems for labelling problematic services with regard to their content and age suitability; however, it should be noted that, despite the requirement laid down in the 1998 Recommendation, there is still no common Europe-wide labelling system. Background information about and examples of technical measures designed to prevent minors accessing unsuitable content (PIN codes for adults, filtering and youth protection software) are also outlined.

Below, therefore, to give readers an idea of other recommended measures to protect minors in the media, examples of Europe-wide self-regulatory initiatives and information on safe Internet use for children and media literacy programmes are provided.

1. Negative – platforms, social media, search engines

As part of the EU's Safer Internet Programme,[15] industry representatives from the member states have launched various self-regulatory initiatives, the development and implementation of which are supported by the European Commission. They are classified as "negative" here because they predominantly concern the setting of standards designed to prevent children and young people accessing certain unsuitable content or to prevent conduct that could harm minors.

1.1. European Framework for Safer Mobile Use by Young Teenagers and Children

In 2007, mobile telephone service providers agreed to adopt a European Framework for Safer Mobile Use by Young Teenagers and Children.[16] This initiative involves four main areas of action:

- Classification of commercial content offered by the providers themselves or commissioned by them from third parties, based on national provisions on services that harm the development of minors.
- The use of access control mechanisms which enable parents to control their children's access to this type of content.
- Education and awareness-raising through measures taken by the mobile companies to inform parents about the safe use of mobile devices and ensure that users have ready access to mechanisms for reporting safety concerns.
- The fight against illegal content hosted in mobile forums or on the Internet, to be conducted by means of co-operation between mobile operators, law enforcement (police) authorities, national authorities and INHOPE (*International Association of Internet Hotlines*).

The initiative's members promised to draw up national codes of conduct within a year and to jointly evaluate the success of the measures at regular intervals on the basis of reports from national operators and stakeholders.[17]

1.2. Safer Social Networking Principles for the EU

The adoption of the Safer Social Networking Principles for the EU[18] in 2009 marked the launch of the second Europe-wide self-regulatory initiative as part of the *Safer Internet* programme. The principles are similar to those of the earlier initiative (see II.1.1, above). They include awareness-raising, the provision of age-appropriate services, the use of tools and technology to increase safe Internet use and eliminate danger wherever possible, and the provision of easy-to-use mechanisms to report unauthorised conduct or content. In some respects, however, they also go further than the first initiative, for example by demanding that users be encouraged and helped to use their personal data sensibly. The European Commission has taken responsibility for evaluating the implementation of these principles,[19] relying on reports on the countries in which the social network operators are based.

1.3. Coalition to make the Internet a better place for kids

The following measures are described in the statement of purpose published at the end of 2011 by a coalition to make the Internet a better place for kids, comprising CEOs of major European, US and Asian companies:[20]

15) http://ec.europa.eu/information_society/activities/sip/policy/programme/index_en.htm
16) http://ec.europa.eu/information_society/activities/sip/docs/mobile_2005/europeanframework.pdf
17) See the third implementation review of 2010 and national implementation reports, available at: www.gsma.com/gsmaeurope/safer-mobile-use/implementation-review/
18) http://ec.europa.eu/information_society/activities/social_networking/docs/sn_principles.pdf
19) See http://ec.europa.eu/information_society/activities/social_networking/eu_action/implementation_princip_2011/index_en.htm
20) http://ec.europa.eu/information_society/activities/sip/docs/ceo_coalition/ceo_coalition_statement.pdf

- Provision of simple and robust tools for reporting inappropriate or illegal content;
- Provision of age-appropriate privacy settings;
- Wider use of content classification;
- Wider availability and use of parental control systems;
- Effective removal of child abuse material.

The evaluation of progress in the implementation of this initiative, the first interim results of which were published in July 2012, is conducted by the companies involved; the results were presented to the Commission and discussed with the Commission and interested third parties (child welfare organisations, researchers, freedom of speech advocates).[21]

1.4. Child-appropriate search engines

One example of a national measure to protect children and young people using the Internet is the *Verhaltenssubkodex der Suchmaschinenanbieter Freiwilligen Selbstkontrolle Multimedia-Dienste-anbieter* (Subcode of Conduct for Search Engine Providers of the Association of Voluntary Self-Regulating Multimedia Service Providers – FSM),[22] which obliges providers to:

- clarify and explain how search engines work;
- structure search results transparently (including by labelling advertising);
- use technical measures to protect children and young people from content which is harmful to them;
- uphold the principle of data economy in dealing with user data;
- improve the protection of young people in the media (particularly from harmful content); and
- refrain from showing URLs classified as harmful to minors by the *Bundesprüfstelle für jugendgefährdende Medien* (Federal Review Board for Media Harmful to Young Persons – BPjM).

