Annex 5:
Reports on possible co-operative regulatory systems

Study on Co-Regulation Measures in the Media Sector

Study for the European Commission, Directorate Information Society and Media
Unit A1 Audiovisual and Media Policies
Tender DG EAC 03/04
Contract No.: 2004-5091/001-001 DAVBST

June 2006
These reports are part of the research that was done for the study on “Co-Regulation Measures in the Media Sector”. The Study is commissioned by the European Commission, Directorate Information Society, Unit A1 Audiovisual and Media Policies, Digital Rights, Task Force on Coordination of Media Affairs (Tender No. DG EAC 03/04).

The above mentioned study aims at providing a complete picture of co-regulatory measures taken to date in the media sector in all 25 Member States and in three non-EU-countries, as well as of the research already done. The study will especially indicate the areas in which these measures mainly apply, their effects, and their consistency with public interest objectives. In this context, the study will examine how best to ensure that the development of national co- and self-regulatory models does not disturb the functioning of the single market by re-fragmenting the markets.

Please note: These second country reports are intended to give a detailed description of cooperative regulatory systems in the different media sectors in the EU-member states. Cooperative regulation is meant as a combination of non-state regulation and state regulation in such a way that a non-state regulatory system links up with state regulation. Such combination may be a co-operation of state and non-state organisations, an accreditation of a non-state regulatory organisation by the state, the incorporation of non-state regulation into state regulation, a ratification/taking-over of decision of the non-state organisation by the state, etc. Thus, it is not necessary that organisations as such are found on both, the state and the non-state level. (For more information on the definition on co-regulation in the meaning of this study, see the interim report). The second country reports provided material for the next steps of the research. The conclusion given in this report cannot be seen as a decision of the contractor, on whether the respective system is a co-regulatory system in the meaning of the study or not.

More information on the study can be found at http://co-reg.hans-bredow-institut.de

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If you have any questions or comments, feel free to contact the contractor of the study

Hans-Bredow-Institute for media research (HBI)
Heimhuder Str. 21
D- 20148 Hamburg
info@hans-bredow-institut.de / http://www.hans-bredow-institut.de

or the sub-contractor, who is responsible for coordinating and organizing the research in the EU Member States:

Institute of European Media Law (EMR)
Nell-Breuning-Allee 6
D-66115 Saarbrücken
emr@emr-sb.de / http://www.emr-sb.de
Table of Contents

1. List of correspondents 4

2. Request and Questionnaire 7

3. Reports on possible co-operative regulatory systems 12
   3.1. Austria 12
   3.2. Belgium 31
   3.3. Cyprus 78
   3.4. Czech Republic 125
   3.5. Denmark 170
   3.6. Finland 200
   3.7. France 224
   3.8. Germany 249
   3.9. Greece 297
   3.10. Hungary 327
   3.11. Ireland 359
   3.12. Italy 398
   3.13. Lithuania 451
   3.14. Luxembourg 489
   3.15. Netherlands 505
   3.16. Portugal 541
   3.17. Slovenia 576
   3.18. Spain 602
   3.19. Sweden 662
   3.20. United Kingdom 691

4. Country Reports Non-EU-Countries 747
   4.1. Australia 747
   4.2. Malaysia 763
   4.3. South Africa 847
1. LIST OF CORRESPONDENTS

Austria
Dr. Robert Rittler
Freshfields Bruckhaus Deringer
Wien

Belgium
Prof. Dr. Francois Jongen
Université de Louvain
Chastre
Prof. Dr. Dirk Voorhoof
Ann Braeckman
Rijksuniversiteit Gent
Gent

Cyprus
Dr. Christophoros Christophorou
Nicosia

Czech Republic
JUDr. Vladimír Kroupa
Attorney at Law
Praha
Milan Šmíd, Ph.D.
Charles University Prague - The School of Social Sciences
Praha

Denmark
Soeren Sandfeld Jacobsen, Ph.D.
Copenhagen Business School – Law Department
Frederiksberg

Finland
Olli Ylönen
Prof. Kaarle Nordenstreng
Ari Heinonen
University of Tampere
Tampere

France
Dr. Jur. (France) Pascal Kamina, LL.M., Ph.D. (Cambridge)
Avocat à la Cour
Paris
<table>
<thead>
<tr>
<th>Country</th>
<th>Co-Regulation Measures in the Media Sector: Annex 5: Coutnry reports on possible co-regulatory systems</th>
</tr>
</thead>
</table>
| Germany  | Dr. Wolfgang Schulz  
Hans-Bredow-Institut für Medienforschung  
Hamburg  
Alexander Scheuer  
Institut für Europäisches Medienrecht  
Saarbrücken  
Thorsten Held  
Hans-Bredow-Institut für Medienforschung  
Hamburg  
Kathrin Berger  
Institut für Europäisches Medienrecht  
Saarbrücken |
| Greece   | Dr. Petros Iosifidis  
City University London  
London |
| Hungary  | Dr. Márk Lengyel  
Körmendy-Ékes and Lengyel Consulting  
Budapest |
| Ireland  | Marie McGonagle, B.A. (Belfast), LL.B., LL.M. (NUI)  
National University of Ireland  
Galway |
| Italy    | Prof. Roberto Mastroianni  
Università di Naples  
Naples |
| Lithuania| Gediminas Pranevicius  
Vilnius  
Laimonas Skibarka  
Vilnius |
| Luxembourg| Jacques Neuen  
Luxembourg |
| Netherlands| Marcel Betzel, LL.M.  
Commissariaat voor de Media  
Hilversum |
| Portugal | Carlos Landim  
Instituto da Comunicação Social (Institute for the Media)  
Lisboa |
<table>
<thead>
<tr>
<th>Country</th>
<th>Name</th>
<th>Affiliation</th>
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<tbody>
<tr>
<td>Slovenia</td>
<td>Brankica Petkovic</td>
<td>Mirovni Institut - Peace Institute</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Ljubljana</td>
</tr>
<tr>
<td>Spain</td>
<td>Prof. Dr. Julian Rodriguez Pardo</td>
<td>Universidad de Extremadura</td>
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<td>Badajoz</td>
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<tr>
<td>Sweden</td>
<td>Michael Plogell</td>
<td>Erik Ullberg</td>
</tr>
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<td></td>
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<td>Wistrand Advokatbyrå</td>
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<td></td>
<td></td>
<td>Göteborg</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Prof. Lorna M. Woods, LL.B (Leeds), LLM (Edinburgh), Solicitor</td>
<td>University of Essex</td>
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<td>Colchester</td>
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<td>Australia</td>
<td>John Corker</td>
<td>National Pro Bono Resource Centre</td>
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<td>Sydney</td>
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<tr>
<td>Canada</td>
<td>Marc Raboy</td>
<td>Bram Dov Abramson</td>
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<td>McGill University</td>
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<td>Malaysia</td>
<td>Zalina Abdul Halim</td>
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<td>Rizal Zalim</td>
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<tr>
<td>South Africa</td>
<td>Prof. Pieter J. Fourie</td>
<td>David Wigston</td>
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<td>University of South Africa</td>
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2. REQUEST AND QUESTIONNAIRE

General remarks
This second country report is intended to give a detailed description of co-operative regulatory systems in the different media sectors in your country, co-operative regulation in the meaning of a combination of non-state regulation and state regulation in such a way that a non-state regulatory system links up with state regulation. Such combination may be a co-operation of state and non-state organisations, an accreditation of a non-state regulatory organisation by the state, the incorporation of non-state regulation into state regulation, a ratification/taking-over of decision of the non-state organisation by the state, etc. Thus, it is not necessary that organisations as such are found on both the state and on the non-state level.

In the covering note, we give one or several examples in which media sector according to our understanding such a co-operative system might be found. Please note, that these examples are not meant to be exhaustive: If you are of the opinion that in your country further interesting forms of co-operative regulation in the above mentioned broad sense exist do not hesitate to describe these systems as well.

Further more, we would like to highlight two aspects of the required description in part I of the report: We would be very grateful, if you could pay special attention to the time aspect of the control of content (control of advertising content or control of program items with view to youth protection, where applicable), i.e. if it is a matter of ex-post or ex-ante control. Another important part of your take will be to pinpoint which part of the system has what sort of tasks, takes what decision, etc.

The required presentations within this country report are intended to be threefold:

- For each system, the first part shall consist of a detailed report of the co-operative regulatory system at stake, written as continuous text.

- The second part shall describe some leading cases in the respective areas, dealt with by the described co-operative regulatory system and being particularly suitable for the illustration of the functioning of the system or its shortcomings. Those decisions shall be of particular interest that were reviewed by a supervisory authority (within the system or outside the system) or a court.

- The third part will contain an assessment of the co-operative systems according to the criteria which have been elaborated in order to determine which types of regulation are meant to be co-regulation for the purposes of this study.

Please use the attached structure. This regards the content of the required report as well as the formatting/numbering.
Co-operative Regulatory Systems in [COUNTRY]

I. Co-operative Regulatory Systems in the [MEDIA] sector (e.g. Press, Television, etc.) No. 1

1. Part I: The co-operative regulatory system
In this part, we would like to ask you to give a detailed overview of the specific regulatory system, covering in particular the following aspects:

a) Development of the regulatory system
Beginning of the co-operation (date), societal background, developments. In this context, the reasons for the introduction of such co-operative regulatory system are of great interest, also, in how far the system has been a novelty in the sense that it introduced regulation to an area formerly left unregulated, for example. Particularly possible modifications/improvements of the system are of special interest, and the incentives for those modifications (evaluation reports, etc.).

b) Subject-matter of the regulatory system
- Objectives of the regulation (e.g. youth protection from offensive Internet content, such as graphic violence...)
- Which processes, decisions, etc. are regulated?

c) Basis of the co-operation
- Legal basis
If there is a legal basis, please name the law, the relevant provisions, secondary regulation, etc.
  - Other form of regulatory basis
If the system bases on another form of regulation, please name the regulation, possibly with a short explanation of this sort of regulation, the relevant provisions, etc.
  - Agreement/contract as basis of the co-operation
If so, please explain, what sort of agreement it is, e.g. is it an agreement under private law or public law, and quote the relevant provisions, etc.

d) Institutions involved in the system, especially their funding and management
- Institutions involved, their respective tasks within the system, the provisions relating to their assessing of content, if possible please name the kind of legal entity of the institution (e.g. part of the public administration, legal person of the private law etc.)
- Legal nature of the means of action of the institutions involved, i.e. are the means part of the public or the private law, etc.
- Funding of the system (e.g. by fees, by the industry, funding by the state) – all forms of making available of resources (including services as e.g. hosting of the office, providing other assistance) and/or financial means, etc.

- **e) Functioning of the system**
  - Rights and duties of the addressees of the regulation, who is concerned by the regulation
  - Participation: mandatory or voluntary?
  - Involved decision-making bodies: Members, nomination, funding, independence, tradition
  - Decision-making process, particularly majorities in the decision-making bodies, right to veto, discretionary power of the decision-making body
  - Complaint procedures
  - (means of) sanctions
  - Transparency of decision making, complaint procedures, i.e. are the decisions published in any way etc.
  - Guidance, awareness: Are guidelines or similar material provided for (i) the involved persons, (ii) the public, consumers, users

- **f) Supervision of the system**
  - Supervisory instances/courts, powers, functioning of the supervision, in specific are there any "fall back" provisions, any possibilities to pend a "case" (infringement) elsewhere (courts etc.) in case of failure of the existent system etc.
  - Sunset clauses, evaluation clauses

- **g) Impact assessment**
  - Evaluation reports, annual reports
  - Number of cases/complaints, number of cases/complaints upheld, delay for handling cases/complaints
  - Official comments, regarding the efficiency of the systems (by the side of the protected stakeholders, the involved authorities, the signers of the codes of conduct, etc);
  - Scientific evaluation or estimation
  - Please note, that at this stage of the study, we intend to collect information on material dealing with the efficiency and impact of the system at stake, an in-depth investigation of such material will be compiled within the third step of the study. Thus, it is
absolutely sufficient, if you restrict yourself to giving a short description of what exists.

2. Part II: Leading cases
Here, we would like to ask you to elaborate on some cases that have been dealt with within the co-operative system. Provided that there are cases which have led to decisions both by the non-state regulatory part and the state regulatory part, these would seem to be of paramount importance. Overall, cases referred to should enable to provide a picture of the conditions under which the system works. Please take into account all kind of "cases" not only those who are similar to a court case

It could also be worth mentioning cases that were dealt with - either by state authorities or by non-state regulatory institutions - before the current system was put in place. Such examples should serve to understand the approaches taken today, in particular what makes the difference in respect of the “old” manner.

3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study
As the study aims to find out ways to optimize the regulation of media to achieve specific goals (e.g. protection of minors, recognisability and separation of advertising as well as its content) only conceptional approaches for achieving public policy goals are covered. Case-by-case strategies or attempts to meet individual interests are excluded. Furthermore, the study primarily aims to provide lawmakers on European level and within the Member States with knowledge for better regulation. Therefore only concepts with a link to the legal framework should be covered.

In this sense, co-regulation is a combination of non-state regulation and state regulation in such a way that a non-state regulatory system is connected with state regulation. The criteria to define the scope of co-regulation that is of interest for this study are relating firstly to the non-state regulatory system, and, secondly, to the link between this non-state regulatory system and state regulation.

a) The non-state regulatory part of the system
For the purpose of this study, non-state-regulatory systems that are part of a co-regulatory system include:

- The setting up of specific organisations, rules or processes
- to influence decisions of persons or decisions of or within organisations
- as long as the setting up is conducted by or within the organisations or parts of society whose members are addressees of the regulation
b) The link between the non-state part and state regulation
In a co-regulatory system, the link between a non-state-regulatory system and state regulation meets the following criteria:

- The system is established to achieve public policy goals targeted to social processes
- There is a legal basis for the non-state regulatory system (however, it is not necessary that the use of non-state regulation is mentioned in the laws),
- The state leaves discretionary power to a non-state regulatory system
- The state uses regulatory resources to influence the non-state regulatory system (power, publicity, money etc.)

Please, classify the described system according to these criteria. For further explanation of these criteria, including non-matching cases, see the presentation of the preliminary results of the study, available at http://www.hans-bredow-institut.de/forschung/recht/co-reg/.

Conclusion
Please, would you be so kind to finish your report with a short conclusion, if to your opinion, the regulatory system described is a co-regulatory system in the meaning of this study.

II. Co-operative Regulatory Systems in the [MEDIA] sector (e.g. Film, Internet, etc.) No. 2
1. ...

2. ...

3. ...

III. ... No. 3
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3. REPORTS ON POSSIBLE CO-OPERATIVE REGULATORY SYSTEMS

3.1. Austria

I. Co-operative Regulatory Systems in the film sector

1. Part I: The co-operative regulatory system – Commission for the Protection of Minors against improper Media Content

a) Development of the regulatory system

The Commission for the Protection of Minors against improper Film Contents (Jugendfilmkommission) was constituted in 1948. The operators of cinemas wished to have such a board to create a uniform legal framework in Austria. Its purpose is to advise the Federal Minister of Education, Science and Culture (the Ministry has had varying names through the decades) regarding the protection of minors against harmful contents of films. In this context it is important that the competence of lawmaking regarding the protection of minors lies with the provinces and therefore the Federal Minister is not responsible for these matters. The Federation did not want to change the Federal Constitution to make the Federation competent, because there was the danger that the allied states France, United Kingdom, USA and the USSR could regard a Federal authority for cinema films as a kind of “censorship of publications board”.

The establishment of the Commission for the Protection of Minors against improper Film Contents was originally meant to be temporary but turned out to be stable. Through the decades some attempts were made to give the Commission a legal basis. There was the option to transfer the competence to the Federation and to issue, on this basis, a Federal law on the Commission. The other option was that the provinces conclude an agreement according to Article 15a of the Federal Constitution. Such a public law agreement would be binding amongst the provinces. The drawback would have been that the provinces had to bear the costs and that giving decisions of such a commission binding effect would be in such a case difficult, too. This is why the situation has remained overall the same since 1948.

In 2001 the Commission’s competence was extended to multi-media works like DVDs and CD-ROMs. Its name was changed into Commission for the Protection of Minors against
improper Media Contents (Jugendmedienkommission; in the following “Commission”). Only two DVDs have been assessed so far.

Since 2001 the Austrian Broadcasting Foundation (Österreichischer Rundfunk, ORF) has some of its films assessed by the Commission for the minimum age requirements. The Commission involves representatives of those parts of the civil society that are interested in the matters that the Commission deals with. Film distributors are involved as well and are generally interested in making business in an ethically correct way. This is an important precondition of the acceptance of the Commission’s recommendations by the film distributors.

b) Subject-matter of the regulatory system

The system has the objective to lay down rules on the minimum age of minors who are allowed to watch a certain film in order to protect minors from harm. Pornographic films are not subject of assessment. For them the statutory minimum age of 18 years is applicable without exemptions. The other important objective is to give recommendations to the public regarding the value of films for minors. The Commission regards itself in this respect more as a service provider to parents, educationists and minors, and less as a regulatory body. The Commission’s competence was extended to multi-media works like DVDs and CD-ROMs in 2001, but it has not exercised this competence yet.

The competence of lawmaking regarding the protection of minors lies with the provinces. This is why recommendations of the Commission are not binding. The panels assess about 360 films yearly, half of which full-length films and half of them trailers. Provincial authorities regularly follow their recommendations, exceptions do occur, but are rare.

c) Basis of the co-operation

There is no legal basis of the Commission. The instructions of the Federal Minister to create and organise the Commission have a purely internal character. This is because, as already has been mentioned above, the Federation lacks competence to regulate the protection of minors against improper media content by law. The provincial laws on cinemas regularly contain a principal restriction of access to films for persons under 16 or 18 years of age. This minimum age can be lowered by the authority on application of the distributor. Such a decision can be substituted, according to the law, by decisions of the Commission.
In Austria’s largest province, Lower Austria (Niederösterreich), which is referred to here for exemplary purposes, the public presentation of a film requires a permit (Bewilligung) (see § 2 Cinema Act of Lower Austria, Official Journal of Lower Austria, structure number 7060-0). It is not allowed to show films to minors under the age of 16 without prior presentation to the Provincial Government and a subsequent permission by Government (§ 14 par. 1 and 2 Cinema Act of Lower Austria). Such a permit may be granted if the film does not harm the physical, mental, psychological, moral and religious development of the minors of a certain age. Lower Austria distinguishes, unlike other provinces, only three stages of age: children and juveniles of every age, children older than 10 and juveniles, and juveniles of 14 years of age or older (§ 14 par. 4 Cinema Act of Lower Austria). The presentation to the Provincial Government may be substituted by the expert opinion of the Jugendmedienkommission or another such board consisting of representatives of the provinces (§ 14 par. 5 Cinema Act of Lower Austria). This is regularly the case as it is in the other provinces with the exception of Vienna. The Government of Lower Austria issues a certificate of approval (Zulassungsbescheinigung) to the cinema operator (§ 15 Cinema Act of Lower Austria).

The legal situation on Vienna is similar, but the mode of operation differs significantly. According to the Vienna Law on Cinemas (Wiener Kinogesetz; Law published in Official Journal of Vienna No. 1955/18, last amended by the Official Journal of Vienna No. 2004/8) the public presentation of a film requires a license (Kinokonzession). Minors under the age of 16 are not admitted to cinemas (§ 10 par. 1 Vienna Law on Cinemas). Par. 2 of that provision provides for administrative exceptions for a film that does not detriment minors. Such exceptions may be granted by the municipal authority (Magistrat) for specific ages of minors, after having heard the Vienna Board for Film Assessment (Filmbeirat der Stadt Wien). The Board consists of one policeman or -woman, one member of the municipal school authority, one expert for education science, one expert for youth care, one expert for national education, one representative of parents, one of the minors, two representatives of the film industry and, at the maximum, three more persons (§ 11 par. 2 Vienna Law on Cinemas). The municipal authority has to allow the admittance of people younger than 16 years “if the films’ value justifies such an exemption and if no detrimental effect on these persons has to be feared of” (§ 10 par. 2 Vienna Law on Cinemas). The authority may allow the admittance of minors for certain age brackets, which are not specified. The same standard applies for the Vienna Board.
for Film Assessment. The Vienna Board is actually effective. It regularly sits jointly with the federal Jugendmedienkommission for the film assessments.

§ 11 par. 5 Vienna Law on Cinemas provides as an alternative to the recommendation of the Vienna Board for Film Assessment the decision of “other Austrian boards or commissions, members of which were appointed by the Government of Vienna”. The decisions of such boards or commissions can be declared binding by an ordinance of the Government of Vienna if they apply similar rules as the Vienna Board for Film Assessment would apply. This is the legal link of the municipal authority of Vienna to the Commission for the Protection of Minors against improper Media Contents. Since the Vienna Board for Film Assessment makes its own assessments, this way of decision-making is never used.

The minimum age that applies to a specific film must be displayed at the entrance of the counter hall and in the counter hall. Announcements of films must not include anything that misleads as to the required minimum age of the viewers (§ 13 Vienna Law on Cinemas). The decisions of the municipal authority are executed by the municipal authority itself and by the police (§ 18 par. 1 Vienna Law on Cinemas). Non-compliance with the Vienna Law on Cinemas and ordinances or decisions that are based on that law may be fined with up to 7,000 € (§ 16 par. 1 Vienna Law on Cinemas).

d) Institutions involved in the system

The recommendations of the Commission are of private law nature. This follows from the fact that neither the Commission nor the Federal Minister has the competence to act by public law means [by, for example, issuing a decree (Bescheid) or an ordinance (Verordnung)] in this field of the law.

The provincial authorities that enforce the provincial laws on cinema, by either following or not the recommendations of the Commission, act by the means of the public law. This has the consequence that legal protection is available easily and cost-efficient according to the General Administrative Procedure Code (Allgemeines Verwaltungsverfahrensgesetz) respectively the Administrative Penal Code (Verwaltungsstrafgesetz). The chains of remedies end at the Constitutional Court and the Administrative Court.

The Commission is partly funded by the Federation and partly by the film distributors. The Federation pays for general costs (hosting of the office; public relations, including the website and printed information) and the officials that are involved in the matters of the Commission. The department 36 of the Vienna Magistrate plans and organises the joint sessions of the
Commission with the Vienna Board for Film Assessment. Film distributors have to pay for each submitted film according to its length (€ 0.065 per meter). The distributors are not legally obliged to apply for the assessment of their films. Those distributors who are neither interested in an age limit below 16 respectively 18 years of age nor in a positive recommendation do actually not apply. The other distributors appreciate the “one-stop-shop-principle” that the system provides for. An assessment of the Commission substitutes in practice the assessment in the provinces and therefore saves money. The provinces do not contribute to the financing of the Commission. The provinces bear the costs of the enforcement of their laws on the cinemas.

e) Functioning of the system

Addressees of the Commission’s recommendation on the minimum age are the provincial authorities, which have the competence to regulate the protection of minors. These recommendations are not binding, but often followed in practice. There were only a few cases in which the authorities deviated from recommendations. It may be assumed that such deviations were caused by lobbying of the film distributors involved.

Addressees of the recommendation regarding the quality of the films are parents, educationists and minors.

The participation of the film distributors is voluntary. Under I.1.d) above has been explained how distributors can gain advantage from an application with the Commission.

The Commission is organised, according to its code of procedure, as follows:

**The Executive Board** *(Kuratorium)* consists of thirteen members. The Board advises the Federal Minister regarding problems of the protection of the youth against improper media contents. It has not convened within the last two years. The chairperson of the Executive Board is, according to the rules of procedure, the Federal Minister. The Executive Board is not engaged in the assessment of media products.

**The Panels’** *(Prüfausschüsse)* task is to give recommendations on the minimum age of the viewers to the provincial authorities and recommendations regarding the quality of the films to the public. There are eight panels, each consisting of one representative of the provinces, three other members and one chairperson.

**The Manager** *(Geschäftsführer)* of the Commission must be an official of the Federal Ministry. Currently Mr. Michael Kluger holds this position.
The Appellate Body (Appellationsausschuss) consists of the chairpersons of all eight panels and two representatives of the provinces. The latter are experts for protection of minors. Their participation is not compulsory if media products are assessed for which provincial legal provisions are not applicable. The Appellate Body reviews the recommendations of the panels upon application. It can decide if at least five members, one of which is a representative of the provinces, are present in the session. The Appellate Body decides by the majority of the votes.

Appointment of the Members of the Commission
The Members of the Commission are appointed by the Federal Minister of Education, Science and Culture. They are media experts, journalists, representatives of the Trade Associations and film distributors, experts of education science, adepts in social work, housewives and officials of the Federal Ministry. They may often represent organisations of parents or minors, religious communities, churches, or provinces. Foreign experts are admitted to the Executive Board as well. Four provinces, Burgenland, Lower Austria, Upper Austria and Styria have nominated members to the panels. Until 2001 the code of procedure provided for rights to give a proposal for the appointment to churches, interest groups of parents, organisations of the youth and the Trade Associations that are members of the Austrian Chamber of Commerce (Wirtschaftskammer Österreich). The Federal Minister followed these proposals regularly. The valid code of procedure does not contain such rights to give a proposal. Nevertheless, there are still members of the Commission who were appointed on the basis of the old rules of procedure. The composition of the Commission changes relatively slowly over the years. The register of members is not publicly available.

The members of the Commission being officials of the Federal Ministry or of a province are bound by instructions of the Federal Minister and other superiors. Since decisions have to be issued rapidly and take a lot of expertise, instructions are practically useless and never given. The other members are not bound by any instruction. This does not mean that they have a status similar to a judge, because there is no guarantee that they will be appointed again in the next period.

The Standards of the Assessment
The criteria for the assessment of a film are

- its length,
- the psychological and emotional development of the minors at a certain age,
- the intellectual development,
- the ethical and moral development,
the film's harmful impacts on religious feelings and
its detrimental effects on the democratic and civil attitudes of the viewers.
The panels not only recommend a certain minimum age as appropriate for viewers but can also positively recommend a film. There are four tiers of recommendation:

- Strong recommendation,
- recommendation,
- recommendation as being acceptable.
- Other films will be explicitly not recommended.

The Commission has issued guidelines for the recommendation on the minimum age. Guidelines on the recommendation regarding the quality of the films are currently being drafted.
The Commission also has the competence to evaluate the contents of multi-media works like DVDs and CD-ROMs. It has, however, only two DVDs assessed so far.

Decisions and their Review
The sessions of the panels are closed, but all members of the other panels are admitted to sessions of other panels. The members of the panel vote publicly and decide by majority vote. In case that no majority can be found (e.g. only four members vote or are present) the chairperson’s vote decides. The recommendations of the panels are made available at www.bmbwk.gv.at/app/jmk/search.xml. The reports contain a short description of the plot. The reasons for the recommendation as to the minimum age of the viewers and as to the quality are very short, mostly one sentence only.

Applicants who are not satisfied with a recommendation of a panel of the Commission can apply for a review by the Appellate Body. Besides of the film distributor, the Appellate Body reviews a panel’s recommendation also on the application of the Commission’s manager or of one of the seven chairpersons of the panels. Parents or interest group do not have the right to appeal. The period for appeal is two weeks from the publication in the Commission’s weekly report. Such proceedings are rare (not more often than three times per year) and regularly finished within a few days. The Commission has no power of sanctions.

f) Supervision of the system

Recommendations of the panels can be reviewed by the Appellate Body, as has been mentioned above. It can be argued that the applicant concludes a contract with either the
Federation or the members of the panel with the purpose that the panel applies its rules to the submitted film. It is therefore, in principle, possible to file a lawsuit against the Federation if a recommendation was not given *bona fide*. This is, however, very unlikely and such a case has never been brought before a court.

It goes without saying that the Federal Minister has supervisory powers over the officials of his or her Ministry. He or she can close the operation of the Commission at his or her will at any time.

The enforcement of the panels’ recommendations, after having been adopted by provincial law, is supervised by the provincial authorities and, in the highest instance, by the Administrative Court and the Constitutional Court. This is why there cannot be a lack of legal protection of the film distributors, the minors or their parents.

*g) Impact assessment*

The Commission issues statistics and summaries of all assessment reports for all members. There exists no evaluation report on the effectiveness of the Commission’s work. There is, however, enough evidence that the recommendations on the minimum age are very effective. The effectiveness of the provincial regulations is unclear. The only important study on the Commission in recent years was published by Michael Latzer, Natascha Just, Florian Saurwein and Peter Slominski (“Selbst- und Ko-Regulierung im Mediamatiksektor”, published at Westdeutscher Verlag, Wiesbaden, 2002).

It is possible that the positive recommendations of the Commission to the public have a positive impact on the number of viewers. There is, however, no evidence that this is the case and it is likely that other factors, like film reviews, marketing and advertising, have a stronger influence on the number of viewers.

The panels assess about 360 films yearly, half of which are trailers and half of which are full-length films. Provincial authorities often follow their recommendations but not all provinces do so without exception.

2. Part II: Leading Cases

The results of the assessment are published on the website www.bmbwk.gv.at/app/jmk/search.xml. The reports contain a short description of the plot. The reasons for the recommendation as to the minimum age of the viewers and as to the quality are very short,
mostly one sentence only. There have been no lawsuits against recommendations of the Commission so far.

It is impossible to report on leading cases because the recommendations are generally accepted widely. There are sometimes complaints by the film distributors on recommendations on the minimum age if they are set, in their opinion, too high. Recommendations of the Appellate Body are generally accepted in practice. Once in a while parents complain that the minimum age is set too high, because they would have liked to take their children to the pictures. The transformation of recommendations into provincial regulations (by decree or ordinance) is a matter of routine.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Commission for minor protection

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
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<tr>
<td>The Commission issues standards for age limits and recommendations of films to the public.</td>
<td></td>
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<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
<td></td>
</tr>
<tr>
<td>Panels do influence decisions of the provincial authorities.</td>
<td>The Commission also advises the Federal Minister regarding problems of the protection of minors against improper content of the media.</td>
<td></td>
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</tr>
</tbody>
</table>

1 Not applicable for Vienna.
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

<table>
<thead>
<tr>
<th>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</th>
<th>Measures by third parties (e.g. NGOs)</th>
<th>The range of possible subjects of non-state action has to be limited to make the definition workable.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Commission only involves persons representing the addressees (provincial authority and film distributors) but also has members who are state officials. The Commission is a mixed state/non-state part of the system.</td>
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</table>

### Link between the non-state-regulatory system and state regulation

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
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<tr>
<td>The system is established to protect the youth from harmful media content, but also to give guidance which films are</td>
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<td>recommendable for minors.</td>
<td>There is a legal basis for the non-state regulatory system</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
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<td>--------------------------</td>
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<tr>
<td>All forms of interaction would come to the fore.</td>
<td>There is no legal basis for the mixed state-non-state part of the system, but there are links that allow for the substitution of recommendations by provincial boards by recommendations of the Commission.</td>
<td>Traditional regulation</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>The Commission has no legal obligations but its recommendations will only be accepted as long as they meet the provincial legal requirements. Even in this sense the Commission has a certain discretionary power.</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
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<td></td>
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<td>actors; pure incorporation of non-state rules does not promise innovation.</td>
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<td></td>
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<tr>
<td>The Federation does, the provinces do not.</td>
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</tr>
</tbody>
</table>
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

The non-state parts of the system are the members of the panels that are neither officials of the Federal Ministry of Education, Science and Culture nor officials of the provinces. They are not bound by any instructions while voting in the panels’ session. There are, however, in the Commission (Administrative Board, Panels, Appellate Body) a considerable proportion of state’s officials. They are bound by instructions of senior officials (Article 20 par. 1 of the Federal Constitution), even though this right has never been exercised for decisions of the Commission, as far as can be seen. The Commission is organised by the Federal Ministry, receives administrative support exclusively from the Ministry and is financed to a large part by the Ministry. In addition, some of these interest groups involved are not “full” private persons. Churches and Chambers are legal persons according to public law in Austria, which does not, on the other hand, imply that they are part of the state. This is why the Commission cannot be called a non-state regulatory part of the system but is better named a mixed state/non-state part of the system. Since 2001 the interest groups involved do not have the right to give a proposal for the appointment of members anymore. In panels, the members who are not officials of the Federal Ministry are the majority. This gives them great influence on the recommendations. The Commission exclusively exercises an ex ante-regulation.

b) The link between the non-state part and state regulation

The link between the mixed state/non-state part of the system and state regulation is contained in the provincial laws on the cinemas as they accept the substitution of a recommendation of the provincial boards for film assessment by the recommendation of the Commission. The provinces leave a certain discretionary power to the Commission. They could, at any time, leave the system and rely on their boards for film assessment exclusively. The general acceptance of the recommendations by both the film distributors and the provincial authorities speak for the assumption that the discretion has been narrowed by a constant practice of the Commission.
By transforming a Commission’s recommendation into provincial law, the provincial (in Vienna: municipal) authorities exercise an ex ante-regulation. The enforcement of the minimum age is ex post-regulation.

As already mentioned under I.3.a) above, the state has a certain influence on the Commission (Administrative Board, Panels, and Appellate Body). This may be exercised by the state’s officials being member of the Commission, by the organisation of the Commission by the Federal Ministry and by administrative support (including the publication of the recommendations and financing) by the Ministry.

**Conclusion:** The co-regulatory system of setting minimum ages for cinema films in Austria has been working since 1948 with great acceptance of all groups involved. However, the Municipality of Vienna does not participate. There is no pressure on the system to change it fundamentally. The effectiveness of its ex ante-regulatory part is outstanding; there is no information on the effectiveness of its ex post-regulatory part available. The non-state regulatory part of the system is strongly influences by the state. This is why the Commission should better be called a mixed state/non-state part of the system. It has to be recalled that the constitution of the Commission was originally meant to be temporary and still has the function to “bridge” a potential gap between the regulatory decisions of the provinces. Another precondition of its functioning is that it provides benefits to the film distributors (costs, speed of the decision) that make them participate even without legal obligation. This means that it can function the way it does only in a specific environment.

**II. Co-operative Regulatory Systems in other media-related sectors**

1. **Part I: The co-operative regulatory system - Regulatory Regime of Analysts**
   
   a) – b) Development and Subject-matter of the system

The Austrian Parliament recently introduced the amendment Federal Official Journal I No. 2004/127 to the Stock Exchange Act (*Börsegesetz*, Federal Official Journal No. 1989/555). It contains regulations on statements and ratings on stock companies that are given in the media. Analysts who recommend to buy/hold/sell stocks in writing (for example in brochures, the press or the internet) have to comply with some provisions on the information that has to be provided to the investors (§ 48f par. 2 items 1–3 and par. 5 Stock Exchange Act).
The supervisory authority for the compliance with these regulations is the Financial Market Authority (Finanzmarktaufsicht, www.fma.gv.at), unless the analyst is subject to the supervision of an effective self-regulatory regime in a Member State of the EU.

c) **Basis of the co-operation**

Analysts who recommend to buy/hold/sell stocks in writing (for example in brochures, the press or the internet) have to comply with some provisions on the information that has to be provided to the investors (§ 48f par. 2 items 1–3 and par. 5 Stock Exchange Act). The legal basis of the co-operation between the state and the self-regulatory system is § 48f par. 2 last sentence Stock Exchange Act which reads as follows: “The provisions of items 1 to 3 do not apply to journalists who are subject to equivalent and adequate regulation – including an equivalent and adequate self-regulatory system – in the respective Member States provided that these regulations have a similar effect like those mentioned in this paragraph.” Paragraph 5 contains the obligation to disclose conflicts of interests for the analyst. The last sentence of par. 5 contains the same rule as the sentence quoted above for the supervision of the compliance with these provisions.

The travaux préparatoire to this provision only state that the intent of that provision is to transpose Art 2 Directive 2003/125/EC. This is why this provision is no indication for a general more positive attitude of the Austrian lawmaker towards co- and self-regulation of the media.

The Financial Market Authority has published its interpretation of § 48f Stock Exchange Act in the internet (www.fma.gv.at/de/pdf/rundsc14.pdf). This paper is not normative but may give a guideline for the future application of this legal provision.

d) **Institutions involved in the system**

The Financial Market Authority is a federal authority, financed partly by the Federation and partly by the companies that are subject to its regulation. It exercises the regulation on all market participants, including the administrative penal provisions. The Austrian Association for Financial Analysis and Asset Management (Österreichische Vereinigung für Finanzanalyse und Asset Management) has issued a code of proper financial analysis. The version of 3 May 2005 is available on www.oevfa.at in German only. It is possible that the Association will try to set up a self-regulatory body. The Association is in contact with the
Financial Market Authority. The Austrian’s Society of Investment Professionals (ASIP) members are mainly portfolio managers, security analysts, investment advisors, and other financial professionals. They have adopted the AIMR’s Code of Ethics and Standard of Professional Conduct, which is available in German at www.asip.at.

\(e\) Functioning of the system

The addressees of the system are journalists and other persons who analyse securities and companies and publish their analyses in the media. The Financial Market Authority supervises the compliance of the analysts with the provisions on the compulsory content of recommendations according to § 48f par. 2 items 1 – 3 of the Stock Exchange Act. The Authority is competent to ask for the reasons why the analyst found a specific recommendation reasonable and in compliance with these rules, the right to read any documents and the right to investigate in private offices (§ 48q Stock Exchange Act). In case that the Financial Market Authority feels that an analyst has failed to comply it has to initiate an administrative penal proceeding against him.

These supervisory powers do not apply to journalists/analysts who are subject to equivalent and adequate regulation – including an equivalent and adequate self-regulatory system – in the respective Member States provided that these regulations have a similar effect like the domestic regulatory system, exercised by the Financial Market Authority. This means that the Financial Market Authority has to assess if the foreign state regulatory system or the Austrian or foreign self-regulatory system is equivalent, adequate and has a similar effect like the domestic regulatory system. Such decisions can be challenged before the Independent Administrative Tribunal (Unabhängiger Verwaltungssenat) and, in the last instance, before the Administrative Court and/or the Constitutional Court.

The participation in an Austrian self-regulatory system is voluntary. Whether the participation in a foreign state regulatory system or self-regulatory system is compulsory or voluntary depends solely on foreign laws. But this (as part of a foreign legal system) has no influence on the legal consequences, the competence of the Financial Market Authority. There are no Austrian regulations on the organisation or financing of such a regulatory system. However, it must be noted, that the unreasonable or unfair organisation of such self-regulatory systems would have the consequence that the Financial Market Authority cannot accept such a system as equivalent and adequate.
f) *Supervision of the system*

The self-regulatory system is supervised by the Financial Market Authority exclusively as to its equivalence and adequateness to the domestic state system and to the scope of its regulation. The Financial Market Authority is supervised by the Federal Minister of Finance (§ 16 of the Act on the Financial Market Authorities, *Finanzmarktaufsichtsbehördengesetz*). Decisions of the Financial Market Authority in administrative penal law matters can be appealed with the Independent Administrative Tribunal, which is itself supervised by the Administrative Court and/or the Constitutional Court. The self-regulatory systems act by the means of private law. Their decisions can therefore be challenged before the courts.

g) *Impact assessment*

There is no such self-regulatory regime in place. Thus no impact assessment could be made so far.

2. **Part II: Leading Cases**

There is no such self-regulatory regime in place. This is why there are currently no cases available.

3. **Part III: Assessment according to the criteria for determining which types of regulation are covered by the study**

a) *The non-state regulatory part of the system*

There is currently no such co-regulatory system operating because a non-state regulatory part has not been formed yet. It may be that interest groups like the Austrian Association for Financial Analysis and Asset Management or the Austrian’s Society of Investment Professionals will form such a body.

b) *The link between the non-state part and state regulation*

The links between the non-state part and state regulation are already in place (§ 48f par. 2 last sentence and par. 5 last sentence Stock Exchange Act). They explicitly mention the self-
regulatory part of the system. The system is established to meet the public goals of proper information of the financial market to avoid distortions by recommendations that are not impartial. The Federation leaves discretionary power to the self-regulatory body by asking, first, only for an “equivalent and adequate self-regulatory system” – not for the same system like the Financial Market Authority – and, second, only for a similar effect of that system to the Austrian state’s supervision but not for the same effect. This means that the fact that the self-regulatory body has decided in a different way from how the Financial Market Authority would not in every case render the Financial Market Authority competent to act. There is no legal basis for an influence of the state on a self-regulatory system. However, those interest groups that come into question for forming a self-regulatory system have been keeping in touch with the Financial Market Authority.

**Conclusion:** The Austrian Stock Exchange Act provides for the introduction of a self-regulatory body, which would be part of a co-regulatory regime. Since the applicable provisions only have entered into force on 1 January 2005, there is no such system in place yet.
3.2. Belgium

A. Flemish Community

I. Co-operative Regulatory Systems in the audiovisual sector

1. Part I: The co-operative regulatory system - The Vlaamse Geschillenraad

The Flemish Council for Disputes on Radio and Television

a) Development of the regulatory system

The Vlaamse Geschillenraad is a regulatory authority, its composition and competences are prescribed by law, more precisely by the Flemish Broadcasting Act 2005 (Art. 174). However, the Vlaamse Geschillenraad also reflects some aspects of co-operation, as a part of its supervisory task is to decide on complaints with regard to “the rules of journalistic ethics”, these rules being provisions, standards and principles of self-regulation which are not formulated in statutory law, but are developed by professionals in the sector of media and journalism. In relation to this aspect, the Vlaamse Geschillenraad is partly composed of professional journalists.

The Vlaamse Geschillenraad was established by the Broadcasting Act 1987 especially in order to develop an instrument to assure pluralism in the audiovisual media in the Flemish Community and to guarantee non-discrimination of the ideological and philosophical convictions in the programmes of the Flemish private television broadcasters. The Vlaamse Geschillenraad initially was created to supervise the new private television broadcaster in the Flemish Community, VTM1. According to the Broadcasting Act 1987 programming on private television broadcasters was prohibited to cause discrimination of ideological and philosophical convictions. The news and information programmes resorted under the obligation to be impartial and to comply with the rules of journalistic ethics. The news programmes must also be guaranteed editorial independence.

Originally the Council’s competence was limited to the private television broadcasters (VTM and the regional broadcasters), while the Decree of 7 November 1990 extended the Council’s supervisory competence over private (local) radios. The modification of the broadcasting

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1 In application of the Broadcasting Act 1987 VTM started broadcasting on 1 February 1989, which brought an end to the so-called monopoly of public television (BRT at the time, now transformed to VRT).
legislation of 4 May 1994 made the Vlaamse Geschillenraad also competent over the public broadcaster BRTN (now VRT). A new modification of the Broadcasting Act of 30 March 1999 further extended the competence of the Council, by transferring the supervision over Art. 78 § 2 of the Broadcasting Act from the Flemish Government to the Vlaamse Geschillenraad. This provision prohibits the broadcasting of programmes that incite to hatred on the grounds of race, gender, religion or nationality.

b) Subject-matter of the regulatory system
The Council’s task is to enforce the application of the Articles 23 § 1, 34 § 2, 36, 64, 73, 9° and 13°, and 96 § 2 of the Broadcasting Act 2005, which are legally compelling provisions for all broadcasting organisations in the Flemish Community. The Council is competent to decide on complaints with regard to alleged infringements on radio and television related to impartiality, respect for journalistic ethics, editorial independence, non-discrimination and non-incitement to hatred on the grounds of race, gender, religion or nationality.  

The Council’s task and competence is more specifically to take decisions with regard to alleged infringements of the following provisions which apply to the broadcasters (both radio and television) established in the Flemish Community:

**Concerning the VRT:**

In the programmes, every form of discrimination is prohibited on the basis of the Universal Declaration of Human Rights. Programming may not cause discrimination between ideological and philosophical convictions. Information programmes, announcements and programmes containing information must be impartial and truthful. The rules of journalistic ethics as stated in the ethical code of the VRT have to be applied in the programmes of the news service. Those programmes are guaranteed editorial independence as stated in the

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2 This is actually Art. 96 § 2 of the Broadcasting Act 2005.

3 The protection of minors is not a competence of the Vlaamse Geschillenraad. For more information on the protection of minors and broadcasting, see the first country report on Belgium/Flemish Community. The unique competence of the Vlaamse Kijk- en Luisterraad (The Flemish View and Listening Council) is to supervise the application of Art. 96 § 1 of the Broadcasting Act (The broadcasters are prohibited to broadcast programmes that can seriously harm the physical, mental or moral development of minors, in particular programmes with pornographic scenes and gratuitous violence. Other programmes which also might damage the physical, mental or moral development of minors have to be encoded or shall be broadcasted by selecting the time of the broadcast that minors in the area of transmission will not normally hear or see such broadcasts. Non-encoded broadcasts of this type have to be preceded by an acoustic warning.) In the near future, the Flemish Regulator for the Media (FRM), with separate specialised chambers, will integrate the Flemish Council for Disputes on Radio and Television, the Flemish View and Listening Council and the Flemish Media Authority (cfr. infra).
editorial statute. The ethical code and the editorial statute of the VRT are prescribed by decision of the managing director in consultation with the representative labour organisations (Art. 23 § 1).

**Concerning the private radio broadcasters:**
Private radio broadcasters are obligated to guarantee diversity of the programmes, especially concerning information and entertainment. In the programmes and programming every form of discrimination is prohibited (Art. 34 § 2).
The broadcasted information must be impartial and must comply with the rules of journalistic ethics. The information programmes are guaranteed editorial independence as guaranteed by the editorial statute (Art. 36).

**Concerning the regional television broadcasters:**
The regional television broadcasters are obligated to broadcast at least four news programmes a day. These daily news programmes must contain a variety of regionally related issues. The news and information programmes are made by the regional broadcasters own editorial staff. The editor-in-chief is responsible for the news programmes (Art. 45 § 1, 3°).
The news programmes must be impartial and must comply with the rules of journalistic ethics and are guaranteed editorial independence as guaranteed by the editorial statute (Art. 73, 9°). In the programmes and in the programming every form of discrimination is prohibited (Art. 73, 13°).

**Concerning the other categories of private television broadcasters**:4
Article 64 guarantees non-discrimination in the programmes of the private broadcasters. Programming may not cause discrimination of ideological and philosophical convictions. The news and information programmes must be impartial, must comply with the rules of journalistic ethics and are guaranteed editorial independence.

**Concerning all radio and television broadcasters:**
The programmes of the broadcasters shall not incite to hatred on the grounds of race, gender, religion or nationality (Art. 96 § 2).

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4 Private broadcasting companies for the whole of the Flemish Community, target groups and theme television, pay television, teleshopping television stations and television services.
c) **Basis of the co-operation**


A part of the supervisory task of the Vlaamse Geschillenraad is, according to the Broadcasting Act, to decide on complaints with regard to “the rules of journalistic ethics”, these rules being provisions, standards and principles of journalistic self-regulation.

The rules of journalistic ethics the Broadcasting Act refers to themselves are indeed not prescribed by statutory law but are to be found in codes which have been promulgated by professionals in the sector of media and journalism, both at international and national level, such as:

- **Bordeaux Declaration.** IFJ Declaration of Principles on the Conduct of Journalists, adopted during a World Congress of the IFJ in Bordeaux, April 1954, amended in 1986.
- **Munich Declaration.** Declaration of the rights and duties of journalists, approved by the Journalists' Unions of the 6 countries of the European Community in Munich, in 1971, adopted during a World Congress of the IFJ in Istanbul in 1972.
- **The Code of principles of journalism,** accepted by the Belgian Association of Professional Journalists (AVBB), The Belgian Association of Newspaper Publishers (BVDU) and the National Federation of Information Magazines (FEBELMA) in 1982.

