

On-line public consultation on Code for Effective Open Voluntarism: Good design principles for self- and co-regulation and other multistakeholder actions

http://ec.europa.eu/information_society/digital-agenda/actions/consultation/

Open until 30/09/2012

1. Please comment on the draft code

1. Conception

1.2 Objectives

In our opinion it would be appropriate to include some paragraphs in this Draft-Code subsection which indicated that the initiative for self- or co-regulation or other multistakeholder action and its objectives should be reflected in a document used to know the specific scope of these actions, both those who adhere to the commitment as to stakeholders and authorities. This document is very important because it would summarize the commitments that a sector is willing to take in carrying out its activities for the benefit of society and fair competition.

In this regard could be made clear in the Draft-Code that such commitments are usually set out in a set of obligations and prohibitions which the signatories undertake to assume (which are often called "Frameworks," "Guidelines" or "Codes of conduct") or alternatively or additionally, when it comes to commitments agreed with the Administration (co-regulation) such commitments are expressed in "Agreements" or "Conventions".

Usually this code or agreement takes the place of a non-existent legal regulation or complete, develops and expands a previous legal regulation. However, please note that sometimes the commitment made does not consist of adopting new rules, but only of being subject to the enforcement and monitoring mechanisms established by self-regulatory systems to ensure and improve compliance with existing legislation.

In those cases where the commitment is subject to the enforcement mechanisms of control and self-regulatory systems can be clearly seen the importance and usefulness of these mechanisms in addition to administrative and judicial enforcement of the legislation through his agility, efficiency and free to consumers.2. Implementation

2. Implementation

2.5. Compliance

We fully support that "there shall be a system allowing complaints by non-participants and participants to be evaluated by independent assessors, with any panel comprising a majority of independent individuals".

In this regard, it is important to emphasize that this system of evaluation or panel must be independent of the particular sector that has made that commitment. And clarify that (as demonstrated by the ADRs of Advertising SROs) a transverse or horizontal organization, funded by the industry but with no dependence on specific sectors or companies and dedicated exclusively to monitor these codes of conduct can be a good tool if they have an independent panel or Jury in charge of resolving those complaints.

In addition it should be taken into account that some self-regulatory systems established in Europe, for example, Advertising SROs have tools, so-called "prior checking" which aims to ensure compliance with the commitments of self-regulation (codes or agreements) incurred and therefore its lawfulness before performing the action in question.

There are two previous monitoring tools whose application in the advertising industry over recent decades has demonstrated its usefulness and that could be proposed as prior monitoring tools prior to any self- or co-regulation commitments: the pre-advice and the pre-clearance. The data show that establishing a prior voluntary control of compliance significantly reduces the number of complaints for breach of the compromise.

Copy advice is the provision by a self-regulatory organization (SRO) of an opinion as to whether or not an advertisement complies with advertising rules. It is provided on a confidential basis and usually accompanied by advice on the amendments necessary to bring a non-complying advertisement into line with the rules. Copy advice is provided upon the request of advertisers, agencies or the media.

Copy advice provided by an SRO is not usually binding on advertisers, agencies or media which request it. These parties are, however, expected to comply with it, particularly if it has been provided by the SRO's adjudication committee.

Seeking copy advice at an early stage in the preparation of a campaign provides advertisers and agencies with a degree of reassurance that it complies with the highest standards of practice. It also prevents wasting time and money on campaigns which breach the rules and are therefore likely to be short-lived. Copy advice can also help to avoid embarrassment and damage to the reputation of an advertiser or a brand caused by adverse publicity if a complaint is upheld. In a wider context, copy advice helps protect the reputation of advertising in general.

Pre-clearance is normally found in circumstances where advertising is subject to statutory or co-regulation. It is the compulsory examination of an advertisement, before it is broadcast or published, to ensure that it complies with legal, statutory or self-regulatory rules. Like copy advice, pre-clearance greatly reduces the risk of complaint, but if a complaint is received, the preliminary decision to grant clearance will be reviewed by the adjudication committee and if necessary, overruled.

**For more info about copy advice & pre-clearance, please check www.easa-alliance.org*

2a. Are you interested to take part in a network of excellence and community of practice of effective open voluntarism?

Yes, we are.

2b. Please indicate in the text box below any existing reference material or experience you consider useful to share within this network of excellence and community of practice, in terms of website, reports or events. Feel free to upload any relevant material.