2. Positive – children's networks ("walled-garden" services)

As well as the "negative" approach of blocking access to inappropriate content, the EU Recommendations advocate a "positive" approach to the protection of minors. Member states are encouraged to provide child-appropriate content[23] and ways of making such content easier to find. These instruments are meant to help children and young people use the Internet as safely as possible by offering content that is particularly suitable for them or, at the very least, harmless. For the purposes of this article, they are classified as "positive".

This approach involves creating a "children's network" within the Internet (so-called "walled-garden" services). This comprises self-contained areas, i.e. websites that provide access to various services that have been approved as child-appropriate,[24] and special search engines[25] which only find sites that are safe for children. The Commission's evaluation report on the

21) See http://ec.europa.eu/information_society/activities/sip/docs/ceo_coalition/report_11_july.pdf
22) www.fsm.de/de/Subkodex_Suchmaschinenanbieter
23) See, for example, www.ein-netz-fuer-kinder.de/foerderprogramme/gefoerderte_kinderangebote.php
24) See www.blinde-kuh.de
25) See www.fragfinn.de/kinderliste.html

EU Recommendations, published in 2011, indicates that such initiatives had been taken in 18 member states.[26]

3. Media literacy

Over many years, a wide variety of projects have been conducted in EU member states to promote media literacy,[27] particularly among children and young people, but also aimed at parents and teachers/trainers. According to a definition proposed by the European Parliament during consultations on the AVMSD, media literacy refers to

> "skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people are able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. They are better able to protect themselves and their families from harmful or offensive material."[28]

This definition shows that media literacy is understood as a means of strengthening and equipping young people (among others) to deal with the opportunities and dangers (including when they come across unsuitable content or are confronted with harmful conduct) of using audiovisual and Internet services. It therefore represents a "positive" aspect of the protection of minors in the media. However, it is at least generally acknowledged that educational measures aimed at improving the media literacy of children and young people cannot, on their own, effectively protect minors from harmful on-demand audiovisual services.[29]

The EU's essential contribution to the promotion of media literacy can be seen, firstly, in how it has systematically collated all the relevant skills and in the various ways in which they have been integrated into different subject areas in education. Secondly, by setting up groups of experts, financially supporting relevant initiatives by (state) educational organisations and/or industry and, finally, observing and analysing different approaches and the success of corresponding measures, the EU has created a framework that is ideal for the sharing of best practices.

III. Summary

A wide variety of approaches to the provision of effective protection of young people from harmful on-demand audiovisual (media) services have been adopted at EU level. On the one hand, compulsory provisions apply to some services, while non-compulsory recommendations apply to others; on the other hand, a combination of "negative" and "positive" approaches is used. It is

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26) 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 – COM(2011) 556 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0556:EN:NOT and p. 7 (para. 3.1) of the accompanying Staff Working Paper.

27) See Tarlach McGonagle, "Media Literacy: No Longer the Shrinking Violet of European Audiovisual Media Regulation?", in: European Audiovisual Observatory (ed.), *Media Literacy*, IRIS *plus* 2011-3.

28) Now: recital 47 AVMSD, which contains further clarification. See also recital 11 of the Commission Recommendation on media literacy in the digital environment for a more competitive audiovisual and content industry and an inclusive knowledge society of 20 August 2009, COM(2009) 6464 final, p. 3: "Media literacy relates to the ability to access the media, to understand and critically evaluate different aspects of the media and media content and to create communications in a variety of contexts."

29) The Commission's first report on the application of the AVMSD also refers to an extremely wide range of media literacy levels among the European population. See 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, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012DC0203:EN:NOT , p. 3.

clear that content providers and parents must work together to deal with services distributed via new platforms that are relevant to the protection of minors. However, particularly with regard to platforms that currently provide access to illegal or harmful content (such as search engines and social networks), as well as "open Internet" services, there is a clear focus on the role of intermediaries who provide technologies for blocking access (filters, youth protection software) and complaints procedures for users to report illegal content. Intermediaries are also actively involved in raising awareness about safe Internet use by providing information about technical measures that can raise protection levels. These activities form part of efforts to improve users' media literacy.