The interpretation and the concrete application of the standards of journalistic ethics has been developed by the former Council of Ethics of the Belgian Association of Professional Journalists (1995-2002) and more recently, since December 2002 by the Council for Journalism (*cfr. infra*). In deciding on alleged infringements by a Flemish broadcaster of the “rules of journalistic ethics” the Vlaamse Geschillenraad is assumed to apply the provisions of
these codes, along the lines of the “jurisprudence” of the former Council of Ethics and/or the actual Council for Journalism. The participation of professional journalists as members of the Vlaamse Geschillenraad is also supposed to guarantee this approach.

d) Institutions involved in the system

According to Art. 174 § 7 the Vlaamse Geschillenraad is funded by the state. The Vlaamse Geschillenraad receives an annual donation (subsidy) from the Flemish Community. Administratively and technically the Council is supported by civil servants of the Ministry of the Flemish Community. Logistics and offices at the disposal of the Vlaamse Geschillenraad are awarded by the Flemish Government.

e) Functioning of the system

The Vlaamse Geschillenraad is an (independent) public body, its members being appointed by the Flemish Parliament for periods of four years, the mandates being renewable. For each session or meeting a member of the Vlaamse Geschillenraad receives an remuneration of 123,95 euro.

The Vlaamse Geschillenraad is composed of nine members. The members must be (at last) 35 years old and fulfil at least one of the following requirements:

- minimum ten years experience as a magistrate (judge);
- minimum ten years experience as an academic with expertise in the field of the communication sciences or law;
- minimum ten years experience as a professional journalist.

The membership of the Vlaamse Geschillenraad for the categories 2° or 3° is incompatible with a political mandate or with a function or a membership in an executive committee in a broadcasting company, or a membership in an executive committee of a press or advertising agency.

5 In its decision of 16 October 2002 (2002/7) the Vlaamse Geschillenraad explicitly referred to the IFJ Declaration of the rights and duties of journalists and to the (Belgian) Code of principles of journalism. The Council in its decision referred to and quoted some of the provisions of both the IFJ Declaration and the Code of principles of journalism (Art. 3, 6 and 7). See also Vlaamse Geschillenraad 5 February 2003 (2003/2).

6 In 2004 the Vlaamse Geschillenraad was subsidized for an amount of 11.250 euro, mainly reimbursing hotel and travel expenses of its members.
The Vlaamse Geschillenraad defines its own rules concerning its organisation and procedures. The Council chooses its chairman and deputy-chairman out of the members of the Vlaamse Geschillenraad. The chairman convenes a meeting by letter. If three members of the Council request for a meeting, the chairman shall convene one. A meeting of the Vlaamse Geschillenraad is valid when at least five of its members are present. The Council takes decisions with an ordinary majority of the present members. However, the Vlaamse Geschillenraad can only impose sanctions if at least five members agree with this sanction. A civil servant of the Ministry of the Flemish Community draws up a report of each meeting. If necessary the Vlaamse Geschillenraad can rely upon experts in specific cases.

The members of the Vlaamse Geschillenraad are under an obligation of secrecy about the complaints under their jurisdiction. The decisions of the Vlaamse Geschillenraad are communicated to the parties involved and to the Flemish Parliament and to the Flemish Government. The decisions are also made public and can be consulted in pdf-format on www.vlaanderen.be/media/vlaamsegeschillenraad.

The Vlaamse Geschillenraad can only take decisions after a complaint. A complaint is admissible under the following (cumulative) conditions:

Within a period of 15 days after the broadcasting of the litigious radio or television programme the complaint must be addressed to the Vlaamse Geschillenraad, sent with a registered letter to its chairman; The complaint must contain the name, the capacity/quality and the address of the applicant; The complaint must indicate which radio or television programme is subject of the complaint. Also the name of the concerned broadcaster, the day and time of broadcasting must be mentioned. The complaint must indicate its subject, with a motivated explanation of the reasons of the complaint and the indication of the harm caused by the litigious program or the interest involved for the applicant. If the complaint is inadmissible, the Vlaamse Geschillenraad will reject it.

If it is admissible, the Chairman or the civil servant of the Flemish Community will sent a copy of the complaint to the broadcaster who is considered responsible for the litigious programme. The broadcaster is obliged to send a copy of the programme (or a part of the litigious programme) to the Vlaamse Geschillenraad within a period of eight days and give additional information with regard the production of the litigious programme.

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8 In contrast with the Vlaamse Kijk -en Luisterraad and the Vlaams Commissariaat voor de Media who can also take decisions on their own initiative (ex officio).
After a new term of eight days the chairman of the Geschillenraad, if necessary after a meeting with the other members of the Vlaamse Geschillenraad, can invite the relevant persons for a hearing. He also decides when the hearing will take place, respecting a period of at least fifteen days after the invitation. Both the applicant and the defendant broadcaster are given the occasion to develop their arguments and observations before the Vlaamse Geschillenraad, also by writing. Each of them can be assisted by a lawyer or legal council. The hearing is held in public, unless the Vlaamse Geschillenraad decides differently. The Vlaamse Geschillenraad formulates its conclusion in a motivated decision **within a period of 60 days** since the complaint. The decision is communicated to the applicant and the broadcasting company, as well as to the Flemish Parliament and the Flemish Government.

The Vlaamse Geschillenraad can only take decisions after a complaint. If the Council is of the opinion that one of the Articles 23 § 1, 34 § 2, 36, 73, 9° and 13°, or 96 § 2 of the Broadcasting Act is not respected by a broadcasting organisation, the Council can decide to sanction the broadcasting organisation. The possible sanctions have a limited scope and are restricted to:

- an admonition, or/and
- an obligation to broadcast the decision of the Vlaamse Geschillenraad.

Under certain conditions (a manifest, important and serious violation of Art. 96 § 2) the Council can also **propose** that the distribution of the programme will be suspended by the Flemish Government in application of Art. 96 § 3.

This article provides:

"The Flemish Government can suspend (provisionally) the distribution of a programme, on proposal of the Flemish View and Listening Council on Radio and Television in case of a manifest, important and serious violation of Art. 96 § 1, or on proposal of the Flemish Council for Disputes on Radio and Television in case of a manifest, important and serious violation of Art. 96 § 2." 

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9 In July and August all terms are suspended, with the exception of the term of 15 days mentioned in article 2, 1° of "Het Reglement van orde en procedure van de Vlaamse Geschillenraad voor radio en televisie van 17 mei 2000", B.S. 28 juli 2000.

10 In some cases the Vlaamse Geschillenraad did not succeed to come to a decision within this period of 60 days, e.g. Vlaamse Geschillenraad 16 November 1994 (1994/1), the day of the introduction of the complaint being 10 August 1994, and Vlaamse Geschillenraad 24 April 2002 (2002/1), the day of the introduction of the complaint being 21 December 2001.


12 See also Art. 2a, 2 and 22 and 22a of the **Television without Frontiers Directive 89/552/EEC** of 3 October 1989 and **97/36/EC** of 30 June 1997.
violation during the previous 12 months on at least two occasions of Art. 96 § 2. The Flemish Government will notify the broadcaster, and in case of a broadcasting organisation from a member state of the European Union also the European Commission. This notification in writing contains the alleged infringements and the measures it intends to take restricting the distribution of the programme should any such infringement occur again.

In case of a foreign broadcaster the European Commission and the member state of the European Union (from where the broadcasting takes place) try to make an amicable settlement within 15 days. If there is no amicable settlement and the violation continues, the provisional suspension becomes effective.”

The website [http://www.vlaanderen.be/media](http://www.vlaanderen.be/media) refers to a link of the Vlaamse Geschillenraad. The public, applicants, lawyers, professionals and the broadcasting organisations can find information about:

- How to contact the Vlaamse Geschillenraad?
- Mission
- How to lodge a complaint?
- Possible sanctions
- Composition of the Vlaamse Geschillenraad
- Legislation
- Decisions

The decisions of the Vlaamse Geschillenraad are also reported and commented on a regular basis in some legal journals, such as Rechtskundig Weekblad and Auteurs & Media.

**f) Supervision of the system**

The Vlaamse Geschillenraad is a quasi-jurisdictional body which decisions are taken in first and last instance.

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g) Impact assessment

Number of cases/complaints:
Since 1992 the Vlaamse Geschillenraad has handled 59 cases. 23 of them were considered inadmissible. For various reasons the Vlaamse Geschillenraad considered these complaints inadmissible: the complaint wasn’t submitted within the 15 days period, the applicant didn’t explain sufficiently the harm caused or the interest involved or the complaint did not concern the supervisory competence of the Vlaamse Geschillenraad. Of the 59 complaints 29 were considered admissible, but unfounded. Only seven of the 59 cases were considered well founded. In three cases the Council gave an admonition and in only one case the Vlaamse Geschillenraad decided that its decision should be broadcasted.

Official comments regarding the efficiency of the systems:
The Flemish Government is of the opinion that the transparency, efficiency and accessibility of the monitoring authorities for the audiovisual media in the Flemish Community should be improved. In the Media Policy Note 2004-2009 the Flemish Minister of Media has formulated the intention to establish one singular organisation monitoring the application of the Broadcasting Act. The new Flemish Regulator for the Media (FRM - Vlaamse Regulator voor de Media, VRM), with separate specialised chambers, will integrate the Flemish Council for Disputes on Radio and Television, the Flemish View and Listening Council on Radio and Television and the Flemish Media Authority. In March/April 2005 the Council of State (Raad van State/Conseil d’Etat) and the Flemish Media Council were requested to give their advice on the draft version of the proposed modification of the Broadcasting Act, establishing the Flemish Regulator for the Media (FRM). On 22 July 2005 the Flemish Government approved the bill establishing the Flemish Regulator for the Media. In autumn 2005 the bill will be discussed in Flemish Parliament.

Scientific evaluation or estimation:15

14 Voorontwerp van decreet houdende de oprichting van het publiekrechtelijk vormgeven extern verzelfstandigd agentschap de Vlaamse Regulator voor de Media en houdende wijziging van sommige bepalingen van de decreten betreffende de radio en de televisie van 4 maart 2005, see www.psw.ugent.be/dv.

References have been made to the difficult, even ambiguous position of the Vlaamse Geschillenraad, particularly with regard to its supervisory competence over the “rules of journalistic ethics” in the news and information programmes on radio and television. The Vlaamse Geschillenraad is a regulatory body, a “state” authority, which is not the most suitable or acceptable forum to make final decisions about the application of the rules of journalistic ethics. The case law of the Vlaamse Geschillenraad reveals that the Council seems to be aware of this problem and is reluctant to decide whether or not the rules of journalistic ethics are respected. It is obvious that the Vlaamse Geschillenraad has not developed to a forum for discussion, debate and awareness about journalistic ethics.

Journalists, publishers and managers of broadcasting organisations have regularly emphasized that the Vlaamse Geschillenraad as a public authority should not interfere with the rules of journalistic ethics, especially since the Raad voor Journalistiek (Council for Journalism, cfr. infra) has been developing the self-regulatory supervision over journalistic ethics in an effective way. Today the non-observance of the rules of journalistic ethics in a news or information programme on radio or television can give rise to both a decision by the Vlaamse Geschillenraad and a decision by the Raad voor Journalistiek, with the risk of contradictory interpretations and decisions (cfr. infra Leading cases).

Since the establishment of the Vlaamse Geschillenraad, some 15 years ago, only few pertinent complaints reached the Council. Apparently it seems that there was not that much reason to complain about discrimination, disrespect of journalistic ethics or lack of impartiality in the news or information programmes on radio and television in the Flemish Community. Yet the cases the Vlaamse Geschillenraad had to deal with, have led to interesting decisions in which some criteria have been developed for the evaluation of impartiality and non-discrimination, with sufficient respect for journalistic freedom.

Of the 59 complaints the Vlaamse Geschillenraad dealt with so far, only seven were considered well founded. Two cases concerned a mockingly satire on the catholic faith, once on VRT-radio and once on VRT-television. In both cases the Vlaamse Geschillenraad considered the litigious programmes discriminatory for one specific religion. In one case a political party, Vlaams Blok, (today Vlaams Belang, Flemish Interest) was considered to be excluded in a discriminatory way by the VRT, as this extreme-right party was not invited to participate in a political debate on TV1 (today Eén). In another case VTM was considered to have integrated in a news item referring to suicide improper images of a person receiving palliative care (cfr. infra Leading Cases). VRT-radio (Radio 2) was considered not respecting the duty of impartiality by not referring to the role of the opposition in a municipal debate in a
news item. ATV (a regional broadcaster) has infringed the accepted standards of journalistic ethics by not correctly reporting a news item and disrespecting the principle of impartiality (cfr. infra Leading Cases). In a radio programme of Q-music vulgar language was considered as an incitement to hatred on the ground of race (cfr. infra Leading Cases).

A specific point of criticism is the condition of harm or interest which the applicant has to invoke and motivate pertinently according to the case law of the Vlaamse Geschillenraad, preventing a kind of “actio popularis”. The Vlaamse Geschillenraad indeed doesn’t accept the mere quality as a listener or viewer of a programme and applies in a strict way the admissibility condition that a complaint can only be accepted if the applicant is victimised or harmed in one or another way or can refer to some concrete interest with regard to the litigious broadcasted programme. Many complaints were indeed found inadmissible for that reason. By narrowing the admissibility for applying to the Vlaamse Geschillenraad, the Council at the same time has reduced its own supervisory competence.

2. Part II: Leading Cases

Case 1: VRT admonished because of discrimination of the Catholic faith (4 October 2001)

In its decision of 4 October 2000 the Vlaamse Geschillenraad has found a breach by the Flemish public broadcasting organisation (VRT) with regard to its obligations under the Broadcasting Act. The Council is of the opinion that the radio-programme “De Rechtvaardige Rechters” on Radio 1 in a discriminatory way has ridiculed the essentials of Christian belief, namely the Resurrection and Ascension of Christ. The Vlaamse Geschillenraad recognises the freedom of expression for broadcasters to criticize and to impart ideas that can offend, shock or disturb a certain group in society. But according to the Council certain limits should not be overstepped and the ridiculing of a certain belief should not have a discriminatory character. The Vlaamse Geschillenraad declared the complaint against the litigious radio programme well-founded. The public broadcasting organisation VRT was admonished. It was the second time that the ridiculing by the VRT of Christian worship has led to an admonition by the Council of Disputes on radio and television.\footnote{Vlaamse Geschillenraad 16 December 1998 (1998/5), see also IRIS 1999/1, 13.}
Case 2: VRT excluded the Vlaams Blok in a discriminatory way (23 October 2001)

According to the Flemish Broadcasting Act the programmes of the VRT should contribute to a democratic and tolerant society (Art. 8 § 3). The Executive Agreement between the VRT and the Flemish Government of 7 November 2001 stipulates that the VRT has to contribute to mutual understanding, increase tolerance and stimulate community relations in a pluri-ethnic and multicultural society. According to the VRT some of the opinions and statements expressed by politicians of the extreme-right and racist party Vlaams Blok did not contribute to mutual understanding and did not stimulate at all tolerance within the multicultural society. For that reason Vlaams Blok politicians were not invited to participate in political debates or were only exceptionally interviewed in news and information programmes on the VRT-channels.

Vlaams Blok politicians have lodged in 2000-2001 several complaints against the VRT because they weren’t invited to participate in political debates, information programmes, political discussions, interviews etc.. The Vlaamse Geschillenraad was of the opinion that the VRT could not sufficiently rely on Art. 8 of the Broadcasting Act for excluding Vlaams Blok politicians from participating in political debates. The Vlaamse Geschillenraad was of the opinion that the VRT can however invoke journalistic criteria to refuse Vlaams Blok politicians. The selection or non-selection of members of a political party to participate in a political debate on radio or television must be justified on “rational, objective, journalistic and reasonable grounds in function of the chosen subject”. According to the Vlaamse Geschillenraad the VRT news service has the freedom to choose which politicians are invited to participate in a debate, but this freedom is not unlimited and the VRT should take into account that there is a prohibition of discrimination of philosophical and political opinions and that the obligation of impartiality must be respected. The several complaints of politicians of the Vlaams Blok did not lead to a “conviction” by the Vlaamse Geschillenraad, except in one case.

In a decision of 23 October 2001 the Vlaamse Geschillenraad was of the opinion that the VRT has acted in a discriminatory way by not inviting the chairman of the Vlaams Blok in a political debate about the government’s policy. Particularly the fact that the V.U. (Volksunie), another party of the opposition, was invited to participate in the television programme and the Vlaams Blok was not, could not be justified. Consequently the complaint of the Vlaams Blok was considered well-founded. The Vlaamse Geschillenraad came to the conclusion that the

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17 The political party Vlaams Blok has transformed itself in December 2004 to Vlaams Belang, Flemish Interest.
VRT had not respected the prohibition of non-discrimination in this case, without imposing a sanction however.

**Case 3: Centre for equal opportunities and opposition to racism vs. VTM (1 April 1998)**
In this case the Centre for equal opportunities and opposition to racism (CGKR) was of the opinion that the Flemish private broadcaster VTM in the (debate) programme “De Eeuwige Strijd” had incited to discrimination and xenophobia towards citizens of Moroccan and Turkish origin. For that reason the CGKR introduced a complaint before the Vlaamse Geschillenraad. The Vlaamse Geschillenraad however was of the opinion that the rules of journalistic ethics were respected in the litigious programme. According to the Council the programme intended to give different points of view concerning a specific social issue, namely the attitudes of the population with regard to foreigners and migrants. The Vlaamse Geschillenraad emphasized that a broadcaster has **audiovisual freedom** of expression. Both the format of a programme and the selection of the subject matter belong to the audiovisual freedom of the broadcaster. In case of an information programme about an actual and social issue, the audiovisual freedom must be exercised with care. The Vlaamse Geschillenraad was of the opinion that in the debate as well advocates as opponents of social integration were heard in a well-balanced way. The programme ended with a statement against any form of discrimination or intolerance. The Vlaamse Geschillenraad was also of the opinion that the debate was well organised and did not trivialise the sensitive societal issue of integration or xenophobia. The Council considered that the rules of journalistic ethics were respected.

This case is particularly interesting because the Raad voor Deontologie (Council of Ethics of the Belgian Association of Professional Journalists, *cfr. infra*) has also been requested to give its opinion about the same programme. In a decision of 20 August 1998 the Council came to the conclusion that the rules of journalistic ethics were not respected by the producers of the programme. Especially the suggestive way of assembling images about incidents between foreigners and the police, broadcasted in the beginning of the programme, gave a one-sided impression about foreigners and dramatized the whole issue. Hence the litigious programme

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18 The subtitle of the debate programme was: “No Moroccan or Turkish people in my street!”

19 The Council of Journalistic Ethics of the Belgian Association of Professional Journalists was competent about the observance of journalistic ethics. It was a self-regulatory initiative and could only give advisory opinions. The Council of Journalistic Ethics is replaced since December 2002 by the Council for Journalists. See also D. VOORHOOF, “Journalisten zonder grenzen”, *Auteurs & Media* 2000/1-2, 36-48 and D. VOORHOOF, “De Raad voor Journalistiek van start”, *Auteurs & Media* 2003/1, 82. See also [www.rvdj.be](http://www.rvdj.be)
of VTM did not take into account some of the self-regulatory journalistic recommendations\textsuperscript{20} for the reporting about foreigners and migrants. Therefore, according to the Raad voor Deontologie, the rules of journalistic ethics were not respected.

**Case 4: VMM/ VTM admonished for not respecting journalistic ethics (16 October 2002)**

In this decision, the Council for Disputes on Radio and Television was of the opinion that the images of a person showed in a news item on suicide had been selected with negligence, disrespecting the general accepted standards of journalistic ethics as formulated in Art. 3 of the IFJ Declaration of rights and duties of journalists. The Council is of the opinion that in the specific context of a news item on suicide journalists should act with very much care. In the litigious news programme on VTM this ethical principle was seriously breached by putting images of a person receiving palliative care in relation to suicide. The VMM was admonished for not respecting a rule of journalistic ethics.

**Case 5: ATV admonished for not respecting journalistic ethics (5 February 2003)**

In another case the Council for Disputes on Radio and Television referred to the ethical principle that when journalists report on controversial issues they should refer to the different perspectives and opinions on that item and check the reliability of the information afforded by one interested party. As ATV omitted to do so and reported only the opinion and position of one party in a conflict, without checking that information on its reliability or accuracy, ATV was considered to have neglected a basic rule of journalistic ethics. ATV was admonished for that reason by the Vlaamse Geschillenraad.

**Case 6: Q-music has incited to hatred on the ground of race (5 March 2003)**

In its decision of 5 March 2003 the Council for Disputes on Radio and Television was of the opinion that the radio programme “Deckers en Ornelis Ochtendshow” on Q-music has incited to hatred on the ground of race. It was the first, and until now the only decision of the Vlaamse Geschillenraad that was ordered to be broadcasted.

According to the Vlaamse Geschillenraad the news coverage of the semi-finals of the Australian Open of 22 and 23 of January 2003 on Q-music was insulting in a very offensive way for all non-white citizens. The reporting of the semi-finals between Justine Henin and

\textsuperscript{20} Recommendations about the reporting about foreigners, Working-group Media and foreigners/migrants, June 1994.
Venus Williams and Kim Clijsters and Serena Williams contained a lot of racist connotations. The Williams sisters were compared with "robocops, black monkeys, men, bulldogs, wood monkeys and aliens". According to the Vlaamse Geschillenraad the continuous use of vulgar racist language rendered such hackneyed statements to commonplaces. The litigious programme was considered to have incited to hatred on the ground of race and Q-music was ordered to broadcast the decision of the Vlaamse Geschillenraad several times in its news programme.

21 During two days the semi-finals were covered on Q-music, with a continuous tirade against Venus and Serena Williams. Listeners were incited to give their negative (!) opinion about the Williams sisters.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study –

Table: Criteria / The Vlaamse Geschillenraad

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
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The Vlaamse Geschillenraad, as a regulatory authority in the sector of radio and television, was established by the Flemish Broadcasting Act of 1987. Actually its composition and competences are regulated in Article 174 of the Flemish Broadcasting Act 2005.

Although being a type of state regulatory system, the Vlaamse Geschillenraad reflects some aspects of co-regulation, as a part of its supervisory task is to decide on complaints with regard “the rules of journalistic ethics”, these rules being provisions, standards and principles of self-regulation which are not formulated in or based on statutory law, but are developed by professionals in the sector of media and journalism. In relation to this aspect, the Vlaamse Geschillenraad is partly composed of professional
journalists.
As the Geschillenraad as a quasi-jurisdictional body is to be considered as a state-regulatory authority all other criteria and dimensions of this assessment frame aren't applicable.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

b) The link between the non-state part and state regulation

The Vlaamse Geschillenraad is established to achieve public policy goals, such as to guarantee pluralism, non-discrimination, impartiality and ‘accountability’ of the news and information programs. There is indeed a link between state regulation and non-state regulation in this perspective, as the Vlaamse Geschillenraad has competence to decide on the compliance in news and information programmes on radio and television with the rules of journalistic ethics, while these rules or journalistic ethics have been promulgated and developed on a self-regulatory basis by professionals in the sector of media and journalism.

**Conclusion:** The described regulatory system is hardly to be considered as a co-regulatory system in the meaning of this study. In the sense that co-regulation is a combination of non-state regulation and state regulation in such a way that a non-state regulatory system is connected with state regulation, the Vlaamse Geschillenraad is not an example of such a system.

The Vlaamse Geschillenraad however is an interesting example of a regulatory authority, reflecting some specific characteristics of co-regulation. The Vlaamse Geschillenraad operates on a strict legal basis and the members are working within a legal framework, appointed by the Flemish Parliament, applying a procedure, competences and (weak) powers of enforcement prescribed by the Broadcasting Act. A part of its supervisory task however, according to the Broadcasting Act, is to decide on complaints with regard **“the rules of journalistic ethics”**, these rules being provisions, standards and principles of self-regulation which are not formulated in statutory law, but are developed by professionals in the sector of media and journalism.

The criticism has been formulated that the Vlaamse Geschillenraad as a “state” authority, is not the most suitable or acceptable forum to make final decisions about the application of the rules of journalistic ethics. The case law of the Vlaamse Geschillenraad reveals that the Council seems to be aware of this problem and is reluctant to decide whether or not the rules of journalistic ethics are respected. It is obvious that the Vlaamse Geschillenraad has not developed to a forum for discussion, debate and awareness about journalistic ethics.

Journalist, publishers and managers of broadcasting organisations have regularly emphasized that the Vlaamse Geschillenraad as a public authority should not interfere with and impose rules of journalistic ethics, especially since the **Raad voor Journalistiek** (Council for
Journalism, *cfr. infra*) has been developing the self-regulatory supervision over journalistic ethics in an effective way.

The draft bill of the Flemish government to unite the existing supervisory authorities in the broadcasting sector into one agency, the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media – FRM, *cfr. Report 1*) might be an occasion to respond to this criticism. The objective of the draft bill is to make the monitoring function of the new media regulator in the Flemish Community more transparent, more accessible and more effective. According to the draft bill the FRM will have two separate and independent chambers, a general chamber and a chamber for ethics (*Kamer voor deontologie en ethiek*). All its members will be appointed by decision of the Flemish Government. The chamber for ethics will be composed of 9 members (judges, academics and professional journalists) and will deal with issues as journalistic ethics, editorial independence, impartiality, discrimination, incitement to hatred on the grounds of race, gender, religion or nationality and the protection of minors on radio and television. In its advisory opinion of 9 May 2005 the *Vlaamse Mediaraad* (Flemish Media Council) has proposed some modifications to the draft bill. The Media Council’s main suggestion is to withdraw the supervisory competence on journalistic ethics from the chamber of ethics, as this aspect of professional ethics is sufficiently guaranteed by the Council for Journalism (*Raad voor de Journalistiek*), a self-regulatory body for journalistic ethics established by the media sector in the Flemish Community. It is also argued that the sanctions that the new FRM will be able to impose are to be considered as interferences by a public authority in the freedom of audiovisual expression and journalistic reporting from the perspective of Art. 10 § 1 of the European Convention for the Protection on Human Rights and Fundamental Freedoms. Art. 10 § 2 of the Convention requires that such interferences in the freedom of expression must *inter alia* be “prescribed by law” and necessary in a democratic society. It might be problematic to fulfil these requirements of Art. 10 § 2 of the Convention as the sanctions the FRM can impose will be based on infringements of rules of journalistic ethics, these rules and standards being only promulgated and developed by private organisations, presumably not being formulated with sufficient precision, clarity

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2 Ranging from an admonition, over the obligation to broadcast its decision to an administrative fine (art. 176bis of the draft Broadcasting Act).
and foreseeability⁴. The Flemish Government in a decision of 22 July 2005 has given its approval to the amended bill. The bill is now sent to the Flemish Parliament. In its actual version the bill explicitly refers to the participation of professional journalists in the chamber of ethics of the VRM. It also institutionalises an advisory input from the Council for Journalism⁴.

II. Co-operative Regulatory Systems in the media sector

1. Part I: The co-operative regulatory system - The Raad voor Journalistiek

The Council for Journalism

a) Development of the regulatory system

The Raad voor de Journalistiek (Council for Journalism) was established in December 2002, replacing the Raad voor Deontologie (Council of Ethics of the Belgian Association of Professional Journalists) in the Flemish Community. The Raad voor Deontologie, operational only since 1995, had been criticized because of its minimal impact on the daily practice of journalism and its lack of credibility due to its composition by only professional journalists, members of the Belgian Association of Professional Journalists. Within the organisation of professional journalists plans and strategies were developed since 1998 in order to improve the self-regulatory monitoring of journalistic ethics.

Pressure also came from politics, as some political parties and politicians were of the opinion that neither the existing legal guarantees, nor the self-regulation for journalistic ethics sufficiently guaranteed the quality and accountability of journalism in the print media and on radio and television. In 1999 a bill to establish a Council for Journalism was introduced in federal parliament, formulating the following objectives:

- To monitor and stimulate the observance for professional journalistic ethics;
- To organise the promotion, the study and the consultation concerning journalistic ethics;

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⁴ In its version approved on 22 July 2005 the bill guarantees a minimum participation of 4 professional journalists in the chamber of ethics which will have 9 members. When deciding about a conflict which exclusively or substantially is dealing with journalistic ethics, the chamber of ethics of the Flemish Regulator for the Media has to request for an advice to the Flemish Council for Journalism.
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

- The drafting of an ethical code for journalists;
- The organisation of an “ombuds” for the media;
- The settlement of disputes concerning the right of reply.

The perspective was to develop in a structural way an instrument for a better observance of journalistic ethics. Although the proposal underlined the importance of self-regulation of the media, on the federal level a legal framework for a Council for Journalism was considered to be necessary. The government’s policy of the Flemish Community however was more in favour of self-regulation in relation to journalistic ethics, emphasizing as well the particular responsibility of journalists and publishers. The Media Policy Note of 2000 requested urgently for the establishment of a Council for Journalism, leaving the initiative to the Vlaamse Vereniging voor Beroepsjournalisten (VVJ – Flemish Organisation of Professional Journalists).

After prolonged consultations in the media sector, in December 2002 the Council for Journalism / Raad voor de Journalistiek was established. The Council for Journalism finally has no legal basis at all and is a complete self-regulatory organisation. The Council for Journalism was created on the initiative of professional journalists and publishers and media houses in the Flemish Community who have organised themselves as a legal person in a non profit association (VZW). The basic objective of the association was to create a Council for Journalism in the Flemish Community. In the French Community the establishment of an analogous instrument of self-regulation in the domain of journalistic ethics is still under construction.

b) Subject-matter of the regulatory system

The Council for Journalism is an independent body for self-regulation. Its objective is to monitor, promote and develop the observance of journalistic ethics in the media in the Flemish Community in Belgium. It is a non-governmental organisation, which responds to questions and handles complaints from the public about the journalistic conduct of the press. The Council for Journalism specifically aims to provide the public with a free and fast way of

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6 VZW: Vereniging zonder winstoogmerk.

7 See also the English presentation of the Council for Journalism on its website www.rvdj.be
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

redressing possible mistakes by the media. The Council also formulates guidelines for journalistic practice. Finally the Council acts as a forum for discussion about the ethics of journalism. Its decisions are meant to develop the awareness for the rules of good journalistic practice and to encourage ethical and professional standards of journalism.

The Council for Journalism aims to cover the complete scale of journalistic activities and considers itself competent with regard to all professionals active as journalists in the media in the Flemish Community. The Council’s monitoring competence with regard to journalistic ethics covers all informational content in the different types of media.

The Council evaluates the compliance of alleged disrespect or violations of professional ethics in the media from the perspective of the existing international and national regulatory instruments regarding journalistic ethics. The professional ethics of journalists are inspired by the following codes:

- International Munich Declaration. Declaration of the rights and duties of journalists, approved by the Journalists' Unions of the 6 countries of the European Community in Munich, in 1971, adopted during a World Congress of the IFJ in Istanbul in 1972.
- The Code of principles of journalism, accepted by The Belgian Association of Professional Journalists (AVBB), The Belgian Association of Newspaper Publishers (BVDU) and the National Federation of Information Magazines (FEBELMA) in 1982.
- Existing editorial codes within some press groups and broadcasting organisations.

Besides the development, the interpretation and application of these codes, the Council also has a task to inform the public about applications and issues of journalistic ethics and has a task of mediation between the public and the media organisations (‘ombuds’-function).

The competence to formulate final decisions or advisory opinions with regard to the application of the rules of journalistic ethics is restricted with regard to the radio and television broadcasters established in the Flemish Community. The reason is that these radio and television broadcasters do already resort under the jurisdictional competence of the Flemish Council for Disputes on Radio and Television with regard the rules of journalistic ethics (cfr. supra, part I, the Vlaamse Geschillenraad voor radio en televisie). As long as the Vlaamse Geschillenraad (or a similar public authority under supervision of the Flemish government or Flemish parliament) has competence to decide in individual disputes whether or not the rules of journalistic ethics have been respected, the Council for Journalism will not proceed with complaints already pending before the Vlaamse Geschillenraad. Moreover the

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8 Printed, audiovisual and on-line media, both general and specialized media, as well as national, regional and local media.
Council for Journalism will also abstain from the handling of any complaints against the audiovisual media who have made a reservation in a protocol at the moment they joined membership in the VZW Council of Journalism.\(^9\)

c) **Basis of the co-operation**

The Council for Journalism has **no legal basis**. It is a complete self-regulatory initiative. In December 2002 the Council of Ethics of the Belgian Association of Professional Journalists has been replaced by the Council for Journalism in the Flemish Community. The Council for Journalism was created by the organisation of professional journalists and by publishers and media houses in Flanders. It is a non-governmental organisation, which operates on its own initiative (if necessary), responds to questions and handles complaints from the public about the journalistic conduct of the media. The Council is a self-regulatory body without disciplinary power. Its decisions are made public and are intended to encourage the compliance with journalistic ethics.

d) **Institutions involved in the system**

The Council for Journalism was created by the organisation of professional journalists (VVJ) and by publishers and media houses in the Flemish Community. On 6 March 2002 they organised themselves in a legal person in the form of a non-profit association, a VZW. In December 2002 it was this Association of the Council for Journalism that effectively established the Raad voor de Journalistiek, the Council for Journalism. The Association of the Council for Journalism is responsible for the practical organisation and financial management of the Council for Journalism. The new Council is funded and financially supported partly (half) by the publishers and the audiovisual media companies and partly (half) by the organisation of professional journalists (VVJ). The VVJ receives a subsidy from the Flemish Community for this purpose.\(^{10}\)

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\(^9\) Preambule van het werkingsreglement van de Raad voor Journalistiek.

\(^{10}\) 80,000 euro on an annual basis.
e) Functioning of the system

According to its internal regulations the Council for Journalism is composed of 18 members (and also 18 substitute members): six representatives of the journalists (A-group), six representatives of the publishers, the broadcasters and the media houses (B-group) and six members who are not involved in the media (C-group). The Council for Journalism chooses its chairman and deputy-chairman out of its members. Its current chairman is a judge at the Supreme Administrative Court in Belgium, the State Council (Raad van State/Conseil d’Etat). The chairman presides the meetings. The Council is administratively supported by a permanent secretariat, under the management of a secretary-general. The secretary-general is also the ombudsman of the Council for Journalism and replies to questions from the public about press ethics. In his role as an ombudsman the secretary-general mediates when a complaint is filed. He consults with the complainant and the involved journalist or media organisation in order to achieve an ‘out of council’ settlement.11 The secretary-general attends the meetings of the Council for Journalism, having an advisory vote. The members of the Council for Journalism, the secretary-general and the administrative staff accomplish their task in complete independence, without prejudice and with due observance of discretion and impartiality.

A meeting is convened by the chairman of the Council. At least eight days before the meeting the members receive the agenda and the necessary documents. The chairman, or when he is prevented the deputy-chairman, or in case the deputy-chairman is also prevented, the oldest member of the Council, presides the meeting. The secretary-general draws up a report of each meeting. The reports are archived by the secretariat of the Council for Journalism. Only its members and their substitutes have access to the reports.

A meeting of the Council for Journalism is valid when at least ten of its members are present. If possible, the Council takes its decisions with consensus. If there is no consensus, a decision is taken with a two-third majority. If such a vast majority cannot be reached, the decision is taken with a simple majority in the next meeting. In that case, the decision can also contain in annex the dissenting opinions.

11 In most cases a friendly (amicable) settlement is effected.
In an annual report the activities, decisions and advisory opinions of the Council are reported.\textsuperscript{12}

The Council for Journalism can take decisions:

- \textbf{whether on request} in reply of a request for general information about journalistic professional ethics, \textit{or} after a complaint, the complainant proving a sufficient personal interest.

- \textbf{whether on its own initiative} when the Council considers it necessary to investigate and analyse a specific journalistic act.\textsuperscript{13}

The procedure in case of a request for general information about journalistic ethics differs from the procedure after a complaint.

In case of a request for general information about journalistic professional ethics the request is only admissible if it contains information with regard to the question and includes the name, the address and the telephone number of the applicant.

The secretariat confirms receipt of the request to the applicant within a period of eight days and can invite the applicant to give additional information to specify the request or add the necessary documents. The question will be answered within a period of three weeks since the file has been completed;

The chairman can qualify a request for information, on proposal of the secretary-general, into a complaint. The secretariat informs the Council for Journalism about the requests for information, together with the answers provided by the secretariat.\textsuperscript{14}

In case of a complaint the procedure is the following:

Within a period of 30 days after the (litigious) broadcasting, publication or journalistic act the complaint must be addressed to the Council for Journalism, sent with a letter to its chairman.

A complaint is only admissible if:

- It contains the name, the address and the telephone number of the applicant;

- indicates the medium or person against whom the complaint is directed;

- indicates its subject-matter, with a motivated explanation of the reasons of the complaint and the indication of the interest involved for the applicant;

- contains a copy and/or the references of the (litigious) reporting or journalistic act;

\textsuperscript{12} Art. 2-8 of the internal regulations. See Raad voor de Journalistiek, \textit{Jaarverslag 2003} en Raad voor de Journalistiek, \textit{Jaarverslag 2004}. The annual reports can also be consulted on the website of the Council, www.rvdj.be.

\textsuperscript{13} Art. 1 of the internal regulations.

\textsuperscript{14} Art. 13-16 of the internal regulations
and finally if it also contains the date of the application and the signature of the complainant.

The secretary-general mediates when a complaint is filed, in order to achieve an 'out of council' settlement. No further action is taken when the mediation is effective and a friendly settlement is agreed on. If a settlement is not possible, the complaint is introduced before the Council for Journalism by the secretary-general. If the complaint however is manifestly inadmissible or manifestly ill-founded, the secretary-general notifies this to the Council. In the next meeting the Council can decide to strike out the complaint of its list of cases. The secretariat reports this decision to all parties.

In all other cases the Council installs a Reporting Committee. This Committee consists of a member of the A-group, a member of the B-group, a member of the C-group and the secretary-general. The complainant is informed about this step in the procedure, all parties concerned are given the occasion to exchange memoranda and put forward further evidence. A hearing is organised with all parties concerned. The Council or the Reporting Committee can also invite other persons for a hearing or can rely on other persons for assistance. When the Council or the Reporting Committee is of the opinion that a case is ready for a decision, the secretary-general will make promptly a report. The report and the complete file are communicated to the members of the Council. The Council deliberates on the case and takes a decision by consensus, if not with a two/third majority or eventually in a next meeting with a simple majority (cfr. supra).

The decision of the Council for Journalism contains:

- The name and the address of the complainant;
- The name of the journalist and the medium concerned;
- A description of the complaint, the facts and the circumstances;
- A description of the procedure and the arguments of the journalist or medium concerned;
- The considerations of the Council;
- The final conclusion of the Council, eventually in annex with the dissenting minority opinions;
- The name of the chairman and the members of the Council who took part in the deliberations and the name of the secretary-general;
- The date and signature of the chairman and the secretary-general;
- Eventually the modalities of public communication of the decision by the medium concerned.
The Council notifies the decision to the parties and to the chairman of the legal person (VZW) Association of the Council for Journalism. The Council can request the medium concerned to publish or broadcast an apology or rectification.\textsuperscript{15}

The decisions of the Council for Journalism are published on its website \url{www.rvdj.be} and in the magazine 'De Journalist'. All practical information and the internal regulations of the Council, containing the provisions with regard the modalities of the procedures, are also available on the website of the Council (\url{www.rvdj.be}).

The website of the Council gives access to all kind of relevant information about the Council for Journalism, including the international and national codes for journalistic ethics, the Council’s composition and its internal regulations, its annual reports and all its decisions, advisory opinions and guidelines.

The website receives averagely about 130 visitors a day.\textsuperscript{16} The decisions and advisory opinions of the Council for Journalism are also reported and commented on a regular basis in some legal journals, such as Nieuw Juridisch Weekblad and Auteurs & Media.

\textit{f) Supervision of the system}

The Council for Journalism is a self-regulatory body, under no specific supervision by the authorities. The secretary-general and the Council are only accountable to the legal person Association of the Council for Journalism.

\textit{g) Impact assessment}

\textbf{Number of cases/complaints:}

\textbf{2003:} In the first year of its existence, the Council for Journalism received 45 complaints. The majority of the complaints (25) came from private persons (i.e. as listener, viewer or reader). 13 complaints were lodged in by or on behalf of an organisation and seven complaints were initiated by media or journalists. In the annual report of the Council seven different categories of complaints are identified, a few complaints are reflected in more than one category:

\begin{tabular}{|l|l|}
\hline
\textbf{Character of the complaint} & \textbf{Number} \\
\hline
Inaccurate reporting & 26 \\
\hline
\end{tabular}

\textsuperscript{15} Art. 17-29 of the internal regulations.

\textsuperscript{16} Raad voor de Journalistiek, \textit{Jaarverslag 2004}. 

Breach of privacy 14
No right of reply 4
Undercover journalism 2
Plagiarism 1
No respect for embargo 1
The non-observance of agreements 1

Approximately 50% of the cases dealt with inaccurate reporting and 30% with breach of privacy. On 31 December 2003 in 30 of the 45 cases a friendly settlement was effected or a final decision was taken.

<table>
<thead>
<tr>
<th>Result of the complaint</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Friendly settlement</td>
<td>17</td>
</tr>
<tr>
<td>Decision of the Council</td>
<td>9</td>
</tr>
<tr>
<td>Manifestly ill-founded or inadmissible</td>
<td>3</td>
</tr>
<tr>
<td>No friendly settlement</td>
<td>1</td>
</tr>
<tr>
<td>Still pending</td>
<td>15</td>
</tr>
</tbody>
</table>

In total 17 friendly settlements were effected. A decision by the Council was taken in nine cases. Five of them were well-founded. The Council has not only treated questions for information (106) and 45 complaints, it also formulated two directive guidelines regarding specific journalistic practices. The first one regulates embargos (esp. ordered by judicial authorities or police), while the second invites journalists to a more reluctant media exposure of victims of crime, disasters or accidents. \(^{17}\)

**2004:** In the second year of its activities, the Council for Journalism handled 43 complaints, of which 28 were new (received in 2004). The majority of the complaints (14) came from private persons. 12 complaints were lodged in by or on behalf of an organisation and 2 complaints were initiated by media or journalists. The complaints are divided in six different categories:

<table>
<thead>
<tr>
<th>Character of the complaint</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inaccurate reporting</td>
<td>17</td>
</tr>
<tr>
<td>Breach of privacy</td>
<td>11</td>
</tr>
<tr>
<td>No right of reply</td>
<td>2</td>
</tr>
<tr>
<td>The non-observance of agreements</td>
<td>2</td>
</tr>
<tr>
<td>Conflicting interest (‘belangenvermenging’)</td>
<td>1</td>
</tr>
</tbody>
</table>

\(^{17}\) Raad voor de Journalistiek, *Jaarverslag 2003.*
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

No respect for embargo 1

In 2004 most cases again concerned alleged inaccurate reporting and the intrusion of privacy by the media. On 31 December 2004 in 32 of the 43 cases a friendly settlement was effected or a final decision was taken.

<table>
<thead>
<tr>
<th>Result of the complaint</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Friendly settlement</td>
<td>19</td>
</tr>
<tr>
<td>Decision of the Council</td>
<td>8</td>
</tr>
<tr>
<td>Manifestly ill-founded</td>
<td>3</td>
</tr>
<tr>
<td>Inadmissible</td>
<td>2</td>
</tr>
<tr>
<td>Still pending</td>
<td>11</td>
</tr>
</tbody>
</table>

In total 19 friendly settlements were effected. A decision by the Council for Journalism was taken in eight cases. The Council has not only treated questions for information (114) and 43 complaints, it has also promulgated two guidelines about specific journalistic practices. The first one is about reporting on suicide and the second one formulates a set of guidelines and principles of awareness in case of reporting about people with a mental illness.18

Official Comments:

In the Media Policy Note of 2004-2009 the Minister of the Media of the Flemish Government emphasizes the added value and importance of the Council for Journalism with regard to the surveillance and respect for journalistic ethics. In the Policy Note the Minister formulated the proposal that when a complaint is lodged before the Council for Journalism, the procedure before the Vlaamse Geschillenraad based on the same complaint should be suspended. This approach would give a kind of priority to the Council of Journalism over the Vlaamse Geschillenraad dealing with complaints about the rules of journalistic.19 This option is reflected in the draft bill on the organisation of the Flemish Regulator for the Media (FRM). In its advisory opinion of 9 May 2005 the Vlaamse Mediaraad (Flemish Media Council) has proposed however some modifications to the draft bill.20 The Media Council’s main suggestion is to withdraw the supervisory competence on journalistic ethics from the chamber.

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59
of ethics of the FRM, as this aspect of professional ethics is sufficiently guaranteed by the Council for Journalism. The bill which has been approved by the Flemish Government on 22 July 2005 however has not followed this suggestion. The bill in its amended version however guarantees the participation of professional journalists in the chamber of ethics of the VRM. The bill also institutionalises an advisory input from the Council for Journalism21.

*Scientific evaluation:*

No scientific evaluation has been published yet analysing the action, decisions or impact of the Council for Journalism.

**2. Part II: Leading Cases**

**Case 1: Undercover journalism - VTM-reporter interviews Marc Dutroux in prison (8 May 2003)**

The first case the Council for Journalism took a decision in concerns an interview by a VTM-journalist with Marc Dutroux, at that time suspected for the murder and sexual abuse of several girls. The journalist, T. Van Hemeledonck, succeeded to sneak “undercover” into the jail of Dutroux, as he was assumed to accompany a senator who was authorised to visit Dutroux in prison. Both in the news and in an information programme VTM broadcasted the audiotapes of the journalist’s conversation with Dutroux.

The Council for Journalism is of the opinion that the journalist did not infringe any rule of the codes of journalistic ethics. The Council recognizes the principle that keeping silent his identity as a journalist (*undercover journalism*) should only be an exceptional practice, when common methods of newsgathering are not sufficient and in as far the issue is related to matters of public interest.

The Council refers to the fact that Dutroux was suspected for having committed major crimes and that he was to be considered as a public person, whose case has been influencing substantially public debate in Belgium. As the journalist had pertinent reasons to believe that a conversation with Dutroux might produce statements with an important societal value (“*grote maatschappelijke betekenis*”), the Council considers the journalist’s practice was

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21 The bill guarantees a minimum participation of 4 professional journalists in the chamber of ethics which will have 9 members, the other members being judges and academics, all appointed by Flemish Government. When deciding about a conflict which exclusively or substantially is dealing with journalistic ethics, the chamber of ethics of the Flemish Regulator for the Media has to request for an advice to the Flemish Council for Journalism.
legitimate. The Council comes to the conclusion that the journalist acted correctly from the perspective of journalistic ethics.

**Case 2: Referring to alleged illegal websites for downloading music is not in breach with a rule of journalistic ethics (9 September 2004)**

At the origin of this decision lays a complaint by IFPI (International Federation of the Phonographic Industry), arguing that some articles published in the newspaper *Het Belang van Limburg* and in the magazine *Deng* were inviting to disrespect copyright and neighbouring rights and therefore were to be considered as illicit journalistic practices. On 22 September 2003 a journalist of *Het Belang van Limburg* had written an article about downloading music on the Internet. The article referred to some websites offering possibilities for free downloading and copying music. In *Deng* a short review of the soundtrack of the movie “Kill Bill” had been published, together with the complete list of the songs and how to download and copy this music with reference to the relevant websites. IFPI in its complaint argued that journalist are allowed of course to report about the phenomenon of downloading music on the Internet, but that no references should be made to these websites giving access to illegal facilities for copying music. IFPI also argued that the media didn’t refer to the websites offering images containing child pornography, neither in the context of reporting about such matters. Both the newspaper and the magazine were of the opinion that they had reported about a social phenomenon, that they didn’t promote the controversial websites and that there were no legal or ethical objections against the references.