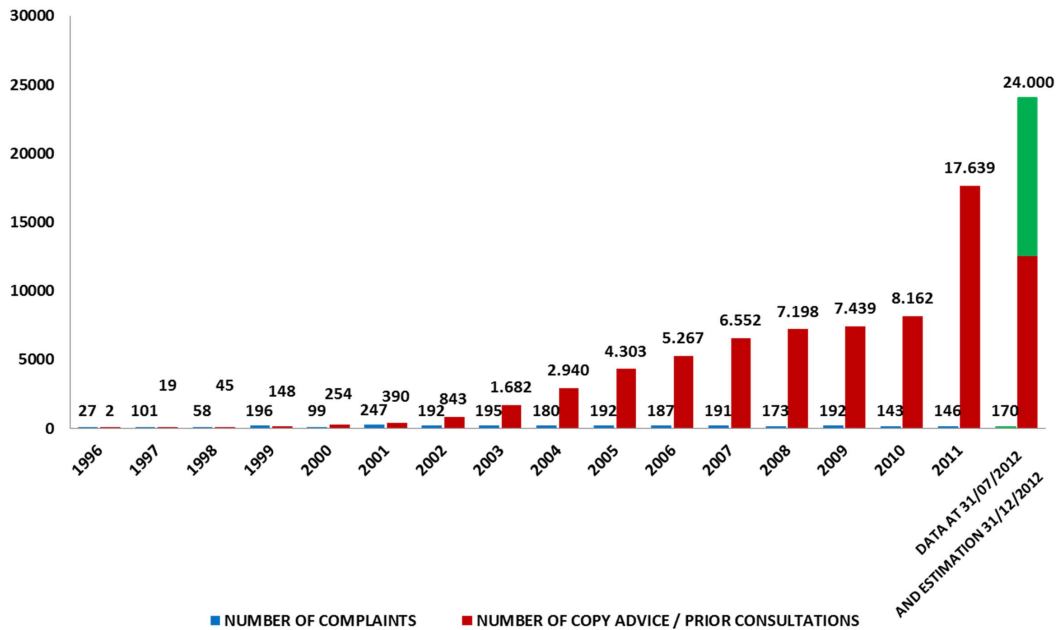
Spanish Advertising SRO's data clearly reflect the development and effectiveness of self- and co-regulation systems (a) in an environment in which voluntarism receives its appropriate share of attention in legislation and in the policy-making toolbox; (b) when self- and co-regulation standards have been properly set up and recognized by Administration.

SPANISH PRO SELF- AND CO- REGULATION ENVIRONMENT

1. Legal recognition of self-regulation in the Spanish Unfair Competition Law and in many sectoral rules (advertising, electronic commerce, food, financial, game, etc.).
2. Establishment in the Spanish Unfair Competition Law of the minimum requirements for self- and co- regulation and their ADRs to enjoy legal and administrative recognition.
3. Recognition of legal and administrative effects to the decisions (Copy advice or prior advice, Jury's resolutions, etc.) to control the actions of self-regulatory bodies legally recognized.

4. Signature of many co-regulatory agreements of the Spanish Advertising SRO with the various competent authorities in advertising

SPANISH ADVERTISING SRO DATA



As can be seen easily, the development of advertising self-regulation activity in Spain (and its success: more previous control from year to year and low rate of complaints) is the result of the effort to establish a voluntary system effective and homologable by authorities and (i) the establishment of general and sectoral self-regulatory codes; (ii) the signing of co-regulation agreements with the Administration to ensure legislation compliance; (iii) co-regulation sectoral Codes of Conduct developed and implemented with authorities.

We can identify two stages:

First stage (1999-2000): AUTOCONTROL makes an effort to establish a voluntary system effective and homologable by authorities

Second stage (2000- today): Autocontrol develops advertising self-regulation in Spain following three models:

- a.- General Code of Conduct and Sectoral Codes of Conduct (pure self-regulation)
- b.- Agreements between AUTOCONTROL and national authorities to ensure compliance with legal standards in specific sectors (there are no codes of conduct, just laws)
- c.- Co-regulation Sectoral Codes of Conduct developed with industry/ authorities and implemented by AUTOCONTROL under Authorities supervision.

Milestones in the second stage of the development of advertising self- and co- regulation in Spain:

- 1999: Agreement with the National Consumer Institute (INC): 25% of the Jury members are appointed by the National Consumer Institute.
- 2000: Spanish Government notifies to the DG SANCO that AUTOCONTROL complies with Recommendation 257/98 (EU). AUTOCONTROL is included by the EC in Network for the extra-judicial settlement of consumer disputes (EEJ-Net)
- 2002 Agreement regarding Audiovisual Advertising signed by AUTOCONTROL- Spanish Advertisers Association (AEA)- TV channels
- Code of Good Practices for the Promotion of Medicines (FARMAINDUSTRIA)
- 2003 Advertising Co-regulation Agreement AUTOCONTROL, Ministry of Industry (Audiovisual Authority), TV channels and AEA (Spanish Association of Advertisers) to ensure compliance with TV laws.
- 2004 Agreement with the National Consumer Institute (INC) for digital advertising and e-commerce self-regulation (Confianza On Line Code of Conduct).
- 2005 Advertising Co-regulation Agreement AUTOCONTROL, Ministry of Health (Food advertising authority) and Spanish Federation of Food and Beverages Industry (FIAB) to develop and implement the **Spanish Co-Regulating Code for Food Advertising Aimed at Children (PAOS Code)**
- Videogames Advertising Code of Conduct (ADESE)
- 2006 Agreement with Red.es (Public entity to promote digital society development) to designate AUTOCONTROL ADR to resolve “.es” domain name’s disputes.
Agreement with Andalucía Audiovisual Council (CAA, Audiovisual regional authority).
Agreement with Cataluña Audiovisual Council (CAC, Audiovisual regional authority).
- 2007 Agreement with Secretariat General for Equality Policies in the Government. (to ensure compliance with Gender Portrayal laws).
- OTC’s advertising Code of Conduct (ANEFP)
- 2008 Collaboration agreement with the Spanish Agency for Food Safety and Nutrition (AESAN): to ensure Implementation and compliance with EU regulation no. 1924/2006 of the European Parliament and the Council of 20/12/2006 concerning health claims.
- Spirits Advertising Code of Conduct (FEBE)
Wine Advertising Code of Conduct (FEV)
- 2009 Recognition of advertising self-regulation under Unfair Commercial Practices Act. The act defines the requirements for Self-regulation to be recognize
- Beers Advertising Code of Conduct (Cerveceros de España)
- Advertising Co-regulation Agreement AUTOCONTROL and Ministry of Environment + **Code of commercial communications with environmental claims (Automotive & energy sectors)**
- 2010 Recognition of advertising self-regulation of credit institutions under Circular 6/2010 of the Bank of Spain (BDE). Homologation of AUTOCONTROL by the Bank of Spain (as SRO that complies with requirements established under Circular 6/2010) authorized to prior control financial advertising. AUTOCONTROL decisions will be taken in account by Bank of Spain.
Recognition of advertising self-regulation under Food and Nutrition Act, when. The law asks for a co-regulation code homologated by the Government and controlled by a self-regulatory body that complies with Unfair Commercial practices Act. If not, the law authorizes the government to make a reglement in this field.

Advertising Co-regulation Agreement AUTOCONTROL, National Consumer Affairs Institute (INC) and Spanish Toymakers Association (AEFJ) + [Toys Advertising Code of Conduct \(Updated\)](#)

2011 Gambling Act asks for a co-regulation scheme to control gambling advertising when it is applied by a SRO that complies with Unfair Commercial practices act. Autocontrol decisions will be taken in account by Gambling Authorities.

[Co-regulation Agreement AUTOCONTROL and Gambling General Directorate \(Gambling Authority\) followed by 2012 Gambling Advertising Code of conduct \(Gambling Sector and Media\) Code of Advertising of Internet Dating Services](#)

3. Please share your knowledge, ideas and opinions about how best to ensure that voluntarism receives its appropriate share of attention in the policy-making toolbox. How best can we address the grey area of self-regulation that are not quite as purely autonomous as the wording in the on better lawmaking implies, **2003 Inter-institutional Agreement** and yet has none of the characteristics required in that Agreement for a system to qualify as co-regulation, and how best to give a new momentum to self- and co-regulation and open voluntarism to ensure that they are duly considered and practiced when they appear to be the most efficient route to the societal benefits in point. This does NOT mean voluntarism should substitute for lawmaking and regulation in any systematic manner, rather making the best possible use of voluntarism is critical to a highly effective policy approach. Please use the text box below or upload any additional relevant material.

1.- The legal recognition of self- and co- regulation is the first way to ensure that voluntarism receives its appropriate share of attention in the policy-making toolbox. This legal recognition is a good reminder for policy-makers about the voluntarism option. This legal recognition should be made in a general law as well as in those sectoral laws regulating areas in which there is a special interest in promoting the self- and co- regulation development.

For example: In Spain self- and co- regulation is recognized, regulated and promoted in the Spanish Unfair Competition Law implementing the Unfair Commercial Practices Directive (Chapter V- Codes of conduct) as well as in several sectoral laws (i.e. General Law on Advertising, Services of the Information Society Act, Gambling regulating Act, etc.). Probably this extended legal recognition of self- and co- regulation in Spanish legislation is one of the main reasons of the extended development of self- and co- regulation in Spain, especially in the advertising sector.

2.- Another way to ensure that voluntarism receives its appropriate share of attention in the policy-making toolbox is to recognize legal or administrative effects to the self- and co-regulation activities (of course without prejudice to the judicial or administrative authorities). This is at the same time an excellent way to incentive industry self- and co-regulation.

For example: In Spain different Acts recognize legal and administrative effects to advertising self- and co- regulation control activities:

-Pre-clearance and copy advice: In case of administrative action of the authority sets the "presumption of good faith" of the advertiser or media that broadcasted an ad that had surpassed the previous control system of self-regulation (when the SRO has been previously homologated –because complies with Unfair commercial practices act). This "prior" control does not prevent "a posteriori" Administrative control that would always prevail (and that it is particularly useful for setting standards of statutory interpretation)

-Alternative Dispute Resolution Bodies: Claims for breach of a code of conduct should be submitted to the ADR body of the self-regulation system before claiming before the courts or the administration (provided that this self-regulatory body is previously recognized/homologated). It is important to remember that self-regulation claims resolution system is free for consumers. If within a short period of time (15 days) the self-regulatory system has not issued a resolution, or this has been breached or it is unsatisfactory to the complainant, then the complainant could claim before the judicial or administrative bodies.