It remains to be seen whether and how, against the background of increasing use of connected TV, these different approaches will be drawn together to form a meaningful, i.e. comprehensible whole from the consumer's perspective. One promising suggestion is to permanently link information relevant to youth protection and the corresponding classifications with the content itself, so that they continue to remain available on different platforms. Such an approach would clearly be aided by greater standardisation of labelling systems (with information on age categories and possible risks) for audiovisual services in Europe and beyond.[30] From the perspective of (European) audiovisual (media) service providers, it remains relevant whether standard, or at least comparable, obligations can be established for content harmful to minors, in order to prevent distortions of competition on the one hand and not to damage the credibility of their own, more far-reaching self-regulatory initiatives on the other.

30) See the joint research project of the Hans Bredow Institute and the Centre for Social Responsibility in the Digital Age, www.hans-bredow-institut.de/de/forschung/moeglichkeiten-ausgestaltung-grenzueberschreitender-online-kennzeichnungen and www.srda.eu/projects/gam/

Protection of Minors against Information Detrimental to their Health and Development in the Russian Federation

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On 21 December 2010 the State Duma (parliament) adopted at the third and last reading the bill "*О защите детей от информации, причиняющей вред их здоровью и развитию*" (On the Protection of Minors against Information Detrimental to their Health and Development)[1] (see IRIS 2009-8/29), which was signed into law by the President on 29 December 2010. It came into force on 1 September 2012.

The new Federal Statute regulates "products of the mass media, printed materials, audiovisual materials on any material object, computer programs and databases, as well as information disseminated by means of public performance and on the information telecommunication networks of general access (including Internet and mobile telephony)" (Article 2). It does not regulate advertising or information of "historical, artistic or any other cultural value to society" (Article 1).

The Statute defines seven categories of information which are prohibited from being disseminated among minors (persons below 18 years of age). They range from pornography to information that contains "bad language" and "negation of family values" (Article 5 para. 2). Information of pornographic character in particular is defined as "information presented in a naturalistic portrayal or description of human genitals and/or sexual contacts or actions comparable to sexual contacts, including such actions directed at an animal". A naturalistic portrayal or description, in its turn, is such "a portrayal or description that in any form and by any means depicts a human, an animal or any parts thereof, actions (inactions), events, phenomena, their effects with a focus on particulars, anatomic details and/or physiological processes."

1) *Rossiyskaya gazeta* governmental daily No. 297 of 31 December 2010, see text (in Russian) at: http://merlin.obs.coe.int/redirect.php?id=13041

The ratings of the "informational products"[2] related to the age of their consumers shall be as follows: below 6 (years old), 6+, 12+, 16+ and 18+ (Article 6 para. 3). The Statute introduces mandatory specific labelling of the products including TV programmes (other than live broadcasts) in accordance with their age rating (Articles 11-12). Airing of products labelled 16+ shall be allowed on TV only from 9 p.m. to 7 a.m., and those labelled 18+ from 11 p.m. to 4 a.m. (Article 13).

Producers and distributors shall be responsible for marking their products in accordance with the directives of the new law. In particular the law encourages them to solicit an expert opinion (that is an opinion of experts as to what category the product belongs to) from organisations and experts accredited by the government. The Statute also contains specific rules for the drafting of these opinions and stipulates their legal consequences. For computer and other games the expert opinion is mandatory.

A year and a half later, on 11 July 2012, the State Duma adopted in the final reading a federal statute titled "*О внесении изменений в Федеральный закон 'О защите детей от информации, причиняющей вред их здоровью и развитию' и отдельные законодательные акты Российской Федерации*" ("On Amendments to the Federal Statute 'On the Protection of Minors against Information Detrimental to their Health and Development' and to other Legal Acts of the Russian Federation").[3] It was signed into law by President Vladimir Putin on 28 July 2012. The Statute introduces a number of changes in the regulation of the Internet that are not necessarily related to the issues of the 2010 Federal Statute "On the Protection of Minors against Information Detrimental to their Health and Development" discussed earlier in this article.