The Council for Journalism is of the opinion that it is not its task to decide on the legal aspects of the case or on the illegal character of the websites. The Council emphasizes the fact that freedom of press is of vital importance in a democratic society. The reporting about a social phenomenon is not the same as making promotion for it. According to the professional rules of journalistic ethics, restrictions on press freedom are only justified if fundamental values are endangered, e.g. the respect for human rights. Fundamental values are not involved in making references to websites where music can be downloaded and copied. In contrast, fundamental values would be involved if it concerned references to websites where child pornography is available.
Case 3: A column in a newspaper is allowed to contain one-sided opinions and polemic language (13 May 2004)

This case concerns a decision by the Council for Journalism on complaint of Luc Standaert, journalist, and Ivo Vandekerckhove, editor-in-chief of the newspaper Het Belang van Limburg against Rudy Collier, general editor-in-chief and Yves Desmet, political editor-in-chief of the newspaper De Morgen. The case is about a critical column in De Morgen, written by Yves Desmet, under the title “Copywriting”, about an article of Luc Standaert in Het Belang van Limburg and Gazet van Antwerpen about the alleged abuse of Visa cards by members of the Flemish Government. Desmet was of the opinion that Standaert had gratuitously copied a press text of the political party Vlaams Blok. According to Desmet, Standaert’s article was to be considered as a kind of propaganda for the Vlaams Blok. The complainant journalist, Luc Standaert was of the opinion that Desmet had formulated incorrect assertions. He also argued to have been shocked by the lack of good-fellowship of Desmet and the belittled and grievous character of the column.

The Council for Journalism is of the opinion that Desmet did not infringe any rule of the codes of journalistic ethics. Readers of the column are supposed to be aware of the fact that Desmet was formulating his personal opinion. According to the Council an author of a column has the right and the freedom to give his opinion about a certain topic. Exaggeration and expression of one-sided opinions belong to the format and characteristics of a column in a newspaper.22

Case 4: Advisory opinion on request of the VVJ (Flemish Organisation of professional Journalists) concerning the publication of photographs of Dutroux (11 March 2004)

On the first day of the Dutroux-trial the presiding judge of the court granted the request of M. Dutroux not to publish recognizable pictures of him in the media. The VVJ raised the question: “How far reaches Dutroux’ publicity right (right of portrait) as an accused person in a trial that carries his name, also considering the right of information of the media and the public?”

The Council for Journalism is of the opinion that in this case the right of information is more important than the right of privacy, here the right of portrait, of the accused person Dutroux. The Council emphasizes that Dutroux has become a public figure because of the nature of the

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22 The Council for Journalism came to a similar conclusion in its decision of 9 December 2004, in the case L. Catherine vs. M. Doornaert.
crimes he is accused for. Dutroux effectively influences the public debate in Belgium. The Council recommends that the judiciary and the media would agree on how criminal cases can reported in the best possible circumstances.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / The Raad voor de Journalistiek

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
</tr>
<tr>
<td>The Raad voor de Journalistiek (Council for Journalism)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>was established in December 2002. The Council for Journalism was created on the initiative of professional journalists and publishers and media houses in the Flemish Community who have organised themselves as a legal person in a non profit association (VZW).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
</tr>
</tbody>
</table>
The Raad voor de Journalistiek is responsible for the observance of the rules of journalistic ethics. The Council responds to questions, mediates and handles complaints from the public about the journalistic conduct of the press. The Council also formulates guidelines for journalistic practice. Finally the Council acts as a forum for discussion about the ethics of journalism.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation, Measures by third parties (e.g. NGOs)  

The setting up of the Raad voor Journalistiek and the developing of criteria concerning journalistic ethics was carried out by professional journalists and publishers and media houses in the Flemish Community, who are also the addressees of the regulation.

### Link between the non-state-regulatory system and state regulation

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
<td></td>
</tr>
</tbody>
</table>
The system is established to achieve public policy goals targeted to social processes. Its objective is to monitor, promote and develop the observance of journalistic ethics in the media in the Flemish Community in Belgium. The system’s objective is to stimulate the quality and accuracy of journalistic reporting, with more awareness and respect for the right of privacy and taking into consideration other fundamental societal values and particular interests of others.

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</tr>
</thead>
<tbody>
<tr>
<td>There is a legal basis for the non-state regulatory system</td>
</tr>
<tr>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
</tr>
<tr>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
</tr>
<tr>
<td>The Council for Journalism finally has no legal basis at all and is a complete self-regulatory organisation.</td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
</tr>
<tr>
<td>Traditional regulation</td>
</tr>
<tr>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state</td>
</tr>
<tr>
<td>The state leaves discretionary power to the Council for Journalism. The Council can mediate, handle complaints and impose the publication of its decisions.</td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
</tr>
<tr>
<td>Indirectly the state partly subsidises the self-regulatory body, by funding (modestly) the association of professional journalists (VVJ) who is an important actor in the system. The decisions of the Council for Journalism may also influence the case law of the criminal and civil courts with regard offences or civil liability of journalists. The authorities also recognize the importance of the Council for Journalism, by referring to it in policy documents and preparatory documents of law making with regard media regulations.</td>
</tr>
</tbody>
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3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

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The authorities also recognize the importance of the Council for Journalism, by referring to it in policy documents and preparatory documents of law making with regard to media regulations.

**Conclusion:** The described self-regulatory system is not to be considered as a co-regulatory system in the meaning of this study. In the sense that co-regulation is a combination of non-state regulation and state regulation in such a way that a non-state regulatory system is connected with state regulation, the Raad voor de Journalistiek is not an example of such a system. The historical development and the action of the Council for Journalism however illustrates that the self-regulatory system influences to a certain level the media regulation. The establishment of the self-regulatory Council for Journalism prevented the development of a legal framework with regard to the monitoring of journalistic ethics. Whereas actual media law (Flemish Broadcasting Act) contains a legal basis for monitoring the application of the “rules of journalistic ethics” by the Vlaamse Geschillenraad voor radio en televisie (Flemish Council for Disputes on radio and television, cfr. *supra*), the establishment and practice of the Council for Journalism has initiated the discussion to restrict or even withdraw the competence of the Vlaamse Geschillenraad or of the future Flemish Regulator for the Media (FRM, cfr. *supra*) with regard to the respect for the rules of journalistic ethics. The Flemish Government on 22 July 2005 confirmed however the option to refer the competence on complaints about journalistic ethics on radio and television to the chamber of ethics of the Flemish Regulator for the Media. In the last version of the bill establishing the Flemish
Regulator for the Media explicit references are made to the Council for Journalism. Before taking a decision in a case which is exclusively or substantially dealing with journalistic ethics, an advice of the Council for Journalism is required by the chamber of ethics of the Flemish Regulator for the Media. And when a complaint is lodged before the Council for Journalism, the procedure before the chamber of ethics based on the same complaint shall be suspended.

**B. The French Community**

**I. Co-operative Regulatory Systems in the audiovisual sector**

**1. Part I: The co-operative regulatory system**

*a) Development of the regulatory system*

The co-operative system in the audiovisual sector in the French-speaking Community of Belgium was settled in 1987, with the first Conseil supérieur de l’audiovisuel. Completely different of the actual Conseil supérieur de l’audiovisuel (established in 1997 and modified in 2003), the first Conseil supérieur de l’audiovisuel was a pure "co-regulatory" organ, composed of 25 to 40 members appointed by the government amongst various professional categories: audiovisual professions, cinema, copyright societies, producers, private radios, local televisions, press, public broadcaster, private televisions, cable network operators, consumers protection’s associations or trade unions.

The first Conseil supérieur de l’audiovisuel had no real regulatory power. It was only an advisory organ, giving advices to the government in order to help it to prepare its decisions. This was a common way to handle in Belgium, where the advice of the professionals is often asked as a part of the decision-making process.

The main problem of this former Conseil supérieur de l’audiovisuel was that, due to the lack of any rule to prevent conflicts of interests and to the absence of any remuneration of the members, most of the members only came to the meetings of the Conseil when they had a personal interest in the advice to give. Advices were therefore suspect of partiality in most of the cases.

In 1997, it was therefore decided to establish a new organ with real regulatory powers (not only advisory) and strict rules of incompatibility and prevention of conflicts of interests – the new Collège d’autorisation et de contrôle – but also to keep the old organ as a newly created
Collège d’avis. Even though the new Collège d’avis is mainly an advisory organ whose competence is to give advices to the government about every question regarding the broadcasting sector, with special attention dedicated to human rights and protection of minors, and to give advices for every draft of amendment to the Décrets or other regulations, it has also the competence to draw up codes. Those codes can become binding if the government approves them.

b) Subject-matter of the regulatory system

The co-operative power of the Collège d’avis to draw up codes is restricted to four matters: advertising and sponsorship, protection of minors, human dignity and political information during electoral campaigns.

There is no real objective in this organisation of the competences. The only idea is that professionals will accept easier codes if they have been associated in the decision-making process.

c) Basis of the co-operation

The legal basis of the Collège d’avis is the décret du 27 février 2003 sur la radiodiffusion.

Art. 132

§ 1°. Le Collège d'avis a pour mission de :

1° rendre, d'initiative ou à la demande du Gouvernement ou du Conseil de la Communauté française, des avis sur toute question relative à l'audiovisuel, en ce compris la communication publicitaire, à l’exception des questions relevant de la compétence du Collège d’autorisation et de contrôle ;

2° rendre, d'initiative ou à la demande du Gouvernement ou du Conseil de la Communauté française, un avis sur les modifications décrétale et réglementaires que lui paraît appeler l'évolution technologique, économique, sociale et culturelle des activités du secteur de l'audiovisuel, ainsi que du droit européen et international ;

3° rendre, d'initiative ou à la demande du Gouvernement ou du Conseil de la Communauté française, un avis sur le respect des règles démocratiques relatives aux droits et aux libertés fondamentales garanties par la Constitution, et plus particulièrement le principe de non-discrimination ;
4° rendre, d’initiative ou à la demande du Gouvernement ou du Conseil de la Communauté française, un avis sur la protection de l’enfance et de l’adolescence dans les services de radiodiffusion ;
5° rédiger et tenir à jour des règlements portant sur la communication publicitaire, sur le respect de la dignité humaine, sur la protection des mineurs et sur l’information politique en périodes électorales. Pour avoir force obligatoire, ces règlements devront être approuvés par le Gouvernement.

§ 2. Lorsque les avis sont demandés par le Conseil de la Communauté française ou le Gouvernement, le Collège les rend dans un délai de trois mois à compter de la date d’envoi de la demande. Le Conseil de la Communauté française ou le Gouvernement peut solliciter un avis du Collège selon la procédure d’urgence. Dans ce cas, l’avis est rendu dans le mois.

Art. 135.
§ 1er. Outre les 4 membres du bureau visés à l’article 139, §1er, le Collège d’avis est composé de trente membres effectifs désignés par le Gouvernement. Pour chaque membre effectif, il est nommé un suppléant issu de la même catégorie socio-professionnelle. Le mandat des membres effectifs et suppléants est d’une durée de quatre ans, renouvelable.
Sans préjudice des dispositions visées à l’article 139, §1er, les 34 membres effectifs et les 30 membres suppléants sont désignés dans le respect de l’article 7 de la loi du 16 juillet 1973 garantissant la protection des tendances idéologiques et philosophiques.
Le membre effectif qui cesse d’exercer son mandat avant son expiration est remplacé par son suppléant. Celui-ci achève le mandat en cours.
Chaque fois qu’il est empêché, le membre effectif appelle son suppléant à siéger. Le président constate la démission d’office d’un membre effectif après six absences consécutives non justifiées.
Les membres effectifs et suppléants du Collège d’avis sont révoqués par le Gouvernement, à son initiative ou sur proposition du Collège d’avis.
Il y a lieu à révocation :
1° pour les motifs résultant de l’application de l’article 404 du Code judiciaire ;
2° en cas de méconnaissance des règles relatives aux incompatibilités visées par le décret et constatées par l’assemblée plénière, les intéressés ayant été entendus en leurs moyens de défense ;
3° en cas de manquement aux règles de déontologie fixées par la Collège d’avis en application de l’article 142, §2 .
§2. Les membres effectifs et leur suppléant sont choisis parmi les personnes appartenant ou ayant appartenu à au moins un des organismes ou une des catégories socio-professionnelles suivants :
1° les professionnels du domaine de l’audiovisuel ;
2° le secteur cinématographique et les producteurs indépendants de programmes audiovisuels;
3° les sociétés d’auteurs et de droits voisins;
4° les éditeurs de services privés de radiodiffusion sonore;
5° les télévisions locales;
6° la RTBF;
7° les éditeurs de services privés de radiodiffusion télévisuelle;
8° les distributeurs de services de radiodiffusion et les opérateurs de réseaux;
9° les professions de la publicité;
10° les annonceurs;
11° les associations d’éducation permanente ou de jeunesse;
12° les associations de défense des consommateurs, des téléspectateurs et des auditeurs;
13° les organisations représentatives des travailleurs des secteurs précités affiliées à une organisation syndicale siégeant au Conseil national du travail;
14° les sociétés éditoriales de presse et le secteur du livre;
15° les journalistes professionnels reconnus en application de la loi du 30 décembre 1963 relative à la reconnaissance et à la protection du titre de journaliste professionnel.

Chacune des catégories socio-professionnelles ci-dessus compte au moins un membre effectif.

§ 3. Le Gouvernement arrête le statut des membres effectifs et suppléants du Collège d’avis.

§ 4. La qualité de membre effectif et suppléant du Collège d’avis est incompatible :
1° avec la qualité de membre d’un pouvoir exécutif européen, fédéral, communautaire ou régional ;
2° avec la qualité de membre d’un cabinet d’un pouvoir exécutif européen, fédéral, communautaire ou régional ;
3° avec la qualité de membre d’une assemblée législative européenne, fédérale, communautaire ou régionale, ou d’attaché parlementaire;
4° avec l’appartenance à un organisme qui ne respecte pas les principes de la démocratie tels qu’énoncés, notamment, par la Convention européenne de sauvegarde des droits de l’homme et des libertés fondamentales, par la loi du 30 juillet 1981 tendant à réprimer
certains actes inspirés par le racisme et la xénophobie et par la loi du 23 mars 1995
tendant à réprimer la négation, la minimisation, la justification ou l’approbation du
génocide commis par le régime national-socialiste pendant la seconde guerre mondiale
ou toute autre forme de génocide;
5° avec la qualité de membre du Collège d’autorisation et de contrôle, les président et vice-
présidents exceptés.
§ 5. Pendant quatre ans, les président et vice-présidents sortant assistent aux réunions du
Collège d'avis avec voix consultative. Les incompatibilités visées au § 4 leur sont applicables.

d) Institutions involved in the system

The Collège d’avis is part of the Conseil supérieur de l’audiovisuel. The bureau of the Conseil
supérieur de l’audiovisuel organises the agenda of the Collège d’avis, and the four members
of the bureau are members of the Collège d’avis (and also of the other college, the Collège
d’autorisation et de contrôle).
The Conseil supérieur de l’audiovisuel is funded by the Communauté française. Both parties
sign a contract to guarantee for five years the funding of the Conseil supérieur de
l’audiovisuel. A four-member committee, the Bureau, heads the Conseil supérieur de
l’audiovisuel with one chairman (full-time tenure) and three deputy chairman (part-time
tenures). Members of the Bureau are members of both the Collège d’avis and the Collège
d’autorisation et de contrôle.

e) Functioning of the system

Codes drawn up by the Collège d’avis are binding for all addressees as soon as the
government approves them. Codes remain indicative as long as the government does not
approve them. The participation in the Collège d’avis is voluntary. Decision-making bodies as
such are not really involved in the Collège d’avis. The members of the Collège d’avis are
appointed by the government with regard to their professional abilities but also to their
political membership: each democratic party represented in the Parliament of the French
Community will present a number of members in proportion to its number of M.P.’s. The
composition of the Collège d’avis is therefore a delicate mix of professional and political
considerations.
The decision-making process is determined by the Règlement d’ordre intérieur: the latest version was adopted on 4 May 2005. There is no right of veto or discretionary power, and the necessary quorum remains normal: simple majority of the present members. The complaint procedure organised for the regulation of the audiovisual sector is not handled by the Collège d’avis but by the Collège d’autorisation et de contrôle, the other College of the Conseil supérieur de l’audiovisuel: however, as explained in the first part of this study, the Collège d’autorisation et de contrôle is not co-regulatory but purely regulatory. All codes and advices of the Collège d’avis, and all decisions of the Collège d’autorisation et de contrôle, are available on the web site of the Conseil supérieur de l’audiovisuel (www.csa.be) and, later, in the annual report. There is only a “Code de bonne conduite administrative” applicable to the employees of the Conseil supérieur de l’audiovisuel, but not to the members of the colleges. No other guidelines are provided.

\textit{f) Supervision of the system
}

The codes of the Collège d’avis will become binding only if the government approves them. Decrees of approval can be voided by the Conseil d’Etat if they appear to be illegal.

\textit{g) Impact assessment
}

No evaluation report is provided, but an annual report of the Conseil supérieur de l’audiovisuel as a whole. As explained, complaints are not handled by the co-regulatory college (Collège d’avis) but by the regulatory college (Collège d’autorisation et de contrôle). In 2004, the college d’avis has issued 3 advices and one code. For scientific evaluation or estimation see F. Jongen, « Le Conseil supérieur de l’audiovisuel, phase 2 : premier bilan », A&M, 2003/6, pp. 422-432.

\textbf{2. Part II: Leading Cases
}

It is impossible to talk about cases what the Collège d’avis concerns. I just can list the various codes adopted by the Collège d’avis since its creation in 1997: The “Code d’éthique de la publicité” was adopted by the former Collège de la publicité (merged in 2003 in the Collège d’avis) on 27 May 1998. It is the only code that has been, until now, enforced by the government to become a binding code.
A first « Recommandation relative à l'information et à la publicité pour la période couvrant la campagne électorale » was adopted by the Collège d’avis on 10 March 1999 for the regional, federal and European elections of 1999. Similar recommendations were adopted by the Collège d’avis on 26 June 2000 (communal elections), 12 February 2003 (federal elections) and 11 February 2004 (regional and European elections). All those recommendations remain indicative. The « Recommandation relative aux jeux et concours » was adopted by the Collège d’avis on 22 March 2000 and remains indicative. Similarly, the « Recommandation relative à la dignité humaine et à la télévision de l’intimité », adopted by the Collège d’avis on 12 June 2002, remains indicative. Eventually, the « Code d’éthique de la publicité audiovisuelle à destination des enfants » adopted by the former Collège de la publicité on 10 July 2002 remains indicative, as the government hasn’t been approving it until now.

3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

The setting up of specific organisations, rules or processes: **OK**
To influence decisions of persons or decisions of or within organisations: **OK**
As long as the setting up is conducted by or within the organisations or parts of society whose members are addressees of the regulation: **I wouldn’t say “by or within the organisations or parts of society”, but “in collaboration with them”**.

b) The link between the non-state part and state regulation

The system is established to achieve public policy goals targeted to social processes: **OK (implicitly)**
There is a legal basis for the non-state regulatory system (however, it is not necessary that the use of non-state regulation is mentioned in the laws): **YES**
The state leaves discretionary power to a non-state regulatory system: **NO**
The state uses regulatory resources to influence the non-state regulatory system (power, publicity, money etc.): **YES**

**Conclusion**: The system of the Collège d’avis within the Conseil supérieur de l’audiovisuel can be considered as a co-regulatory system in the meaning of this study, but it’s only co-regulatory in a very restricted way. However, it must be said that it has probably not been intended as co-regulatory. Firstly, because the Collège d’avis is mainly the subsistence of a
former advisory committee (the first Conseil supérieur de l’audiovisuel, existing from 1987 to 1997), which has only recently (in 2003) received competences which can be considered as co-regulatory (to issue codes which will become binding if they are approved by the government). A second raison could be that its regulatory powers remain very restricted in law and also in fact: since 2003, the Collège d’avis has issued only one code (regarding electoral programs for the electoral campaign of 2004) which wasn’t aimed to be more than temporary.
3.3. Cyprus

Introduction

Cyprus acceded to independence in 1960. Colonial legacy and troubled political life slowed down the development of institutions likely to strengthen democracy. Political and other activities and ideas were treated on the basis rather of traditional values than as components of a democratic society, based on rights that need protection.

Under the conditions that dominated the country, it is no surprise that the first ever mass media regulatory system was introduced in 1989; other regulatory systems followed in a slow pace. Their effectiveness is questionable as might be the assumption that this is exclusively the fault of the specific legal and other frameworks.

The first regulatory system, applying to the print media, was one of co-regulation. Elements of co-regulation or delegation of power are also found in systems adopted later to regulate other sectors.

I. Co-operative Regulatory Systems in the press sector

1. Part I: The co-operative regulatory system

a) Development of the regulatory system

The first regulatory system was introduced in 1989, under the Press law¹. It was the product of three years cooperative work of the official side and the print media professionals. The law replaced the old law, dating back to 1947 and aiming to serve the interests of the British colonial power; the latter’s provisions referred to a series of obligations of publishers and printers.

In the 1980s changes took place in the print media sector, due to technological developments and societal and other reasons. Cyprus also rejoined in 1985 the Council of Europe Parliamentary Assembly² and the ambition was to fulfil the obligations of all Council of Europe member states.

² Cyprus left its seats in the Parliamentary Assembly in the 1960s, following the collapse of the partnership government between Greek and Turkish Cypriot communities.
In 1981-1982 dailies started circulating also on Monday, breaking thus with the tradition of six issues per week. This led to the closing down of most weeklies, some with long historical course. In the late 1980s, pressure was increasing for breaking with the state monopoly in broadcasting.

The government set a working group with the participation of the professionals of the print media with the task to draft a Press law to replace the old one. The extended title of the Press law of 1989 is indicative of its content: “Law consolidating and unifying the laws concerning the introduction of measures for safeguarding press freedoms, the establishment of a Press Council and a Press Authority, the publication circulation and selling of newspapers and other print media, the registration of books, the possession of printing presses, the establishment of a printing house and other relevant matters”.

The final result did not meet the demands of the professionals for a co-regulatory system. They claim that the balance achieved by the working group in the draft text was destroyed by last minute changes decided by the parliament, such as the one concerning the composition of the Press Council.

b) Subject-matter of the regulatory system

The Press law of 1989 was taking most of the provisions of the law it replaced and introduced many more, relating to the setting up of the Press Council and the Press Authority, but also to media and journalistic rights and freedoms. Access to sources of information, dissemination of information and opinions and non-disclosure of sources are rights protected under the law that provides, also, for the obligation of public and other authorities to respond to queries by the press.

The Press law of 1989 responded to the demand for protecting freedom of expression and safeguarding press freedoms and rights. It enables the exercise of free expression by lifting /relaxing constraints or limitations in the print media.

The main objectives of the law are the following:

- It establishes a system of regulation with the participation and/or first role assigned to the professionals of the press sector.
- It safeguards the right of journalists to exercise their functions at all stages of their work.

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3 Party representatives were included in the Council.
• The law guarantees the right of journalists of non-disclosure /protection of sources.
• The right to free expression is enhanced, through the lifting of impediments to the publication of a newspaper in the form of money deposit.
• The right to correction and right of reply are ensured under the provisions of the law.

The Press Council is assigned with the task of regulating matters related with journalistic and media ethics. Within the scope of its functions are also the tasks of ensuring respect for freedom and independence of the press and defending its rights. In this respect, it issues codes of conduct and examines cases for misbehaviour of the media and of journalists and/or violation of the code of professional conduct, and suggests measures or actions likely to remedy any harm caused by such misbehaviour. The Council is also the authority responsible for the issuance of professional cards to journalists or their cancellation.

Under the law, the chairman of the Press Council has the authority to decide on cases connected to the right of correction and of reply, namely, eventual refusal by a newspaper to publish a correction/reply and the length of the reply.

The Press Authority is assigned with powers regulating various aspects of the circulation of newspapers. Free circulation and distribution should be guaranteed and agencies /sub-agencies are obliged to accept for distribution all newspapers, but the Authority decides on “technical” aspects. Operating a distribution agency or a sub-agency requires a licence by the Minister of Interior, following an opinion by the Authority.

The price of the newspapers and commissions are decided by the Authority following approval by the Minister of Interior. Other issues are also regulated by the law.

c) Basis of the co-operation

The basis of the co-operation is the Press law of 1989.

Article 3 provides for the establishment of the Press Council and its functions; article 4 defines its composition, nomination and appointment of the chairman and its members, and article 5 refers to meeting and decision-making procedures.

The role and powers of the chairman of the Council related to the exercise of the rights to correction and of reply are stipulated in articles 38 and 39 respectively.

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4 The terms “arthro” / “article” and “paragraphos” / “paragraph” in official jargon are translated into “section” and “sub-section” respectively.
Article 24 of the law provides for the establishment and the functions of the Press Authority; its composition, membership and procedures of nomination/appointment of the chairman and its members are set in article 25, while article 26 deals with meeting and decision-making procedures. Articles 18 and 19 provide for the role and powers of the Authority in connection to the licensing of newspaper distribution agencies and sub-agencies. No other legal document, formal or informal agreement relevant to the above regulation does exist.

d) Institutions involved in the system

Public institutions and private/professional bodies are involved in the system. Administrative tasks are solely assigned to the public authorities, while matters relating to the carrying out of professional activities and the rights affected by them are dealt with by the co-regulatory bodies, dominated by the professionals. In certain tasks (nominations and appointments etc) common action and interaction is needed. Funding and support was fully assumed by the state.

— The institutions involved in the system are the following:

Public authorities

— The council of Ministers appoints the chairman and members of the Press Council and the Press Authority.

— The Minister of Interior is the authority responsible for the issuance of certificates and/or licenses for the publication of newspapers and the establishment of newspaper distribution agencies and sub-agencies, as well as for the establishment of printing houses and registration of printing presses.

— The Ministry of Interior is the depository for copies of books and newspapers.

— The Minister of Foreign affairs is cooperating with the Minister of Interior for the issuance of licence for the publication of a newspaper by a foreign person.

— The Press and Information Office, the media service of the government, was assigned the task of providing logistics and other support to the Press Council and Press Authority.

— The Union of Cyprus Journalists is nominating members of the Press Council and the Press Authority.

— The Association of Newspaper Publishers is also nominating from its ranks members to the Press Council and the Press Authority and the chairman of the Authority.
The Press Council and Press Authority have not had permanent offices or seat. They were meeting at the premises of the Press and Information Office, the media service of the government. The latter was providing logistical and other support. It included in its budget the necessary funds for covering the expenses of the chairman and of the two press bodies.

\textit{e) Functioning of the system}

Participation in the system was neither mandatory nor voluntary. The involvement of the Union of Journalists and of the Association of Publishers in the drafting of the law leads to the assumption that they were willing to participate in the bodies set to regulate the press market. They were involved in the nomination of their members.

Membership in the Press Council was as follows:
The Council of Ministers appoints the members from lists of nominees submitted by the respective organisations or authorities:

- Three members nominated by the Association of Journalists and three by the Association of Newspaper Publishers.
- One member nominated by each parliamentary political party\textsuperscript{5}.

The chairman, appointed by the Council of Ministers, should have a legal background and be of the \textit{“highest professional and moral status”} with no connection with the press sector. The minimum number of members to form a quorum is set to six and decisions are taken by single majority\textsuperscript{6}, with the chairman having the winning vote in case of draw. The Council itself can initiate the examination of a case or open a case following complaints by the public. There is no provision on procedures for examination of cases (hearing, rights of parties etc). Under the law, the Council publishes periodic reports on its activities and decisions.

Membership in the Press Authority was as follows:
The Council of Ministers appoints the members from lists of nominees submitted by the respective organisations or authorities:

- The Association of Newspaper Publishers (three members) and the Union of Journalists (one member).

\textsuperscript{5} This clause was introduced by the parliament at the last stage before it approved the law. As a result the total number of members and the balance between professionals and party representatives depended on the number of parties in parliament. Four parties had seats in parliament in 1989 and eight after the 2001 elections.

\textsuperscript{6} No reference of the basis, i.e. members present or members casting a vote.
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

- The owners of newspapers distribution agencies and the owners of printing houses (one member each).
- The Press and Information Office, the Ministry of Interior and the ministry of Commerce and Industry (one member each).

The chairman should be one of the three members nominated by the Association of Newspaper Publishers. Five members form a quorum and decisions are taken by single majority\(^7\), with the chairman having the winning vote. No other details about procedures are provided.

\(^f\) Supervision of the system

No supervisory mechanisms or institutions are mentioned in the law and no evaluation schemes are foreseen.

\(^g\) Impact assessment

Under the law, the Press Council publishes periodic reports on its activities and decisions. In fact, the Press Council and the Press Authority have never effectively operated. After a couple of meetings the professionals refused to take part and declared that they were not recognising the authority of the two bodies. The chairman of the Press Council continued to deliberate on his own on a number of cases, until the expiration of its term of office in December 1992. He issued statements in about 20 cases, denouncing the behaviour of the press/journalists in a very severe wording. There is no data about eventual complaints by the public; one may assume, though, that such cases did not take place due to the fact that the system never worked.

Official comments, regarding the efficiency of the systems:

The chairman of the Council complained for lack of support and resources, both by the professionals and the government. The chairman of the Union of Journalists said that the Union would never recognise a body in which the state authorities interfere. “State involvement in regulation constitutes a threat to press freedoms”, he stated to the author of this report. He supports self-regulatory mechanisms.

\(^7\) No reference of the basis, i.e. members present or members casting a vote
Scientific evaluation or estimation:
In reality, the value of the system and the extent to which it could be workable were not effectively put to test. The refusal of the professionals and in particular of the Union of Journalists to agree with the inclusion of party representatives in the Press Council and with the choice of the chairman blocked the whole system from the very beginning. On the other hand, the law was suffering from many gaps and flaws; it established no right to be heard on any charge and no crisis resolution procedures.

2. Part II: Leading Cases
The only cases dealt with were the ones where the chairman of the Press Council issued his decisions relating to press reports and denouncing the newspapers’ behaviour.
### 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

**Table: Criteria / Press sector**

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td></td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
</tr>
<tr>
<td>The Press Council and the Press Authority are non-state institutions that set their working rules and procedures.</td>
<td>Pure consultation</td>
<td></td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>The Minister of Interior is the authority responsible for the issuance of certificates and/or licenses for the publication of newspapers and the establishment of newspaper distribution agencies and sub-agencies, as well as for the establishment of printing houses and registration of printing presses. The Ministry of Interior is the depository for copies of books and newspapers.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
As long as this is performed by or within the organisations or parts of society that are addressees of the regulation | Measures by third parties (e.g. NGOs) | The range of possible subjects of non-state action has to be limited to make the definition workable.

In both bodies representatives of the print media participate. They form a majority in the Authority and eventually in the Council.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criteria</strong></td>
</tr>
<tr>
<td>The system is established to achieve public policy goals</td>
</tr>
<tr>
<td>The aim is to safeguard the rights and freedoms of the professionals but also to protect the rights and legitimate interests of the public. The system also determines administrative procedures in relation to various tasks and issues.</td>
</tr>
<tr>
<td>There is a legal basis for the non-state regulatory system.</td>
</tr>
<tr>
<td>The system is established by the press law of 1989.</td>
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<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
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<td>---</td>
</tr>
<tr>
<td>The state promulgated a law establishing the regulatory system, but further regulation (the codes of ethics) and decision making were left to the discretionary power of the Council and the Authority it established by law.</td>
</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
</tr>
<tr>
<td>Logistical support and funding are provided by state services. Participation of representatives of state services and political parties are likely to control or influence the system. The system is clearly a co-regulatory one, whatever the membership balance within the two bodies.</td>
</tr>
</tbody>
</table>
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

The Press Council and the Press Authority are non-state bodies. Under the law, they set their procedures of work and decision making. Most importantly, the Press Council has the authority to draw codes of conduct and monitor compliance by the media to their provisions. The law entrusts it with the power to decide on remedies in case of breach of the code of conduct. The majority of members of the two bodies should also be addressees of the regulation, i.e. media professionals.

b) The link between the non-state part and state regulation

The state promulgated a law establishing the regulatory system, but further regulation (the codes of ethics) was left to the discretionary power of the Council and the Authority it established by law. The professional bodies nominated their representatives in the regulators but the state (Council of Ministers) reserved for itself the power to appoint both the chairman of the Press council and the members of both bodies. By offering funding and logistical support to the regulators and be represented by public employees in the Authority and party representatives in the Press Council could monitor the work and, eventually, influence decisions.

**Conclusion:** The system established under the Press law of 1989 is clearly a co-regulatory one, with the state reserving to itself an active role in appointments and logistical support and with political parties represented in the Press Council.

**Following the establishment of the Commission of Journalistic Ethics in May 1997, the Press is fully self-regulated. No other body is effectively acting as print media regulator.**
II. Co-operative Regulatory Systems in the broadcasting sector

Introduction

The collapse of the regulatory system in the print media occurred at a time of increasing pressure for the liberation of the air waves. The Union of Journalists participated in the drafting of the new broadcasting laws of 1990 and 1992 and also in the advisory committee for licensing. In view of the lack of regulations and the slow pace of the authorities in drafting them, the Union of Journalists initiated an effort with the Association of Newspaper Publishers and the owners of broadcasting stations aiming at the adoption of self regulatory measures. In May 1997, they all signed an agreement adopting a Code of Journalistic Ethics and setting up a Commission of Journalistic Ethics\(^1\). Following the signing of the agreement six months later by the public service Cyprus Broadcasting Corporation, the Code applies to all, print and broadcast media, as are the powers of the Commission.

- The law on Radio and Television Stations of 1998\(^2\) contains a number of provisions that can be qualified as co-regulatory; they refer to the following:
  - The establishment of an Advisory Committee by the Cyprus Radio Television Authority.
  - The setting up of a Committee of Ethics by each broadcaster and
  - a clause under which the Cyprus Radio Television Authority can examine a case for breach of the Code of Journalistic Ethics only if they receive a request by the Commission of Journalistic Ethics.
  - The broadcasters are also responsible for rating their programmes according to their content; programme content should not be likely to harm minors.

The addressees of the regulation are the broadcast media that should act and operate in compliance with the clauses of the legislation on Radio and Television Stations. On the other hand, public and private bodies are called to be represented in the Advisory Committee of Radio and Television.

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\(^1\) The name in Greek is Επιτροπή Νομοσχεδιογραφικής Δεοντολογίας / Commission for Journalistic Ethics. The Commission officially translates its name into ‘Cyprus Media Complaints Commission’. http://www.cmcc.org.cy/

1. Part I: The co-operative regulatory system No. 1 - The Advisory Committee

a) Development of the regulatory system

The drafters of the Radio and Television law of 1998 thought that setting up a body representing the public, as part of the regulatory system, could assist the independent regulator in its work. They aimed at the largest possible membership.

b) Subject-matter of the regulatory system

The ultimate aim of the clause on setting up an Advisory Committee was to serve the overall objectives of the broadcasting regulatory system, i.e. protection of minors from violent and other offensive content, respect for human dignity and privacy, respect of the rights of the audience etc.

By its composition, the Advisory Committee was intended to represent the public opinion and reflect the views and concerns of the public.

c) Basis of the co-operation

Article 11 of the law on Radio and Television Stations of 1998 provides for the establishment of an Advisory Committee, “which advises the Radio and Television Authority in the exercise of its competencies”. The composition of the Committee includes representatives of various public authorities, media professionals and public and private institutions and bodies.

d) Institutions involved in the system

The Advisory Committee of Radio and Television was constituted by the Radio and Television Authority, under art. 11 of the law on Radio and Television Stations of 1998. It is composed by representatives of public and private organisations / bodies and its operation is governed by regulations\(^3\). The Committee meets at the premises of the Authority, which provides logistical support and funding.

The Radio Television Authority is an independent broadcasting regulator established under article 2 of the law on Radio and Television Stations of 1998. It is appointed by the Council of Ministers and its decisions are founded on the provisions of the law on Radio and Television Stations of 1998 and the relevant regulations. On issues relating to the public service Cyprus Broadcasting Corporation, the Authority decides on the basis of the laws and regulations governing the establishment and operation of the Corporation. The Authority is funded by the industry. Art. 24 of the Radio Television law provides for payment by broadcasters of license fees and of 0.5% on income from advertising. Art. 38 of the law provides that fees are deposited on the Authority’s account; the same applies to money coming from fines imposed to broadcasters and fees from the examination of applications for granting licences. The Authority has its own budget, staff and services.

**e) Functioning of the system**

Participation of various organisations in the Advisory Committee of Radio and Television can not be mandatory; no clause under the law stipulates the obligation of any body to be represented. Under the law, the Committee is composed by 18 persons, representing ministries and other public bodies, the church, media professionals and owners, trade unions, other professional bodies etc. The various bodies are nominating their representatives and the Radio Television Authority gives its consent. No clause provides for remedies in case the Authority refuses to appoint a nominee.

The minimum number of members present to form a quorum is 50% of the total plus one member. In case of failure to form a quorum, a new meeting is convened necessitating only 1/3 (one third) plus one of its members present. The Committee advises the Authority on issues covering the whole spectrum of the regulatory system: They relate to journalistic freedoms, rights and obligations, to professional ethics, to the use of language, the protection of minors and of consumers, as well as to the (fair) treatment of various religious or other minorities. The Committee can advise on other issues related to the work of the Authority on its own initiative or following a request by the latter. It can also have consultations with the

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5 See the full list in annex I.
Authority on measures that could assist with parental control on television programmes viewed by minors.

The Committee “hands” its annual report, which may also include suggestions to the Radio Television Authority about amendments to the law.

\textit{f) Supervision of the system}

The Radio Television Authority should justify decisions taken against any opinion expressed by the Advisory Committee. This is implied in a Supreme Court’s decision (see Supreme Court, (Appeals Court), Case No 3251, Radio Television Authority vs Antenna TV, 24.3.2004).

\textit{g) Impact assessment}

Under regulation 4 of the relevant Regulations, the Advisory Committee of Radio and Television should hold at least four meetings a year. It actually held about six meetings per year in 2002 – 2004, down from 11 and 9 in 2000 and 2001. The Committee was requested to present the views of its members to the Authority on important issues, such as the list of major events, its composition and functionality and other. It also initiated memorandums with general observations/suggestions to the Authority on issues related to gaps and omissions in legislation, on the Committee’s composition, on programme quality, language, broadcasting media, ownership and measures to safeguard the independence of media professionals. The Committee insisted on the need for the Authority to force the broadcasters to sign collective agreements with the Union of Journalists and other professional bodies, as a means for safeguarding their professional independence. The Committee organised in 2001 a seminar on good practice in the use of the Greek language.

\textbf{2. Part II: Leading Cases}

In April 2000, the Radio Television Authority sought the advice of the Committee on the content (considered as highly erotic) of the film \textit{Showgirls}. The Committee refused to “act as a sensor”, but expressed the opinion that the film might incite minors to using drugs.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Advisory Committee of Radio and Television

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
</tr>
<tr>
<td>The Advisory Committee is a non-state institution</td>
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<td></td>
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<tr>
<td>functioning as part of the regulatory system.</td>
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<tr>
<td>To influence decisions by persons or, in the case of</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
<td></td>
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<tr>
<td>organisations, decisions by or within such entities</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>This non-state body advises the Radio Television Authority on matters defined by law.</td>
<td>Advices can not be ignored by the Authority without proper justification.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
<td></td>
</tr>
<tr>
<td>Representatives of the professionals are members of the Committee but the majority is formed by representatives of public services and private organisations.</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Link between the non-state-regulatory system and state regulation</td>
<td>Criteria</td>
<td>Cases excluded by this criterion</td>
<td>Explanation</td>
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<tr>
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</tr>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
<td></td>
</tr>
<tr>
<td>The Committee presents to the Authority a wide spectrum of views, reflecting public opinion, with the ultimate aim of protecting minors, as well as rights and freedoms.</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
<td></td>
</tr>
<tr>
<td>There is a legal basis for the non-state regulatory system.</td>
<td>Traditional regulation</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
<td></td>
</tr>
<tr>
<td>The Committee is established by the law on Radio and Television Stations of 1998.</td>
<td>Decision makings lies with the Radio Television Authority</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not</td>
<td></td>
</tr>
</tbody>
</table>
Logistical support and funding are provided by the Authority.

Participation of representatives of state services can influence the work of the Committee.

<table>
<thead>
<tr>
<th>state-regulatory system</th>
<th>promise innovation</th>
</tr>
</thead>
</table>

This part of the system can be qualified as participatory regulation, in the sense that representatives of the public participate in the Committee. The professionals – addressees of the regulatory system are members of the Committee, but have not a decisive role.
1. Part I: The co-operative regulatory system No. 2 - The Committee of Ethics

a) Development of the regulatory system

The inclusion of a regulation for the establishment of an internal Committee of Ethics was based on the thinking that this could fill the gap in respect of the need for professional training and keeping up with programme standards. This was necessary, given that no requirements are set by any legal or other provision for the exercise of journalism.

b) Subject-matter of the regulatory system

The Committee of Ethics, set by each broadcaster, is an internal body with the task to also serve the main objectives set by the broadcasting regulatory system, as mentioned above. Through professional training it is expected to acquaint professionals with the legal and other rules pertaining to the exercise of their functions, while supervision of programmes would ensure respect of quality standards.

c) Basis of the co-operation

The regulations adopted in 2000 under the law on Radio and Television Stations of 1998\(^1\) provide also for the establishment by every broadcaster of an Ethics Committee. The Committee’s task is to “sustain programme standards”, as provided by the law and the regulations, and organise in-house training.

d) Institutions involved in the system

The Committee of Ethics is a body set by each broadcaster. It reports to the Radio and Television Authority, three times a year (report periods should be shorter than four months). Funding, management and all relevant issues are left to the discretion of each broadcaster.

The Radio Television Authority is supervising the establishment and work of the Committees.

\(^1\) Regulation 21(2).
e) **Functioning of the system**

Observance of the clause on the Committee of Ethics is mandatory for all commercial broadcasters. Membership, procedures of work and decision making are left to the discretion of the broadcaster(s). Under the regulations the Committee should be composed by “competent individuals”.

f) **Supervision of the system**

Committees of Ethics should report to the Radio Television Authority but no details are set in the legislation about the content of the report and any follow-up action by the Authority.

g) **Impact assessment**

Very few broadcasters created a Committee of Ethics; a number of reports were submitted to the Authority in 2000 and 2001, but this did not continue. The Radio Television Authority has not taken drastic measures for the implementation of the relevant regulation.

2. **Part II: Leading Cases**

No cases emerged.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Committee of Ethics

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
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<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
</tr>
<tr>
<td>The Committee of Ethics is a non-state institution that can set its own working rules and extent of action.</td>
<td></td>
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</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
<td></td>
</tr>
<tr>
<td>The Committee can influence the behaviour of the broadcaster through training and supervision.</td>
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<tr>
<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
<td></td>
</tr>
<tr>
<td>The Committee belongs to the broadcaster, but can not be qualified as regulatory body</td>
<td></td>
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</tbody>
</table>
## Link between the non-state-regulatory system and state regulation

<table>
<thead>
<tr>
<th>Criteria</th>
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<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
<td></td>
</tr>
<tr>
<td>The aim is to provide training and supervise compliance with the law in respect of quality and standards. The ultimate goal is respect of the viewers’ rights and protection of minors.</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
<td></td>
</tr>
<tr>
<td>There is a legal basis for the non-state regulatory system.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Committee is part of the system governed by the Radio and Television law of 1998 and is established under the relevant regulations of 2000.</td>
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</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
<td></td>
</tr>
<tr>
<td>There is no specific discretionary power under the law. The committee’s powers lie with the discretion of the broadcaster.</td>
<td>Certain tasks are in the competency of the Minister and the Ministry of Interior.</td>
<td></td>
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</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
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<td></td>
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<tr>
<td>No real influence of the state or the regulator can take place. Reporting to the Authority is set in a vague manner.</td>
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</tbody>
</table>
1. Part I: The co-operative regulatory system No. 3 - The rating system

a) Development of the regulatory system

Under the law on Radio and Television Stations of 1998, art. 29 para. (4), the Radio Television Authority had the obligation to seek ways for the protection of minors, including a rating system. Article 29. para (4) of the law is identical to art. 22b of the directive 36/1997 on TWF.

b) Subject-matter of the regulatory system

Regulations introducing a programmes rating system would serve the protection of minors. This is why rating is based on age and (non) suitability of their content to specific age groups.

c) Basis of the co-operation

Regulation 22 of the regulations (normative administrative acts) on Radio and Television Stations of 2000 provided for the rating by broadcasters of all programmes, and adequately informing the viewers. The rating criteria should be based on several rules related to programme content, included in part VI of the regulations.

d) Institutions involved in the system

Each broadcaster is responsible for implementing the rules set in the law and the regulations relating to the rating system. They are private companies funded by advertisements and selling their productions. The Radio Television Authority supervises the whole sector, and compliance of the rating with the law and regulations. The Authority is an independent regulator appointed by the Council of Ministers, and funded by the industry.

e) Functioning of the system

Broadcasters must decide and rate their programmes and inform the public in the daily press and in specialised TV magazines. They must also inform the viewers verbally before the
screening and optically during the programme. Rating is based on onscreen display of signs (figure or letter plus colour) that correspond to the following categories.

- (K) – Suitable for all ages.
- (12) – Not suitable for viewing by persons below 12 years old.
- (15) – Not suitable for viewing by persons below 15 years old.
- (18) – Not suitable for persons under 18 years old.
- (A) - Highly erotic content. Only broadcasters with encoded signal can screen such programmes between 24:00 and 05:30 hours.

The Radio Television Authority monitors the system.

\[ \text{f) Supervision of the system} \]

The rating of programmes by the broadcasters is monitored by the Radio Television Authority for compliance with the law. This is done only after the screening of programmes. Under article 3 (2) (a) the Authority can impose administrative sanctions to broadcasters for failing to display rating signs or for rating not supported by the content of a programme. Sanctions can be recommendations, warnings, up to three-month licence suspension, revocation of the licence or fines. Fines can reach 5,000 Cyprus Pounds (8,500 euro) per day for television and 2,000 CP for radio broadcasters.

All Authority’s decisions are subject to judicial review by the Supreme Court.

\[ \text{g) Impact assessment} \]

All broadcasters adopted programme rating some months after the regulations were voted (January 2000), but criteria have not been consistently followed. The Authority examined cases where programmes rated (12) or even (15), i.e. not suitable for the under 12 / 15 years old, were screened within the family zone. In many cases, programmes were underrated. This was also the case of programmes rated (K), i.e. suitable for all. Systematic monitoring of programmes leads to the conclusion that many individual programmes and regular ones (talk shows or other) are in breach of the law.

Rating information has not been provided in the press or TV magazines so far.

\[ ^1 \text{Art. 41A (2) and 41B under the amended 2004 law.} \]
2. Part II: Leading Cases

In the case No 3251 Radio Television Authority vs Antenna TV, the Supreme Court decided that under the law, responsibility for rating films lies with the broadcasters; the Radio Television Authority has the power to decide whether the specific rating violates the law; the authority is not bound by the rating of the Board of Rating Cinematographic Works (projected in cinema halls). The Court also decided that the Authority’s verdict to consider the film as “highly erotic” and sanction the broadcaster was not against the advice sought by the Advisory Committee of Radio Television; the latter had said that it could not act as a censor. It did not express its view on the erotic character of the film, so the Authority was not obliged to justify disagreement with the Advisory Committee.

The RTV Authority has examined several cases for breach of the regulations on the rating of programmes. In most cases the charges include non-proper rating, failure to adequately inform the viewers about the programmes and screening scenes that might harm minors.

2 Supreme Court, (Appeals Court), Case No 3251, Radio Television Authority vs Antenna TV, 24.3.2004.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Rating of Programmes

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<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
</tr>
<tr>
<td>The broadcasters have the power to rate their programmes according to rules set in the law /regulations.</td>
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</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
<td></td>
</tr>
<tr>
<td>Rating is part of the regulatory system and not a system by itself. It is an internal process for implementation of the law.</td>
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<tr>
<td>As long as this is performed by or within the organisations or parts of society that are addresseees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
<td></td>
</tr>
<tr>
<td>Rating is at the discretion of broadcasters, limited to function on the basis of specific rules and limited margin of action.</td>
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### Link between the non-state-regulatory system and state regulation

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<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
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</tr>
<tr>
<td>The ultimate goal is respect of the viewers’ rights and protection of minors.</td>
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<td></td>
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</tr>
<tr>
<td>There is a legal basis for the non-state regulatory system.</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
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</tr>
<tr>
<td>The rating system is part of the regulatory system set by the law on Radio and Television Stations of 1998 and relevant regulations.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
<td></td>
</tr>
<tr>
<td>The discretionary functions of the broadcasters are exercised with the ensuing supervision of the regulator.</td>
<td>Real powers to judge are in the hands of the Authority.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
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<tr>
<td>state-regulatory system</td>
<td>promise innovation.</td>
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<tr>
<td>Supervision by the Authority but also the clauses of the law and relevant regulations provide the frame within which the action of the broadcasters should take place.</td>
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</tr>
</tbody>
</table>
1. Part I: The Co-operative system No. 4 - The Co-operation of RTA and the Commission of Journalistic Ethics

a) Development of the regulatory system

Under the law on Radio and Television of 1998, art. 51. the Radio and Television Authority could issue regulations, among other, on issues relating to a code of journalistic ethics. This led to the decision to incorporate the Code of Journalistic Ethics, already adopted by the professionals, in the regulations voted by parliament in 2000. Media professionals insisted on including a clause not allowing the Authority to examine issues related to the Code, without a prior request by the Committee of Journalistic Ethics.

b) Subject-matter of the regulatory system

The clause of the law allowing the Radio Television Authority to examine cases in connection to the Code of Journalistic Ethics on the condition that the Commission of Journalistic Ethics requests it responded to the position of the Union of Journalists and professionals that issues related to journalistic ethics can not be decided upon by a state or official body. The decision to let the Authority, which is appointed by the state, to deal with issues of professional ethics, is left to the discretion of a self regulatory body.

c) Basis of the co-operation

Under the law on Radio and Television Stations adopted in January 1998, the Radio and Television Authority was entrusted with the power to impose sanctions, among other, “for the breach of the Code of Journalistic Ethics, following a request by the Commission of Journalistic Ethics” (art. 41A (1)\(^1\)). Article 51 entrusts the Authority with powers to draft regulations on various issues, including a code of journalistic ethics. Regulations are approved by the Council of Ministers and voted in parliament.

In January 2000, the parliament voted regulations\(^2\) under the law on Radio and Television Stations. The Code of Journalistic Ethics\(^3\) was incorporated to the regulations as appendix

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1. Before amending law 97(I)/2004 on Radio and Television Stations, this provision was in art. 3(2).
3. As already mentioned, the code was drafted and adopted by media professionals in May 1997.
VIII. This led to the assumption that there was no more need to have a request by the Commission of Journalistic Ethics before examining cases related to the Code.

In a number of cases, the courts decided that the Radio and Television Authority had not the power to by-pass the clause of the law; the Commission’s request is a requirement for examining cases connected with the Code of Journalistic Ethics.

In 2001, the Code of Journalistic Ethics was also incorporated in regulations governing the operation of the public service Cyprus Broadcasting Corporation.

d) Institutions involved in the system

The Radio Television Authority is an independent broadcasting regulator established under article 2 of the law on Radio and Television Stations of 1998 (for more information see above, p. 7).

The Commission of Journalistic Ethics is a body set by the Union of Journalists, the Association of Newspaper Publishers and the owners of commercial broadcasters. The basis of its establishment is an agreement signed by the aforementioned organisations in May 1997. Its task is to ensure observance of the Code of Journalistic Ethics both by print and broadcast media. The Commission may request the Radio and Television Authority to examine cases of breach of the Code of Journalistic Ethics. The Commission is hosted at the premises of the Union of Journalists.

The Union of Journalists, the Association of Newspaper Publishers and the owners of broadcasting media, as well as the Cyprus Broadcasting Corporation are parties to the Commission of Journalistic Ethics. They appoint members to the Commission. With the exception of the CYBC, they are also represented in the Advisory Committee of Radio and Television.

4 The chairman of the Union of Journalists affirmed to the author of the present report that the Union did not give their consent for the inclusion of the code in this legal text.

e) Functioning of the system

The Commission of Journalistic Ethics is the product of an agreement between partners who voluntary chose to participate in the body. Under these conditions, their participation is voluntary. However, as long as they are part of the convention, the organisations and their members are obliged to abide with the rules set by it, namely to conform to the Code of Journalistic Ethics.

The three professional sectors (the Union of Journalists, the Association of Newspaper Publishers and the broadcast media owners) nominate an independent chairman and appoint three members each from their own ranks. These ten members nominate other three non-media professionals of their choice.

The Commission examines cases of breach of the Code of Journalistic Ethics. It can initiate the case or follow on a complaint by members of the public or by an organisation.

The link made in the law on Radio and Television stations between the Commission of Journalistic Ethics and the Radio and Television Authority can be binding only for the latter; it can not examine any case under the Code of Journalistic Ethics. The chairman of the Commission of Journalistic Ethics stated before the parliamentary committee for internal affairs that they will never request examination of any case by the Authority.

f) Supervision of the system

All decisions of the Radio Television Authority are subject to judicial review. The Authority should report to the Council of Ministers every three years about the development of pluralism and ownership in the media.

The Authority’s decisions are subject to judicial review by the Supreme Court.

Decisions of the Commission of Journalistic Ethics are not subject to any supervisory control.

g) Impact assessment

The Radio Television Authority publishes a bi-annual report on its activities.

The Authority meets once or twice per week and is examining over two hundred cases per year. About one third originate in complaints by the public. More than 50% of the cases are upheld. Some cases in the past were related to the breach of the Code of Journalistic Ethics without a request by the Commission on Journalistic Ethics.
Under the self regulatory system, the Commission of Journalistic Ethics examines 20-30 cases per year. The number of complaints by the public in the last two years has increased. According to its rules of procedure, the Commission can not examine a case if this is examined under any system set by law, and on any ground. The Radio Television Authority supports the view that the condition set in the law for the examination of issues related to the code of ethics is affecting its independence and limiting its powers. The Union of Journalists supports the view that no state or other official authority should interfere with issues related with the professional code of ethics. They think that professionals should deploy every effort in order to prove that self regulation can be efficient. They see reluctance on behalf of the broadcasters to contribute to effective functioning of the Commission of Journalistic Ethics.

2. Part II: Leading Cases

In two cases, the Supreme Court repealed decisions by the Radio Television Authority, and sanctions against Antenna TV, on the ground that the Authority examined breaches of the Code of Journalistic Ethics by by-passing the requirement set by art. 3(2) of the law on Radio and Television Stations, i.e. prior request by the Committee of Journalistic Ethics. It also decided that regulation 19 in annex VIII of the regulations of 2000 was ultra vires because it went beyond what is stipulated in art.3 (2) of the law. The Commission of Journalistic Ethics decided on 21.07.2004 that whatever the reasons that did not allow EU commissioner Günter Verheugen to have an interview with the Cyprus Broadcasting Corporation about the referenda of April 2004, this behaviour of the Cyprus

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6 Information provided by the chairman of the Union of Journalists.
8 See note No. 10 above.
Broadcasting Corporation was “not fully consistent with the word and spirit of the Code of Practice” (author’s note: the Code of Journalistic Ethics).

The Commission did not examine the above case in connection to Antenna TV; this was done by the Radio Television Authority, which initiated a case against this channel but not against the public broadcaster. Its powers at that time were limited to the commercial channels.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Co-operation RTA and Commission of Journalistic Ethics

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
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</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
</tr>
<tr>
<td>The rule for prior request by the Commission of Journalistic Ethics to the Authority for examining cases related to the Code of ethics is part of the law. The Code was incorporated into the regulations.</td>
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<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
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<tr>
<td>The specific provision of the law involves a non-state body in the process of opening a case for breeches of the Code, which is part of the legislation.</td>
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<tr>
<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
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<tr>
<td>The opening of procedure in relation to breeches of the Code is left to the discretion of a body set and functioning with the participation of the media professionals, who are largely majoritarian in it.</td>
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</table>
### Link between the non-state-regulatory system and state regulation

<table>
<thead>
<tr>
<th>Criteria</th>
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</tr>
</thead>
<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
<td></td>
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<tr>
<td>A first goal is to acknowledge that professionals have some power over issues related to their Code of ethics. The ultimate goal is to enforce respect for a professional code that also aims at the protection of rights and interests of the public.</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
<td></td>
</tr>
<tr>
<td>There is a legal basis for the non-state regulatory system.</td>
<td>Traditional regulation</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
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<tr>
<td>The rule/provision under the law on Radio and Television Stations is part of the broadcast media regulatory system.</td>
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<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
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<tr>
<td>A self-regulatory body has the discretionary power to decide whether it will allow the regulator to exercise its competencies / powers in relation to a specific issue.</td>
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<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>\textit{Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.}</td>
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<tr>
<td>The inclusion of the Code in the regulations may be viewed as attempting to regulate on the specific issues. The rule reverted to the opposite direction, where the state allows a non-state body to influence the regulatory system.</td>
<td>The Commission can examine cases related to the Code of Ethics if the Authority or another legal entity hasn't started the examination procedure.</td>
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</tbody>
</table>
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

In the aforementioned system, the Commission of Journalistic Ethics, the Advisory Committee on Radio Television and the Committee(s) of Ethics set by each broadcaster are non-state regulatory bodies. The broadcasters are also first instance regulators in respect of the rating of programmes.
From the above bodies, the Commission of Journalistic Ethics is a purely self-regulatory organisation and it can be part of the state regulatory system in relation to the code of ethics only in the case it so decides.

b) The link between the non-state part and state regulation

The powers left to the discretion of the Committee of Ethics for keeping up with programmes standards, and to the broadcasters for deciding the ratings of their programmes are of different nature; in the first case, the power should be used for initiatives leading to awareness and responsibility, while in the second case, any rating is subject to control and the sanctioning powers of the Radio Television Authority.
In the case of the Advisory Committee of Radio Television, the state part is delegated through the role played by the independent Radio Television Authority, financing and supporting the operation of the Advisory Committee. In reality, little or no real power is left to the Advisory Committee; through the participation of the broadcasters and other media professionals, though, a link is made between non-state and state regulation in a relationship which is different from the one between the Authority as regulator and the broadcasters as addressees of its action. For example, if the Advisory Committee expresses an opinion on a specific issue or case, the Radio Television Authority will be obliged to justify any different approach it might adopt.

Conclusion: In the aforementioned cases, there are some glimpses of co-regulation, the real power lying with the Radio Television Authority and the Commission of Journalistic Ethics. The latter has no sanctioning powers and it appears unwilling to establish the link stipulated in the law; it will refrain to examine cases already under the scrutiny of the official state
regulator, while, avoiding to request examination by that authority of cases related to the Code of Journalistic Ethics.

VI. Co-operative Regulatory Systems in the film sector

1. Part I: The co-operative regulatory system

a) Development of the regulatory system

The law on the classification/rating of cinematographic works in force up to 2002 was a legacy of the British colonial administration; under this law, dating back to 1935, a body of censors was rating and censoring the films destined for screening in cinema halls. Cuts or complete banning of films was taking place. This was the case of films “Crash” in the late 1990s and “Romance” in 2000 and many others in previous years. Public debate about the need to change the law started in the early 1980s, but it was only in 2002 that this took place 1. The law established a new board on the line of the previous one, but acting only as a film rating body.

b) Subject-matter of the regulatory system

The law on the classification of cinematographic films aims at the protection of minors from harmful film content, through a rating system based on suitability for specific age groups. Under the law, any person planning to screen a film in cinema halls, should present the film to the board of classification of films that will rate it in terms of suitability for viewers of specific ages. The law provides also for the actions the authorities must take in the case of non compliance with the law; any police officer has the power to enter a premise at any time, without a court order and seize any film screened without authorization from the board of classification.

c) Basis of the co-operation

The basis of the system is the law on the classification/rating of cinematographic works of 2002. A Board of Classification of Cinematographic Works is established under art. 3; the

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1 Law No. 238/2002, Official Gazette, 31 December 2002
composition and tasks, as well as general rules on the appointment of the Board’s members and its functioning are also set in the law. The procedures followed for submission of films for rating, decision making and other issues are set in relevant regulations\(^2\) voted by the parliament. The rating system is based on the age factor, starting from “suitable for all”, and unsuitable for persons aged 12/15/18. In the appendix of the regulations the criteria are set on which the board decides the classification of films.

\(\text{d)}\) **Institutions involved in the system**

The Minister of Interior is the authority appointing the members of the board. Public service departments and professional and other private bodies nominate representatives that will be appointed to the board by the Minister of Interior. The Press and Information Office provides logistical support and secretariat services; the screening of the films is taking place at its premises and its director is the head of the Board. The members of the Board receive a small fee each time they participate in a meeting/screening of a film.

\(\text{e)}\) **Functioning of the system**

Every person intending to screen a film in public/cinema halls is obliged to make the necessary arrangements for screening the film and presenting all relevant publicity material to the Board of Classification of Cinematographic Works. A fee is paid for each film screened. Members of the police have the authority to enter any place where a film is screened without authorisation, interrupt the screening and seize the film. The Board is composed by 30 persons from public and private organisations\(^3\) appointed by the Minister of Interior for a term of five years. Members represent the ministry of Education and culture, the radio and television authority, the welfare services, professional bodies in the film/production industry and associations of parents, consumers association\(^4\); film critics, sociologists and psychologists participate under their personal capacity. A quorum is formed when sixteen members are present. The Chairperson has the winning vote.

\(^3\) See full list of membership in annex II.
\(^4\) Members are initially nominated by their respective service/body/association.
The Board can set five-member committees with the task of carrying out the screening. They elect a chairperson; the minimum number of members present for decision making on the rating of films is three.

In the name of public interest, the Board has the power to withdraw the rating accorded. In case of a complaint against the decision on a film, the issue is decided by the Board.

\textit{f) Supervision of the system}

No supervisory instance is foreseen in the law. Under the Constitution (art. 146) any person has the right to appeal to the Supreme Court against decisions of the authorities.

\textit{g) Impact assessment}

The Board keeps records of the films screened and their rating. No reports are foreseen in the legislation. In 2003, the Board rated 115 and in 2004 119 films.

\textbf{Scientific evaluation or estimation}

There is no evaluation of the system to that day; no incident or complaints have been made public in the two and half years since the establishment of the new system.

\section*{2. Part II: Leading Cases}

Under the old law, the Board of Censors rated the film “Crash” as pornographic and did not allow its screening in cinema halls. A public debate took place both against the decision as such but also against censorship. The film was screened by the “Club of Friends of Cinema”; access to the screening hall is reserved to members of the association.
### 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

**Table: Criteria / Film sector**

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Criteria</th>
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<th>Explanation</th>
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<td></td>
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<td>Informal agreements, case-by-case decisions</td>
<td></td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
</tr>
<tr>
<td></td>
<td>The Classification Board is established and rule and procedures are set for the classification of films destined for public screening in cinema halls.</td>
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<td></td>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td></td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
</tr>
<tr>
<td></td>
<td>The specific system involves a non-state body, the Classification Board with powers to decide on the rating of cinema films.</td>
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<tr>
<td></td>
<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td></td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
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<tr>
<td></td>
<td>Some addressees of the system participate in the Board but most members represent public services and private associations, or are individuals. The large majority belong to the private sector.</td>
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<tr>
<td>Criteria</td>
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<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
<td></td>
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<tr>
<td>The system aims at protecting the youth from film harmful content.</td>
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<tr>
<td>There is a legal basis for the non-state regulatory system.</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
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</tr>
<tr>
<td>The system is established by the law on the classification of Cinematographic Works and is governed also by relevant regulations.</td>
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<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
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<tr>
<td>The state leaves full decision making powers to the Board.</td>
<td></td>
<td></td>
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<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
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</table>
The appointment of the members, logistical support and funding are provided by the state. The chairperson is a public employee, while other public service representatives are members of the board. The above can influence the system.

The system can be qualified as participatory regulation, in the sense that representatives of the public participate in the Board and the professionals – addressees of the regulatory system have not a decisive role.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

Participation based on the idea of representing various parts of the society, as well as the flexibility of organisation of the Board’s work assign a significant role to representatives of the public.

b) The link between the non-state part and state regulation

The state keeps the possibility to influence processes through the system of appointments, keeping key roles to officials and offering support to the Board. The balance between the non-state and state part, though, depends on the perception of the role and dynamism of members. Members of private bodies are largely majoritarian in the Board. This might not be the case for five-member committees.

**Conclusion:** The system can be qualified neither regulatory nor self-regulatory. It may fall under a category one could name “participatory” regulation; state part mixes up with members of the public, of professional and other organisations to decide on issues that concern the whole society. In fact, the matter at stake (rating of films) is not a complex task.

**Annex I**

Membership to the Advisory Committee on Radio and Television is reserved to one representative of the following:

- Ministry of Interior
- Ministry of Communications and Work
- Ministry of Education and Culture
- Law Office of the Republic
- Private Radio Broadcasters
- Private Television Broadcasters
- Union of Journalists
- Local Authorities
- Trade Unions
— Chamber of Commerce and Industry and Union of Employers
— Cyprus Chamber of Science and Technology
— University of Cyprus
— Association of Consumers
— Association of Sociologists and Psychologists. Their representative should be nominated by the Confederation of Parents.
— Association of Advertisers
— Church of Cyprus
— Associations of Sound and Vision Artists
— Association of Newspaper Publishers

Annex II

Membership to the Board of Classification of Cinematographic Works is reserved to the following:

— The director of the Press and Information Office, as chairperson
— Two officers of the Press and Information Office
— Two officers of the ministry of Education and Culture
— One officer of the Radio Television Authority
— One officer of the Welfare Services
— One member of the Film Advisory Committee
— Two members of the Union of Cinema and Television Directors
— Two members of the Union of Actors
— One member of the Confederation of Parents of Secondary Education
— One member of the Association for the Prevention of Family Violence
— One member of the Consumers Association
— Three cinema critics
— Six psychologists, including two psychologists for children
— Six sociologists
3.4. Czech Republic

I. Co-operative Regulatory Systems in the broadcasting sector

1. Part I: The co-operative regulatory system

a) Development of the regulatory system

The co-operative regulation in the Czech media is nearly non-existent, especially in the meaning of a combination of non-state regulation and state regulation in such a way that a non-state regulatory system is closely linked up with state regulation. The system, in which a state has delegated regulatory authority to a non-state organization, exists in the Czech Republic only in the field of some legal professions or in the field of the medical professions. For example, the lawyers have a self-administrative profession organization Czech Bar Association, there are also the Chamber of Public Notaries or the Chamber of Bailiffs, the physicians have the Medical Chamber, all these bodies are enacted by the law. Nothing similar exists in the media field.

There are four so called “media councils” in the Czech Republic, but neither of them has a co-regulatory or self-regulatory function. The Broadcasting Council (see the first report) is vested with the state administration functions (www.rrtv.cz/en/). The other three Councils, e.g. Czech Television Council (www.ceskatelevize.cz/english/), Czech Radio Council (www.rozhlas.cz/rada/portal/) and Czech News Agency (CTK) Council (www.ctk.cz/english/about_us/council/) are supervisory bodies constituted by the law for the right of the public to oversee activities of the particular public service media. These three councils have no power to control or correct a content of the media. The councils appoint and recall the CEO of the organizations, decide on complaints filed against the CEO, approve the budget and the annual report that is submitted to the Parliament.

The subsequent checking of the content of the media is usually delegated to the government and to its agencies (public prosecutor, police, municipal authority, state administration body).

E.g. the Act No. 40/1995 Coll., on the Regulation of Advertising defines four controlling agencies with a power of penalize the offence against the law:
• the Council for Radio and Television Broadcasting for commercials transmitted in radio and television broadcasting and for sponsoring of radio and television programmes;

• the National Institute for Drug Control for advertisements of human medicines and sponsoring in this field, except for activities referred to in clause (a) above;

• the Ministry of Health for advertisements for sanitary equipment and sponsoring in this field, except for activities referred to in clause (a) above;

• in all other cases, the district trade licensing office in whose territory the person distributing advertisements in other cases has corporate seat or residence.

Under Article 8 paragraph 7 of the Act No. 40/1995 Coll., on the Regulation of Advertising, as amended by the Act No. 138/2002 Coll., the above controlling agencies may (when deciding on the imposition of a sanction against entities acting in breach of the provisions on the regulation of advertising) request the expert opinion of the professional associations in the sphere of advertising. The professional association, which is providing such expert opinions to state administration organs, is namely the Advertising Council.

The Czech Advertising Council ("Advertising Council") has been established in 1994 as a non-profit organization by the association of advertisers, advertising agencies and media and became the first self-regulatory association from the Central and Eastern Europe, which was adopted in 1995 as full member of EASA (European Advertising Standards Alliance).

b) Subject-matter of the regulatory system

The Advertising Council has adopted the ethical Code of Advertising practice with the aim to implement ethical advertising standards in the Czech Republic which is to ensure that the interests of general public are respected in regard to the advertising, that the advertising is true, honest and decent and comply with the Czech laws as well as internationally acknowledged principles governing the advertising practices in terms of contents and form, as
issued by the International Chamber of Commerce. The Code is designed to serve all the subjects acting in the field of advertising and sets up the rules of professional behaviour.

The advertising which is subject to the self-regulation by the Council, encompasses the press, billboards, direct-mail, audiovisual productions, advertising in cinemas and in the radio and television broadcasting, hence including all media sectors, that are part of this study.

The Advertising Code addresses also general public and provides it with information about the limits which were voluntarily accepted by the subjects engaged in or using the advertising and which want to enforce its provisions by the means of the ethic self-regulation. Advertising Council’s member organizations expressly acknowledge in the Statutes of the association the Code and undertake neither to produce nor to accept any advertising which would be in contravention with the Code or that they will withdraw such advertising which is found to be in breach of the Code’s ethical principles of advertising as by the decisions, made by the Arbitration Commission as the independent organ set up by the Advertising Council - an advertising ethics self-regulatory body of the Advertising Council.

Member organizations of the Advertising Council undertake in the Statutes to do their utmost to make other persons active in the field of advertising in the Czech Republic to honour the aims and individual provisions of this Code.

The Advertising Council does not deal with advertising during election campaigns and with political advertising in general and does not handle complaints on advertising in which the legal aspects are prevailing over the ethical aspect of advertising as are regulated by the Code.

c) Basis of the co-operation

The Advertising Council may provide expert opinions, as requested by the state administration controlling bodies under the Article 8 paragraph 7 of the Act No. 40/1995 Coll., on the Regulation of Advertising,. Since its establishment in 1995, The Advertising Council has issued 193 expert opinions on request of the district trade licensing offices. Also the Council for Radio and Television Broadcasting has asked several times the Advertising Council for its expert opinion on the broadcast advertising.
In issuing its expert opinions provided on request of the controlling agencies, the Arbitration Commission applies not only the provisions its Advertising Code, but the provisions of the Act No. 40/1995 Coll., on the Regulation of Advertising Act, the advertising regulation of television and radio advertising as provided under the Act No. 231/2001 Coll., on Radio and Television Broadcasting, as amended by the Act No. 274/2003 Coll. and Act No. 341/2004 Coll (which is a lex specialis to the Advertising Act as regards television and radio advertising, as its provisions have priority over the provisions of the Advertising Act).

d) Institutions involved in the system

The Czech Advertising Council ("Advertising Council"/ Rada pro reklamu (RPR)) has been established in 1994 as a non-profit organization by the association of advertisers, advertising agencies and media and became the first self-regulatory association from the Central and Eastern Europe, which was adopted in 1995 as full member of EASA (European Advertising Standards Alliance).

The RPR has 24 members: 7 professional associations such as the Association of Communications Agencies, Czech Association for Branded Products Association, Czech Publishers Association, Association of Czech Advertising Agencies and Marketing Communication, Czech Direct-Marketing Association, Association for Outdoors Advertising, Czech Forum for Responsible Drinking, public and private medias, together with major companies from various industries.

The companies that are holding broadcasting licences for broadcasting of the two nation-wide commercial terrestrial broadcasting stations, TV NOVA and PRIMA TV, are also members of the Advertising Council and have undertaken to comply with the provisions of the Advertising Code.

The Council for Radio and Television Broadcasting and other state bodies, which may request the expert opinion of the Advertising Council.
e) Functioning of the system

The Advertising Council decides on complaints which may be lodged to The Advertising Council by the general public, consumers’ associations, advertisers, state administration or other organs and institutions. The complaints are made free of charge. In exceptional cases, the Advertising Council may also decide on non-compliance of advertising with the Code at its own initiative.

The procedure of handling complaints is regulated by the Rules of Procedure of the Advertising Council. The Arbitration Commission is the only body entrusted with the task to handle the complaints and to decide on appeals made on its decisions. The name of the physical person making the complaint is not made public without the consent of the person.

Upon receipt of the complaint, the Advertising Council calls on the advertiser and/or the responsible advertising agency to submit its comments on the complaint. Arbitration Commission may decide to invite the advertiser and/or advertising agency to personally participate at the Commission’s deliberations for the purpose of providing additional explanation to the complaint.

The Advertising Council may also inform the advertising media, in which the advertising was made public, on the complaint. In case that the advertiser and/or advertising agency make a declaration that the advertising shall be modified or withdrawn, The Advertising Council shall make (through its Arbitration Commission) a decision, which is communicated to the advertiser (and to the advertising media concerned under certain circumstances) and to the person which lodged the complaint. In case that the complaint has been made publicly or if the advertiser or advertising agency concerned has made the complaint publicly known, the Arbitration Commission’s decision on the complaint will be also made public in the media.

If the advertiser and/or advertising agency does not submit its standpoint on the complaint within the prescribed deadline (usually within 7 days) or if it makes a declaration in which it states that it considers the complaint as non substantiated in whole or in part and that it will not either modify or withdraw the advertising, The Advertising Council will (through its Arbitration Commission) make a decision. Such decision of the Arbitration Commission will be delivered also to the respective association, of which the advertising agency (and or advertiser) is a member. The decision will be also made public in the media. The advertiser and/or the advertising agency have the right to appeal the Arbitration Commission's decision
within 7 days from its receipt. The proceedings of the Arbitration Commission on handling the complaints apply to appeals by analogy.

As the complaints made to the Advertising Council are made mostly against members of the Advertising Council, the decisions of the Arbitration Commission are widely accepted by the members concerned. Ultimately, the member concerned which decides not to come into line repeatedly with the Arbitration Commission's decision, may be expelled from the respective association, which is member of the Advertising Council.

If the decision of the Arbitration Commission is concerning a member of the Advertising Council, the member concerned has - in addition to the right of appeal to the decision of the Arbitration Commission - also the right to so called “court protection” which is a right to appeal at ordinary court the decision of the organ of the association directed to the member of the association according to paragraph §15 of the Act No. 83/1990 Legal Coll. on forming associations of citizens.

Since its establishment in 1994, Advertising Council has built a considerable reputation among the advertisers, advertising agencies and print and broadcast media and ultimately in the general public. As of its establishment until the end of 2004, the Advertising Council handled 445 cases of complaints, in 100 cases the Advertising Council has recommended withdrawal of the advertising or modification of advertising in compliance with the Code. More than 260 complaints were rejected by the Advertising Council as not being substantiated. 40 complaints resulted in withdrawal of advertisements or their modification and the remaining complaints were handed over to the state administration controlling bodies. Some of the leading cases of complaints handled by the Advertising Council were widely publicized and commented in the daily press.

Only on the specific request of advertisers, advertising agency or media, the Advertising Council may provide (usually for remuneration) a preliminary check or preliminary consultation of advertising (i.e. pre-clearance of advertising).

The Advertising Council may also provide expert opinions, as requested by the state administration controlling bodies under the Article 8 paragraph 7 of the Act No. 40/1995 Coll., on the Regulation of Advertising. Since its establishment in 1995, The Advertising Council
has issued 193 expert opinions on request of the district trade licensing offices. Also the Council for Radio and Television Broadcasting has asked several times the Advertising Council for its expert opinion on the broadcast advertising. The Advertising Council has also provided in two cases also its expert opinions on request of the Police of the Czech Republic, i.e. these opinions were made outside the framework of the Act on the Regulation of Advertising.

It is important to note in this context, that in issuing its expert opinions provided on request of the controlling agencies, i.e. by acting in the scope of the activities of the Advertising Council as provided under the Article 8 paragraph 7 of the Act No. 40/1995 Coll., on the Regulation of Advertising,. the Arbitration Commission applies not only the provisions its Advertising Code, but the provisions of the Act No. 40/1995 Coll., on the Regulation of Advertising Act, the advertising regulation of television and radio advertising as provided under the Act No. 231/2001 Coll., on Radio and Television Broadcasting, as amended by the Act No. 274/2003 Coll. and Act No. 341/2004 Coll (which is a lex specialis to the Advertising Act as regards television and radio advertising, as its provisions have priority over the provisions of the Advertising Act ).

Although the Advertising Code has not force of law, its ethical principles may be upheld by the controlling agencies in execution of their state administration functions in the legal regulation of advertising under the general provisions of the Broadcasting and Advertising Acts, since the legal regulation of advertising partially overlaps with the ethical advertising self- regulation under the provisions of the Advertising Code. In addition, the professional institutions like the Advertising Council are obliged to interpret in formulating their expert opinions requested by the controlling agencies the applicable legal regulation and not only ethical regulation. Such overlapping of ethical and legal regulation indirectly ensures, that the self-regulatory provisions of the Advertising Code, which cannot in itself be legally enforced, may ultimately be taken into account by the controlling agencies in their deliberations on imposing administrative sanctions and thus will be sanctioned under the law, as the general principles on advertising of the Advertising Code coincide with the general provisions of applicable legal regulation of advertising as contained in the Section 2 of the Advertising Act.

**Excerpts from the Section 2 of the Advertising Act:**

(1) The following types of advertising are prohibited:
(a) Advertising of any goods, services or other performance or values whose sale, provision or distribution is in conflict with applicable laws;
(b) Advertising based on the effect of subliminal messages, which means, for the purpose of this Act, any advertising that may affect the subconscious of a natural person without being consciously perceived by such person;
(c) Misleading advertising;
(d) Surreptitious advertising, which means, for the purpose of this Act, any advertising that it is difficult to identify as such, namely because it is not designated as advertising;
(e) Distribution of unsolicited advertising if the addressee incurs any expenses as a result of such advertising or if such advertising disturbs the addressee.

(2) Comparative advertising is permissible only under the terms stipulated herein and in a special law.

(3) Advertising may not be in conflict with good morals and may not contain, in particular, any discrimination due to race, sex or ethnic origin, or offend religious or national (ethnic) feelings, may not endanger, in a generally unacceptable way, common morals, detract human dignity, contain any elements of pornography or violence or employ a motif of fear. Advertising may not attack any political creed.

(4) Advertising may not promote any behaviour that is detrimental to health or threatens the safety of persons or property, and any conduct that is detrimental to any environmental protection interests.

(5) Advertising that is distributed together with any other communication must be visibly distinguishable and properly separated from the rest of such communication.

Section 2c
Advertisements that may affect minors may not
(a) promote any conduct impairing their health, mental or moral development;
(b) recommend for purchase any products or services, making use of the inexperience or gullibility of such persons;
(c) entice them to persuade their parents, legal guardians or other persons to purchase any products or services;
(d) use their special trust in their parents, legal guardians or other persons;
(e) inappropriately present those persons in dangerous situations.
Excerpts from the Advertising Code

3. Basic Requirements for Advertising

3.1 Advertising is not allowed to encourage breaking laws or create the impression that advertising agrees with it

3.3 All advertising has to meet the principles of a honest competition among competitors

4. No advertising, as a matter of general principle, is allowed to endanger good name of advertising as such or decrease the trust into advertising as a service provided to consumers.

f) - g) Supervision of the system and Impact assessment

The number of complaints submitted to the Advertising Council (1995 - June 2005)

<table>
<thead>
<tr>
<th></th>
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<tr>
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</tbody>
</table>

Total/Infringing/Refused/Accepted

Note: “Infringing” means that the complaints were found as non-compliant with the Advertising Code, thereby infringing the Advertising Code

“Refused” means that the complaints were not found as non-compliant with the Advertising Code

“Accepted” means that the complaints were changed by the advertiser/advertising agency or withdrawn

Source: Advertising Council - June 2005

The number of expert opinions issued for state organs by the Advertising Council (1995 - June 2005)

<table>
<thead>
<tr>
<th></th>
<th>1995</th>
<th>1996</th>
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</tbody>
</table>
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

| Police  | 2 |
| Ministr. | 1 1 1 1 1 |

Note: “Trade Office” means Trade Licensing Office as controlling agency
“SÚKL” means the National Institute for Drug Control - controlling agency for drug advertising

Source: Advertising Council - June 2005

The complaints handled by RPR (Rada pro reklamu/Advertising Council) Arbitration Commission sorted according to the media (1995 - June 2005)

<table>
<thead>
<tr>
<th></th>
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Source: Advertising Council - June 2005


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Source: Advertising Council - June 2005
As mentioned in the first phase of the report, on 2 July 2003, the First Chamber of the Czech Parliament approved a code for the public service broadcaster Czech Television which, in accordance with Article 8 (1c) of the Act No. 483/1991 Coll., on the Czech Television, as amended, had been drawn up by the Director General of the Czech Television and approved by the Council of the Czech Television. The *Czech Television Code* is designed to set out and establish the principles for the operation of public service television and thus become an effective instrument for ensuring that the objectives of public service television are fulfilled. The code's provisions apply to Czech Television and its employees, including those engaged on a contractual basis. Breaches of the code are treated as disciplinary offences and may result in dismissal of the employee or individual contractor concerned.

The company CET 21 s.r.o. which holds licence to broadcast the commercial nationwide television TV NOVA has recently adopted an Ethics Code on the Protection of Minors and Teenagers in its own broadcasting, which is largely based on the pattern of the BBC Production Guidelines and takes into account the jurisprudence of the Czech courts and regulatory praxis of the Broadcasting Council in this sphere. The provisions of the Code regarding the protection of minors against violence are in certain aspects stricter than the applicable legal regulation on the protection of minors.

The Broadcasting Council is the only regulatory body vested with the competence to impose administrative sanctions regarding the content of broadcasting including its advertising and sponsorship content. The administrative proceedings of the Broadcasting Council are governed by the Law No. 71/1967 Coll., on administrative proceedings (administrative rules), as amended. This law will be replaced, with effect as of January 1, 2005, with a new Law on Administrative Proceedings (Act No. 500/2004 Coll). Broadcasting Council in its state administration functions as a content regulator and controlling agency for broadcast advertising and sponsorship is applying two basic laws regulating the broadcasting content: Act No. 231/2001 Coll., on Radio and Television Broadcasting as amended and the Act No. 40/1995 Coll., on the Regulation of Advertising as amended. Some provisions regarding the definitions of misleading advertising are contained in the section on unfair competition of the Commercial Codex (Act No. 513/1990 Coll. as amended). The provisions on regulation of advertising in the Act No. 231/2001 Coll., on Radio and Television Broadcasting have priority above the provisions on regulation of advertising the Act No. 40/1995 Coll., on the
Regulation of Advertising. Unfortunately, the Act No. 231/2001 Coll., on Radio and Television Broadcasting does not contain the possibility of co-operative regulation as provided under the Article 8 of the Act No. 40/1995 Coll., on the Regulation of Advertising, i.e. cooperative regulation in other spheres of content regulation than the regulation of advertising and sponsorship, under which the Broadcasting Council as the controlling agency may demand an expert opinion from the appropriate professional associations in the advertising sector, when deciding on imposition of penalties to broadcasters for commercials transmitted in radio and television broadcasting and for sponsoring of radio and television programmes which is not in compliance with the legal regulation of advertising.

Although the Broadcasting Council in its reports to the Czech Parliament stresses the necessity of supporting the self-regulatory conduct of broadcasters, the Broadcasting Council has in fact only rarely made use of the possibility to ask the respective professional associations in the advertising sector (such as the Advertising Council) for expert opinion as provided under the Article 8 of the Act No. 40/1995 Coll., on the Regulation of Advertising, despite the fact that especially since 2004, the number of sanctions imposed on broadcasters for non-compliance of broadcast advertising and sponsorship with the respective legal regulation and also the number of administrative proceedings initiated by the Broadcasting Council in its content regulatory capacity has greatly increased.

However, in execution of its regulatory functions especially when imposing sanctions, the Broadcasting Council often commences its administrative sanction proceedings upon reception of complaints made by individual citizens and various non-profit associations protecting consumers and interests of various social and professional groups, as such complaints supplement (and often initiate) the monitoring of broadcast content made by the Broadcasting Council at its own initiative as a part of its legal obligations.

The Broadcasting Council's regulatory authority extends also to the public broadcasters (Czech Television and Czech Radio) as regards content regulation, including regulation of broadcast advertising and sponsorship. The administrative decisions of the Broadcasting Council on imposing sanction on broadcasters may be appealed by the broadcasters concerned at special administrative courts by filing an action against the Broadcasting Council's administrative decision, under the provisions of the Code on Court Administration Process, which entered into force in the year 2002. (Act No. 150/2002 Coll.) A special court senates decide on appeals against the decisions of the Broadcasting Council under the above cited Code. A Supreme Administrative Court established as of January 1, 2003 is deciding on
cassation complaints which may be lodged against these decisions of the Administrative Court by either the Broadcasting Council or the broadcaster affected by the appealed decision of the Broadcasting Council.

The Administrative Court Proceedings Code, which was adopted in March 2002 and entered into force on 1 January 2003, introduced a new, modern system of administrative law which consists of Regional Courts, which will act as first instance appellation courts of in all administrative decisions made by the Broadcasting Council, and a Supreme Administrative Court, which will act as the second instance for cassation complaints. The new regulation of the appellation principle of the decisions of the broadcasting Council and introduction of system of the cassation complaints over such applied decisions has an impact on the improving the administrative decision-making processes of the Broadcasting Council. As the courts of appeal have cancelled a number of decisions of the Broadcasting Council on granting broadcasting licences on the grounds that these decisions were not properly substantiated, the Broadcasting Council was compelled to more transparently substantiate its administrative decisions on granting licences for broadcasting.

Under Article 32 of the Act No. 231/2001 Coll., on Radio and Television Broadcasting, as amended by the Act No. 274/2003 Coll. and Act No. 341/2004 Coll, the basic obligations of Broadcasters and Operators of Retransmission also include the obligation of the broadcasters and Operators of Retransmission to ensure, that any programmes which might endanger the physical, mental or moral development of minors is immediately preceded by a verbal warning of the unsuitability of the programme for minors and that any programme unit and announcement that might endanger the physical, mental or moral development of minors and is broadcast outside the period of 06:00 to 22:00 should be labelled with a pictorial symbol warning of the unsuitability of the programme for minors; such a symbol shall remain on the screen throughout the time of broadcasting. It is left upon the broadcasters to decide on the criteria on programmes which are to be labelled with a pictorial symbol as well as on the graphic format of such warning. A non-compliance of broadcasters with the obligation not to broadcast programmes that might endanger the physical, mental or moral development of minors and is broadcast outside the period of 06:00 to 22:00 is sanctioned by the Broadcasting Council, which may impose a fine from 20,000 up to 10,000,000 CZK.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Broadcasting Sector

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
<td></td>
</tr>
</tbody>
</table>

There is no non-state regulatory system in the broadcasting sector. Certain elements of co-operative form of regulation exists in the sphere of advertising and sponsorship (but excluding advertising during election campaigns and political advertising in general). Under Article 8 paragraph 7 of the Act No. 40/1995 Coll., on the Regulation of Advertising, as amended, the Council for Radio and Television Broadcasting (as the state administration organ with a power of imposing administrative sanctions) may (when deciding on the imposition of a sanctions against entities acting in breach of the provisions on the regulation of advertising broadcast transmitted in radio and television broadcasting and sponsoring of radio and television programmes) request the expert opinion of the professional associations in the sphere of advertising. The professional association, which is providing such expert opinion of the Advertising Council (in total 7 cases since 1994) This informal requests go beyond the procedure prescribed by the Article 8 para 7 of the Act No. 40/1995 Coll., on the Regulation of Advertising.
opinions to state administration organs, is namely the Advertising Council, established in 1994, which is a self-regulatory, non-state association, founded by advertisers, advertising agencies and media

The request for an expert opinion of the Advertising Council (or other professional non-state associations in the sphere of advertising) may be made not only by the Broadcasting Council but (for other than broadcast advertising and sponsorship) such request may be made also by other state administration agencies (the National Institute for Drug Control for advertisements of human medicines and sponsoring in this field, the Ministry of Health for advertisements for sanitary equipment and sponsoring in this field, the district trade licensing offices.

To influence decisions by persons or, in the case of organisations, decisions by or within such entities

<table>
<thead>
<tr>
<th>Pure consultation</th>
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</table>
| Requesting of an expert opinion of the professional non-state self-regulatory associations in the sphere of advertising and sponsorship by the respective state administration agencies (such as the Broadcasting Council) under Article 8 paragraph 7 of the Act No. 40/1995 Coll., on the

The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.

Although the Advertising Code has not force of law, its ethical principles may be upheld by the controlling agencies in execution of their state administration functions in the legal regulation of advertising under the general provisions of the Broadcasting and Advertising Acts, since the legal regulation of advertising partially overlaps with the ethical

| | The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange. |
| Advertising self-regulation under the provisions of the Advertising Code. In addition, the professional non-state self-regulatory associations like the Advertising Council are obliged to interpret in formulating their expert opinions requested by the controlling agencies the applicable legal regulation of advertising and sponsorship and not only its ethical self-regulation. This ensures, that the self-regulatory provisions of the Advertising Code, which cannot in itself be legally enforced, may ultimately be taken into account by the controlling agencies in their deliberations on imposing administrative sanctions and thus will be sanctioned under the law, as the general principles on advertising of the Advertising Code coincide with the general provisions of applicable legal regulation of advertising as contained in the Section 2 of the Advertising Act. |
| Regulation of Advertising is not mandatory, and there is no formal procedure on handling of such an expert opinion by the state administration agencies |
| As long as this is performed by or within the organisations or parts of society that are addressees of the regulation |
| Measures by third parties (e.g. NGOs) |
| There is no legal basis for such a regulatory system |
| The range of possible subjects of non-state action has to be limited to make the definition workable. |

The Czech Advertising Council (“Advertising Council”) was established in 1994 as a non-profit organization by the association of advertisers, advertising agencies, Advertising Council is a full member of EASA (European Advertising Standards Alliance).

Advertising Council has adopted ethical...
<table>
<thead>
<tr>
<th>Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems</th>
</tr>
</thead>
<tbody>
<tr>
<td>Code of Advertising practice implementing ethical advertising standards. Advertising Council’s member organizations expressly acknowledge in the Statutes of the association the Code and undertake neither to produce nor to accept any advertising which would be in contravention with the Code or that they will withdraw such advertising which is in breach of Code’s ethical principles of advertising as found by the decisions, made by the Arbitration Commission as the independent organ set up by the Advertising Council - an advertising ethics self-regulatory body of the Advertising Council.</td>
</tr>
<tr>
<td>The advertising which is subject to the self-regulation by the Council, encompasses the press, billboards, direct-mail, audiovisual productions, advertising in cinemas and in the radio and television broadcasting,</td>
</tr>
<tr>
<td>The Advertising Council does not handle complaints on advertising in which the legal aspects are prevailing over the ethical aspect of advertising as are regulated by the Code. Advertising Council decides on complaints which may be lodged to Advertising Council by the general public, consumers’ associations, advertisers, state administration or other organs.</td>
</tr>
</tbody>
</table>
The procedure of handling complaints is regulated by the Rules of Procedure of the Advertising Council. The Arbitration Commission is the only body entrusted with the task to handle the complaints and to decide on appeals made on its decisions. Only on the specific request of advertisers, advertising agency or media, the Advertising Council may provide (usually for remuneration) a preliminary check or preliminary consultation of advertising (i.e. pre-clearance of advertising).

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
<td></td>
</tr>
<tr>
<td>There is no legal basis for such a regulatory system</td>
<td>There is a legal basis for the non-state regulatory system</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
</tr>
<tr>
<td>---------------------------------------------------</td>
<td>----------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>There is no legal basis for such a regulatory system</td>
<td>There are no such informal agreements</td>
<td>Traditional regulation</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td></td>
<td>The Broadcasting Council as a state administration organ is the only regulatory body vested with the competence to impose administrative sanctions regarding the content of broadcasting including its advertising and sponsorship content. Broadcasting Council in its state administration functions as a content regulator and controlling agency for broadcast advertising and sponsorship is applying two basic laws regulating the broadcasting content: Act No. 231/2001 Coll., on Radio and Television Broadcasting as amended and the Act No. 40/1995 Coll., on the Regulation of Advertising as amended. Some provisions regarding the</td>
<td></td>
</tr>
</tbody>
</table>
The definitions of misleading advertising are contained in the section on unfair competition of the Commercial Codex (Act No. 513/1990 Coll. as amended). The provisions on regulation of advertising in the Act No. 231/2001 Coll., on Radio and Television Broadcasting have priority above the provisions on regulation of advertising the Act No. 40/1995 Coll., on the Regulation of Advertising. The Act No. 231/2001 Coll., on Radio and Television Broadcasting does not contain the possibility of co-operative regulation as provided under the Article 8 of the Act No. 40/1995 Coll., on the Regulation of Advertising, i.e. cooperative regulation in other spheres of content regulation than the regulation of advertising and sponsorship.