On the one hand, the Statute on Amendments further specifies the regulation with regard to detrimental online information. In particular, it provides details as to the labelling of harmful audiovisual products and elaborates on the procedures for expert evaluation of "informational products." According to the changes "placement on the Internet" should now be called "dissemination via the Internet". The Statute on Amendments also introduces the notion of "network publications" in order to regulate the labelling of online media – in line with the recent more encompassing additions to the Russian media law (see IRIS 2011-7/42). These changes are enforced from the day of publication of the Statute.

On the other hand, the Statute on Amendments introduces new and more general restrictions on the Internet at large. It adds to the 2003 Federal Statute "*О связи*" "On Communications" a provision stipulating that Internet access providers shall block and unblock access to information on the Internet in line with the rules and procedures of the 2006 Federal Statute "*Об информации, информационных технологиях и защите информации*" ("On Information, Information Technologies and on Protection of Information"). In order to make the application of the blocking rule possible, the 2006 Federal Statute had to be adapted. This happened by introducing an array of definitions of new notions into the 2006 Federal Statute. These definitions relate to online communications, such as Internet website, webpage, domain name, network address, website owner, hosting provider.

The 2012 Statute empowers the governmental supervisory agency for the audiovisual sector *Roskomnadzor* (see IRIS 2011-1/46 and IRIS 2011-7/42) to establish a database of domain names and network addresses of websites that contain information the dissemination of which is prohibited in the Russian Federation. The database will be based on court decisions concerning the illegal character of information in a particular website taken from individual cases. The Ministry of Justice already maintains a similar blacklist based on court decisions in anti-extremism cases (see IRIS 2007-9/27), but from now on this database can be further expanded to include violations of legislation on advertising, copyright, personal data, etc. Moreover, the database will start to include findings from decisions of the federal executive bodies relating to three categories of illegal

2) Informational products are defined as mass media products, printed products, audiovisual products in any form, computer software, as well as information disseminated via public performances, via informational telecommunication networks, including Internet, and via mobile telephony communications.
3) No. 139-FZ. Published on 30 July 2012 in the official daily *Rossiyskaya gazeta*.

information: child pornography, information on the production and distribution of narcotics, and information on methods of committing suicides.

The procedures on the use of the blacklist are as follows. Within 24 hours of receiving a notice from *Roskomnadzor* on the illegal character of information, the hosting provider asks the website owner to remove the now forbidden webpage from his website. The website owner must oblige within 24 hours of receiving the notice from the hosting provider. If this does not happen, the hosting provider should block access to the entire website. If neither takes place the network address itself goes on the blacklist and is now to be blocked by the Internet communication operator, also within 24 hours. If this fails to happen the operator faces the possible loss of its licence. These changes entered into force on 1 November 2012.

Soon after these latest amendments, *Roskomnadzor* issued, on 4 September 2012, recommendations to the media outlets on how to apply the recently amended Federal Statute "On the Protection of Minors against Information Detrimental to their Health and Development".[4]

In particular, the recommendations determine how to place the pictograms used for marking the ratings of the "informational products" related to the age of their consumers in audiovisual and online media.

For TV programmes the pictograms shall be printed on the listings of TV programmes for every item as well as be placed in the actual broadcasts of programmes rated 12+ and above. The pictogram is to be placed in a corner of the screen and kept there for at least eight seconds after the start and again after interruption of a programme (e.g. after commercials). There is an exemption for live TV programmes and the "informational products that have significant historical, artistic or other cultural value for the public."

In online media the pictogram shall be placed on the top part of the front page of any website concerned and correspond to the "informational products" with the highest level of restrictions that are accessible on the site. The sign shall not be smaller than either 75% of the font of the second-level headings or the font size of the main text in bold, or 20% of the size of the main column on the website. In colour it should correspond to or be in contrast to the colour of the title of the online media outlet.

Online news sites are exempted from marking. Comments of readers or their reports on the pages provided for such purposes by the online media are not to be marked either.

4) Рекомендации по применению Федерального закона от 29.12.2010 N° 436-ФЗ "*О защите детей от информации, причиняющей вред их здоровью и развитию"* (Recommendations on the implementation of the Federal Statute of 29 November 2010 No. 436-FZ "On the Protection of Minors against Information Detrimental to their Health and Development"). Officially published on the website of Roskomnadzor: www.rsoc.ru/docstore/doc1373.htm

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