The Broadcasting Council’s regulatory authority extends also to the public broadcasters (Czech Television and Czech Radio) as regards content regulation, including regulation of broadcast advertising and sponsorship. The administrative decisions of the Broadcasting Council on imposing sanction on broadcasters may be appealed by the broadcasters concerned at special administrative courts by filing an action against the Broadcasting Council’s administrative decision, under the provisions of the Code on Court Administration Process, which entered into force in the year 2002. (Act No. 150/2002 Coll.).
A Supreme Administrative Court established as of January 1, 2003 is deciding on cassation complaints which may be lodged against these decisions of the Administrative Court by either the Broadcasting Council or the broadcaster affected by the appealed decision of the Broadcasting Council.
II. Co-operative Regulatory Systems in the press sector

1. Part I: The co-operative regulatory system

   a) Development of the regulatory system

   There is no real co-operative regulatory system in the field of print media in the Czech Republic. Long time after the Velvet Revolution in 1989 the regulatory framework in the press was based on the old Press Act from the Communist era, amended in March 1990. The amendment removed all the restrictive provisions, which have had restraining effect on the freedom of the press. As an assurance against the abuse of the newly acquired freedom, the new provisions were introduced into the Civil Code, which enabled for a plaintiff to get punitive damages for a libel or for an infringement of basic personal rights.

   For several years the Czech society did not feel a need to regulate publishing activities and the content of the press by any law or by any self-regulations. The debate about the shape of the new Press Act took ten years and ended in the year 2000. The legal conflicts, which have arisen from the media activities in the meantime, have been subjects of court legal proceedings based on the general law, not on any special media law.

   In 1990, the professional association of Czech journalists (Union of Czech Journalists - Syndikát novinářů ČR) joined the Declaration of Principles on the Conduct of Journalists by International Federation of Journalists, and declared them as a code of conducts for his members. The public debate on the new Press Act provoked two initiatives directed towards self-regulation of the press. Some observers claims that these initiatives were a self-defense action of a kind, launched by journalists and by the media industry, which had been facing the potential danger of adopting too restrictive Press Act by the Parliament.

   The Union of Publishers, associating the most of newspapers and magazines publishers, has approved in September 2000 the Code of Press Ethics, which presupposed the existence of twelve-members Czech Press Council, selected from the respected personalities of press industry and public life. The Czech Press Council was never appointed because of disagreements and divisions among the members of the Union. The seven chapters of the
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

Code of Press Ethic were rather early forgotten, and they are not presented at the Union of Publishers web page (www.uvdt.cz) any more.¹

In November 1998, the Union of Czech Journalists adopted the Code of Ethic, established the Ethical Commission, and approved its Charter. (www.syndikat-novinaru.cz/etika/)

b) Subject-matter of the regulatory system

The Charter defines the Ethical Commission as an independent professional body, whose mission is to implement the principles of the Constitution and of the declarations of the International Federation of Journalists (www.ifj.org). The Ethical Commission shall publish general recommendations, specific opinions and judgements concerned with the violation of journalistic ethic.

c) Basis of the co-operation

There is no connection between the Press Act and activities of the Ethical Commission. The authority of the Ethical Commission is rather the moral one, because when a final judgement on a breach of the Code of Ethic is adopted, the Commission has no power to enforce any sanctions, not even enforce publishing of the judgement in a particular media.

d) Institutions involved in the system

Members of the Ethical Commission are appointed by the Administrative Board of the Union. According to the charter, the Commission shall consist of eleven members. However, it works with only eight members, mostly respected journalists, for this time being. The reason is that there are only few people who are ready to participate in this voluntary not paid job. An independent scholar from the Charles University chairs the Commission.

¹ The European Institute for the Media (www.eim.org) published in August 2004 the Final report of the study on the information of the citizen in the EU, prepared on behalf of the European Parliament. This study mentions and describes the existence of the Code of Ethics. However, it did not notice that the Code was a stillborn baby.
When the Commission receives a complaint against a particular media, and when the complaint is accepted, the Commission asks the media in question for an explanation and opinion. Despite a missing legal obligation applied to the Commission's request, the respective media usually complies with the request and waits for the final decision.

*e) Functioning of the system*

The Press Act (Act No. 46/2000 Coll., on Rights and Duties in Publishing the Periodical Press) did not contain any co-regulatory or self-regulatory provisions with regard to the content of newspapers and magazines. As already have been mentioned in the first report, the provisions of the Press Act are strictly limited to the rights and obligation of publishers.

All the periodical press shall be registered at the registry maintained by the Ministry of Culture. Each copy of the periodical press shall contain the identification data of the publisher, who is also obliged to send “compulsory copies” to the libraries prescribed by law. The Act stipulates the right to reply for anybody offended by factual statement (not by opinion) published in the periodical press. The institute of “subsequent statement” is reserved for the persons involved in criminal proceedings, who are entitled for publishing of the final outcome of the proceeding, if the case has been published by the press earlier.

The non-appearance of co-regulatory measures does not mean a non-existence of several self-regulatory initiatives. Several Czech print media adopted its own Codes of Ethic or Codes of Conducts, among them the national dailies MF Dnes, Hospodářské noviny, Lidové noviny, the weekly Týden or the Czech News Agency (CTK).

The CTK Code serves as a guideline for work of the CTK journalists, and it is a part of the work contract with new CTK employees. The application of the Code has nothing common with the CTK Council, the nine-members supervisory body described above, which is appointed by the Chamber of Deputies of the Czech Parliament. A violation of the Code is controlled by the management of the news agency, not by the CTK Council. The Council is authorized to deal with complaints against the agency's activities only, and to discuss them with the CEO of the CTK agency.
2. Part II: Leading Cases

Because of the absence of any co-operative system in the field of the print media, it is possible to mention only the media cases, in which the state authority (police, courts, and antimonopoly office) was involved. The most of legal cases related to the media have originated from lawsuits of natural persons, which were offended by the content of a particular media, a daily or a magazine. The libel actions were started either as a civil proceeding (infringement of personal rights, a possibility of getting a punitive damage) or as a criminal proceedings (defamation, slander, libel, a possibility of punishment of the offender).

Some of the cases were subject of simultaneous hearing at the court and at the Ethical Commission of the Union of Journalists. E.g. the recent untruthful report made by the tabloid weekly Aha! about the popular bestseller writer and professor Michal Viewegh and his alleged student mistress. Or false report about alcoholism and marital conflicts of the popular actors couple Josef Abrham and Libuse Safrankova, published by the tabloid daily Super in 2001, that was prosecuted as a criminal defamation. However, there has not been any connection between these simultaneous proceedings, the police and courts did not ask the Ethical Commission for an opinion or for a counsel.

The famous freedom of expression case took place in 2000. Two reporters of the daily “MF Dnes” were charged with abetting a crime (article 166 of the Penal Code), when they discovered and published a document that should discredit a Social Democrat politician Petra Buzkova, and whose author was the Prime Minister’s advisor. President Havel pardoned the two journalists, although the journalists subsequently called for the case to go to trial in order to establish a legal precedent regarding the right of journalists to protect their sources. In March 2001, the investigators concluded that both journalists had not committed any crime.

Any of court verdicts and judgments did not have any impact on a change of regulation or self-regulation of the media. Since the Velvet Revolution in 1989 the freedom of speech and the free market principles have been inviolable. There is no limit of cross-ownership of the print media in the Czech Republic. The media are considered to be the business, which should be governed by the trade law.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Press Sector

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criteria</strong></td>
<td><strong>Cases excluded by this criterion</strong></td>
<td><strong>Explanation</strong></td>
<td><strong>Additional remarks</strong></td>
</tr>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
</tr>
<tr>
<td>There is no non-state organization or a rule or a process, which regulates the press in the Czech Republic.</td>
<td>The Union of Publishers, associating the most of newspapers and magazines publishers deals only with publisher’s common interest. The Union of the Czech Journalists is an association, whose basic aim is to defend the interest of its members.</td>
<td>Pursuing of the public interest in the press sector is implemented by means of the public law, e.g. by invoking the Constitution, the civil, criminal and trade law.</td>
<td></td>
</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
<td></td>
</tr>
<tr>
<td>See above.</td>
<td>The both Unions in question are publishing their opinions in cases, which are of concern of their members.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td>The range of possible subjects of non-state action has to be limited to make the</td>
<td></td>
</tr>
</tbody>
</table>
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

<table>
<thead>
<tr>
<th>Definition Workable</th>
</tr>
</thead>
<tbody>
<tr>
<td>The participation of both Unions (as a consulting bodies) in drafting the Press Act, adopted in 2000.</td>
</tr>
</tbody>
</table>

**Link between the non-state-regulatory system and state regulation**

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td><strong>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</strong></td>
<td></td>
</tr>
<tr>
<td>See above – there is no non-state-regulatory system.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td><strong>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</strong></td>
<td></td>
</tr>
<tr>
<td>There is no legal basis for such a regulatory system. The Press Act No. 46/2000 merely defines the rights and duties of the publishers (e.g. registration, compulsory copies for libraries, right to reply, obligatory copies etc.), but does not mention any specific regulatory measures.</td>
<td>There is no link between Ministry of Culture, district’s offices/municipalities (responsible for observing the Press Act), and the Union of Publishers and the Union of Journalists.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
<td><strong>Innovative forms can only be found if there is real</strong></td>
<td></td>
</tr>
<tr>
<td>No.</td>
<td>Yes. See the report.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----</td>
<td>---------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
<td></td>
</tr>
<tr>
<td>No.</td>
<td>In November 1998, the Union of Czech Journalists adopted the Code of Ethic, established the Ethical Commission, and approved its Charter. (<a href="http://www.syndikat-novinaru.cz/etika/">www.syndikat-novinaru.cz/etika/</a>). The similar activity of the Union of Publishers failed in 2001. Several Czech print media adopted its own Codes of Ethic or Codes of Conducts, which serves them for internal use. The same goes for the Code of Conducts adopted by the Czech News Agency (CTK), a public service body established by law.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

The regulation of the media and pursuing of the public interest (protecting of minors, human rights, fight against misleading information) in the press sector is implemented by means of the public law, e.g. by invoking the Constitution, the civil, criminal and trade law.

There is no regulator with an authority upon the printed media. The publishing of periodicals is considered to be a free entrepreneurial activity that has to be registered at the Ministry of Culture, that has some special duties (the compulsory copies for libraries, guarantee of right to reply etc.), but otherwise it shall not be any way regulated by the state.

Self-regulating activities (Code of Conducts in the media, Code of Journalistic Ethics in the Union of Journalists) have a twofold reason. On the one hand, with making their codes accessible to general public, the media and journalists want to represent themselves as responsible, reliable and trustworthy players. On the other hand, the codes of conducts serve to the media employers as a disciplinary tool or as a practical guideline for their own editorial policy.

**Conclusion:** The co-regulation in the meaning of a linkage between state and non-state organizations does not exist in the media sector of the press.

### III. Co-operative Regulatory Systems in the online sector

#### 1. Part I: The co-operative regulatory system

_a) Development of the regulatory system_

Introduction of online services and of the internet in the Czech Republic was rather slow at the beginning. The Internet was restricted to the academic community till the 1995; the first private Internet providers broke the monopoly of the state telecom organization in the second half of the nineties. The initial paid online services were expensive and reserved for the B2B business.
b) Subject-matter of the regulatory system

The providers of the internet and of the online services had to comply with the Telecommunication Act as to their equipment; their telecommunication license did not impose any specific content obligations. The former Telecommunication Act was replaced this year by the new Act No.127/2005 Coll., on Electronic Communications and on Change in Some Related Act (Electronic Communication Act).

The penetration of internet is still not very high in comparison with the EU states due to the telecom fees that are still too expensive in relation to the purchasing power of the Czech population. Nevertheless, the provision of the Electronic Communication Act in force from May 2005, and the recent sale of the Czech Telecom to foreign investor (Spanish Telefonica) should enhance the competition at the communication market and cut down the telecom tariffs.

c) Basis of the co-operation

The first specific legal norm applied to the online services was adopted in July 2004. The Act No.480/2004 Coll., on some services of the information society (known as "Information Society Services Act", known also as "Anti-Spam-Act"), resulted from implementing the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market.

d) Institutions involved in the system

The provisions of this Act apply mainly to the general responsibility of service providers for transmitted content, and to the unsolicited commercial communication. The authority competent to carry out supervision of compliance with the act is either the Personal Data Protection Office or “the relevant professional self-governing chamber established by statute” in cases of commercial communications from persons exercising a regulated profession.

1 See http://www.micr.cz/files/1598/LawIS.pdf
The professions are among others: lawyers, notaries (e.g. Czech Bar Association, Chamber of Public Notaries - Act No. 85/1996 Coll., on the legal profession), physicians, doctors and pharmacists (Czech Medical Chamber, Czech Dental Chamber and Czech Pharmacists’ Chamber – Act No. 220/1991), auditors (Chamber of Auditors – Act No. 254/2000 Coll., on auditors) or tax consultants – (Chamber of Tax Advisors - Act No. 523/1992 Coll., on tax consultancy).

The “Information Society Services Act” can be classified as an example of the co-operative regulatory system, because the control of services, the commercial communications, is administered not only by the state agency, but also by the professional self-governing chambers in the extent of their authority.

In November 2001 the Czech Publishers Association (Unie vydavatelů denního tisku) established the sub-association of the internet periodical publishers (for details see the first report) and adopted the “Code of internet advertisement’s ethics”. This Code should fill in the gap in the Act No. 40/1995 on advertisement regulation, which does not cover some specific peculiarities of the Internet advertisement. The Code has only four sections concerning:
- The erotic advertisement,
- The deceiving (bluffing) advertisement,
- The hidden advertisement and
- The aggressive advertising formats.

The Czech Publishers Association initiative is not interconnected with the state regulation. It is purely self-regulating activity of a rather declarative nature.

2. Part II: Leading Cases

The Personal Data Protection Office, established by the Act No. 101/2000 Coll., on the Protection of Personal Data, is the main supervisor with regard to observing the part of the “Information Society Services Act” concerning commercial communications. The Office received about 500 complaints against unsolicited commercial communication during the first six month of the Act being in force. (See the table)
The number of complaints against unsolicited commercial communications submitted to the Personal Data Protection Office (7 September 2004 - 15 March 2005)

<table>
<thead>
<tr>
<th>complaint</th>
<th>2004</th>
<th>2005</th>
<th>TOTA</th>
<th>per cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>sent by the e-mail</td>
<td>117</td>
<td>8</td>
<td>125</td>
<td>25,67%</td>
</tr>
<tr>
<td>sent by the (snail) mail</td>
<td>9</td>
<td>1</td>
<td>10</td>
<td>2,05%</td>
</tr>
<tr>
<td>using the form at the web page</td>
<td>180</td>
<td>172</td>
<td>352</td>
<td>72,28%</td>
</tr>
<tr>
<td>uoou.cz</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>rejected by the Office</td>
<td>29</td>
<td>27</td>
<td>56</td>
<td>11,50%</td>
</tr>
<tr>
<td>(among them complaints from</td>
<td>7</td>
<td>9</td>
<td>16</td>
<td>3,29%</td>
</tr>
<tr>
<td>abroad)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Complaints total</td>
<td>306</td>
<td>181</td>
<td>487</td>
<td></td>
</tr>
</tbody>
</table>


The administration procedures of these complaints are still pending, no case was finalized to the stage of penalizing the offender, which would have legal validity.

As to the co-regulation part, the data are not available for this time being. The "The Information Society Services Act" is in force for a short time, and there is no information about any actions taken by the professional self-governing chambers recently. That can be explained also by the fact that the spamming by professionals in the Czech Republic is not widespread, the tolerance of Czech Internet users is high, therefore the complainants are missing.

That goes also for Internet advertising, where the Czech Publishers Association press releases did not mention any breach of the Internet Advertisement’s Ethic Code.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Online Services/Internet

<table>
<thead>
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<tr>
<td><strong>The creation of organisations, rules or processes</strong></td>
<td>Informal agreements, case-by-case decisions</td>
<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
<td></td>
</tr>
<tr>
<td><strong>The part of the Act No.480/2004, on some services of the information society (known also as the “Certain Information Society Services Act”), that deals with the commercial communications, applies the co-operative form of regulation, when involving into supervisory activities the non-state bodies.</strong></td>
<td>The Union of Publishers, associating the most of newspapers and magazines publishers, established the sub-association/Division of the publishers of the internet periodicals.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</strong></td>
<td>Pure consultation</td>
<td><em>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</em></td>
<td></td>
</tr>
<tr>
<td><strong>The authority competent to carry out supervision of compliance with the act is either the Personal Data Protection Office or “the relevant professional self-governing chamber established by statute” in cases of commercial communications from persons exercising a regulated profession.</strong></td>
<td>The Division of the internet periodical’s publishers at the Union of Publishers adopted the Code of Internet Advertisement’s Ethics.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>As long as this is performed by or within the organisations</strong></td>
<td>Measures by third parties (e.g. NGOs)</td>
<td><em>The range of possible</em></td>
<td></td>
</tr>
</tbody>
</table>
or parts of society that are addressees of the regulation | subjects of non-state action has to be limited to make the definition workable.
---|---
The chambers of regulated professions are the Czech Bar Association, the Chamber of Public Notaries, the Czech Medical Chamber, the Czech Dental Chamber, the Czech Pharmacists' Chamber, the Chamber of Auditors and the Chamber of Tax Advisors. | No.

### Link between the non-state-regulatory system and state regulation

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
</table>
The system is established to achieve public policy goals | Measures to meet individual interests | The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation. |


There is a legal basis for the non-state regulatory system | Informal agreements without any legal criteria to judge the functioning of non-state regulation | If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.
<table>
<thead>
<tr>
<th>The Act applies mainly to the general responsibility of service providers for transmitted content, and to the unsolicited commercial communication. The supervision of some part of the unsolicited commercial communication is delegated to the professional self-governing chambers of the regulated professions.</th>
<th>There is no link between the Division of the internet periodical’s publishers and supervisors of the “Information Society Services Act” (the Personal Data Protection Office, the independent professional self-governing chambers)</th>
<th>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
<td></td>
</tr>
<tr>
<td>The supervision of the commercial communications includes the state administration body, the Personal Data Protection Office, and the independent professional self-governing chambers enacted by other law.</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>The Code of Internet Advertisement’s Ethics has four chapters forbidding the erotic advertisement, the deceiving (bluffing) advertisement, the hidden advertisement and the aggressive advertising formats.</td>
<td></td>
</tr>
</tbody>
</table>
3. **Part III: Assessment according to the criteria for determining which types of regulation are covered by the study**

The Electronic Communication Act (Act No. 127/2005) does not impose any content limits or regulation of the online services and the internet.

The only legal norm specifically addressing this media sector is the above-mentioned “Information Society Services Act” No. 480/2004, on some services of the information society, which is in fact the Czech copy of the EU Directive 2000/31/EC, on certain aspects of information society services.

The Act No. 480/2004 stipulates the liabilities of the service providers, which are responsible for the content only if they “initiates the transmission, selects the user of the information transmitted, or selects or modifies the contents of the information transmitted.” (Article 3, para 1). This provision was welcomed by many Czech internet service providers, because before the “Information Society Services Act” in force they could be held liable and co-responsible for the content on their servers, if a general provision of Civil Code would have been applied.

Nevertheless, any service provider shall meet all obligations arising out of special legal regulations concerning the protection of public order, public health, state security and consumer protection. It means that the protection of public interest issues is in the electronic online media sector, like in the press media sector, left to the general public law, e.g. by invoking the Constitution, the civil, criminal and trade law.

In the part of the Act No. 480/2004 that deals with the liabilities of service providers the traditional model of state regulation was introduced. The part dealing with the commercial communications has applied the co-operative form of regulation, which involves the state administration body, the Personal Data Protection Office, and the independent professional self-governing chambers enacted by other law.

**IV. Co-operative Regulatory Systems in the film sector**

1. **Part I: The regulatory system**

A co-regulatory measure regarding the determination of accessibility of audio-visual works whose content could endanger the moral development of minors has been introduced by the Act No. 273/1993 Coll., on some Conditions of the Production, Dissemination and Archiving
of Audio-visual Works, amendments to some acts and on other laws, as amended (the Act on Audio-vision). Under Article 4 of the Act on Audio-vision the producer of the Czech audiovisual work is obliged to determine the level of accessibility of the audiovisual work produced by it and to state such accessibility limit in its agreement with the distributor of such audiovisual work and the distributor must adhere to such limit. Similarly, the distributor of audiovisual work is obliged to determine the accessibility limit for audiovisual work distributed by it and to state such accessibility limit in its agreements with the organizers of audiovisual productions (cinemas), sales shops and rental shops selling and renting audiovisual works. Such accessibility limit must be also labeled on the cover of the audiovisual work. The operator of cinema must check that the attendants of the cinema screenings comply with the accessibility limit determined by the distributor of the audiovisual work. Producer's, distributor's and cinema operator's non-compliance with the above obligation may be sanctioned by a relatively modest fine up to 10.000 Czech crowns. The criteria for the accessibility of the audiovisual work are determined by the producers and distributors themselves.

Act No. 40/1995 Coll., on the Regulation of Advertising, has abolished special provisions of the Act No. 273/1993 Coll. (Act on Audio-vision) in its part regulating advertising during public screening of audiovisual works. General provisions of the Act No. 40/1995 Coll., on the Regulation of Advertising are applicable also for the film sector as this act applies also to public screenings of audiovisual works and to the carriers of the audiovisual works. As described in the part of the study dealing with the broadcasting sector, the system of co-operative regulation exists also in the film sectors in the sphere of regulation of advertising and sponsorship as under the provisions of the Article 8 paragraph 7 of the Act No. 40/1995 Coll., on the Regulation of Advertising, as amended, the respective state administrative controlling bodies may (when deciding on the imposition of a sanctions against entities acting in breach of the provisions on the regulation of advertising and sponsorship disseminated during the public screening of audiovisual works may request the expert opinion of the professional associations in the sphere of advertising, i.e. the Advertising Council as a self-regulatory, non-state association, founded by advertisers, advertising agencies and media.

The functioning of the system of determination of accessibility of audio-visual works is sanctioned by penalties to be imposed by the Ministry of Culture.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Film Sector

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
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<tbody>
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<td>The creation of organisations, rules or processes</td>
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<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
<td></td>
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A co-regulatory measure regarding the determination of accessibility of audio-visual works whose content could endanger the moral development of minors has been introduced by the Act No. 273/1993 Coll., on some Conditions of the Production, Dissemination and Archiving of Audio-visual Works, amendments to some acts and on other laws, as amended (the Act on Audio-vision). Under Article 4 of the Act on Audio-vision the producer of the Czech audiovisual work is obliged to determine the level of accessibility of the audiovisual work produced by it and to state such accessibility limit in its agreement with the distributor of such audiovisual work and the distributor must adhere to such limit. Similarly, the distributor of audiovisual work is obliged to determine the accessibility limit for audiovisual work distributed by it and to state such accessibility limit in its agreements with the organizers of audiovisual productions (cinemas), sales shops and rental shops selling and renting audiovisual works.

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has abolished special provisions of the Act No. 273/1993 Coll. (Act on Audio-vision) in its part regulating advertising during public screening of audiovisual works. General provisions of the Act No. 40/1995 Coll., on the Regulation of Advertising are applicable as this act applies also to public screenings of audiovisual works and to the carriers of the audiovisual works. The provisions of the Article 8 paragraph 7 of the Act No. 40/1995 Coll., on the Regulation of Advertising, as amended, the respective state administrative controlling bodies with a power of imposing administrative sanctions) may (when deciding on the imposition of a sanctions against entities acting in breach of the provisions on the regulation of advertising and sponsorship disseminated during the public screening of audiovisual works may request the expert opinion of the professional associations in the sphere of advertising. i.e. the Advertising Council as a self-regulatory, non-state association, founded by advertisers, advertising agencies and media

The request for an expert opinion of the Advertising Council (or other professional non-state associations in the sphere of advertising) may be made by the National Institute for Drug Control for advertisements of human medicines and sponsoring in this field, the Ministry of Health for advertisements for sanitary equipment and sponsoring in this field, the district trade licensing offices in all other cases

The assessments made for the Broadcasting sector in its part dealing with the co-operative regulation in the sphere of advertising and sponsorship therefore apply similarly to the advertising and sponsorship during public screening of
audiovisual works and for the dissemination of copies (carriers) of audiovisual works.

<table>
<thead>
<tr>
<th>Measures</th>
<th>Possible subjects</th>
</tr>
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<tbody>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
</tr>
<tr>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
<td></td>
</tr>
<tr>
<td>Although the Advertising Code has not force of law, its ethical principles may be upheld by the controlling agencies in execution of their state administration functions in the legal regulation of advertising under the general provisions of the Advertising Act, since the legal regulation of advertising partially overlaps with the ethical advertising self-regulation under the provisions of the Advertising Code. In addition, the professional non-state self-regulatory associations like the Advertising Council are obliged to interpret in formulating their expert opinions requested by the controlling agencies the applicable legal regulation of advertising and sponsorship and not only its ethical self-regulation. This ensures, that the self-regulatory provisions of the Advertising Code, which cannot in itself be legally enforced, may ultimately be taken into account by the controlling agencies in their deliberations on imposing administrative sanctions and thus will be sanctioned under the law, as the general principles on advertising of the Advertising Code coincide with the general provisions of applicable legal regulation of advertising as contained in the Section 2 of the Advertising Act.</td>
<td>Requesting of an expert opinion of the professional non-state self-regulatory associations in the sphere of advertising and sponsorship by the respective state administration agencies under Article 8 paragraph 7 of the Act No. 40/1995 Coll., on the Regulation of Advertising is not mandatory, and there is no formal procedure on handling of such an expert opinion by the state administration agencies</td>
</tr>
<tr>
<td>Measures by third parties (e.g. NGOs)</td>
<td>The range of possible subjects of non-state action</td>
</tr>
<tr>
<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td></td>
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</table>
The non-state regulatory system for the determination of accessibility of audio-visual works is performed by the producers and distributors of audio-visual works. Non-observance of this system of determination of accessibility of audio-visual works is sanctioned by penalties to be imposed by the Ministry of Culture.

| The Czech Advertising Council ("Advertising Council") was established in 1994 as a non-profit organization by the association of advertisers, advertising agencies, Advertising Council is a full member of EASA (European Advertising Standards Alliance). Advertising Council has adopted ethical Code of Advertising practice implementing ethical advertising standards. Advertising Council’s member organizations expressly acknowledge in the Statutes of the association the Code and undertake neither to produce nor to accept any advertising which would be in contravention with the Code or that they will withdraw such advertising which is in breach of Code’s ethical principles of advertising as found by the decisions, made by the Arbitration Commission as the independent organ set up by the Advertising Council - an advertising ethics self-regulatory body of the Advertising Council. The advertising which is subject to the self-regulation by the Council, encompasses the press, billboards, direct-mail, audiovisual productions, advertising in cinemas and in the radio and television broadcasting. The Advertising Council does not handle complaints on advertising in which the legal aspects are prevailing over the ethical aspect of advertising as are regulated by the Code. Advertising Council decides on complaints which | has to be limited to make the definition workable. |
may be lodged to Advertising Council by the general public, consumers’ associations, advertisers, state administration or other organs and institutions. The procedure of handling complaints is regulated by the Rules of Procedure of the Advertising Council. The Arbitration Commission is the only body entrusted with the task to handle the complaints and to decide on appeals made on its decisions. Only on the specific request of advertisers, advertising agency or media, the Advertising Council may provide (usually for remuneration) a preliminary check or preliminary consultation of advertising (i.e. pre-clearance of advertising).

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
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<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
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<tr>
<td></td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state</td>
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Co-Regulation Measures in the Media Sector: Annex 5: Coutnry reports on possible co-regulatory systems

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<tr>
<th>The legal basis for a co-regulatory measure regarding the determination of accessibility of audio-visual works whose content could endanger the moral development of minors has been introduced by the Act No. 273/1993 Coll., on some Conditions of the Production, Dissemination and Archiving of Audio-visual Works, amendments to some acts and on other laws, as amended (the Act on Audio-vision).</th>
<th>Traditional regulation</th>
<th>regulation all forms of interaction would come to the fore.</th>
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<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation</td>
</tr>
<tr>
<td>There is no other regulation which is meant to be co-regulation for the purposes of this study other than the two systems described in this assessment for the film sector (i.e. - the determination of accessibility of audio-visual works whose content could endanger the moral development of minors - the elements of co-operative regulation as regards advertising and sponsorship in public screening and labelling of audiovisual works.</td>
<td></td>
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<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
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<td></td>
<td>of non-state rules does not promise innovation.</td>
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<td>-------------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------</td>
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</tr>
<tr>
<td>Under the Act on Audio- vision, the Ministry of Culture may impose sanctions to producers and distributors of audiovisual works for non-observance of their obligations regarding determination of public accessibility of works</td>
<td>The Advertising Council has adopted ethical Code of Advertising practice with the aim to implement ethical advertising standards in the Czech Republic which is to ensure that the interests of general public are respected in regard to the advertising, that the advertising is true, honest and decent and compliant with the Czech laws as well as internationally acknowledged principles governing the advertising practices in terms of contents and form, as issued by the International Chamber of Commerce. The Code is designed to serve all the subjects acting in the field of advertising and sets up the rules of professional behaviour.</td>
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</table>
3.5. Denmark

I. Co-operative Regulatory Systems in the broadcasting sector

1. Part I: The co-operative regulatory system - Public service contracts

The Danish Broadcasting regulation does not specifically authorise co-operative regulatory systems. However, a quasi co-regulatory measure follows from the Broadcasting Act § 12(2) and § 31(4). It stipulates that the public service broadcasters’ public service obligations shall be specified in a contract with the Minister of Culture.

a) Development of the regulatory system

The system with public service contracts entered into force on 1 January 2003. On this basis each of the public service broadcasters have entered into an agreement with the Minister of Culture covering the period 2003-2006.

The introduction of the public service contract system does not change the overall public service obligations as set forth in § 10 of the Broadcasting Act. Before the introduction of the new system, the public service obligations were specified in executive orders pursuant to the Broadcasting Act.

1 Act no 1052 of 17 December 2002, as amended by Act no 439 of 10 June 2003, with appurtenant executive orders.

2 § 12(2): Denmark's Radio’s fulfilment of its public service obligations shall be specified in a contract between the Minister of Culture and Denmark's Radio.

§ 31(4): The regional TV2 stations’ fulfilment of their public service obligations shall be specified in public service contracts between the Minister of Culture and the individual stations.

3 § 10: The overall public service activities shall provide, via television, radio and Internet etc. the Danish population with a wide selection of programmes and services comprising news, general information, education, art and entertainment. Quality, versatility and diversity shall be aimed at in the range of programmes provided. In the planning of programmes freedom of information and expression shall be a primary concern. Objectivity and impartiality must be sought in the information coverage. The programming shall ensure that the general public has access to material information on society and debate. Furthermore, particular emphasis shall be placed on Danish language and culture. The programming shall cover all genres in the production of art and culture and provide programmes which reflect the diversity of cultural interests in Danish society.
The change in relation to the old regime lies in the fact that public service contracts enable a greater level of details in regard to the content of the public service concept than it was possible before, as set forth in executive orders. Under the old regime this level of details was not specified in writing and was thus entrusted with the public service providers themselves to express.

b) Subject-matter of the regulatory system

As mentioned, under the old regime the public service obligations were only described in general terms in the Broadcasting Act and appurtenant executive orders. The purpose of the public service contract system is to achieve more governmental control with the public service broadcasters’ compliance with the public service obligations.

c) Basis of the co-operation

As described, the public service contract system is set forth in § 12(2) and § 31(4) of the Broadcasting Act and is carried out via contracts between the public service broadcasters and the Minister of Culture. The contracts are entered into force as contracts under private law.

The contracts do not specify the consequences of a possible breach of contract. However, it is generally accepted that the contracts are non-enforceable before the courts. The question of legal enforceability of the contract is not considered as important. Possible breach of contract from the part of the public service broadcasters can and will be met by political sanctions from the Government and Parliament, e.g. through financial reductions of the state’s public service contributions (that constitutes the dominating part of the public service broadcasters’ funding).

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4 There has been no breach of contract so far.
5 In theory, if the Minister of Culture decides that the public service broadcasters are in breach of contract, such decision can be brought before the courts. However, being state institutions, lawsuits filed by the public service broadcasters against the state are not realistic.


d) Institutions involved in the system

The public service broadcasters include DR, TV2/Denmark and 8 regional, independent companies under the common name TV2.6

The public service contract system does not require any special funding.

e) Functioning of the system

The entering into public service contracts is prescribed by the Broadcasting Act and is as such an obligation for the public service broadcasters.

The public service broadcasters shall submit an annual report to the Minister of Culture describing the level of compliance with the contract. The Minister has discretionary power to evaluate and react upon the broadcasters’ level of compliance. Thus, the public service broadcasters cannot complain about the Minister’s reaction to their reported compliance. However, the Radio and Television Board delivers an opinion on the level of compliance to the Minister, re point f) below. The Board’s opinion is only an opinion, not a decision. The Minister is not bound by the opinion from the Board.

f) Supervision of the system

As mentioned, the public service broadcasters are obligated to submit annual reports regarding their compliance with the contracts. The reports shall be sent to the Minister via the Radio and Television Board, which delivers an opinion of the reported level of compliance to the Minister.

g) Impact assessment

Because the public service contract system was introduced in 2003, the system is rather new and still under development. The first annual report (for 2003) has been compiled and evaluated by the Radio and Television Board as well as the Minister of Culture. Neither the

6 As part of a pending process to privatise the nationwide public service broadcaster TV2, the station’s obligation to enter into a public service contract was repealed in 2004.
Board nor the Minister had any objections to the report and its conclusion (that the broadcasters on the whole were in compliance with the contract).

2. **Part II: Leading Cases**

As described, the public service contract system is rather new and no cases have been dealt with so far.

Under the old regime (where the public service obligations were set forth only in the Broadcasting Act with appurtenant executive orders) no cases existed either. As indicated, the public service broadcasters' level of compliance with the public service obligations' is generally a political issue, not a legal.
### 3. III: Assessment according to the criteria for determining which types of regulation are covered by the study

**Table: Criteria / The public service contract system**

<table>
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<th>Non-state regulatory system</th>
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<td>(the drawing up and evaluation of public service contracts)</td>
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<td>decisions by or within such entities</td>
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<td>that the public service obligations are</td>
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<td>complied with</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
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<td>It is conducted by the parties that are addressees of the regulation</td>
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<td>(the public service broadcasters, the Radio and Television Board, the</td>
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<tr>
<td>Minister of Culture)</td>
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</table>

<p>| Link between the non-state-regulatory system and state regulation           |                                                                                                       |                                                                                                      |
| Criteria                                                                    | Cases excluded by this criterion                                                                         | Explanation                                                                                           | Additional remarks                                                                 |
| The system is established to achieve public policy goals                    | Measures to meet individual interests                                                                     | The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation. |
| Compliance with statutory public service obligations                        |                                                                                                       |                                                                                                      |</p>
<table>
<thead>
<tr>
<th>There is a legal basis for the non-state regulatory system</th>
<th>Informal agreements without any legal criteria to judge the functioning of non-state regulation</th>
<th>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</th>
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<td>The Broadcasting Act</td>
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<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
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<td>It leaves the public service broadcaster’s to draw up the contract specifying the public service obligations (instead of specifying the obligations in the legislation.)</td>
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<td>The state uses regulatory resources to influence the non-state regulatory system</td>
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<td>The system reflects that the state uses regulatory resources to influence the public service contract system (annual reports that are evaluated by the Radio and Television Board and the Minister of Culture).</td>
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</tbody>
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The public service contract system

- set up rules (the provisions in the contract) and processes (the drawing up and evaluation of public service contracts)

- to influence decisions of persons/organisations (The Minister of Culture/The Danish Parliament, who wishes to ensure that the public service obligations are complied with)

- is conducted by the parties that are addressees of the regulation (the public service broadcasters, the Radio and Television Board, the Minister of Culture)

- is established to achieve public policy goals (compliance with statutory public service obligations)

- has legal basis (in the Broadcasting Act)

- leaves the public service broadcaster’s to draw up the contract specifying the public service obligations (instead of specifying the obligations in the legislation)

- reflects that the state uses regulatory resources to influence the public service contract system (annual reports that are evaluated by the Radio and Television Board and the Minister of Culture).

Conclusion: Consequently, in my opinion, the public service contract system under the Danish Broadcasting Act is a co-regulatory system in the meaning of the present study.
II. Co-operative Regulatory Systems in the press sector

1. Part I: The co-operative regulatory system - The regulation of “sound press ethics”

a) Development of the regulatory system

The Media Liability Act\(^1\) § 34(1) has the following wording:

"The content and conduct of mass media must be in conformity with "sound press ethics.""

Cases regarding alleged violations of sound press ethics shall be submitted to the Press Council, a public complaints board (i.e. a public authority). The Press Council can express its criticism and direct the editor to publish the Council’s decision to an extent specified by the Council. The Council cannot impose a sentence on the mass media or assure the complainant financial compensation. Such sanctions can, however, be imposed by bringing the case before the courts.

When interpreting the general clause of sound press ethics, the Press Council attach significant importance to “Guidelines of Sound Press Ethics” (the “Guidelines”), which are drafted by the Danish Newspaper Publisher’s Association, a private association of newspaper traders.

The co-regulatory system regarding sound press ethics was introduced with the present Media Liability Act that came into force on 1 January 1992.

Under the old regime (the Press Act from 1938) only the printed press was regulated. Further, there was no statutory regulation regarding press ethics. A self-regulatory regime had been developed, under which the newspapers voluntarily could subdue to a

\(^1\) Consolidated Act No 85/1998.
private complaints board whose decisions were based on the already then existing Guidelines. Similar voluntarily systems were developed as regard the electronic media (whose ethical guidelines also resembled the Danish Newspaper Publisher’s Association’s Guidelines).

The purpose of the 1992 Media Liability Act was partly to extend the scope of the regulation to cover both printed and electronic media, partly to create a statutory legislative framework for the evaluation of “sound press ethics”. This resulted in the general clause in the Act. The general clause regarding sound press ethics should, as before, be interpreted on basis of, inter alia, the Guidelines. However, the Press Council is not bound by the Guidelines and shall, where relevant, include other sources of law, e.g. the European Convention on Human Rights.

Further, a public complaints board, the Press Council, was established pursuant to the Act (as a replacement of the private established complaints board).

b) Subject-matter of the regulatory system

As described, the objective of the system regarding sound press ethics is to create a statutory framework while at the same time allowing flexibility by creating the legal standard “sound press ethics”.

c) Basis of the co-operation

The legal basis is the Media Liability Act § 34 as supplemented by, inter alia, “Guidelines of Sound Press Ethics”, re above.

d) Institutions involved in the system

The institutions involved are the Press Council and the Danish Newspaper Publisher’s Association.
Provisions regarding the Press Council follow from chapter 7 of the Media Liability Act. The Press Council is funded by public means. It consists of 8 members appointed by the Minister of Justice and representing legal expertise, editors, journalists and members representing “the public opinion”. The Council arranges approx. 15 annual meetings where the cases are handled. In each case 4 members participate: a lawyer (who are also chairing the meeting), an editor, a journalist and a member representing “the public opinion”. Both people and organisations can lodge a complaint to the Council if they think they have been denounced by the media and if they have got a cause of action. The notice of complaint is 4 weeks after publication. Regarding the Council’s sanctions, see point a) above.

Besides the fact that the Danish Newspaper Publisher’s Association has drafted the Guidelines, there is no co-operation between the Press Council and the Danish Newspaper Publisher’s Association.

e) Functioning of the system

Before the Media Liability Act it was voluntary whether the media institutions would commit themselves to comply with “sound press ethics”. Under the Media Liability Act, the media institutions covered by the Act are obliged to comply with the legal standard of sound press ethics. Further, the concept of sound press ethics as well as the complaint procedure is now established in the Act.

The system regarding sound press ethics is well known and accepted in the media sector.

f) Supervision of the system

The Ministry of Justice supervises the Media Liability Act. Decisions made by the Press Council can be brought before the courts.
g) Impact assessment

The Press Council handles 50-100 cases annually regarding sound press ethics. The Council publishes yearly reports on its cases etc. To my knowledge there are no official reports concerning the efficiency of the system. However, it is my impression that the system is generally considered well functioning.

2. Part II: Leading Cases

As mentioned, the Press Council handles 50-100 cases annually regarding the media institutions’ compliance with sound press ethics. Because the present system under the Media Liability Act is merely a codification of the (self-regulatory) system that existed before the Act, the legal basis for the cases is basically unchanged.

Both before and under the present regulatory regime the cases that the Council handles primarily deal with 1) correct information (including the obligation to print correct information and to present the counterpart with insulting information before it is printed), 2) different kinds of conduct (including the right to privacy and the obligation to make a clear dividing line between advertisements and editorial material), 3) ethical rules regarding legal reporting (e.g. to be objective, not to obstruct justice etc.).

Examples of typical cases decided by the Council:

1) Plaintiff, a former cashier in a horse-riding club, filed a complaint over an article in a newspaper. According to the article the local police was investigating a case where the cashier allegedly had committed fraud against the horse-riding club. The Council found that information in the article according to which the cashier should have transferred an amount of money from the club to his own bank account was detrimental to the cashier. Thus, the newspaper should have re-examined the information by presenting it to the cashier before publishing. Consequently, the Council expressed its criticism of the newspaper.

2) Plaintiff filed a complaint in a case where a TV-programme contained serious accusations that plaintiff were the cause of his neighbour’s children being –
wrongfully – removed from the home by the local authorities. In course of the programme pictures of the plaintiff were transmitted. The Council expressed its criticism of the TV-station having transmitted the pictures of the plaintiff.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Guidelines of sound press ethics

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As long as this is performed by or within the organisations or parts of society that are addressees of the regulation

| Measures by third parties (e.g. NGOs) | The range of possible subjects of non-state action has to be limited to make the definition workable. |

Is conducted by the parties that are addressees of the regulation: the media/the Council

|  |  |

<table>
<thead>
<tr>
<th><strong>Link between the non-state-regulatory system and state regulation</strong></th>
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<tr>
<td><strong>Criteria</strong></td>
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<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
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<tr>
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</tr>
<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
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<tr>
<td>Media Liability Act</td>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
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<td>---------------------------------------------------------------------</td>
</tr>
<tr>
<td>“power” is left to guidelines drafted by the sector itself</td>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
</tr>
<tr>
<td>The system regarding sound press ethics reflects that the state uses regulatory resources to influence</td>
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</tr>
<tr>
<td>the compliance with sound press ethics (the Council).</td>
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</table>
The system regarding sound press ethics

- set up “codes of conduct” (the Guidelines) and a complaint process
- to influence decisions of persons/organisations (the media)
- is conducted by the parties that are addressees of the regulation (the media/the Council)
- is established to achieve public policy goals (compliance with ethical standards of the media)
- has legal basis (in the Media Liability Act)
- leaves “power” to guidelines drafted by the sector itself
- reflects that the state uses regulatory resources to influence the compliance with sound press ethics (the Council).

**Conclusion:** Thus, in my opinion, the system regarding “sound press ethics” is a co-regulatory system in the meaning of the present study.

### III. Co-operative Regulatory Systems in the online services sector

1. Part I: The co-operative regulatory system - The future Danish Domain Name System

   a) Development of the regulatory system

   The Danish domain name system has from its establishment in 1999 and up until now been based entirely on self-regulation. ICANN (the Internet Corporation for Assigned Names and Numbers) has delegated the administration of the Top-Level domain .dk to
DIFO (the Danish Internet Forum), a private, non-profit association established in 1999. DK Hostmaster, a fully owned subsidiary of DIFO, carries out the daily administration of the Danish domain name system. In addition, DIFO has (on a self-regulatory basis) established a private complaints board, which handles complaints regarding DK Hostmaster’s decisions.

On 4 June 2005 the Danish Internet Domain Names Act was adopted by Parliament. The Act creates a legislative framework for the future domain name system and thus transforms the present self-regulatory framework into a co-regulatory framework.

b) Subject-matter of the regulatory system

Up to now, the self-regulatory administration of the Danish domain name system has worked reasonably. However, some uncertainty has evolved regarding, in particular, the rights and obligations of the administrator and the legal basis and competences of the Complaints Board. As regard the administrator, the uncertainty has concerned the legitimacy of the appointment of DIFO and the authorities’ competences in case the administrator does not comply with its obligations. As regard the Complaints Board, the legal basis for its decisions to a certain degree rests on general and rather vague “legal principles”. This has created uncertainty as to the specific legal basis for the Board’s decisions.

Thus, the purpose of the regulation is to create a legislative framework – and thus legal certainty – for the domain name system while preserving the core elements of the self-regulatory system.

c) Basis of the co-operation

The basis of the future domain name system is the Act, re above.

---

1 Act 598/2005 on Internet Domain Names especially assigned to Denmark.
d) **Institutions involved in the system**

The institutions involved will be the administrator of the Danish domain name system, the Complaints Board and the Ministry of Science, Technology and Innovation as supervisory administrative body.

e) **Functioning of the system**

Pursuant to the new Act, the future Danish domain name system will be build on the following principles: 1) the system will be based on legislation, not self-regulation; 2) the administrator will be appointed due to a public tender (“beauty contest”); 3) the Act establishes the fundamental rules for the administrator: transparency, broad representation (in the administrator’s board) of the Internet environment and non-profit administration; 4) self-regulatory competences for the administrator in terms of establishing the regulatory framework for the daily operation of the system, and 5) a legislative basis for the Complaints Board, which is to be appointed by the Minister of Science, Technology and Innovation.

f) **Supervision of the system**

The supervision of the system will be carried out by the Ministry of Science, Technology and Innovation. The Complaints Board’s decisions can be brought before the courts.

g) **Impact assessment**

Because the Act is new, no impact assessment is available.

2. **Part II: Leading Cases**

Because the Act is new, no cases exist.
As mentioned, under the present self-regulatory regime some uncertainty exists as to the legal basis of the legal basis for the (privately organised) Complaints Board’s decision. Under the Act a general clause in introduced (§ 12), determining that domain names may not be registered “contrary to good domain name conduct”. This provision will provide the new Complaints Board with a certain statutory basis for its future decisions, while enabling the Board to maintain its practice based on the former self-regulatory system.

Thus, only the legal basis for the Board’s decisions and the Board’s status of publicly established complaints board instead of privately established complaints board will basically change. The complaints procedure as well as the existing practice will remain unchanged.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Domain Name system

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<tr>
<th>Non-state regulatory system</th>
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As long as this is performed by or within the organisations or parts of society that are addressees of the regulation | Measures by third parties (e.g. NGOs) | The range of possible subjects of non-state action has to be limited to make the definition workable.

Yes, it is conducted by the parties that are addressees of the regulation, (the administrator/the new Complaints Board) |  |

<p>| Link between the non-state-regulatory system and state regulation |  |
|---|---|---|---|
| Criteria | Cases excluded by this criterion | Explanation | Additional remarks |
| The system is established to achieve public policy goals | Measures to meet individual interests | The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation. |  |
| It is established to achieve public policy goals (a statutory framework for the “public good” that domain names assigned to Denmark constitute) |  |  |  |</p>
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<th>There is a legal basis for the non-state regulatory system</th>
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<td>system</td>
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The new Domain Name system:

- set up a new statutory framework for the existing self-regulatory system
- to influence decisions of persons/organisations (the Internet society)
- is conducted by the parties that are addressees of the regulation (the administrator/the new Complaints Board)
- is established to achieve public policy goals (a statutory framework for the “public good” that domain names assigned to Denmark constitute)
- has legal basis (the new Act)
- leaves “power” to the privately organised administrator
- reflects that the state uses regulatory resources to influence the administration of the Danish domain name system.

**Conclusion:** Thus, in my opinion, the domain system is a co-regulatory system in the meaning of the present study.
3.6. Finland

I. Co-operative Regulatory Systems in the broadcasting and press sector

1. Part I: The regulatory system – The Council for Mass Media

a) Development of the regulatory system

Council for Mass Media was established in 1968. Already in 1927 the Finnish newspaper journalists had started their own Suomen Sanomalehdistön Kunniaoikeusto (“Honorary Code for Finnish Newspapers”) in which the companies and employers organisations did not participate. The first ethical code for journalists was written in 1957 as Lehtimiehen ohjeet (“Guide for Newspaperman”) In the 1960s journalism developed fast and also some scandalous elements came part of the media. To avoid legal restrictions both the journalists and media companies sought a solution which became in 1968: Council for Mass Media. Fear for legislation was not unnecessary: in 1974 the law regarding privacy was renewed and breaching privacy could be punishable up to 2 years in prison. Main arguments for the new law came after some scandalous reporting. After 1957 Journalists Code of Ethics or Guidelines for Journalists have been renewed 1968, 1976, 1983, 1992 and 2005. First Basic agreement for the Council for Mass Media was signed 10 December 1968 and it was amended 1 January 1975. New Basic agreement is from 1998.

b) Subject-matter of the regulatory system

The general task of the Council is to interpret good journalistic practice as well as defend freedom in regard to speech and the right to publication. The Council deals with issues on the basis of request made to the same, but can also take up a matter important as a question of principle on its own initiative. In individual cases the Council may, in addition to its resolutions as given, also prepare statements of a general nature.

The Council may deal with *editorial content as well as advertising material* in contradistinction to the same, as approved in the Mass Media within this basic agreement. It may also take up the procedures in the gathering of information on the part of those in the service of the Mass Media or those doing freelance work for the same. The Council may
likewise address itself to any attempts on the part of the authorities or individuals to limit the freedom of speech or the right to publication.

The Council bases its decisions on its free deliberation in respect to the Journalist Guidelines and other established principles of good journalistic practice.

c) Basis of the co-operation

The work of the Council is based on Basic agreement. First Basic agreement for the Council for Mass Media was signed 10 December 1968 and it was amended 1 January 1975. New Basic agreement is from 1998. Today the Council for Mass Media Basic agreement is signed by:

- Finnish Association of Magazines and Periodicals
- Finnish Association of Local Periodicals
- Finnish Association of Radio and Television Journalists
- Finnish Newspapers Association
- Union of Journalists in Finland
- Finnish Broadcasting Company
- MTV Oy Ltd ("MTV3" Finnish Commercial TV)
- Association of Finnish Broadcasters
- Oy Ruutunelonen Ab ("Channel Four" Finnish Commercial TV)
- Finnish Urban Press Association

d) Institutions involved in the system

The Council gets funding from the organisations that have signed the Basic Agreement. The financing of Council activities and other support shall be taken care of by the Council for Mass Media Relief Association by means of annual fees as substantiated. The relief association may accept State assistance in support of the functions of the Council.

e) Functioning of the system

The Council is based on voluntary agreement and made up of nine members, whose term of office is three years.
A select committee consisting of representatives of the Associations shall appoint six of the members as well as personal auxiliary members for the same. Those appointed should be professionally experienced and well-grounded in ethical questions. They should in toto reflect expertise in respect to both the press and the electronic media. The decisions in regard to appointment must be rendered unanimously within the committee.

The Council shall choose, as representatives of the public, three members and three auxiliary members. The same are not permitted to be in the service of the Mass Media nor in related positions of trust.

Proposals in writing including grounds for recommendation in regard to those members and auxiliary members representing the public must be prepared for the Council, in a manner defined by the Council prior to election. After term of office has ended, the same members of Council cannot be appointed nor can they be immediately re-selected. A Council Chairperson shall be selected for a period of three years. This person shall not be allowed to be in the service of the Mass Media nor in a related position of trust. The term of office shall begin when the chairperson is selected and has assumed duties. The relief association chairperson or a person summoned from another association shall act as chairperson for the caucus. Election of the chairperson must be unanimous.

Prior to resolution, the Council must hear the formal complaint or other object of notification. The Council may hear, in addition to the parties concerned, the reports of specialists and also attempt to acquire written clarification. The hearing of interested parties and specialists may be carried out on either a written or oral basis. The Council cannot handle matters submitted on an anonymous basis nor, barring pressing reason, any matter in regard to which the time elapsed is longer than three months. If the notice-provider clearly seeks resolution of the Council in conjunction with corresponding criminal court action or compensation for damage in a court of law, the Council shall not take up the matter concerned or shall interrupt its deliberation during such legal proceedings.

The Chairperson of the Council and members thereof are disqualified from handling any issue to which they are party or in regard to which they are in such close liaison that this may affect their impartiality. The meetings of the Council are not public unless the Council in some specific case makes resolution to the contrary.
Anyone has the right to obtain information in regard to the documents in the possession of the Council to the extent that legislation in effect on public access allows.

The resolutions of the Council are final. If the resolution of the Council or presiding officers is based on incorrect information or misunderstanding, the Council may on its own initiative or at the request of the party concerned re-address the issue in question. Such request must be presented without delay subsequent to receipt of resolution.

f) Supervision of the system

The Association entering into this agreement is permitted to cancel participation therein by making written notification of its resignation to the relief association. Termination shall come into effect as of one year from notification. The Association seeking dismissal is obliged to remit its annual fee until actual date of termination. The relief association shall decide on questions of dismissal due to contract infraction or negligence in regard to annual fee. Such resolution must be carried out unanimously.

g) Impact assessment

The Council must prepare a report of its activities yearly, which is to be given to the relief association at the latest by the time of its annual meeting.

Cases handled per year:

- 84 in 1995
- 70 in 1996
- 54 in 1997
- 44 in 1998
- 77 in 1999
- 63 in 2000
- 78 in 2001
- 76 in 2002
- 66 in 2003
- 63 in 2004
2. Part II: Leading Cases

Apart from normal cases, the statutes of the Council grant the possibility to give statements of a general nature. During the decades five of these have been made.

- **Statement of the right to reply and correction** (1978). The purpose for the statement was to establish more universal practices concerning reply and correction. Today reply and correction are mentioned also in the Act on the exercise of Freedom of Expression in Mass Media (460/2003).

- **Statement on interviews** (1981). The purpose for the statement was to establish more universal practices concerning interviews and stated that the interviewee should know where the interview would be published. The statement also clarified the practices of checking the interview.

- **Statement on the right to privacy** (1980). The statement pointed out that the right to privacy is universal for all citizens as was also written in Criminal Law in 1974. The sphere of privacy could vary. If a person was in public office, his/her privacy is more restricted than an ordinary citizen’s.

- **Statement on the use of names in stories reporting on crime** (1981). In the first code of journalist ethics (1958) it was already mentioned that journalists should carefully consider when it is necessary the mention individual names. The Council stated (1981) that the basic principle is to avoid names in criminal stories. The use would be acceptable only when a significant public interest demands it.

- **Statement on hidden advertisement** – advertising should be clearly distinctive from journalistic material.
### 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

#### Table: Criteria / Council for Mass Media

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*Council for Mass Media works case-by-case*

*Council for Mass Media decisions lead the way of interpretation of Code of Conduct with the intention of proper and universal conduct in the branch.*
As long as this is performed by or within the organisations or parts of society that are addressees of the regulation, the range of possible subjects of non-state action has to be limited to make the definition workable.

The members are from media organisations and the public.

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<td>The purpose for the council for Mass Media is to “to interpret good professional practice and defend the freedom of speech and publication”</td>
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Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

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<th>Private law agreement</th>
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The state/EU leaves discretionary power to a non-state regulatory system

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In “Sananvapaus” (Helsinki 2004, p. 98) Dr. Riitta Ollila interprets that as the Data Protection Ombudsman checks that practices of individual branches comply with the Personal Data Act (523/1999), the self-regulation in media branch is in fact co-regulation

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<th>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</th>
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The state uses regulatory resources to influence the non-state regulatory system

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3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

The Council for Mass Media is independent without any state involvement.

Conclusion: The Council for Mass Media is a self-regulatory system.

II. Co-operative Regulatory Systems in the advertising sector

1. Part I: The regulatory system - The Council of Ethics in Advertising

a) Development of the regulatory system

The Act on Equality between Women and Men came into force in Finland at the beginning of 1987. The law proposal included a statement that advertising sector should organize self-regulation for achieving equality in advertising. The negotiation body for advertising established the Council for Equality in Advertising. This council was in operation 1989-2001 and dealt only with cases concerning equality. The Council of Ethics in Advertising was established in 2001 and has a broader remit.

b) Subject-matter of the regulatory system

The Council of Ethics in Advertising issues statements on whether or not an advertisement or advertising practice is ethically acceptable. The Council mainly deals with requests from consumers and with issues that are deemed to have public significance. The consumers may request the Council to give a statement of a certain advertisement. The Council can also take a separate case into consideration without outside request.

c) Basis of the co-operation

d) Institutions involved in the system


The Council is financed by the agreeing parties. Some fees may be issued with cases of decisions which the Council is asked to consider in advance (at the moment c. 600 euros per case) and also, if the case is exceptionally large.

Codes of conduct in good marketing issued by the Council (12.12.2003)

e) Functioning of the system

The participation is voluntary. Interested parties, i.e. consumers, entrepreneurs, organisations involved with advertising and state organisations can write and ask for a statement of the Council. The Council focus is on the cases that have large public significance and therefore selects the cases, which it takes in consideration. But the Council does not give statements on the legality of advertisements (market law cases belong to Market Court).

f) - g) Supervision of the system and Impact assessment

There is no supervision system in place. Annual report on activity in 2004 states: 42 cases, 26 statements, 6 reprimands, 7 mild reprimands. Summary of cases in 2005: in total 15 cases were handled by the Council, of which ten cases have concerned sexual equality, one has concerned the representation of children in advertisements, three cases have fallen in the category of misleading advertisements and one case has dealt with the responsibility to act within the limits of the code and the regulations.

2. Part II: Leading Cases

The Council of Ethics in Advertising has published (in Finnish) the cases from the whole period 2001-2005 on its website. As an example find hereafter one case of 2005.
In case 1/2005 the advertisement is situated in a farm. THE STORY:
The Farm-owner's daughter is alone and preparing the meal. A Boy from the neighbouring farm arrives and sits down eating the food, which has been prepared by the daughter, who serves him dish after dish. The boy looks at the girl's cleavage, which is shown very well. The evening comes and the parents of the girl are coming home, so the boy leaves the farm. The Girl stays in the yard, looking very disappointed. From the "off" a male voice starts to tell a story: "Once upon a time at the home farm between two great hills a boy and a girl meet each other. To turn the head of the boy, the girl has prepared many delicious dishes. And the boy likes them. And he likes them very much. And it ends as always with Kariniemi food. That is the end of the story."

THE ADVERTISER'S STATEMENT: The advertisement is representing the fact that the products are delicious and one can prepare several different meals using these products. The values of the brand - ethics, quality and good-nature humour are shown in the advertisement. The classical "boy meets girl" situation is featured. The girl wants to make impression with the food, because she knows that the way to a man's heart goes through his stomach. The plan fails, because the food is so good, that the boy almost doesn't notice the girl. The advertiser states that this advertisement does not depreciate, defame or diminish women. The girl of this advertisement is not presented as an object, but a subject who has made a plan to turn the boys mind.

STATEMENT OF THE COUNCIL OF ETHICS IN ADVERTISING: According the 4th article 1st paragraph of the International Code of Advertising Practice advertisements should not condone any form of discrimination, including such based upon sex. According to the principles of good marketing conduct, issued by the Council of Ethics in Advertising, in the 2nd paragraph, an advertisement is against good marketing conduct if a woman or a man is used as a sex object or improperly to catch attention and if this way of representation has no connection to the product or service advertised. The Council states that in this case the woman is used as an eye-catcher with no connection to the product. However in an advertisement which is planned to be humoristic, the woman is active as opposed to the passive man and this style diminishes the misconduct. Based upon previous and the whole impression of the advertisement, the Council states in this case that the advertisement does not comply with the 4th article 1st paragraph of the International Code of Advertising Practice nor with the 2nd paragraph of the principles of good marketing conduct.
Three members of the Council disagreed with the majority of the Council and published their DISAGREETING OPINION: According the 4th article 1st paragraph of the International Code of Advertising Practice advertisements should not condone discrimination based upon sex. In this humoristic advertisement the woman plays an active part compared to the man and is not just an eye-catcher. The whole impression given by this advertisement is not generally offensive or sexually discriminating. Based on this, we state that this advertisement doesn' infringe the 4th article 1st paragraph of the International Code of Advertising Practice or the 2nd paragraph of the principles of good marketing conduct.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

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<td>Cases are selected so that they represent a wide general interest and by definition have a broad influence on the practises</td>
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<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td>The range of possible measures for co-regulation is broad and includes input from various stakeholders.</td>
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or parts of society that are addressees of the regulation | subjects of non-state action has to be limited to make the definition workable.

*The Council members come from interest organisations*

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*The predecessor of Council of Ethics in Advertising, the Council for Equality in advertising, was established because during the preparation of the Law of equality between men and women (609/1986) it was proposed that the advertising branch should self-regulate the equality aspect in advertising. This purpose continues with Advertising Council.*
| Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems |
|---|---|---|
| There is a legal basis for the non-state regulatory system | Informal agreements without any legal criteria to judge the functioning of non-state regulation | If there were no limits on the link to non-state regulation all forms of interaction would come to the fore. |

**Private law agreement**

| The state/EU leaves discretionary power to a non-state regulatory system | Traditional regulation | Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation. |

| The state uses regulatory resources to influence the non-state regulatory system | Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system | Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation. |
**Conclusion:** The Council of Ethics in Advertising is a self-regulatory body.

**III. Co-operative Regulatory Systems in the copyright - sector**

1. **Part I: The regulatory system – The Copyright Council**

   **a) Development of the regulatory system**

   After Finland became independent in 1917, the first law “on copyright of intellectual products” (Laki tekijänoikeudesta henkisiin tuotteisiin) was from 1927 (174/1927). A new Finnish Copyright Law was then from 1961 (404/1961). After that it was revised several times. In revision 442/1984 the Copyright Council was established and the Council started in 1985. In detail the functions of the Council were written in Copyright Decree (495/1985). As Finland joined European Union several changes were made in legislation. The Copyright Decree (574/1995) also was revised accordingly. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society has been written into Finnish law with a slight delay. Government proposal for new Copyright Law (HE 177/2002) was already in parliament, which could not go through it before regular election and the proposal according procedural regulation came to nothing. New government proposal (HE 28/2004) is in the final stages in the Parliament.

   **b) Subject-matter of the regulatory system**

   The Copyright Council assists the Ministry of Education in copyright matters and issues opinions on the application of the Copyright Act.

   **c) Basis of the co-operation**

   The legal basis is provided by the Copyright Decree (574/1995, hereafter translated by the correspondent):

   - § 18: *Members of the council are appointed by the Government after a proposal of the Ministry of education for a three year period each: chairperson, vice chairperson and not more than fifteen members and also for each a deputy member.*
• § 19: 1) In the Council there have to be represented most important in the Copyright Law mentioned copyright property holders and users. 2) The Chairperson, vice chairperson and at least one member and their deputies must have Bachelor degree in Law and they must also have knowledge on copyright issues and these can not represent the interests of holders or users mentioned in the previous chapter.

• § 20: The Council can delegate some issues to specialist divisions. For these subdivisions the council appoints chairperson from those mentioned in 19 § 2 and then as many members as necessary.

• § 21: Copyright Council has the power of decision with chairperson or vice chairperson and at least five members. Subdivision has the power of decision with the division chairperson and at least one member.

• § 22: Compensations for their input and travel costs are paid according to the state committee norms to the chairpersons, members, secretaries and those experts the Council hears.

• § 23: In detail the work of the Council can be organised in a procedure accepted by the Ministry.

d) Institutions involved in the system

The Council is composed of representatives of the major right holders and users of protected works. The chair, vice-chair and at least one member represent other interested parties. They are obliged to have a university degree in law. The Council is funded by the State Budget.

e) Functioning of the system

The Finnish Government appoints the Council for three year periods. The participation is voluntary, but necessary if right holders and users of protected works will give their point of view for the decisions. Interest groups nominate candidates for the appointment. At the moment the members represent different sectors: Movie and Video, Performing Arts, Commerce, Literature, Publishing, Architecture and Design, Museums, Broadcasting, Copyright Holders Associations, Industry, IT, Photography and Music publishing. The other sectors are represented by deputy members: Journalists, Newspapers, Composers, Libraries, Advertising, Art and Recording Industry.
Anyone can request in writing an opinion from the Copyright Council concerning his/her copyrights. If there is another party involved, the Council invites their reply. The opinions are given either in Finnish or in Swedish. The Finnish opinions are published by the Association of Finnish Lawyers and are also available in the Finlex database maintained by the Ministry of Justice.

**g) Impact assessment**

In 20 years the Council has given over 200 expert opinions pertaining to the interpretation of the Act.

**2. Part II: Leading Cases**

In 2003 the Council stated that a unique photo could be considered as normal news photo. In 1952 Helsinki Olympic Games only one photographer managed to take a photo of the moment when Paavo Nurmi lit the Olympic flame in the stadium. In 2002 this photo was used as a basis for an advertisement. The photographer asked the Copyright Council to consider if the advertisement was in violation of his copyright. The council stated that it was a normal news photo and thus the cover of the copyright had expired. (Tekijänoikeusneuvoston lausunto 2003:6, not in English).
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Copyright Council

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
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<td>Copyright council works case-by case</td>
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<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
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<tr>
<td>Copyright council decisions form basis for practise in copyright matters</td>
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<tr>
<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
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<tr>
<td>Copyright council members are mainly from the organisations and parts of society that are addressees of the regulation</td>
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### Link between the non-state-regulatory system and state regulation

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
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<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
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<tr>
<td>Copyright Council decisions intent to lead the interpretation of the Copyright legislation</td>
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<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation, all forms of co-regulation would be equally feasible.</td>
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<tr>
<td><strong>Copyright Decree (574/1995)</strong></td>
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<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
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<tr>
<td><strong>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</strong></td>
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<table>
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<tr>
<th><strong>Copyright Council is independent in its decision, although in principle it acts as a negotiative body for the Ministry of Education</strong></th>
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<tbody>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
</tr>
<tr>
<td><strong>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</strong></td>
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<tr>
<th><strong>Appointment of members, financing by state</strong></th>
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</table>

**Conclusion:** The Copyright Council can be considered as a co-regulatory system.
3.7. France

I. Co-operative Regulatory Systems in the broadcasting sector

1. Part I: The co-operative regulatory system No. 1 - Rating logos («signalétique jeunesse») and classification for television programmes

   a) Development of the regulatory system

French television developed early on a system of identification of programmes of a violent or erotic nature, or otherwise prejudicial to minors. The first form of identification, a “carré blanc” (white square), appeared in 1961.

This and other forms of “signalétique jeunesse” were developed by broadcasters as a way to inform the public of the nature of certain programmes which were otherwise subject to broadcasting restrictions under the applicable regulations, notably article 15 of the Law of September 30, 1986 (broadcasting Act).

In application of this article, the CSA, by a directive of May 5, 1989, instructed broadcasters to refrain from “broadcasting programmes, in particular audiovisual or cinematographic works, of an erotic or violent character between 6 p.m and 10:30 p.m.”.

But neither the Law of September 30, 1986 nor the recommendation of May 5, 1989 imposed a specific signalétique, nor the use of such signalétique, to broadcasters.

In practice a signalétique system was only implemented by hertzian channels. Moreover, each of these channels had its own logos, with specific shapes and colours, and their own classification system. And the signalétique was only applied to television and cinematographic films.

In 1995, the CSA, following a study on violence on television, initiated talks with broadcasters in order to find a way to improve the protection of minors. Following these discussions the broadcasters involved undertook, inter alia:
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

- to implement a classification of audiovisual and cinematographic works in 5 categories,
- to warn the public by the use of a signalétique jointly designed by them.

All hertzian broadcasters adopted such a system on July 2, 1996. A slightly different signalétique remained for the pay channel Canal+

These undertakings where later incorporated in the broadcasting licences concluded with the CSA (and for public channels, in the decrees establishing their obligations).

Following several requests by the CSA, cable channels accepted to apply the signalétique jeunesse and the associated classification from March 2000.

The law of August 1, 2000 amending article 15 of the broadcasting law of September 30, 1986, created a legal basis for this signalétique jeunesse.

The system was extended to all programmes, including magazines, in 2001.

In 2002, after consultation of the concerned actors, the CSA decided to modernize the system in order to facilitate its perception by the public.

b) Subject-matter of the regulatory system

Clearly, the objective of the regulation is to protect youth from violent or sexually explicit content (see art. 15 of the law of September 30, 1986, hereunder).

c) Basis of the co-operation

The law of August 1, 2000 amending article 15 of the broadcasting law of September 30, 1986, created a legal basis for the signalétique jeunesse. It provides:

“The CSA takes care of the adolescence and child welfare and of the respect of the dignity of the person in the programmes offered to the public by a service of audio-visual communication.
It takes care that programs likely to harm the physical, mental or moral blooming of the minors are not offered to the public by a service of radio and television, except when it is ensured, by the choice of the hour of diffusion or by any suitable technical process, that minors are not normally likely to see them or to hear them.

When programs likely to harm physical, mental or moral blooming of the minors are offered to the public by services of television, the CSA takes care that they are preceded by a warning to the public and that they are identified by the presence of a visual symbol throughout their duration.

It takes care moreover that no program likely to harm seriously physical, mental or moral blooming of the minors is offered for use of the public by the services of radio and television.

It finally takes care that the programs do not contain any incentive to hatred or violence for reasons of race, sex, behaviour, religion or nationality.

Currently, the signalétique jeunesse and the associated classification is the object of a recommendation of the CSA of June 7, 2005.

As already mentioned, in an important decision rendered in February 2004, the highest administrative court, the Conseil d'Etat, confirmed that the recommendations of the CSA are obligatory, and that their non-compliance can be sanctioned under the broadcasting Act (as a non compliance with the principles set out in the Act).

The obligation to use the signalétique is also included in the broadcasting licences of the private broadcasters, and was included in the decrees detailing the obligations of the public broadcasters.

Therefore, private broadcasters failing to use the system would be in breach of their obligations under the licence. The same would be true if the broadcasters “underrate” their programmes.

d) Institutions involved in the system

The Conseil Supérieur de l'Audiovisuel (CSA), created by a law No 89-25 of January 17, 1989, is historically the third authority of audio-visual regulation in France. The main function of this independent administrative authority is to guarantee the freedom of
communication in the conditions laid down by the basic Law on Freedom of communication of September 30, 1986, as amended. It is composed of nine members: three are named by the president of the Republic, three are designated by the president of the Senate and three others by the president of the national Assembly. The term of the office of the members was reduced from nine to six years. Members of the CSA are neither revocable nor renewable.

Under the terms of the law No 89-25 of January 17, 1989, the CSA has the following powers:

- It nominates the presidents and board members of the public broadcasting companies (TV and radio).
- It manages the terrestrial frequencies. This includes the planning for the FM waveband, the allocation of broadcasting channels to televisions and the frequency planning of terrestrial digital television.
- It issues licenses for terrestrial broadcasting to FM radios and private television companies. Such licenses are conditioned by the conclusion of a convention entered into between CSA and the broadcaster establishing rules that are applicable to their particular service. These rules apply in particular to advertising, sponsorship, the production and broadcasting of film and television productions and to the protection of youth. Public television companies (public channels) are created by the law itself, and operate under conditions in the form of a cahier des charges fixed by decree, which defines their obligations, including those associated with their public service role.
- The CSA monitors broadcasting activities to ensure the respect of the broadcasters’ obligations and of principles of the Law on Freedom of communication (relating to the pluralism and veracity of information, broadcasting quotas, obligations of production, protection of youth, advertising, sponsorship and tele-shopping, promotion of the French language...)

The CSA can impose administrative sanctions if commercial or public broadcasters are deemed not to have respected their commitments and obligations. The CSA issues opinions, recommendations and carries out studies. It can also be consulted by the Conseil de la concurrence (competition authority) on anti-competitive practices and mergers.
e) Functioning of the system

Private and public broadcasters are concerned by the regulation. The participation is mandatory (through art. 15 of the Law of September 30, 1986, the recommendations of the CSA and the applicable licences). The required categorisation of programmes within one of the five categories of classification, which directs, *inter alia*, the use of rating logos, is determined by the broadcasters themselves, and is their sole responsibility.

Each broadcaster institutes a screening committee, in charge of proposing a classification of programmes. Some broadcasters created such committees internally. Others use external experts or require the opinion of committees composed of television viewers.

As mentioned, the visioning committees only propose a classification. The classification and the use of the logo is the responsibility of the broadcaster. The CSA has set out criteria to use the classification of programmes in its recommendations. The control of the respect, by broadcasters, of their classification and *signalétique* obligations is made *ex post* by the CSA. Violation of these regulations can carry, following the appropriate procedure (usually a cease and desist letter or request for explanation sent by the CSA), penalties for the broadcaster and, theoretically, a “black screen” or the withdrawal or the non renewal of the licence.

Complaints can be made by any interested person to the CSA. The CSA is not required to open a procedure or to act upon such a complaint. Observations made by the CSA to the broadcasters are made public in the following weeks on the website of the CSA (www.csa.fr) and in the CSA’s monthly information newsletter.

Guidelines are published by the CSA in its recommendations, available on its website.

f) Supervision of the system

This system is supervised by the CSA. Its decisions may be appealed before the administrative courts (*Conseil d’État*).

g) Impact assessment
Each year a working group “protection of youth and deontology of programmes” created within the CSA organizes meetings with broadcasters in order to make an assessment of the protection of youth during the previous year. This report is published.

No statistics in regard to the number of cases or complaints are available. But the CSA receives complaints from viewers’ groups, family organizations or individual viewers on a daily basis.

The system was modernized in 2002 after a study commissioned by the CSA showed that the general public did not have a good perception of the then applicable logo system.

In 2003 the CSA commissioned a poll on the perception of the new system. The study showed that 83% of the parents found it easier to understand than the previous one, and that 74% of them use it for choosing the programmes viewed by their children.

2. Part II: Leading Cases

The CSA sends warning or observation letters to broadcasters for underrating certain of their programmes on a regular basis.

However very few formal procedures are initiated each year, and these usually do not go beyond their first stage, that is, a formal warning letter (“mise en demeure”) adopted by decision of the CSA. The programs or their classification are usually modified by the broadcasters immediately upon receipt of the letters or observations from the CSA.

As a matter of illustration, the report published by the CSA on the use of the signalétique for the year 2004 mentions several letters (simple observation letters or warning letters) sent to broadcasters for the underrating of their programmes, but not formal “mises en demeure”. In 2002 the CSA issued only 4 formal “mises en demeure” for all broadcasters (terrestrial, cable and satellite).

More specifically, for the year 2004 (free terrestrial channels only – source CSA report):

- On March 15, 2004, the CSA issued an informal warning letter to the public broadcaster France 2 for the absence of the rating logo “-12” during the broadcasting of the motion picture “Shaft” on Sunday April 11, at 8:55 p.m. France 2 had sent an apology letter claiming a technical problem. The CSA requested that France 2 implement a control procedure allowing to insert a logo during broadcasting.
• On April 5, 2004, the CSA asked France 2 not to broadcast during the day programmes with a “-12” rating, following the broadcasting of a short documentary on the career of an actor of pornographic film during a morning show at 7 a.m.

• On April 23, 2004, the CSA warned the private channel TF1 following the broadcasting of the reality program “Fear Factor”, due to numerous scenes involving dangerous behaviour prejudicial to minors.

• On May 7, 2004, the CSA required a classification “-10” for an American television film broadcast by the public broadcaster France 3 without any rating.

• On May 7, 2004, the CSA made observations to the private channel M6 for a program containing sexually explicit images, which should have been rated “-10”.

• On May 25, 2004, the CSA requested that a logo “-12” was used for possible re-broadcasts of one American theatrical motion picture broadcast by TF1 on February 24, 2004 at 8:55 p.m., as it was broadcast a Tuesday night during school holidays.

• On June 21, 2004, the CSA sent warning to M6 due to the broadcast of a reality show (Big brother) in which one of the contestant depicted a sexual activity. The CSA noted that this programme, broadcast at 7:00 p.m., was followed by around 130,000 minors of less than 13, and that it should have been broadcast with a “-10” logo.

• On October 5, 2004, the CSA sent observations to France 3 regarding 2 American television films which should have been broadcast with a “-12” logo, due to scenes of violence and eroticism. One was broadcast without logo and the other with a “-10 logo”

• On October 19, 2004, the CSA authorized France 3 to broadcast on November 1st, that was a Tuesday, from 8:55 p.m. the first episode of a series on the Algerian insurrections of 1954, rated “-12”, since this first episode contained less difficult scenes than the subsequent episodes.
### 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

#### Table: Criteria / Rating system

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
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<tbody>
<tr>
<td></td>
<td>The creation of organisations, rules or processes</td>
<td></td>
<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
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<tr>
<td></td>
<td>Initially developed by broadcasters.</td>
<td>But modified between broadcasters and the CSA. Therefore included in the recommendations of the CSA, and incorporated into the licences entered into with the CSA (private broadcasters).</td>
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<td></td>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td></td>
<td><em>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</em></td>
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<td></td>
<td>Set standards for broadcasting</td>
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</table>
As long as this is performed by or within the organisations or parts of society that are addressees of the regulation | Measures by third parties (e.g. NGOs) | The range of possible subjects of non-state action has to be limited to make the definition workable.

Applied by private and public broadcasters.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
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<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Yes. Protection of minors</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
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<td>There is a legal basis for the non-state regulatory system</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
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<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>The law contains general obligations concerning the protection of minor but does not impose the creation of such a system.</td>
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<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
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<td>No. Rather, the system developed by the CSA with the professionals is included in the recommendations of the CSA, i.e. in the “state regulations” of the sector.</td>
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<td>Pure incorporation of “rules” developed jointly between professional organizations and the CSA.</td>
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</table>
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

As described, the system is based on state regulation, either primary legislation (article 15 of the Law of September 30, 1986), or secondary regulation from the administrative authority in charge of monitoring the sector (recommendations and decisions of the CSA). Professionals were only involved in the creation of the actual standards.

b) The link between the non-state part and state regulation

This system is based on state regulation, determined after (non mandatory) consultation of the interested parties.

Conclusion: In the opinion of this reporter, the regulatory system described is not a co-regulatory system in the meaning of this study.

1. Part I: The co-operative regulatory system No. 2 - Advertising

a) Development of the regulatory system

In France, the advertising for brands on television was authorized in 1968. A decree of January 1, 1969 created a public entity, the RFP (for Régie française de publicité) in charge of the commercialization of advertising space on the then existing (public) channels, which could control the content of advertising.

With the law of July 29, 1982 opening the way to private television and radio services, the control of advertising was granted to the newly created broadcasting authority, the Haute Autorité (which will be replaced by the CNCL in 1986 and by the CSA in 1989).

The Law of September 30, 1986 creating the CNCL granted to this authority the right to control the object, the content and the programmation of advertising broadcast on public and private television channels (article 14). Therefore the CNCL exercised an ex ante control through a special committee, the Comité de la communication publicitaire radiodiffusée et
télévisée, which replaced the RFP in 1987. Broadcasters were under the obligation to declare and submit their advertising programmes to the CNCL.

The successor of the CNCL, the CSA, created in 1989, inherited from the functions of the CNCL with regards to advertising under Article 14, which provides:

Article 14 of the Law of September 30, 1986 provides:
“The Conseil supérieur de l’audiovisuel exercises a control, by all means adapted, on the object, the contents and the methods of programming of the advertising programmes diffused by the national companies of programs and the holders of the authorizations delivered for services of audiovisual communication under the provisions of the present law.”

However, as of 1991, following requests by players in the advertising sector wishing to implement a self-regulation system, it was decided by the CSA that its control would only apply ex-post. The obligation to declare advertising prior to broadcasting was removed in 1993.

The self-regulation system is applied through a private association created by members of the advertising industry, the BVP. The BVP defines the deontological rules, set out in the BVP Charter, which apply to the whole profession. This covers all forms of media advertising, including print, radio, Internet, outdoor/poster, television and cinema advertising. It provides advice to professionals during production and gives an opinion on the conformity of their campaign or messages with the applicable regulations before publication or broadcasting. The BVP develops or helps specific sectors to develop specific codes of deontology in the field of advertising. To this date there exist more than 60 codes.

In principle, advertisers and media are not required to present or obtain pre-clearance of their advertising with the BVP. However, following the above-mentioned discussions with the CSA an exception was made in the field of television advertising. Therefore since 1992 a form of ex ante control of television advertising is performed by the BVP, while the CSA performs an ex post control on radio and television advertising.
Under the old ex ante control system the BVP was a member of the screening committee established by the CNCL. The two forms of control are now entirely distinct, and the BVP is not involved in the procedures established by the CSA.

b) Subject-matter of the regulatory system

The “de facto cooperation” between the BVP and the CSA covers television advertising.

c) Basis of the co-operation

The legal basis of the intervention of the BVP is found in its charter and in the membership agreements. There is no legal basis, in particular in the Broadcasting Act, for this ex ante control. Despite members undertake to follow the advice and decisions of the BVP, these only have a consultative value. In case of non compliance with one of its decisions, the BVP may issue a formal warning or ask the media not to publish the advertisement (but the media is not required to do so by law).

The CSA is under no legal (or contractual) obligation to request or follow the decisions or opinions of the BVP with regards to television advertisings. In practice it does not request such advice and does not consult the BVP.

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

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

d) Institutions involved in the system

The "Conseil Supérieur de l'Audiovisuel (CSA)", created by a law No 89-25 of January 17, 1989, is historically the third authority of audio-visual regulation in France. The main function of this independent administrative authority is to guarantee the freedom of communication in the conditions laid down by the basic Law on Freedom of communication of September 30, 1986, as amended. It is composed of nine members: three are named by the president of the Republic, three are designated by the president of the Senate and three others
by the president of the national Assembly. The term of the office of the members was reduced from nine to six years. Members of the CSA are neither revocable nor renewable.

Under the terms of the law No 89-25 of January 17, 1989, the CSA has the following powers:

- It nominates the presidents and board members of the public broadcasting companies (TV and radio).
- It manages the terrestrial frequencies. This includes the planning for the FM waveband, the allocation of broadcasting channels to televisions and the frequency planning of terrestrial digital television.
- It issues licenses for terrestrial broadcasting to FM radios and private television companies. Such licenses are conditioned by the conclusion of a convention entered into between CSA and the broadcaster establishing rules that are applicable to their particular service. These rules apply in particular to advertising, sponsorship, the production and broadcasting of film and television productions and to the protection of youth. Public television companies (public channels) are created by the law itself, and operate under conditions in the form of a cahier des charges fixed by decree, which defines their obligations, including those associated with their public service role.
- The CSA monitors broadcasting activities to ensure the respect of the broadcasters’ obligations and of principles of the Law on Freedom of communication (relating to the pluralism and veracity of information, broadcasting quotas, obligations of production, protection of youth, advertising, sponsorship and tele-shopping, promotion of the French language...)

The CSA can impose administrative sanctions if commercial or public broadcasters are deemed not to have respected their commitments and obligations. The CSA issues opinions, recommendations and carries out studies. It can also be consulted by the Conseil de la concurrence (competition authority) on anti-competitive practices and mergers.

The "Bureau de Vérification de la Publicité (BVP)" is a private association, entirely independent from the State. It was first established in 1935 as the “Office de Controle des Annonces”, and became the BVP in 1953. Its governing body, the Board of Directors, includes one Chairman and 25 members, of which representatives of advertisers (4), agencies (4), of the print media (6), of television (3), of outdoor advertising (2), of the cinema (1), of
the multimedia (1), of radio (1), of consumers' interest (1) and experts in advertising (2). The Chairmanship is held by an independent personality.

The BVP defines the deontological rules, set out in the BVP Charter, which apply to the whole profession. This covers all forms of media advertising, including print, radio, Internet, outdoor/poster, television and cinema advertising. It provides advices to professional during production and gives an opinion on the conformity of their campaign or messages with the applicable regulations before publication or broadcasting.

The BVP develops or helps specific sectors to develop specific codes of deontology in the field of advertising. To this date there exist more than 60 codes.

As mentioned, advertisers and media are not required to present or obtain pre-clearance of their advertising with the BVP, except in the field of television advertising. Despite members undertake to follow the advice and decisions of the BVP, these only have a consultative value. In case of non compliance with one of its decisions, the BVP may issue a formal warning or ask the media not to publish the advertisement (but the media is not required to do so by law).

*e) Functioning of the system*

Advertisers and agencies are concerned for the *ex ante* control through the BVP, and public and private broadcasters for the *ex post* control by the CSA.

Advertisers and agencies are required to present or obtain pre-clearance of their advertising with the BVP under the BVP charter. However, despite members undertake to follow the advices and decisions of the BVP, these only have a consultative value. In case of non compliance with one of its decisions, the BVP may only issue a formal warning or ask the media not to publish the advertisement.

Public and private broadcasters are subject to the *ex post* control of the CSA by law (article 14 of the Law of September 30, 1986).

For the *ex ante* control agencies and/or advertisers must provide a copy of the final advertisement to the BVP prior to its distribution. A registration number is given to the
advertisement, which is screened by a working group of the BVP. After screening an opinion/decision on the compliance or non compliance of the message with the regulation and/or deontologic rules is given by the BVP.

Within the CSA, a working group, under the authority of a member of the CSA, examines all questions relating to advertising. Advertisings are monitored by the CSA. The decisions (notably the sanctions), recommendation, observations and advice of the CSA are adopted by a majority of the members that are present (with a quorum of 6 members); the vote of the President prevails in case of share of votes.

Concerning the *ex ante* control by the BVP, in case of non compliance with one of its decisions, the BVP may only issue a formal warning or ask the media not to publish the advertisement. Consumers often complain directly to the BVP.

Concerning the *ex post* control by the CSA, violation of the advertising regulations can carry, following the appropriate procedure (usually a cease and desist letter or request for explanation sent by the CSA), penalties for the broadcaster and, theoretically, a “black screen” or the withdrawal or the non renewal of the licence

Complaints can be made by any interested person to the CSA. The CSA is not required to open a procedure or to act upon such a complaint.

Observations made by the BVP are not public. However, the BVP does not hesitate to communicate on the advertisements on which it made reservations.

Observations made by the CSA to the broadcasters are made public in the following weeks on the website of the CSA ([www.csa.fr](http://www.csa.fr)) and in the CSA’s monthly information newsletter.

In regard the *ex ante* control, the BVP issues codes of conducts, and does not hesitate to communicate on certain individual cases. For the *ex post* control, guidelines are published by the CSA in its recommendations, available on its website.
f) Supervision of the system

The decisions of the BVP only have a consultative value. In case of non compliance with one of its decisions, the BVP may only issue a formal warning or ask the media not to publish the advertisement. The decisions of the CSA may be appealed before the administrative courts (Conseil d’Etat).

g) Impact assessment

The BVP communicates on its activities in this field and on certain decisions, notably in its newsletters or in the press.
The CSA communicates on its activity and decisions in the field of advertising, notably in its newsletters and in its annual reports.

The BVP screens more than 14,000 advertisement programmes a year. For many of them the BVP requires a modification. Due to the compliance of agencies and advertisers the BVP issues very few negative opinions (around ten a year), which are usually followed by its members.

Due to the efficiency of this ex ante control and to the conformity of the opinion of the BVP to the regulations and to the policy of the BVP (sometimes ascertained through consultations made by the BVP to the CSA), the decisions of the CSA in relation to advertising cleared by the BVP are rare.

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

2. Part II: Leading Cases

The Annual report of the CSA for the year 2003 mentions the following cases in the field of advertising message (contents):

- Following the broadcasting of an advertisement showing a driver without seatbelt, the CSA asked the BVP to inform its members that such messages could not be broadcast anymore.
• The CSA informed a broadcaster that one message for telephone services to teenagers was contrary to the regulations on the protection of youth. The message was removed.

By contrast, for programmes which are not subject to an ex ante control by the BVP the CSA initiated several procedures against broadcasters; this is in particular the case for “clandestine advertising” or for the promotion of prohibited products in programmes other than advertisements. This is a sign of the efficiency of the system established by the BVP.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Advertising sector

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td></td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
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<tr>
<td>Creation of rules and processes in the field of advertising.</td>
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<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td></td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
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<tr>
<td>Yes.</td>
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<td></td>
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<tr>
<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td></td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
<td></td>
</tr>
<tr>
<td>Criteria</td>
<td>Cases excluded by this criterion</td>
<td>Explanation</td>
<td>Additional remarks</td>
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<td>---------------------------------------------------------------</td>
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<tr>
<td>The system is established to achieve public policy goals</td>
<td></td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
<td></td>
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<tr>
<td>Yes (protection of minors, fair advertising, compliance with regulations, etc.).</td>
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<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td></td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
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<tr>
<td></td>
<td></td>
<td>No. The BVP is a private association, entirely independent from the State, and the various regulations on advertising do not refer to this body.</td>
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<tr>
<td>Co-Regulation Measures in the Media Sector: Annex 5: Coutnry reports on possible co-regulatory systems</td>
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<td>And despite members undertake to follow the advice and decisions of the BVP, these only have a consultative value. In case of non compliance with one of its decisions, the BVP may issue a formal warning or ask the media not to publish the advertisement (but the media is not required to do so by law).</td>
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<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
<td></td>
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</tr>
<tr>
<td>The non-state and state regulatory systems are totally independent.</td>
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</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
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</tr>
</tbody>
</table>
No. In the field of broadcasting there is a “de facto” division of labour between the BVP and the CSA, but which is not organized by the law.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

The non-state part of the system, i.e. the *ex ante* control by the BVP, is not of a regulatory nature. However, in practice the decisions of the BVP are followed by its members. The quality of these opinions (and their conformity with the regulations and policy of the CSA) certainly accounts for this compliance.

b) The link between the non-state part and state regulation

The *ex ante* and *ex post* controls are complementary, but are technically totally independent. There are, however, exchanges of letters between the CSA and the BVP. The BVP, on the one hand, consults the CSA before issuing regulations or doctrines. The CSA, on the other hand, informs the BVP of infringements of the regulations it may be informed of.

Also, on a strict legal point of view article 14 of the law of September 1986 granting to the CSA the power to control advertisements does not require this control to be restricted to an *ex post* control. This restriction was made by the CSA as a result from discussions between the CSA and professionals and in consideration of the establishment of the *ex ante* control through the BVP.

**Conclusion:** Accordingly, the system of the control of television advertising could be seen as a form of de facto co-regulations, although the CSA is not bound by any of the decision of the BVP and by the general division of task so established.
3.8. Germany

I. Co-Operative Regulatory System in the Broadcasting and Internet Sector
– Protection of Minors

1. Part I: The Co-Operative Regulatory System

a) Development of the Regulatory System

Co-operation between the state media authorities (and the newly founded KJM, see below) and self-regulatory / non-state institutions was strengthened in 2003. The non-state bodies in place (FSF and FSM, see below) did already exist before the regulatory system changed that year. However, the enactment of the interstate treaty on protection of minors in the media (Jugendmedienschutzstaatsvertrag) extended their responsibility and their scope for decision-making. In order to secure compliance with the aims of the interstate treaty, it established a certification requirement for non-state bodies. Reasons for these changes were twofold: On the one hand, it had become clear that internet regulation could not be handled without self-regulatory components. On the other hand, competence for regulation of internet services had been subject to discussion between the states and the federal government. The federal government agreed on leaving supervision of internet content to the states. In return, the states accepted the federal approach towards more self-regulation.

aa) Overview on Original Regulation

i) Broadcasting

Before 2003, protection of minors in broadcasting was part of the interstate treaty on broadcasting (Rundfunkstaatsvertrag, “RStV”). Self-regulatory bodies were only mentioned in sec. 3 (8) RStV: The state media authorities had to mind reports of self-regulatory bodies before making a decision. However, the state media authorities were free to diverge from ratings given in these reports. Codes of conducts were not mentioned in the interstate treaty.
In practice, a code of conduct on talk shows (Freiwillige Verhaltensgrundsätze zu Talkshows im Tagesprogramm) played an important role.

**ii) Internet and Mobile Media**

When it came to regulation of so-called tele-services (Teledienste) and media services (Mediendienste), self-regulatory bodies were involved, as well. Providers of these services had either to authorise an appointee for the protection of minors or to contract with a self-regulatory body, instead.

**bb) Reform of Law for Protection of Minors**

In spring 2002, the Prime Ministers of the states and the Federal Government agreed on basic terms for the amendment of the legal framework for the protection of minors in the field of media. As the overall regulations and the competencies of the supervisory bodies were completely fragmented at that time, the common aim was to develop a coherent framework for the protection of minors in the area of broadcasting and electronic online media. Two new laws, the Act for the Protection of Minors (Jugendschutzgesetz, JuSchG) at the federal level and the Interstate Treaty on the Protection of Minors in the Media (Jugendmedienschutzstaatsvertrag) at the state level, came into effect on 1 April 2003.

Under the Jugendmedienschutzstaatsvertrag, supervision of broadcasters and of providers of online services is the responsibility of the state media authorities. As broadcasting regulation devolves on the states and not on the federation, different media authorities exist. For services that are provided in more than one state a special body has been established: the Commission for the Protection of Minors in Electronic Media (Kommission fuer Jugendmedienschutz, KJM). The KJM consists of six directors of state media authorities and six experts appointed by the federal government and the governments of the states.

However, self-regulatory bodies play an important role as well. The task of self-regulatory bodies is to classify content and to ensure the enforcement of rules. Furthermore, self-regulatory bodies may make exemptions to the watershed regulation for the broadcasting of
films, which had been given a rating by the self-regulatory body for film, FSK, under the Jugendschutzgesetz (see below) before.

This system is also linked to the system in the film sector (see below). According to sec. 5 (2) JMStV, it is assumed that offerings (e.g. films) are likely to impair the development of minors if FSK (see below) has classified them as not suitable for children or adolescents of the respective age (group).

b) Subject-Matter of the Regulatory System

As sec. 1 JMSV states, the treaty aims at providing minors’ protection from offensive content and the protection from content violating human dignity. Sec. 4 contains a catalogue of illegal content (content that falls under criminal law) and a second catalogue of content (e.g. pornography) that must not be broadcasted, but may be provided on the internet as long as it is secured that only adults have access.

Aside from this, providers of broadcasting and so-called tele-media (Telemedien, e.g. internet services) have to make sure that content that is likely to impair the development of minors is not accessible for minors of the respective age (sec. 5). Providers can meet these requirements by observing a watershed-regulation or by “other means” which can be access-blocking software.

c) Basis of the Co-Operation

Basis of this co-operation are sec. 19 and sec. 20 of the interstate treaty. While sec. 19 stipulates the requirements a self-regulatory body has to fulfil in order to obtain an accreditation by the KJM, sec. 20 contains the above-mentioned rules regarding the self-regulatory “shield”.

In addition, the state authorities are empowered to enact statutes and guidelines for the protection of minors which the self-regulatory bodies have to take into account.
d) Institutions Involved in the System, especially Their Funding and Management

aa) Broadcasting and Internet

i) KJM

Created in 2003 by sec. 14 (2), JMStV, the KJM is the central state supervisor for all matters concerning minors’ protection in the media, as laid out in sec. 20 (2) JMStV. It is not a truly separate legal institution, but acts as an organ of the respective state media authority in charge of the broadcaster or media service provider to be supervised.

Consisting of 12 experts being chosen from different pools:

- six directors of state media authorities (Landesmedienanstalten), sec. 14 (3) No. 1
- four members of state minors’ protection authorities, sec. 14 (3) No. 2
- two members of the federal minors’ protection authority, sec. 14 (3) No. 3.

Tasks of KJM include, amongst others,

- the supervision of actors’ compliance with the rules of the JMStV,
- certifying self-control institutions, to ensure that they are entitled to fulfil their tasks (see below),
- certifying encryption and filter systems as well as programs for minors’ protection.

In order to firm up the provisions on harmful or compromising content (sec. 5 JMStV), the state media authorities may enact by-laws. Only recently (28/06/2005), the authorities made use of this entitlement. The KJM is funded by a part of the broadcasting licence fee that is allocated to the state media authorities.

ii) State Media Authorities

According to the JMStV, KJM is in each case seen as part of the state media authority that is responsible for the respective service. Sanctions are imposed by the state media authority. However, the state media authorities are bound internally vis-a-vis the decisions of the KJM. Apart from executing the decisions of KJM, the state media authorities are responsible for monitoring broadcasting and – in addition to Jugendschutz.net (see below) – internet services. If they have reasonable grounds to suspect a breach of the JMStV, they inform the KJM. The state media authorities are funded out of 2 % of the broadcasting licence fee (sec. 10 Rundfunkfinanzierungsstaatsvertrag).

bb) Broadcasting

On the non-state side, the **Freiwillige Selbstkontrolle Fernsehen e.V. (FSF)** exists.

The FSF was founded in 1994. It is a non-profit organisation financed by the private German television companies. In August 2003, it gained certification by the KJM as “institution of voluntary self-control” under the JMStV.

Its organisational structure comprises the following parts:

- “members’ council” (Mitgliederversammlung): representatives of the member companies
- executive committee consisting of seven television company representatives elected by the “members’ council”: legal representatives of the FSF and management organ
- administration agency (“Geschäftsstelle”): organising media examinations, public relations
- “Kuratorium”: consisting of 10 or up to 18 experts from representative social groups and the member companies (not more than one third may be sent by member companies):
  - responsible for decisions on media classifications,
  - supervision of classification processes, in particular by choosing and training the respective examiners
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

- responsible for development of the classification code of procedure
- consulting the executive committee concerning matters of protection of minors
  - Independent examiners: 98 persons (January 2005), mostly volunteers, 5 professional examiners, who preside the examination councils and permanently keep in touch with the “Kuratorium”

The FSF has produced codes concerning its own work: the classification code of procedure\(^2\) and the classification guidelines.\(^3\)

**cc) Internet and Mobile Media**

**i) Jugendschutz.net**

Jugendschutz.net was founded in October 1997 by the state authorities responsible for the protection of minors by virtue of sec. 22 State Treaty on Media Services (Mediendidienstestatatsvertrag, “MDStV”). In 2003, Jugendschutz.net was included in the new concept of protection of minors. According to sec. 18 JMStV, Jugendschutz.net assists KJM and the state authorities responsible for the protection of minors. It monitors internet services and informs KJM and FSM of breaches of law. However, Jugendschutz.net cannot impose sanctions itself. In addition, it is responsible for consulting and training electronic media service providers, sec. 18 (2)-(4). Jugendschutz.net is funded by the state authorities responsible for the protection of minors.

**ii) Freiwillige Selbstkontrolle Multimedia-Diensteanbieter e.V. (FSM)**

The Freiwillige Selbstkontrolle Multimedia-Diensteanbieter (FSM) was founded in 1997. It is financed by several companies and associations working in the online-economy. Currently, it has 18 members (11 full members and 7 supporting members).\(^4\) It was – after considerable

disputes in 2004 concerning the implications and the necessity of such action and, thus, a delayed application – certified by the KJM as an institution of voluntary self-control under the JMStV. FSM is responsible for supervision of electronic media services and their compliance with state law concerning the protection of minors (JMStV) as well as their own code of conduct. Besides its general code of conduct, FSM has issued a sub-code of conduct for search engines. Complaints can be filed to the FSM complaints management institution.

e) Functioning of the System

The main factors of the system are the following: On the one hand, there is an incentive for the industry to follow the decisions of non-state organisations like FSF and FSM as the decisions of these organisations protect broadcasters and content providers against sanctions imposed by the state media authorities and the KJM (as long as the non-state organisation does not act beyond the scope of its discretionary power). On the other hand, FSF and FSM are controlled by the state in as far as these organisations need a certification by the KJM and are supervised by state media authorities and KJM.

The task of self-regulatory bodies is to classify content and to ensure the enforcement of rules. Furthermore, self-regulatory bodies may make exemptions to the watershed regulation for the broadcasting of films given a rating by the self-regulatory body for film, FSK, under the Jugendschutzgesetz (see below) some time ago (in principle, 15 years have to have elapsed).

As responsibility for the effective protection of minors devolves on the states, instruments exist to regulate self-regulation, of which the most important is that self-regulatory bodies need certification. According to sec. 19 (3) of the Jugendmedienschutzstaatsvertrag certification is granted if:

- the independence and competence of the members of the control committees are ensured;
- adequate funding is guaranteed by a number of providers;
- guidelines for the decisions of the committees have been worked out in such a way that in practice effective protection of minors is ensured;

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6 See http://www.fsm.de/?s=Subkodex+Suchmaschinenanbieter.
• procedural rules have been worked out on the extent of examination, on the obligation on the participating providers to submit relevant content to the self-regulatory body, on sanctions and on the revision of decisions (organisations responsible for the protection of minors must be given the chance to request a revision);

• it is ensured that providers are heard before a decision is made, the reasons for the decision are given in writing and are disclosed to interested persons;

• a body responsible for dealing with complaints has been established.

Certification may be granted for four years, but can be renewed. The KJM may revoke certification if the self-regulatory body does not act in accordance with legal requirements.\(^7\)

Where certified self-regulatory bodies exist, the powers of state regulatory bodies are limited. In broadcasting, the power of the state media authorities and the KJM is limited as long as the following requirements have been fulfilled: The respective content had been submitted to a licensed self-regulatory body before this content was broadcasted, the provider had followed the decision of the self-regulatory body and the self-regulatory body had not acted beyond the scope of its discretionary power. When the JMSfV has been infringed by the broadcast of content that could not be submitted to a self-regulatory body in advance (e.g. live broadcasts), licensed self-regulatory bodies have to deal with the matter after the content has been broadcast. As long as a provider follows the decision of the self-regulatory body and the self-regulatory body does not act beyond the scope of its discretionary power, the state media authorities and the KJM cannot impose sanctions on the provider. However, this self-regulatory “shield” only gives “protection” if the broadcaster is affiliated to the licensed self-regulatory body (while affiliation is not necessary, if the respective content is submitted to the self-regulatory body before the content is broadcast).

When it comes to tele-media services (e.g. internet services) the system is similar to that regarding broadcasting content which cannot be submitted to a self-regulatory body in advance. In contrast to that system, internet providers need not be affiliated to the self-regulatory body to be protected by the self-regulatory shield. It is sufficient that they follow

\(^7\) The licensing of self-regulatory bodies also affects organisations covered by the federal Jugendschutzgesetz (see below). Material rated by a licensed self-regulatory body may not be classified as harmful to children (Indizierung) by the Bundesprüfstelle (BPS) except by a decision of the KJM.
the decisions of a licensed self-regulatory body – no matter whether they are affiliated to this body or not.

This means that the state media authorities do not impose sanctions on broadcasters and internet providers as long as the non-state organisations do not act beyond the scope of their discretionary power. Sanctions are imposed by FSM and FSF instead. According to sec. 19 JMStV, self-regulatory bodies only get a certification if they have issued procedure rules, including rules on possible sanctions. Broadcasters and internet providers that have joined FSF or FSM or that have at least agreed to follow their rules accept sanctions by FSF and FSM in order to avoid state sanctions.

Another important factor is the way FSM, FSF and KJM find out about breaches of law. Besides monitoring by the state media authorities and Jugendschutz.net, complaints can help to find illegal content. According to sec. 19 JMStV self-regulatory bodies can only be certified if they offer the possibility to send complaints to them.

\textit{f) Supervision of the System}

Certified non-state organisations are supervised by the KJM. If the decisions of a non-state organisation are not in line with the JMStV, the KJM can revoke its certifications. The JMStV does not stipulate any other sanctions that can be imposed on the non-state organisations.

Every two years, KJM has to file a report on the implementation of the provisions of the JMStV (the first report has been filed). This report has to be sent to the state media authorities, the state authorities as well as the federal authorities responsible for the protection of minors.

From the end of 2006 onwards, the JMStV can be terminated by each state in each year. The provisions concerning the self-regulatory “shield” giving “protection” against decisions of the state media authorities can be terminated separately.

According to sec. 20 (7) JMStV the states evaluate implementation of the provisions concerning the self-regulatory “shield” giving “protection” against decisions of the state media authorities (sec. 20 (3) and (5) JMStV) three years after the JMStV came into force. This evaluation is especially based on the above-mentioned KJM-report, and statements given by the self-regulatory bodies and the state authorities responsible for the protection of minors.
According to a protocol declaration of the states, JMStV and JuSchG will be evaluated during a period of five years after these laws came into force.

g) Impact Assessment

aa) Broadcasting

From 1994 to May 2005, FSF examined 6,581 programmes. 2,364 applications were rejected or only accepted under conditions. 172 programmes were fully rejected, which means that they must not be broadcast at all.8 An annual report is available, the first report of KJM is as well.

bb) Internet

According to its annual report in 2004, FSM has handled 977 complaints, 63 % concerning German providers. 32 % were forwarded to police authorities or to INHOPE (“Association of Internet Hotline Providers in Europe”). 27 % were unsubstantiated, 11 % did not fall within the responsibility of FSM.

Of the content people complained about: 26 % were child pornography, 21 % pornography, 11 % right-wing extremism, 11 % potentially harmful to minors, 11 % issues of private law, 16 % other. Overall, the number of complaints relevant to minors’ protection remained equally high compared to former years. However, FSM envisages a strong increase of complaints on child pornography.9

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8  More information can be found on http://www.fsf.de/fsf2/pruefung/statistik.htm.
2. Part II: Leading Cases

The following cases can be seen as leading ones:

a) “MTV – I Want a Famous Face”; Cosmetic Surgery Shows

Most remarkable is the case concerning “MTV – I Want a Famous Face”\(^1\):

- approved by FSF for all audiences (MTV was at the time not member of FSF)

- KJM asserts violations of JMS\(t\)V by 3 episodes of the series, in line with their principle resolution on cosmetic surgery shows\(^2\); it holds that the FSF, by its decision, exceeded its scope of judgment evaluation; the Bavarian State Media Authority takes action against MTV:
  
  o administrative fine
  
  o repetition of the respective episodes is allowed only for broadcasting during the hours between 11:00 pm and 06:00 am by order of the state media authority

- MTV brings proceedings for a preliminary injunction against the order before the administrative court in Munich and succeeds: File number: M 17 S 04.4817\(^3\)

- appeal by the state media authority before the administrative court of appeal of Bavaria: The original order issued by the Bavarian State Media Authority is declared immediately enforceable. File number: Az: 7 CS 05.79. Date: 22/03/2005. The court weighed the risk of the content being broadcast although it impairs children’s development against the risk of the content not being broadcast although it does not impair children’s development.

b) Certification of FSM

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\(^{10}\) See report in MMR 2005, issue 06, p. XIX.

The process of certifying the FSM as an institution of voluntary self-control under the JMStV proved to take a long time and is still ongoing:

- during the consultation process for the reform of minors’ protection law, FSM strongly resists any licensing obligation\(^\text{13}\) and even threatens to discontinue any self-regulatory activity

- in December 2003, FSM changes its constitution in order to fulfil licensing requirements and files an application for certification with the KJM in February 2004\(^\text{14}\)

- as another step towards meeting certification requirements, FSM changes its code of conduct by including provisions of the JMStV in June 2004\(^\text{15}\)

- it took until the end of 2004 / the beginning of 2005 for the KJM to handle FSM’s application (whilst the FSF was certified straight away [as from August 2003 onwards]\(^\text{16}\)), and grant a licence, although only under certain conditions\(^\text{17}\):
  
  o FSM’s code of procedure shall be changed by including duties of documentation
  
  o FSM shall be obliged to inform KJM about current proceedings and activities

- no final decision on those additional obligations has been made so far and, thus, no unconditional certification has taken place yet\(^\text{18}\)

- as FSM filed a lawsuit, courts examine the licence conditions at the moment.\(^\text{19}\)

\(^{12}\) See MMR 2005, issue 04, p. XI.


\(^{16}\) See also on the critiques Monika Ermert, heise news http://www.heise.de/newsticker/meldung/52420.


\(^{19}\) http://www.heise.de/newsticker/meldung/61202.
c) “Saving Private Ryan”

Before the current legal framework, i.e. the Jugendmedienschutzstaatsvertrag, came into force, the following dispute arose between television channel ProSieben, FSF, State Media Authority Brandenburg and the “Joint Body for Youth Protection and Programmes of the State Media Authorities” (“Gemeinsame Stelle für Jugendschutz und Programm”, GSJP) before the enactment of the JMStV.

Chronology:

- FSK classifies film “Saving Private Ryan” as suitable for viewers older than 16 years on 29 September 1998

- ProSieben, seeking to broadcast the film at 8 pm, which is generally not possible for films classified 16+, produces a cut version that is 5 min. and 5 sec. shorter, which was approved by the FSF for audiences 12+ on 21 March 2001; the main argument was that the broadcasting of an anti-war statement such as “Saving Private Ryan” may even serve additional educational purposes

- ProSieben applies for an exemption on 26 April 2001 with the joined group of the state media authorities (“GSJP”) in order to broadcast before 10 pm. GSJP recommends for the Media Council of the State Media Authority Brandenburg (= the decision-making body in charge for granting an exemption) to reject the application. The Authority eventually declines the exemption by orders of 15 November 2001 and 17 January 2002 and obligates broadcasting possible only from 10 pm to 6 am.

- ProSieben brings proceedings in front of the Administrative Court Berlin in order to waive the authority’s decision. The court decides in favour of ProSieben ruling that declining the exemption was unlawful both in formal and material respects and obliges the state media authority to initiate a new decision-making process. Key argument in this respect was that the authority would have to give significantly more consideration to the approval by the FSF instead of simply adopting the GSJP’s recommendation. The court’s finding is that recommendations given by FSF can only be declined if it contained serious and apparent flaws. Consequently, by this interpretation of the law, FSF would have been granted an enormous scope of discretionary power.
- Pro Sieben applies one more time for an exemption on 26 July 2002, which is rejected. Another 2 minutes are cut from the film and another application is handed in, again unsuccessfully. The broadcaster brings emergency proceedings in order to be granted a preliminary exemption to broadcast the film at least once on 05 January 2003. Whilst the Administrative Court Berlin grants such an exemption, this verdict is overruled by the Administrative Court of Appeal Berlin, upholding an appeal by the State Media Authority Brandenburg. The latter argued that the preliminary permission applied for by Pro Sieben may only be granted under particular circumstances in emergency proceedings. However, it was not highly probable that an exemption would be granted in regular proceedings, so there was no need to anticipate this decision yet to be made.

- despite not being permitted by law to do so, Pro Sieben nevertheless broadcast “Saving Private Ryan” at 8 pm on 05 January 2003. The State Media Authority Brandenburg intended on fining the broadcaster and launched respective proceedings.

- the dispute was finally settled with an agreement: the authority issued a formal complaint to be accepted by Pro Sieben, the film must not be broadcast again before 10 pm. A settlement was agreed on between FSF, KJM (which was established in the meantime) and Pro Sieben obliging the latter to make a major contribution to the promotion of minors’ protection, including measures in the field of media education, the arrangement of a symposium on issues concerning the description of war in the media and featuring these issues in its programmes.21

3. Part III: Assessment According to the Criteria for Determining which Types of Regulation Are Covered by the Study

a) The Non-State Regulatory Part of the System

- the setting-up of specific organisations, rules or processes

20 For details see the facts-section of the decision by the Administrative Court Berlin in ZUM 2002, pp. 499-501.

21 See also http://www.mabb.de/start.cfm?content=presse&template=pressemeldungsanzeige&id=609.
Non-state organisations like FSM and FSF examine and rate content of broadcasts and internet services and deal with breaches.

- to influence decisions of persons or decisions of or within organisations

  Broadcasters and internet providers follow decisions of FSM and FSF in order to avoid sanctions imposed by state media authorities.

- as long as the setting-up is conducted by or within the organisations or parts of society whose members are addressees of the regulation

  FSF and FSM were founded and are funded by the industry.

b) The Link between the Non-State Part and State Regulation

- the system is established to achieve public policy goals targeted to social processes

  The public goal is the protection of minors.

- there is a legal basis for the non-state regulatory system (however, it is not necessary that the use of non-state regulation is mentioned in the laws),

  Involvement of non-state organisations is based on provisions of the JMStV.

- the state leaves discretionary power to a non-state regulatory system

  State media authorities and KJM can only overrule decisions of FSM and FSF if these non-state organisations act beyond their scope of discretionary power.

- the state uses regulatory resources to influence the non-state regulatory system (power, publicity, money etc.)

  Only non-state organisations that were certified by the KJM can take part in the JMStV based regulatory system

Conclusion: As the system fulfils all above-mentioned criteria, it can be seen as a co-regulatory system.
II. Co-Operative Regulatory System in the Film and Video Games Sector – Protection of Minors

1. Part I: The Co-Operative Regulatory System

a) Development of the Regulatory System

When it comes to the protection of minors in the film sector, self-regulatory bodies have traditionally played an important role: they have been, and still are, responsible for age classification. The federal Jugendschutzgesetz, which came into force in 2003, distinguishes between different levels of content: Content that is harmful to children (jugendgefährdend) is classified by a federal board (Bundesprüfstelle). Material that has been classified as harmful to minors must not be shown in places children have access to and must not be handed to children. Content that is not harmful to children, but can impair children’s development (entwicklungsbeeinträchtigend) is rated by state authorities responsible for the protection of minors. However, this age classification (suitable for all children and adolescents, over 6 years, 12 years, 16 years or not suitable for children and adolescents) has been handed over to self-regulatory bodies. While, before 2003, the self-regulatory body FSK classified films on the basis of an agreement between the states, the new Jugendgesetz explicitly stipulates that age classification can be performed by self-regulatory bodies.\(^{22}\) Age classification of video games falls within the responsibility of the self-regulatory body USK (*Freiwillige Selbstkontrolle Unterhaltungssoftware*) (see below).

aa) Overview on Original Regulation

Before the new Jugendgesetz came into force, age classification had already been performed by FSK. This was based on an agreement between the states. According to this agreement, the state authorities responsible for the protection of minors adopted decisions of FSK as long as a state authority did not disagree and made a diverging decision.\(^{23}\)

\(^{22}\) According to OLG Koblenz, 21.12.2004 (4 U 748/04), EuZW 10/2005, p. 317+, videos or DVDs that have only been rated by UK’s Board of Film Classification must not be offered by mail order in Germany.

bb) Reform of Law for Protection of Minors

Since 2004, this practice was based on law. According to sec. 14 (6), the state authorities responsible for the protection of minors can agree on a joint procedure including decisions of self-regulatory bodies funded or supported by industry associations. This agreement can determine that decisions of self-regulatory bodies are seen as decisions of the state authorities as long as a state authority does not make a diverging decision.

b) Subject-Matter of the Regulatory System

Non-state organisations are involved when it comes to content that can impair children’s development (entwicklungsbeeinträchtigend). Access of children and adolescents to such content may only be granted if the state authorities or the non-state organisations have rated the content as suitable for children and/or adolescents of the respective age.

c) Basis of the Co-Operation

Since 2003, the co-operation between state authorities and non-state organisations was based on the Jugendschutzgesetz.

d) Institutions Involved in the System, especially Their Funding and Management

aa) Bundesprüfstelle für jugendgefaehrden Medien (BPjM)

The Bundesprüfstelle (Federal investigation office) is responsible for classifying content as harmful to children (jugendgefaehrden). It was established in 1954 and was renamed in the reform 2003. Now it is responsible for all media ("Medien").

Generally, examinations are performed by a board consisting of the chairperson, eight representatives of different social organisations (e.g. artistic and literary community,
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

entertainment industry, youth welfare, teachers, and religious groups) and three representatives of the states. If the board, with a majority of 2/3 of the members, decides that the object contains content dangerous for young people ("jugendgefährdend"), it enters its name into the "list of youth-endangering media" ("Liste jugendgefährdender Medien"), generally referred to as the "index".

**bb) Oberste Jugendschutzbehoerden der Laender**

According to the Jugendschutzgesetz, supreme state authorities responsible for the protection of minors (in most cases ministries) rate content that is not harmful to children, but can impair children’s development (entwicklungsbeeinträchtigend). As already mentioned, this rating has been handed over to self-regulatory bodies. However, the authorities retain the ultimate right to overrule such decisions in single cases, if particular state authorities disagree with the self-regulatory body’s institutions’ classification.

**cc) Freiwillige Selbstkontrolle der Filmwirtschaft (FSK)**

FSK is a private organisation (since 2002 limited company GmbH), which is part of SPIO ("Spitzenorganisation der deutschen FilmwirtschaftCentral" – Association of the Film Industry); it has 16 members: professional associations representing more than 1,100 individual companies).

FSK was founded in 1949 in order to provide a private means of film-control to avoid direct state control. Since 1983 it is also responsible for age classification of video cassettes and similar film media.24

Age classification is performed by examination boards. The majority of the members of the boards are nominated by state authorities.

24 For FSK principles see http://www.spio.de/media_content/422.pdf.
dd) Freiwillige Selbstkontrolle Unterhaltungssoftware (USK)

USK conducts age classification of computer games. USK was founded in 1999. The foundation was based on an agreement between the „Foerderverein fuer Jugend und Sozialarbeit e.V.“ and the entertainment software association. Representatives of the state and the federal government are members of the advisory board of USK. In addition, a representative of the state authorities responsible for the protection of minors takes part in the examination of computer games.

ee) DT-Control

According to sec. 12 (5) JuSchG, CDs and DVDs that contain parts of films or video games are only allowed to be offered together with newspapers and magazines, if a self-regulatory organisation has found that they are not likely to impair children’s development. This rating is done by the Interessengemeinschaft Selbstkontrolle elektronischer Datenträger im Pressevertrieb ("DT-Control"). DT-Control was founded in 1995 by several associations, amongst them the association of German magazine publishers VDZ (Verband deutscher Zeitschriftenverleger). In addition to ratings according to sec. 12 (5) JuSchG, DT-Control examines data carriers that are voluntarily submitted by publishers.

e) Functioning of the System

In practise, age classification is done by FSK and USK. Theoretically, however, the state authorities can overrule each decision of these non-state organisations.

Classifications made by FSK and USK have to be observed by persons and organisations who offer the respective content or grant access to it.

\[25\] USK principles can be found on http://helliwood.mind.de/~usk/pdf/Grundsaetze_USK.pdf; classification code of procedure can be found on http://helliwood.mind.de/~usk/pdf/Pruefordnung_USK.pdf.
However, FSK and USK have no power to impose sanctions. Breaches of provisions of the Jugendschutzgesetz either fall under criminal law (indictable offence) or are prosecuted as administrative offences (which means that the offender has to pay a monetary fine).

\( f) \) Supervision of the System

As mentioned above, the state media authorities can overrule decisions of FSK and USK.

\( g) \) Impact Assessment

\( aa) \) BPjM

Media on the index (as of 30 June 2005):
- 2,904 films
- 405 computer and video games
- 855 print media
- 455 LPs, MCs, CDs,
- 985 electronic media services
- 1 leaflet

Statistics 2004\(^{26}\):
- 297 applications, 356 encouragements mainly by police authorities, 146 actions initiated by BPjM
- 388 listings (52 films, 12 magazines/newspapers, 15 other print media, 9 computer games, 110 LP/MC/CD, 190 online services)
- 20 rejected applications for listing
- 154 de-listings

\(^{26}\) See also http://bundespruefstelle.de/bpj/m/statistik/2004.php.
- 189 halts of proceedings and other actions

**bb) FSK:**

Statistics counting films receiving their premiere; quarter report II/2005:


Number of FSK-approved films:


- strong increase in film rating numbers since 1994, particularly because of successful publishing of films on DVD

**cc) USK:**

Press release concerning annual report 2004:

- more than 12,200 productions examined since 1994
- more than 50% are classified suitable for persons younger than 12 years
- 32 times no classification granted since 01 April 2003 ➔ “unrated according to sec. 14 JuSchG”, not suitable for minors
- director of USK: “self-control works, cooperation with youth protection authorities works out well, distributors of unrated productions abstain from publishing their works in Germany”

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2. Part II: Leading Cases

A leading case is the game “Counter Strike” and the events around the school massacre of Erfurt:

- the German version was approved by USK for 16+ in 2000, the US-version was approved for 18+
- 26 April 2002: The pupil Robert Steinhäuser kills 16 people including himself in the Gutenberg School in Erfurt. He is reported to have excessively played the game “Counter Strike”. The daily newspaper “Frankfurter Allgemeine Zeitung” publishes an article that accuses the film and video-game industry to be responsible for actions like the massacre of Erfurt, a great part of the media concurs
- BPjS decides on whether or not to put the US-version of the game on the index and decides against it on 16 May 2002, followed by an announcement of minister for family and youth Sabine Bergmann to review the decision after the enactment of the new JuSchG
- quite quickly, induced by the events of Erfurt, the preparations for the new JuSchG were finalised and it was passed on 23 July 2002

Case of the computer game “Command and Conquer: Generals” (occurred before enactment of JuSchG):

- 14 February 2003: USK classifies the game as 16+
- 25 February 2003, shortly before publication (which was due in March 2003), BPjS lists the game on the index due to a preliminary decision that was confirmed by definite listing in March 2003: only one month before the enactment of new JuSchG, when BPjM could not have acted single-handedly against media approved by USK
- the publisher, Electronic Arts, brings proceedings against the BPjS decision in front of the Administrative Court Cologne

3. Part III: Assessment According to the Criteria for Determining which Types of Regulation Are Covered by the Study

a) The Non-State Regulatory Part of the System
• the setting-up of specific organisations, rules or processes
  ➔ Age classification is performed by FSK and USK.

• to influence decisions of persons or decisions of or within organisations
  ➔ Access to content classified by FSK or USK must not be granted to children and adolescents under the respective age.

• as long as the setting-up is conducted by or within the organisations or parts of society whose members are addressees of the regulation
  ➔ FSK and USK were founded and are funded by the industry. However, state representatives are members of the advisory board of USK. In addition, a representative of the state authorities responsible for the protection of minors takes part in the examination of computer games. The majority of the members of the boards of FSK are nominated by state authorities.

b) The Link between the Non-State Part and State Regulation

• the system is established to achieve public policy goals targeted to social processes
  ➔ The public goal is the protection of minors.

• there is a legal basis for the non-state regulatory system (however, it is not necessary that the use of non-state regulation is mentioned in the laws)
  ➔ Since 2003, there is legal basis (sec. 14 (6) Jugendschutzgesetz).

• the state leaves discretionary power to a non-state regulatory system
  ➔ Crucial point: In general, decisions are made by FSK and USK. Theoretically, however, the state authorities can overrule the decision of FSK and USK without observing any discretionary power of the non-state organisations.

• the state uses regulatory resources to influence the non-state regulatory system (power, publicity, money etc.)
Decisions of FSK and USK are not influenced by the state. However, state representatives are members of the advisory board of USK. The majority of members of the boards of FSK are nominated by state authorities.

**Conclusion:** Although the state authorities responsible for the protection of minors can theoretically overrule each decision of FSK and USK, so far, this has not happened in practice. That is why discretionary power of FSK and USK can be assumed within the scope of this study. Therefore, the system can be seen as a co-regulatory system.

### III. Co-Operative Regulatory Systems in the Broadcasting (Advertising) Sector

Provisions for the regulation of advertising in Germany can be found in several acts. In general, the regulation concerns not one specific medium but rather media as a whole. Nevertheless, there will be no separate chapter about advertising but for exemplary purposes it will be presented in the frame of broadcasting.

#### 1. Part I: The Co-Operative Regulatory System

There are two main self-regulatory organisations in the advertising sector in Germany that are also responsible for TV advertising. On the one hand, there is the German Advertising Council (“Deutscher Werberat” – DW) which deals with issues of taste and decency of advertising measures. On the other hand, there is the Centre for Combating Unfair Competition (“Zentrale zur Bekämpfung unlauteren Wettbewerbs”) which entails the right to initiate legal action against companies that infringe the Law against Unfair Competition (Gesetz gegen unlauteren Wettbewerb – UWG).

Other self-regulatory organisations are the German Direct Marketing Association (“Deutscher Direktmarketing Verband” – DDV) and the Association of Fair Advertising of Medical Products (“Integritas – Verein für lautere Heilmittelwerbung e.V.”).
Aside from these, there are the state media authorities, which are responsible for the specific regulations of advertising of the Rundfunkstaatsvertrag concerning the commercial broadcasters.

The compliance with the advertising regulations of public service broadcasters is monitored by the respective Broadcasting Council of each broadcasting station.

\[a)\] \textit{Development of the Regulatory System}

In 1972, the German Advertising Council was founded. It emanated from the German umbrella organisation of the advertising industry, the German Advertising Federation ("Zentralverband der deutschen Werbewirtschaft – ZAW") due to a recommendation of the Council of Europe. The ZAW had been already active since 1949. But with the Advertising Council an institution has been established that directly deals with complaints about advertising and the self-discipline of the advertising industry. This institution should assume responsibility through voluntarily self-regulation. The Advertising Council forms part of the ZAW and, hence, the two bodies have a common membership.

The Centre for Combating Unfair Competition has been established in 1912, shortly after the adoption of the UWG. It is an association of corporations and business organisations with the goal to create self-regulation to ensure fair competition.

The state media authorities were established in the mid-1980s, together with the beginning of the era of dual broadcasting (i.e. alongside public service commercial broadcasting has also been allowed).

\[b)\] \textit{Subject-Matter of the Regulatory System}

\[aa)\] \textit{Advertising Council (Werberat)}

It is the task of the Advertising Council to take measures for the development of advertising regarding content, message, and design. Furthermore, its mission is to support responsible actions in the advertising sector as well as to detect and to eliminate grievances. One of its main functions is to deal with consumer complaints regarding advertising.
The scope of the regulation includes youth protection, product specific regulation (e.g. health protection), and ethical issues (taste and decency). The DW deals e.g. with complaints about discrimination of women or other groups of the society, violation of religious beliefs, advertising using fear or breaches of the Council’s rules.

The Advertising Council is responsible for all kinds of media, but only as long as commercial advertising is concerned (that means e.g. not in the range of political or social advertising).

It initiates the procedure either acting on its own concerns about an advertisement or as reaction to a complaint. It deals with both, competitor and consumer complaints. Complaints alleging misleadingness or unfair competition are transferred to the Centre for Combating Unfair Competition.

It is also responsible for commercial communication e.g. on the internet and concerning other new communication technologies. But it decides only on advertising in German language, as other languages could hamper the complaints procedure and lead to misunderstandings.

As a basis for the decisions, the Advertising Council takes into account the state laws (e.g. the Rundfunkstaatsvertrag) as well as its own codes.

**bb) Centre for Combating Unfair Competition (WBZ)**

The task of the WBZ (“Wettbewerbszentrale”) is to ensure a functioning competition and to prosecute violations of a fair competition. It deals only with competition law in the sense of the UWG, i.e. only with issues on unfair competition. It handles complaints of members, public authorities, and consumers and enhances the amicable settling of disputes. Furthermore, it is authorised to take legal action in its own name to enforce claims. The work of the WBZ covers advertising in all media.

The work of the WBZ does not overlap with the work of the DW. In respect to the state media authorities there may be an overlap. A breach of § 7 para. 1 Rundfunkstaatsvertrag (the provision about consumer protection and advertising) may also constitute a breach of UWG. Thus, it is possible that the state media authorities as well as the WBZ deal with a complaint. A difference between the two institutions is that the state media authorities apply only to the broadcasters whereas the WBZ concerns any business. It is to be considered that this, however, may be a rather theoretical case. As the DW transfers cases to the WBZ, as
mentioned above, it is to assume that the WBZ does the same with cases under the responsibility of the DW.

**cc) State Media Authorities**

The state media authorities are responsible for advertising matters in broadcasting only. They monitor the programmes according to the provisions in the Rundfunkstaatsvertrag (RStV) as well as in laws on special issues (as e.g. the restrictions imposed on advertising of medical products in the Heilmittelwerbegesetz [law on the advertising for medical products]). The RStV empowers the state media authorities to issue joint guidelines on the implementation of advertising regulations (Sec. 46 RStV) (see also Part 1 Chapter 1 of this study).

**c) Basis of the Co-Operation**

**aa) Advertising Council**

The Advertising Council (DW) is not mentioned in any German law. The Council itself, in contrast, has to take into account the legal provisions by making its decisions. This principle is provided in the rules about the work of the Council.

The DW sets its own codes and rules concerning permissible advertising that serve as basis for its decisions.

The Advertising Council is mentioned in the joint guidelines of the State Media Authorities on Advertising, the Separation of Advertising and Content, and on Sponsoring (“Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring”). These guidelines are enacted on the basis of the Rundfunkstaatsvertrag and serve to concretise its rules for the daily work of the state media authorities. In the guidelines, it is said that the state media authorities also have to apply the rules of the DW about advertising for alcoholic beverages (“Verhaltensregeln des deutschen Werberates ueber die Werbung fuer alkoholische Getraenke”).
bb) WBZ

The WBZ is a private organisation under German civil law which has legal capacity. It is, thus, an organisation as required in § 8 III No. 2 UWG. It is not as such mentioned in German laws. However, the above-mentioned provision gives the WBZ the right to file a suit in the name of complainants.

d) Institutions Involved in the System, especially Their Funding and Management

aa) Advertising Council (DW)

The DW consists of members of the advertising economy (4), the media (3), communication agencies (2), and the advertising-depedended professions (1). The members of the DW must also be members of the presidency of the ZAW. The presidency of the ZAW consists of 22 elected members out of its member organisations. The DW is funded by ZAW membership fees. The ZAW is funded by its members, the 41 organisations of the advertising economy. There are no other sources of income for the DW. Especially, the complaints proceedings are free of charge. The secretary of the DW is provided by the ZAW.

bb) WBZ

The WBZ consists of members from the chambers of Industry and Commerce (“Industrie- und Handelskammern – IHK”), the chambers of craft, 400 business organisations and about 1,200 companies. Every natural person may become member of the WBZ if working commercially or as free-lancer.
cc) **State Media Authorities**

The state media authorities are public institutions with legal capacity. They are not part of the state administration, but independent authorities with the right of self-administration. There is one state media authority in almost every state (out of 16 federal states, Berlin and Brandenburg established a joint authority). Members of its boards are basically representatives of the societal relevant groups. The administrative director of the authority prepares and carries out decisions taken by the internal body. The state media authorities are financed predominantly by broadcasting licence fees. Other sources of income are administrative fees of official acts of the authorities.

In 1985, the Conference of Directors of the State Media Authorities ("Direktorenkonferenz der Landesmedienanstalten" – DLM) was established to improve the co-operation between the authorities. Furthermore, in 1993 the working group of the State Media Authorities ("Arbeitsgemeinschaft der Landesmedienanstalten in der Bundesrepublik Deutschland" – ALM) was founded to further enhance this co-operation. Its duties are e.g. to develop joint positions concerning specific issues of interest as well as to enact joint guidelines. There are several committees specialising on specific issues. Particularly, to mention is the joint Committee on Programme, Advertising and Media Literacy ("Gemeinsame Stelle Programm, Werbung und Medienkompetenz" – GSPWM), which tries to enhance a consistent ruling on these matters in each state media authority.

e) **Functioning of the System**

aa) **DW**

The membership in the DW is voluntary. The members of the DW are elected by the ZAW presidency. It is the only decision-making body involved in the complaints procedure.

Everyone has the right to make a complaint at the DW. The DW may also initiate a procedure in its own right. The complaint has to be made in written form. Complaints by telephone are only accepted, if the caller can be identified. It is sufficient to indicate name and address of the complainant, and to name the advertising measure or to attach it. It is not necessary to
make further explanations. The name of the complainant is handled confidentially as long as he/she has not declared his/her approval to the mentioning of his/her name. If the complainant is another company, it has to explicitly ask for a confidential treatment of its name. Otherwise, it may be disclosed to the other parties involved.

Rules for the decision-making process are provided in the code of procedure of the DW ("Verfahrensordnung des Deutschen Werberates").

If the Council regards a complaint as manifestly ill-founded, it rejects it. The complainant may file a protest against that decision. In this case, the procedure goes on. Otherwise, if it is not rejected, the Council asks the responsible company to make a statement on the complaint within a certain time frame. If the company declares that it changes or stops the campaign, the DW gives note of that to the complainant. If the company declares that the complaint is unfounded, the DW makes a decision in written form. For a decision, the simple majority of the members’ votes is required. The working basics of the DW provide that the decisions of the Council shall be independent. It is free in forming an opinion. It, thus, has to take into consideration the legal provisions, the guidelines of the ZAW as well as the international code of conduct of the advertising practice.

In case of an objection to the advertising measure, the Council gives the concerned company or agency a deadline to communicate whether it will stop or change the advertising or not. If it is stopped, the DW informs the complainant. If the advertising will not be changed, or if there had been no reply within the time limit, the DW may inform the public. It also asks the media which has published the advertisement not to publish it anymore. There is no further (state) enforcement of the sanctions. The condition for such a public reprimand is that the company or agency did not follow the decision of the DW. For both parties there is the possibility to raise an objection. The same code of procedure, in a slightly changed version, applies to complaints about online advertising. In that case the publication of public reprimands takes place on the website of the DW.

The meetings of the DW are confidential. Participation of non-members of the DW is not allowed except for other members of the ZAW presidency and chairmen of the DW member organisations. Furthermore, it is possible for delegates of the companies that are concerned to take part in the meetings. But it is not permitted for them to be present in the decision-making process.
To keep its decisions transparent to the public, the DW publishes an annual yearbook in March, presenting tables on quantity and topics of the complaints as well as describing exemplary cases.

In order to set rules for the advertising companies, the DW publishes codes of practice concerning several issues. These rules apply in addition to the legal provisions. There is e.g. a code about the advertising with and for children on radio and television, a code about the commercial communication of alcoholic beverages as well as statements about advertising on tires and about endangering pictures (especially concerning traffic accidents).

bb) WBZ

Membership in the WBZ is voluntary. Members have to pay an annual subscription fee. The amount of the subscription is fixed individually for each member, taking into account the financial needs of the WBZ and the financial potential of the member.

Bodies of the WBZ are the member’s assembly, the steering committee and the advisory board.

The member’s assembly is responsible for decisions on every issue concerning the WBZ. It elects the steering committee on proposal of the advisory board. It also elects the advisory board.

The task of the advisory board is to give the steering committee notice of the industry’s opinion and the interests concerning issues of competition.

Executive affairs are the task of the steering committee, which appoints a chief executive officer.

The WBZ is independent from the state and from other organisations.

Everybody may make a complaint no matter whether he/she is a member of the WBZ or not. Complaints are handled free of charge. In a complaint has to be named: the name of the company that is concerned, the reason of the complaint, medium and date of publishing, content of the advertisement.

The WBZ decides whether or not the complaint is of substance. If the preliminary review is affirmative, the WBZ writes to the advertiser and pronounces a warning, i.e. it lets the advertiser decide: either he has to sign an agreement that he will stop the advertising – if he
then breaches this agreement, he has to pay a certain monetary fee (penalty clause) – or, the advertiser stops the criticised measure.

If he does neither, the WBZ decides whether to take legal action for unfair competition or not. If the advertiser breaches the agreement (e.g. if the advertisement is repeated) he has to pay the penalty to the WBZ.

cc) State Media Authorities

Subject of the activities of the state media authorities are the commercial broadcasters. In case of the advertisement monitoring, the authorities may pronounce a formal remark, they may fine the broadcasters, or withdraw the licence (see also Chapter 1 of Part 1 of this study).

The state media authorities start their work either as response to a complaint of a viewer or due to its own findings. They have their own rules of complaint and make their decisions transparent in form of publications (e.g. press releases). Furthermore, they release rules on different subjects (e.g. the above-mentioned joint guidelines on advertising).

The competencies of the Advertising Council and the state media authorities may overlap in some cases. However, there is no example available for such a crossing. If such a case occurs both organisations may deal with it. But the state media authorities are able to impose more severe sanctions. The Advertising Council, on the contrary, would rather try to solve the case as an arbitrator. The competencies of the WBZ and the state media authorities are mutually exclusive, for the state media authorities are not responsible for consumer protection and the law on unfair competition.

f) Supervision of the System

aa) DW

There is no supervision of the system.
bb) WBZ

There is no direct supervision of the system. But it lies in the complaints procedure itself that the courts often have the final decision (e.g. if the advertiser does not sign the agreement). Therefore, an indirect kind of control by the courts is to assume.

c) State Media Authorities

The decisions of the state media authorities that are enacted in form of administrative acts may be submitted to the administrative courts.

They do not exercise control over the DW’s decisions.

g) Impact Assessment

AA) DW

As mentioned above, the DW publishes an annual report.

In 2004, there were 929 complaints to the DW about 372 advertising measures. Thereof 118 were not part of a decision of the DW. The decisions on the remaining 254 advertising measures were as follows: 204 were not criticised by the DW, in 40 cases the advertisers agreed to stop the measure, 3 advertisers changed the measure and 7 advertisers were publicly reproved.

When an advertisement is criticised the company usually follows the decision of the Council. This is worth mentioning, especially because most of the advertising measures are legal and the ethical judgement cannot really be measured. The decisions of the DW are not binding, but they nevertheless have influence on the decisions of the courts. They are relevant in respect of what is to be considered as fair competition in the advertising industry.

It is also a sign of influence that the Council’s rules are mentioned in the Joint Guidelines of the state media authorities.

*bb) WBZ*

The WBZ publishes an annual report. In 2004, it worked on 20,376 procedures. Thereof 5,467 cases concerned elements of offences of the UWG – as issues of unobjective influence or unfair sweepstakes. Amongst the cases were also 3,447 complaints of misleading advertising.

In 2004, the WBZ initiated 454 lawsuits, and conducted, together with the pending lawsuits a total of 946. Out of these 487 were closed and 86 % thereof were won by the WBZ.

1,024 cases were referred to arbitration by the Chambers of Industry and Commerce.

In the public, the WBZ is criticised due to its practice of the procedure. It is said that the companies had almost no chance to resist the critique of the WBZ and would, therefore, often pay immediately.

2. Part II: Leading Cases

*a) DW*

Most of the complaints the DW has to decide on concern the discrimination of women by way of their portrayal in advertising (41 % in 2004). Other issues are endangering of children/youths, breaches of ethical standards or discrimination in general.

In this respect the following examples may be regarded as leading cases.

In a TV spot, a woman was shown trying to pull out of a garage. Due to her hurting neck, she does not look backward. So she drives several times against the garage. Not until she uses the advertised healing-plaster, she drives easily out of the garage. The complainant argued that this spot was discriminating against women. The DW decided that the opinion of the complainant had been an over-interpretation: The viewers could understand the spot as an amusing presentation. Furthermore, it had to be allowed to present social stereotypes in spots – e.g. women as bad drivers – in a satirical way.
A TV spot of a radio station showed a woman’s bottom and a hand clapping on it. Then a voice said “Modern Music... radio”. The complainant criticised that the spot would be sexist and discriminating against women. It would be disrespectful to use a clap on the bottom as a stylistic device to draw attention to the radio station. The Council asked the radio station for a statement – as a consequence the spot was not shown again.

A TV spot of an internet service for consumer consulting showed three plungers in canvas chairs, lacking arms and legs after a shark-attack. One of the men tried with his stunted arm to scare away a mosquito. The complainant criticised that the spot would exploit disabilities for the purpose of advertising. The Advertising Council decided the spot as objectionable. After the decision the internet service stopped broadcasting the spot.

\[ b) \textit{WBZ} \]

The WBZ deals mostly with complaints about breaches of consumer protection provisions in general as well as on the internet and with improper standard form contracts. Secondly, it has to decide on cases as surreptitious advertising, unobjective manipulation or illicit sweepstakes. Another emphasis lies on cases of misleading advertising.

In many cases the subject of the complaint is finally judged by the courts. Thus, the decisions available concerning the complaints are often judgements of the courts in favour of the WBZ as complainant.

A TV spot that showed a financial investment and that promoted it with the slogan “Top interest – more than 8 % are possible” was regarded as a case of misleading advertising, because in fact this interest had not been offered during the whole term, in the average of the term it was only 5 %.
c) State Media Authorities

In 2003,31 the GSPWM (“Gemeinsame Stelle Programm, Werbung und Medienkompetenz”) ruled on a special programme of commercial broadcaster ProSieben, which dealt with the release of a new BMW. This programme had been a breach of the principle of separation of content and advertising. It had been presented as an editorial content, but in fact the advertising character had come to the fore. It would have been necessary to show the indication “continuing commercial spot” (“Dauerwerbesendung”). Instead, only the indication “infomercial” appeared during the programme. According to the GSPWM this had not been a sufficient indication of advertising.

3. Part III: Assessment According to the Criteria for Determining which Types of Regulation are Covered by the Study

a) Advertising Council

The Advertising Council has to be classified as a non-state regulatory system. It creates rules as e.g. its codes of conduct. Furthermore, it has its own rules of procedure and, thus, a stable way of preceding the complaints.

Its task is more than pure consultation. Due to its system of sanctions, it influences the decisions of persons active in the advertising sector. The addressees of the regulation are clearly defined as persons or organisations that are responsible for advertising in any form.

Furthermore, the system is established to achieve public policy goals – it ensures that the content of advertising is in line with the ethical perceptions of society. There is also a legal connection between the Advertising Council and the state regulation: the rules of the Council are mentioned in the Joint Guidelines on Advertising of the state media authorities. This legal connection cannot be seen as a basis for the work of the Advertising Council. Nevertheless, it is a stable link between state and non-state regulation.

There may be doubts whether the last criteria that qualifies a system as "co-regulatory" is fulfilled: the discretionary power. Non-state regulation is included at the stage of lawmaking: When it comes to advertising rules concerning alcohol the state media authorities refer to the rules of the Council. At this stage, one can only speak of discretionary power if changes of the non-state code are also adopted by the state media authorities as a rule (that means that the adoption of changes is immanent to the regulatory system).

In this case, the link explicitly refers to the rules on alcohol advertising of the Council of 1998.

In practise, however, the state media authorities use the latest version of these rules. That means there is discretionary power of the Council concerning the question whether to amend the rules or not.

Thus, the system can be qualified as co-regulatory.

b) WBZ

The WBZ matches only some of the criteria that indicate a self-regulatory organisation. It is not setting up specific rules. But its work influences decisions of advertisers e.g. when it pronounces cautions, then the advertisers have to react.

There is a link between the state and the WBZ through the legal basis it relies on (§ 8 III No. 2 UWG – as mentioned above). The WBZ is established to achieve public policy goals: the protection of consumers against unfair competition. The state does not administrate the protection of consumers itself – it allows the WBZ to do this. But the frame for this action is given by the state through the provisions in UWG. Thus, one would have to ask, whether this link is sufficient to qualify as a co-regulatory system. It is to consider, that the state has no further influence to the work of the WBZ. The legal frame is the only connection between the state and the WBZ. What actions are to be taken in detail is only decided by the WBZ.

Aside from this, the only discretionary power that is given to the association is that it may decide by itself, whether it pronounces a caution or takes legal action. Thus, it has no more power than a competitor according to § 8 III No. 1 UWG.

Perhaps, it is possible to qualify the WBZ as a co-regulatory institution, but due to the above-mentioned arguments it is rather to be assumed that it is a self-regulatory organisation.
c) State Media Authorities

The state media authorities are the state regulatory part of the system.

**Conclusion:** The integration of the rules of Advertising Council concerning alcohol advertising can be seen as a co-regulatory system. The Advertising Council has discretionary power as the state media authorities use the latest version of these rules and the Council is free to amend these rules. The WBZ could also be seen as a co-regulatory body. Although the element of the creation of its own rules is not given, it influences decisions by persons or, in the case of organisations, decisions by or within such entities. One could call the right to take legal action some kind of regulation. Natural persons may, according to the UWG not take legal action – this kind of monitoring and, thus, regulation is taken over by the WBZ. It is this specific perception of statutory rights that makes the WBZ seem to be more than a self-regulatory body.

IV. Co-Operative Regulatory Systems in the Press Sector (in Particular, Data Protection in the Media)

1. Part I: The Co-Operative Regulatory System

   a) Development of the Regulatory System

The German Press Council (“Presserat”) was founded on 20 November 1956 by 5 newspaper publishers and 5 journalists. It had been the reaction to the planned Federal Press act (that did never come into force). The draft law provided for the establishment of a self-monitoring instance in the form of a body under public law. This planned state monitoring caused tremendous opposition from journalists and publishers associations and did not succeed. Instead of accepting a regulation by a federal press law the Press Council should be a counterdraft to state regulation. It was the British Press Council that the founders had in mind when setting up the German Press Council.
In December 1973, the Code of the Press (“Pressekodex”) was published. From that time on, every journalistic work the Press Council had to judge on has been measured on the Code of the Press.

In 1976, the German Parliament (“Deutscher Bundestag”) adopted the “Law on the guarantee of independence of the Press Council’s board of complaint”\(^\text{32}\), which provided the basis for further action of the board of complaint.

From 1982 to 1985, the Press Council stopped its work temporarily due to a dispute about the publishing of public reprimand.

In 1996, the self-control of the publishers expanded also to online-media. From this time on, the Press Council has also been responsible for the monitoring of the digital distribution of newspapers, magazines and news services.

In 2002, the responsibility expanded to the self-control of data protection in editorial departments. It was the result of negotiations of the Press Council and the Federal Ministry of the Interior, as well as of other delegates and experts on data protection. A legal provision was cancelled on condition that the Press Council creates a functioning voluntary code of conduct.

\(b)\ Subject-Matter of the Regulatory System

It is the task of the Press Council to monitor the observance of the journalistic principles laid down in the Press Code.\(^\text{33}\) These are for example the due diligence to check the validity of news, the observance of truth and human dignity, the imperative to separate advertising and editorial content, and the principle of non-discrimination. The Press Council is not responsible for complaints about broadcasters, the right of reply, damages for pain and suffering, or advertising (except for the principle of separation of advertising and editorial content).

Furthermore, the Press Council is in charge of prevention and monitoring of data protection infringements in editorial departments. It is, however, not responsible at all for any broadcasting issues. In general, data protection in the media is divided into two areas: on the one hand, the protection of data of the consumers of the media (clients of the publishers or


\(^{33}\) Available in German language at: http://www.presserat.de/uploads/media/Kodex_03.pdf.
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

broadcasters), on the other hand, the protection of data in respect to the journalistic and editorial work of the media (data protection in editorial departments). The Press Council deals with the latter – restricted to the press sector (and the online offers of publishers that are identical with the printed publication).

There may be crossings with the work of the ZAW (see p. 27+) regarding the separation of advertising and content for a breach of this basic principle may also constitute an issue of unfair competition. But in practice, there are no cases dealt with by both organisations.

c) Basis of the Co-Operation

The work of the Press Council is, on the one hand, ensured by Art. 5 para. 1 of the German constitution, the Basic Law (“Grundgesetz”), that provides the freedom of the press and, thus, the framework for press self-monitoring. On the other hand, there is the “Law on the guarantee of independence of the Press Council’s board of complaint”, where the Press Council is explicitly named – only a single time in the laws of Germany. The Law is about a subsidy of the State for the board of complaint to ensure its independence and functioning. The remit and the legal status of the Press Council are not defined in a legally binding way. The decisions of the Press Council are not legally binding; they rely on the ethic of the journalist’s profession. The Press Council is a registered (non-profit) association in accordance with the Civil Code and, thus, a legal person under private law.

Concerning the press, there exist specific laws in the federal states. These laws provide inter alia that the press has to work with diligence.

As regards the data protection, it derives from Art. 5 Grundgesetz that there exists the “privilege of the press” which limits the applicability of data protection laws to a few provisions (see also Part 1, Chapter 2.3 of this study).

Concerning the press, there is a provision in the federal data protection law (“Bundesdatenschutzgesetz”) that ensures the privilege of the press. In § 41 para. 1 Bundesdatenschutzgesetz (BDSG) it is said that the federal states have to ensure that only a few enumerated provisions are applicable. Among them are the provisions about the unauthorised collection, use or transfer of data (§ 5 BDSG) and the possibility to develop own codes of conduct (§ 38 a BDSG). Also a provision in case of breaches of these rules is applicable (§ 7 BDSG). § 41 para. 1 BDSG was implemented in the state press laws. The
Co-Regulation Measures in the Media Sector: Annex 5: Coutnry reports on possible co-regulatory systems

states have a margin in transposing this provision. Nevertheless, most of the state press laws only refer to the BDSG. Thus, in fact there is a quite uniform editorial data protection law in Germany. Only in the press law of Hamburg there is a more detailed provision in this respect: § 11 a of the state press law states that if a publisher does not adhere to the code of conduct on data protection, §§ 41 para. 3 and para. 4 BDSG are applicable mutatis mutandis. These provisions in the BDSG refer to the editorial data protection of the public service radio broadcast station “Deutsche Welle”. The person who is affected by use of his/her data may claim information and correction.

In the provision about the codes of conduct (§ 38 a BDSG) it is said that professional organisations may submit draft codes of conduct on data protection to the responsible authority. The authority then checks if these codes of conduct are compatible with the data protection law.

The rules of the Press Council on data protection in editorial departments may be regarded as such a code of conduct that adds certain aspects to the legal obligations.

Nevertheless, there is one problem regarding the implementation of § 38 a BDSG: In the press sector there does not exist an authority that is responsible for monitoring the editorial data protection. The Press Council’s system of the voluntary self-regulation on data protection in editorial departments takes the place of such an authority. This system contains a board of complaints and some rules of the Pressekodex that were amended in order to cope with issues of data protection.

Thus, it was not possible to have the code of conduct checked by an authority, as provided in § 38 a BDSG. Nevertheless, the rules on data protection in the Pressekodex were discussed and coordinated with the federal delegate on data protection (“Bundesdatenschutzbeauftragter”).

If regarded as such a code of conduct in the meaning of § 38 a BDSG, the provision on damages of § 7 BDSG is applicable in case of a breach of the code of conduct. § 7 BDSG stipulates that the damages only have to be paid, if diligence had not been respected. The code of conduct contains provisions on the due diligence. Thus, the breach of the code of conduct means the breach of the due diligence. And, vice versa, it may be argued that if certain behaviour was found not to infringe upon the Code, there will not be a disrespect of the rules on diligence.
**d) Institutions Involved in the System, especially Their Funding and Management**

The institution involved in the system is the Press Council.

The Press Council is, on the one hand, funded by the contributions of the sponsoring associations. On the other hand, the State has been subsidising the Council since 1976 due to the above-mentioned law on the guarantee of independence of the Press Council’s Board of Complaint. But because the Board of Complaint shall not be dependent on that state funding, the subsidiary shall not exceed 49 % of the total revenue of the Council.

The work of the Press Council and the Advertising Council do usually not cross. Though the Advertising Council is responsible for all kind of media, it deals with complaints about the content of advertising. The Press Council in contrast, deals in the advertising sector only with issues about the separation of advertising and editorial content.

Also, there are no similarities with the work of the Centre for Combating Unfair Competition (WBZ). The WBZ deals only with infringements of the Act on unfair competition – an issue that does not belong to the responsibilities of the Press Council.

There is a special board of complaint for data protection issues established at the Press Council. In addition to the other sources, it is funded by direct remuneration from the publishing companies that are not members of the Council.

As regards data protection, it has to be distinguished between the press and the broadcasting sector. The basis (Art. 5 GG) is the same, but the legal and practical implementation is different. Regarding the commercial broadcasters, the state media laws contain the press privilege and, thus, it is provided, together with either the federal or the state act on data protection, for the data protection in editorial departments (the provisions of the federal data protection act referred to above). There are no codes of conduct of the commercial broadcasters.

According to the state media laws (e.g. § 50 para. 3 Landesmediengesetz Baden-Württemberg) the commercial broadcasters have to appoint a data protection delegate out of their organisation, who monitors the application of the data protection rules. Furthermore, there is a state data protection delegate, responsible for monitoring the data protection in official institutions but not for monitoring editorial data protection of the commercial broadcasters. But if the state data protection delegate finds a breach of the rules by the commercial broadcasters during his monitoring of the official institutions, he may (according
to the state data protection acts, e.g. § 28 Landesdatenschutzgesetz Baden-Württemberg) report this to the data protection delegate of the broadcaster.

*e) Functioning of the System*

The Press Council consists of 28 members. There are four publisher and journalist associations involved in the “Trägerverein des deutschen Presserats e.V.” (association of sponsors of the German Press Council): the “Bundesverband deutscher Zeitungsverleger” (BDZV), the “Verband deutscher Zeitschriftenverleger” (VDZ), the “Deutscher Journalistenverband” (DJV) as well as the “Deutsche Journalisten- und Journalistinnen Union” (dju). Each of which delegates two members to the members’ assembly of the “Trägerverein”. The members’ assembly deals with the legal, financial and personal issues of the Press Council. Also, the four sponsors send seven members each to the plenary, that meets twice a year. The plenary elects six members for each of the two chambers of the Board of Complaint. It is the task of the Board of Complaint to consider the complaints, and, if necessary, to take measures.

The Board of Complaint on editorial data protection consists of five members of the plenary and of one representative of the advertising papers’ publishers.

The addressees of the regulation are publishers, editors and journalists. If the Council has issued a public reprimand, it has to be published by the specific publisher. The membership in the Press Council is voluntary. Only if the publishers signed a voluntary self-commitment, they have to accept the sanctions.34

Concerning the data protection it works the same: only publishers who signed the voluntary self-commitment are under the surveillance of the Press Council. A problem occurs regarding the publishers that did not join the Press Council’s data protection system. As there is no state authority that is responsible to monitor the editorial data protection in the press, it is to be assumed that the non-members to the system will be regarded as any other private company. This means, that all the provisions of the federal data protection act will be applicable and, thus, the publishers will in fact not enjoy the privilege of the press.

34 Available in German language at: http://www.presserat.de/Selbstverpflicht-tungs.185.0.html.
Everyone has the right to complain about newspapers, magazines or the editorial content of publisher’s online-services. The decision-making process is laid down in the complaints order (”Beschwerdeordnung”).

After the receipt of a complaint, the head of the complaints committee and the office are considering it. If the complaint is not justified, they inform the person who had submitted it. If the complaint is justified, the concerned media is asked for a statement. Then the complaints committee decides about the case. If the complaint was justified, the committee takes measures against the medium. If a complaint has fundamental importance, the plenum of the Press Council decides on it (§ 3 Beschwerdeordnung).

Possible sanctions are:

1. public reprimand (with the obligation to print it)
2. non-public reprimand (without obligation to print it, e.g. to protect the victim)
3. statement of disapproval
4. comment

§ 13 of the Beschwerdeordnung provides the conditions for the decision which of the sanctions to choose.

The petitions of the parties are not binding – even if a petition is discontinued, the Press Council can follow up the matter due to e.g. the ethics of the press.

If a newspaper or a magazine receives a public reprimand, it is obliged to print it in one of the following issues. Most of the German publishers (about 90 %) signed a declaration about the obligation to print such reprimands.

The Press Council is not interested in taking the position of judges; it is rather interested in dialogue and criticism to establish professional ethics.

Furthermore, the Press Council takes action to prevent data protection infringements. It publishes e.g. guidelines about data protection and organises events to keep journalists and publishers informed about important data protection issues.

There are instructions available at the internet on how to make a complaint. There is also a sample letter available that can be filled in if someone wants to make a complaint.
The cases the Board of Complaint has decided on are published annually in the yearbook of the Press Council.

The transparency in respect of the monitoring of the data protection is archived by the regularly published reports on the work of the Press Council.

*f) Supervision of the System*

There are no supervisory instances. Only the self-commitment on data protection had to be approved by the state regulatory authority with regard to the Federal Act on data protection. Only publishers that did not accept the self-commitment are then under the supervision of the delegates of the state on data protection.

*g) Impact Assessment*

In 2003, there had been 682 complaints at the Press Council. Out of this there were 542 cases to be examined. The decisions in 2003 were not only about complaints received in 2003 but also about complaints received in 2002. The Press Council decided in 232 cases. It arrived 82 times at the conclusion that the issues were obviously no breach of the Press Code. 20 times it made public reprimands, 6 times non-public reprimands, 49 statements of disapproval, 55 comments and in one case there was no measure at all.

Most of the complaints were made by private persons, and mostly the complaints were against local newspapers, followed by the yellow press.

Concerning the data protection there had been 8 complaints in 2003.

There is an overlap in state and non-state regulation, for the state press laws provide also an obligation of diligence. But the state has no specific authority that could enforce this obligation. The impact of the press code and the relevant decisions by the Press Council in this respect are that they serve as benchmarks for the courts.
2. Part II: Leading Cases

a) Advertising

In an article of a local newspaper, it is reported that the city attracts stars to do their shopping there. A local jeweller is introduced as especially worthwhile, who reports detailed of his prominent customers in an interview. There is also a photo beside the article that shows the jeweller together with one of his prominent customers. The star is clearly interested in a brand watch which name is to see in the background.

One reader complained that the article had been surreptitious advertising. The publisher admitted that the article was in breach of the Press Code. He announced that the journalists were again informed to pay more attention to the Press Code.

The Press Council decided, that § 7 of the Press Code was breached. Without any public interest the article informed about a company and its clients.

The Council did not sanction the publisher due to its promise to consider the case accurately.

b) Ad-Cover

A local newspaper published one issue with a big advertising on the front page. Page 3 of the same issue contained the "real" front page. One reader complained that the basic principle of separation of advertising and editorial content was breached.

The Press Council rejected that complaint. This form of advertising did not breach § 7 of the Press Code. The advertising had been clearly recognizable.

c) Advertising

A local newspaper presented a local bakery in its business section. It was portrayed as a company that expands despite of fierce competition. It was also mentioned that during the Olympic Games there would be a gift coupon in the newspaper for one product of this bakery.

One reader complained that this article contained surreptitious advertising. The headline of the page would have to be “Business partners in portrait”.

294
The chief editor of the newspaper declared that there was cooperation with the bakery during the Olympic Games. The readers had been informed about this campaign in the local section. After this, the article in the business section had been published. Usually, in the business section local companies were presented. The fact of the advertising cooperation could not be the reason not to report on the bakery. Furthermore, it would be rather fair to inform the readers again about the cooperation.

The Press Council decided that the article had been a breach of no. 7 Press Code and issued a public reprimand. The article had not been an objective coverage because the detailed description of the products had apparently been advertising. This form of reporting would not be covered by the public interest. Furthermore, taking the article in connection with the actual advertising cooperation of the newspaper and the bakery would not be adequate. To publish this article in the business section had been a breach of the basic principle of separation of advertising and editorial content.

d) Data Protection

The main focus of the complaints had been publications with the unauthorised use of personal data or pictures. Thus, the cases have a strong connection to the rights of the person.

In a report about historic criminal cases, a local newspaper described an act of violence in the year 1964. The night-watchman of a cooperating farming organisation had been slayed. The newspaper reported about the man who had been arrested and printed his surname and the initial letter of his name. The headline was “The LPG-murderer”. The man had been condemned of manslaughter and fire-setting, and had been released from prison in 1979. His wife complained at the Press Council that her husband was called a “murderer” in the headline, despite of his condemnation of manslaughter, which is not as severe as murder. She objected further, that through the publication of the name, the re-socialisation of her husband had been destroyed. She and her husband were still living near the site of the crime in rural surroundings where people know each other.

The author argued that he did not know that the man was still living in that area. He said that the headline had been justified for the crime is still known as the “LPG-murder”.

The Complaints Council decided that the newspaper infringed the Press Code and chose as sanction a public reprimand. It would be a severe breach of the duty to take care of personal
data that the newspaper wrote about the manslaughter as murder. Through the issuing of the surname and the initial letter of his name, the man would be easy to identify in the rural area. The rehabilitation had been endangered due to the anonymisation only in parts. The Complaints Council requested the newspaper to ensure, that the infringement would not persist. Accordingly that issue of the newspaper has to be removed from public archives. Particularly, a correction will have to be issued.

3. Part III: Assessment According to the Criteria for Determining which Types of Regulation Are Covered by the Study

The “traditional” part of the Press Council, i.e. the part dealing with complaints about the basic ethics of the press, cannot be assessed as a co-regulative system. Some of the criteria are matched, but the link between the non-state-regulatory system and state regulation is missing: there is no legal basis for the non-state regulatory system. Indeed, one connection to the state exists by the “Law on the guarantee of independence of the Press Council’s board of complaint”. But the funding that is provided does not establish any further cooperation of the Council and the state. Precisely that funding shall support the independence of the Council and the state does not gain any influence from it.

The part of the Press Council that deals with the data protection could be regarded as a co-regulatory system. It is provided in the Federal act on data protection as well as in the press laws of the states that data protection within the press sector may be monitored by self-regulatory bodies. Furthermore, there is a real division of power between non-state and state actors: The Press Council is responsible to deal with the complaints that are made about those publishers that signed the self-commitment. The state is responsible (or: may be responsible) for the ones that did not sign the self-commitment and for the other media, as long as there are no self-commitments.
3.9. Greece

I. Co-operative Regulatory Systems in the broadcasting sector

1. Part I: The co-operative regulatory system

a) Development of the regulatory system

Co-operative regulatory systems in the Greek broadcasting sector were introduced in the 1990s. Up to that time only legal and administrative rules applied. Greek Laws 2328/1995 and 2644/1998 were (and still are) the main legal instruments applied to the broadcasting sector. However, EC broadcasting policies had an effect on Greek regulators who from the 1990s onwards have attempted to incorporate co-regulatory measures in the media sector. Economic and technological developments, as well as the changing global regulatory climate towards introducing more flexible media rules, were additional factors influencing regulatory thinking in Greece.

As a response to the changing regulatory environment, Article 9, chapter B of the Greek law 2863 / 2000, published in the Hellenic Government Official Gazette A, 262 / 29 November 2000, provided for self-regulation mechanisms by instituting self-regulatory bodies in respect of radio and television services. Under the new legislation, holders of authorisations (both private radio and television channels broadcasting without encryption and suppliers of encrypted radio and/or television services) must conclude multi-lateral contracts in which their parties define the rules and ethical principles governing the programmes broadcast. There must be at least two parties to the contract; other radio and television bodies may be invited to sign subsequently. Failure to conclude or sign a self-regulation contract would constitute a violation of the legislation in force and result in the NCRTV withdrawing or suspending the corresponding authorisation. The ethical rules provided for in the self-regulation contracts may under no circumstances be contrary to the legislation in force (see Kostopoulou, 2001).

In the context of this new flexible and liberating regime, interested parties, such as broadcasters and advertisers, accepted some responsibility for developing co-regulatory codes of practice,
which prior to the 1990s did not exist in the broadcasting regulatory framework. There are three relevant co-regulatory systems:

- Code of ethics for journalists and audiovisual programs
- Code of conduct for news and other political programs
- Code of advertising and communication standards

b) Subject-matter of the regulatory regime

b.1. Code of ethics for journalists and audiovisual programs

This code was decreed by the National Council for Radio and Television (NCRTV) and published in 1990 as part of a collective contract signed by the Association of Athenian Journalists (ESIEA) and the management of the Greek Public Broadcaster ERT. The rules in the code apply to public broadcasting - national and local, as well as to private radio and television stations.

In terms of journalists, the Code states that:

- Journalism is a function
- Truth and its presentation constitute the main concern of the journalist
- The journalist defends everywhere and always the freedom of the press, the free and undisturbed propagation of ideas and news, as well as the right to opposition
- The religious convictions, the institutions, the manners and customs of nations, peoples and races, as well as citizens' private and family life are respected and inviolable
- The primary task of the journalist is the protection of people's liberties and democracy, as well as the advancement of social and state institutions
- Respect for national and popular values and the protection of people's interests should inspire the journalists in the practice of their function
- The journalists while practicing their function reject any intervention aimed at concealing or distorting the truth
• The access to sources of news is free and undisturbed for the journalist, who is not obliged to reveal his/her information sources
• The function of journalism may not be practiced for self-seeking purposes (see European Institute for the Media, 2004, pp. 90-91; also International Journalists’ Network).

The journalists do not accept any advantage, benefit or promise of benefit offered in exchange for the restriction of the independence of their opinion while practicing their function.

In terms of audiovisual programs, the Code stipulates that:

• broadcast programs must be of high quality and promote the national culture;
• news and factual programs should be accurate and conform to reality;
• the Constitution, laws and institutions of the country must be respected;
• the writing of programs and their presentation must carefully conform to the grammatical rules of the Greek language;
• during the programs, the rule for both presenters and guests is to be well-mannered, especially when the programs are meant for or could be watched by under-age children (see International Journalists’ Network).

Of particular interest is Article 9 (Protection of Minors), which provides that:

• The preparation and presentation of entertainment programs must take into account the negative influence they can have on under-age listeners and viewers, if they are aired at the time of day when that part of the public is watching.
• Entertainment programs which show acts of torture on human beings or animals, or which show violent scenes should not be aired at times when minors are watching, unless the aim is explicitly educational.
• Programs should not contain pornographic acts or unjustified scenes of violence, likely to seriously harm minors' physical, psychical or moral balance. If such scenes are shown, all necessary steps must be taken to avoid that minors view such programs.
b.2. Code of conduct for news and other political programs

In addition to the above code, a code of conduct for news and other political programs for journalists working for broadcast media was ratified by a Presidential Decree (77/2003) in March 2003. This code of conduct was drawn up in accordance with the procedure set out in Article 3(15) of Law 2328/1995. The code was developed by the NCRTV in consultation with the national federation of the reporters' associations, with advertising agencies, and public and private broadcasters.

The new code of conduct applies to all radio and television broadcasts, both free-to-air and subscription services. It aims at the protection of individuals' rights and respect for public order, pluralism and democracy, within the framework of the Greek constitution (Article 15), which provides that audio-visual media must ensure quality demanded by the social role of radio and television and the cultural development of the country.

The new code of conduct regulates specific issues relating to the presentation of news bulletins, reporting on legal proceedings, the protection of the presumption of innocence of the accused, as well as the protection of minors, especially when children or adolescents are involved in criminal acts or accidents. Special concern is demonstrated for the protection of private life and of the rights of individuals who participate in radio and television programmes and talk shows. According to the new rules of conduct for news reports and political programmes, the broadcasting of information acquired through illegal telephone bugging, secret microphones or cameras is forbidden. It is also explicitly stipulated that the broadcasting media are bound to respect and not to transmit aggravating comments regarding the refusal of an individual to participate in a news programme (see Kostopoulou, 2003).

News should be presented with due accuracy and impartiality. Events must not be confused with personal views expressed by journalists during a news or political programme. The broadcasting of breaking news must be restricted and take place after careful consideration. Special attention is given to the presentation of violence and the reporting of crimes, criminal techniques and terrorist acts. Such reporting must in no way encourage imitation. Also, it is explicitly laid down that reporters' investigations must not be a substitute for police inquiries and interrogations. During
the coverage of protests or party political events it is forbidden to use methods that encourage misleading the audience (ibid). The above decree entered into force on 28 June 2003.

b.3. Hellenic code of advertising and communication standards

As stipulated by Law 2863/2000, the holders of operating licences for free-to-air radio and television stations, along with the Greek association of advertising companies and the Greek advertising federation, drew up the Hellenic advertising and communication code governing the content, presentation and promotion of adverts by the licence holders. The code applies to all forms of advertising of all kinds of products and services as well as to all forms of commercial and public communication. The code specifies the rules of professional etiquette and ethics which must be observed in relation to citizens / consumers by all parties involved in advertising - that is, advertisers, advertising agencies, and advertising media, as well as by all parties involved in demanding or supplying the aforementioned forms of communication. Issues that might arise out of the co-regulatory process are addressed by two committees: a first-instance committee for the control of advertisements, and a second-instance joint committee for the control of advertisements (see below).

The main principles of the code are as follows:

- Every advertisement must be legal, proper, honest, and accurate.
- Every advertisement must be created in a spirit of social responsibility and comply with the principles of fair trade as these are generally understood in business.
- Advertisements must not undermine public trust in advertising activities.

In terms of rules, of particular importance are the code’s applicability to the protection of privacy, the exploitation of reputation, as well as children and young people. More specifically:

Art. 8 (Protection of privacy) provides that:
Advertising must not refer to or depict any individual - either private or public person - without his or her prior consent. Moreover, advertising must not refer to or depict the property of any natural or legal entity without its prior consent in a manner that may cause the impression of its personal approval.
Art. 9 (Exploitation of reputation) provides that:

- Advertising must not make unjustified use of the name or acronym of any company, enterprise, house, organization, or foundation.
- Advertising must not take advantage of the good reputation of the name and the logo of another company or product, or of the favourable impressions created by another advertising campaign.

Art. 14 (Children and young people) provides that:

- Advertisements must not take advantage of the natural credulity of children or the lack of experience of young people.
- Advertising which is directed to children or young people or which is liable to influence children or young people must not contain elements or illustrations which might result in their mental, moral, or physical harm.

c) Basis of the co-operation

As mentioned above, Article 9, chapter B of the Greek law 2863 / 2000 provided for self-regulation mechanisms by instituting self-regulatory bodies in respect of radio and television services. Responding to this, broadcasters and advertisers accepted some responsibility for developing co-regulatory codes of practice. The outcome of this changing regulatory philosophy has been the design of the three codes of conduct described above. In this sense, the legal basis of this cooperative regime is legislative since there is a legal basis for the cooperative regime as far as development of the codes is concerned.

However, the task of ensuring compliance with the rules contained in the self-regulation contracts is entrusted to the Internal Ethical Committees designated by the contracting parties themselves. In the event of violation of the rules contained in the contracts, the Ethical Committees may impose moral penalties, e.g., the obligation to broadcast messages or special programmes, etc. Failure to abide by the decisions of the Committee imposing such penalties would constitute a violation of the legislation in force, thereby incurring the penalties provided for by law, which are imposed by the NCRTV. The Internal Ethical Committees may also be entrusted with the power to investigate complaints and ensure exercise of the right of correction on the part of natural or legal persons whose honour or reputation has been damaged or whose strictly personal rights have been infringed (Kostopoulou, 2001).
Concerning the advertising code in particular, it was Law 2863 / 2000 which provided that the radio and television bodies, EDEE (Hellenic Association of Advertising and Communication Agencies), SDE (Hellenic Advertising Association), and any other representative body in the advertising sector, may draw up an ethical code of practice concerning the content and the presentation of advertising messages broadcast by the electronic media. Therefore, it can be inferred that the basis for this cooperative regime is a legal one. However, the above organisations have set up a non-profit company for the purpose of ensuring that advertising messages broadcast by the electronic media respect both the legislation in force and the ethical code of practice. Producers of advertising messages and duly authorised radio and television bodies or suppliers of encrypted radio and television services or unions or associations of the same - may also be associate members of this non-commercial partnership. Representatives of written press companies may also be associate members if, according to the articles of association, the company's objects also include investigating advertising messages published in the written press. The non-commercial partnership is to provide its members with an opinion on whether an advertising message complies with the regulations in force before it is broadcast. In exceptional cases a message may be considered after it has already been broadcast once (Kostopoulou, 2001).

d) – e) Institutions involved in the system and its functioning

With respect to the Hellenic code of advertising and communication standards, responsibility for adhering to the code's rules lies with advertisers, advertising agencies, and publishers or owners of printed, electronic and other advertising media, or their legal representatives. According to Art. 14 of the code: (a) Advertisers assume general responsibility for their advertisements; (b) Advertising agencies must ensure that the advertisements which they create, edit, or distribute to the news and other advertising media do not contravene the Code. Advertising agencies must also bring to the attention of advertisers any deviations from the letter and / or the spirit of the Code and help advertisers adhere to it; (c) Advertising media must exercise appropriate control before approving of advertising and presenting it to the public.

The responsibility for adhering to the code's provisions covers all forms of advertising, including testimonials, statements, and illustrations, which are derived from other sources. The fact that the
content or the form is derived in whole or in part from another source by no means justifies an unqualified exemption from adhering to the rules. No advertiser, advertising agency, or party involved in demanding or supplying the aforementioned forms of communication, publisher, owner of printed, or electronic, or other advertising media, or legal representative thereof, must be involved in any way whatsoever and for any reason whatsoever in exhibiting advertising which the competent authority which controls implementation and enforcement of this code has declared as contravening the provisions of the present code (see Art 14 of the code).

The competency and responsibility for the implementation and enforcement of the code lies with a civil company for the control of advertising which was established according to the provisions of Greek law 2863 / 2000. The civil company (entitled ‘Symboulio Elegxou Epikinonias’ (Council of Supervising Communications) – SEE (web site: http://www.see.gr), which is a member of EASA - the European Advertising Standards Alliance, is funded by its members’ contributions (among its members are EDEE and SDE), as well as the fees of companies that submit complaints for investigation. It should be noted that individuals or representatives of consumer associations can submit complaints to be investigated for free (i.e. they are not required to pay a fee). Two commissions for the control of the content of advertisements and all other forms of commercial, political, and public communication were also established - a first-degree commission, which - besides processing appeals - advises on applications for preliminary approval and also ex officio addresses potentially contravening advertisements and / or other forms of commercial and public communication, and a second-degree commission to process appeals against decisions by the first-degree commission. In 2004 the first-degree committee issued 46 decisions instigated by own initiative or following complaints, while the second-degree committee issued 15 decisions.

All parties which are involved in the system of communication in any way - as advertisers, advertising agencies, parties involved in demanding or supplying the aforementioned forms of communication, publishers, owners of printed, electronic or other advertising media - have a moral and legal obligation for self-regulation and self-control in order to adhere closely to the provisions of the code regarding all advertising material and comply with the decisions of the regulatory commissions.
f) **Supervision of the system**

Responsibility for the overall supervision of the system lies with NCRTV. However, in the case of the Hellenic code of advertising and communication standards, the competency and responsibility for the implementation and enforcement of the code lies with the civil company SEE.

g) **Impact assessment**

Impact assessment associated with the co-regulatory mechanisms takes place within the framework of the institutions concerned. Official documents are limited and the author is not aware of any evaluation/assessment of the system.

2. **Part II: Leading cases**

No cases in relation to the above codes have been dealt with by a court of law.

Concerning the Hellenic code of advertising and communication standards in particular, the cases which illustrate how the system works are SEE decisions and findings on investigations of breaches of codes. These tend to be subject-specific. An example is the Decision No. A3149 of 22 May 2005. In this decision the first-degree committee investigated a complaint that was initiated by BOLD OGILVY, TIM. It concerned a communication (i.e. an advertisement) by the mobile telephone company COSMOTE to promote its products. The committee concluded the following: that the assertions in the advertisement that “you talk to everybody and do not pay” and that “it is better to talk for free” are general, absolute, not substantiated and tend to exaggerate. The committee considered that it is likely for the user who takes advantage of this promotion to eventually end up paying, for instance, by exceeding the free time allocated, or by using other services. For this reason, the committee decided that the communication under review breaches art. 4, para 1 of the advertising code, and as a result it needs to be amended within three months.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Three codes of conducts in the broadcasting sector

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
</tr>
<tr>
<td>The three codes of conduct, notably the code of ethics for journalists, the code of conduct for news and other political programs, and the advertising and communication code, have been set up by the regulatory body NCRTV.</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge.</td>
<td></td>
</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
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</table>
The code of advertising and communication standards is handled by the civil company SEE (member of EASA). This body has considerable discretion in the administration of the complaints system through its first-, and second-instance committees. It is also financially independent as it is funded by its members’ contributions, as well as the fees from companies that submit complaints for investigation.

With regards to the code of ethics for journalists and audiovisual programs, complaints concerning the quality of programs are first examined by the director general or whoever is in charge of the station. Next, if need be, it is examined by the NCRTV (see Art. 11 of the code entitled how complaints are examined’).

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation Measures by third parties (e.g. NGOs) The range of possible subjects of non-state action has to be limited to make the definition workable.

The codes are addressed to broadcasters, advertisers, journalists and other interested parties.
<table>
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</tr>
</thead>
<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
<td></td>
</tr>
<tr>
<td>Yes - the system is established to achieve public policy goals, including the protection of minors (esp. with regards to the advertising code), freedom of expression and truthfulness in news presentation (esp. with regards to the code of ethics for journalists), as well as accuracy and impartiality in news and current affairs (esp. with regards to the code of conduct for news and other political programs).</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to</td>
<td></td>
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</table>
The co-operative regulatory system was set up by legislation. Greek law 2863 / 2000 provided for self-regulation mechanisms by instituting self-regulatory bodies in respect of radio and television services. Under the new legislation, owners of broadcasting channels must conclude multi-lateral contracts in which their parties define the rules and ethical principles governing the programmes broadcast. The development of the three codes of conduct outlined above took place within this context.

In particular, the code of ethics for journalists and audiovisual programs was decreed by the National Council for Radio and Television (NCRTV) and published in 1990 as part of a collective contract signed by the Association of Athenian Journalists (ESIEA) and the management of the Greek Public Broadcaster ERT.

The Presidential Decree 77/2003, published on 28 March 2003, ratified a new code of conduct for news and other political programmes drafted by the NCRTV. This code of conduct was drawn up in accordance with the procedure set out in Article 3(15) of Law 2328/1995. Under this Article, prior to the elaboration of codes of conduct, the NCRTV must seek the opinion of the National Federation of the Reporters’ Associations, as well as the opinion of the
Advertising Agencies and advertisers’ representative associations, of the public broadcaster (ERT-S.A.), of the private broadcasters and of the associations representing local radio stations.

The state/EU leaves discretionary power to a non-state regulatory system

Traditional regulation

Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.

The code of advertising and communication standards was elaborated by the NCRTV, but it is practised by the civil company SEE which has considerable discretion to handling complaints.

Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system

Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.

The state uses regulatory resources to influence the non-state regulatory system

The revision of the codes is subject to the NCRTV.
3. Part III: Assessment according to the criteria for determining which type of regulation are covered by the study

a) The non-state regulatory part of the system

The three codes of conduct described above, notably the code of ethics of journalists, the code of conduct for news and other political programs, and the advertising and communication code, have been set up by the regulatory body NCRTV. However, the code of advertising and communication standards is practised by the civil company SEE. This body has considerable discretion in the administration of the complaints system through its first-degree and second-degree committees. It is also financially independent as it is funded by its members’ contributions, as well as the fees from companies that submit complaints for investigation.

With regards to the code of ethics for journalists and audiovisual programs, complaints concerning the quality of programs are first examined by the director general or whoever is in charge of the station. Next, if need be, it is examined by the NCRTV (see Art. 11 of the code entitled ‘how complaints are examined’).

b) The link between the non-state part and state regulation

The co-operative regulatory system was set up by legislation. Greek law 2863 / 2000 provided for self-regulation mechanisms by instituting self-regulatory bodies in respect of radio and television services. Under the new legislation, owners of broadcasting channels must conclude multi-lateral contracts in which their parties define the rules and ethical principles governing the programmes broadcast. The development of the three codes of conduct outlined above took place within this context.

In particular, the code of ethics for journalists and audiovisual programs was decreed by the National Council for Radio and Television (NCRTV) and published in 1990 as part of a collective contract signed by the Association of Athenian Journalists (ESIEA) and the management of the Greek Public Broadcaster ERT.
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

The Presidential Decree 77/2003, published on 28 March 2003, ratified a new code of conduct for news and other political programmes drafted by the NCRTV. This code of conduct was drawn up in accordance with the procedure set out in Article 3(15) of Law 2328/1995. Under this Article, prior to the elaboration of codes of conduct, the NCRTV must seek the opinion of the National Federation of the Reporters' Associations, as well as the opinion of the Advertising Agencies and advertisers' representative associations, of the public broadcaster (ERT-S.A.), of the private broadcasters and of the associations representing local radio stations.

The code of advertising and communication standards was elaborated by the NCRTV, but it is practised by the civil company SEE.

**Conclusion:** The development of co-regulatory mechanisms, and in particular the drafting of the three codes of conduct described above, exists alongside statutory legislation. It should be noted though that the co-regulatory system was established by administrative legislation. The three codes have been elaborated by the regulatory agency NCRTV, so they cannot be considered as purely self-regulatory mechanisms. Also, the NCRTV has overall responsibility of the system. It is only the code of advertising as practiced by SEE that can perhaps be considered as purely co-regulatory system.

II. Co-operative Regulatory Systems in the internet sector

1. Part I: The co-operative regulatory system

   a) Development of the regulatory system

In terms of administrative legislation, it is the national telecommunications and post commission (EETT), established in 1992 by Act 2075, which supervises and regulates the telecommunications, postal and online services markets.

Economic and technological advances, as well as the changing global regulatory climate towards introducing more flexible media rules, influenced greatly regulatory thinking in Greece. The liberalisation of telecommunications in the late 1990s and the setting up of alternative network infrastructures raised the issue of internet regulation. Legal questions
came to the fore concerning intellectual property, trademark law and domain names, illicit and harmful content, privacy protection, data protection, liability of service providers, internet crime, and e-commerce. The development of the Internet and its potential to harm minors provided a strong incentive to apply regulation in an area formerly left unregulated. In this context there has been some debate concerning the introduction of co-operative regulatory systems.

b) Subject-matter of the regulatory regime

No umbrella association of Internet Service provides (ISPs) has so far been set up to address these issues. Individual companies, such as the national telecommunications provider OTE, have developed their own codes of practice to cover telecommunications services provided by them. Following a fraud case in 2004 (see ‘Leading Cases’ below), there has been discussion among the largest mobile operators in order to construct a code of practice in order to safeguard both themselves and their customers from such events. There are two views as to who will be responsible for designing and implementing such a code. Some industry players believe that EETT should be responsible for that, while others suggest that the code should be developed by the companies themselves. Regarding the content of the code, it is widely assumed that it will be based on the ICTIS code of practice developed in the UK.1

Despite the absence of an umbrella association of ISPs, in 1999 Greece witnessed the setting up of two self-regulatory organisations. First, in early 1999 the Education and Religious Affairs Ministry set up the Greek School Network (GSN, website: http://www.sch.gr), essentially the education system’s Intranet, providing telematic services for primary and secondary schools as well as administrative units. The funding

1 ICSTIS Code of Practice – ICSTIS (Independent Committee for the Supervision of Telephone Information Services) is a co-regulatory body that has responsibility for the regulation of premium rate services delivered over electronic communications networks. This Code of Practice has been developed by Orange, O2, T-Mobile, Virgin Mobile, Vodafone and 3 for use in the UK market. The ICSTIS Code of Practice can be found at www. icstis.org.uk.
for devising and operating this service comes from national and European public sources, i.e. it is co-funded by the EU ‘Safer Internet Action Plan’ (web site: http://www.saferinternet.org). Its aim is to protect pupils from exposure to harmful Internet content.

Second, in November 1999, a non-profit self-regulatory body for Internet content, known as SAFENET (‘Greek Self-regulating Organisation for Internet Content’), was set up. The establishment of the organisation was an EETT initiative and was founded and supported by several Greek organisations including the largest Internet Service Providers HELLAS-ON-LINE, OTEnet and FORTHNET, the Greek national research network, the Greek association of Internet users, and the largest Greek consumers association EKPIZO. SAFENET is supported by private funding (i.e. company contributions). Its aim is to safeguard and promote self-regulation arrangements for safer use of the Internet through combating illegal and offensive content on the Internet. SAFENET ensures compliance with the regulations of the European network of hotlines INHOPE, participates in the organised events and ensures close cooperation (see http://europa.eu.int/information_society/activities/sip/projects/hotlines/greece/index_en.htm).

Since March 2003 SAFENET has been operating the hotline SAFELINE. This was a response to an urgent need to control and restrict the flow of illegal content on the Internet (i.e. child pornography, illegal acts with minors as victims). This hotline (http://www.safeline.gr) receives complaints regarding crimes committed via the Internet and reports them to the police. Its primary objective is to combat child pornography on the internet, and secondarily to protect against racism, electronic card gaming, and data protection. An additional objective is to raise awareness of issues regarding illegal and harmful content. For this purpose it provides advice for parents, guardians and children as to how to use the internet safely. In its site it includes information on technological developments, such as Internet filters which lock specific sites. For the convenience of the users, it also contains a list of common questions with answers. The primary role of the SAFELINE is to create an open space for internet users who wish to report cases on
indecent content and use. It can be considered as a ‘bridge’ between citizens and the police force. SAFELINE normally considers cases following reports submitted by individuals or companies.

c) Basis of the cooperation

The setting up of the non-profit body SAFENET was an initiative by the regulatory agency EETT. Following this initiative, eight ISPs and computer companies, along with two non-profit organisations joined forces to establish this civil-law non-profit body entitled SAFENET (see Letter ref. 6715/A/4777 by C. Chalastanis to N.G. Van der Pas). The body functions independently and is supported by several Greek Internet industry corporations and organisations (see below).

The setting up of the hotline SAFELINE was an initiative by SAFENET. The right of the establishment of the SAFELINE derives from the constitutional right (as expressed in Arts. 10 and 12 of the Greek Constitution) of all Greek citizens to report to the public authorities cases that might affect their personal and/or social rights. Apart from the provisions of the Greek Constitution, the legal framework within which SAFELINE was established were the Civil code (especially Arts. 36, 42 which define the citizens’ rights to report crimes and the ways to do it) and laws 2774/1999 (dealing with intellectual property rights and data protection) and 2225/1994 (dealing with the right to remain anonymous – this right applies in every communication between SAFELINE and an internet user).

d) Institutions involved in the system, especially their funding and management

SAFENET is the industry body responsible for promoting self-regulatory procedures for the safer use of the internet, so as to protect children from being exposed by sites of indecent content (i.e. pornographic, violent, racist). SAFENET is a non-profit organisation supported by the following Greek internet industry corporations and organisations:
- FORTHNET
- OTEnet
- COMPULINK
- GROOVY
- HELLAS-ON-LINE
- IDEAL TELECOM
- GRNET S.A. (Greek research and technology network)
- EEXI (Association of Greek Internet users)
- EKPIZO (Consumers association for the quality of life)
- ACROPOLIS NET
- HELLAS NET

SAFELINE is funded by the following organisations/bodies:

- European Safer Internet plus Program
- SAFENET (industry body responsible for promoting self-regulatory procedures)
- FORTNET (Internet Service Provider)
- ITE (Foundation for research and technology – available at: www.forth.gr)
- IME (Foundation of the Hellenic World – available at: www.fhw.gr)

\( \text{\textit{e) Functioning of the system}} \)

As already mentioned, under the scheme citizens can complain to the SAFELINE about Internet content. SAFELINE has the power to investigate complaints submitted and for this purpose it cooperates closely with the police force. It normally investigates complaints put down by individuals, but can also act in its own will (however, in some cases, such as the case of an insult, there is a requirement for a complaint to be submitted). It accepts for investigation every complaint relating to indecent or harmful content on the Internet. Nevertheless, the most frequent cases are the following:
Child pornography (in considering these cases investigations take into consideration No. 348A of the Greek Civil code, as amended by Law 3064/2002, which defines ‘child pornography’ and sets the penalties for committing such a crime; additional legal instruments that are taken into account are Law 5060/1931 relating to indecent press releases, as well as the Convention of United Nations for the Rights of the Children, which was ratified by Law 2101/1992)

Racism and violence (here any investigation takes into account the Greek Constitution which stipulates that all citizens, regardless of their race, ethnicity, language or religious and political preferences should enjoy freedom of life and respect of their honour; also No. 330 of the Greek Civil code, which defines the penalties for proceeding into violent acts)

Terrorism (here, relevant are: Law 1789/1988 which ratified the European Convention for Combating Terrorism; Law 2928/2001 which amended No. 187 of the Greek Civil code relating to terrorist organisations; and Law 3034/2002 which ratified the International Treaty that prohibited the funding of terrorism).

The steps that are followed by the SAFELINE for examining complaints are:

- In the first instance, a preliminary checking takes place regarding the content of the complaint. For example, if it concerns an Internet site, SAFELINE checks that the URL really exists and that its content is potentially illegal
- Following this, there is an attempt to figure out the country of origin of the content by using advanced technological methods
- The next step is to inform the Greek police force. Every complaint, regardless of the country of origin, is forwarded to the police
- In cases where the content originates from abroad, the complaint is processed to the hotline (if any) of the country of origin
- Finally, in cases where the person who submitted the complaint made their personal contact details known, SAFELINE informs them of the steps/actions taken based on their complaints.
f) Supervision of the system

Responsibility for the operational aspects of the system lies with the Internet industry. There are no specific legal requirements for ISPs. However, the relevant provisions of the Greek Constitution and Greek civil and penal law, as described above, apply to combat illegal and offensive Internet content.

g) Impact assessment

The author is not aware of any impact assessment carried out in relation to the activities of ISPs.

2. Part II: Leading cases

There is limited access to the details of SAFELINE investigations and decisions that identify prohibited Internet content. As a result there is a lack of published information regarding particular cases.

However, the author would like to mention a particular case that triggered the discussion about developing a code of practice among mobile telephony providers. In September 2004 the Police Department of Commercial Fraud arrested an Audiotext TV program producer for fraud. The program in question showed two almost identical photos and was encouraging the viewers to identify the differences and then call a Premium rate number to report them. Literally, thousands of people called to answer the question and win 50,000 Euros! The bizarre thing was that the majority of callers gave wrong answers, despite the fact that there were a couple of extremely obvious differences between the photos. In fact, that was the incentive for the Police decision to investigate the legality of that show. During the investigation it came out that most of the callers were on hold for the maximum time a Premium rate call lasts (i.e. 15 minutes). It was also discovered that all the call answers were fake (it was actually employees of the producer that made the calls), thus both the content provider and the TV producer managed to earn a great
amount of money. This case resulted in people losing their trust on such services. This situation alarmed mobile telephony companies and provided the incentive to start a discussion about developing a code of practice.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Internet Sector

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
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<tr>
<td>The non-profit self-regulatory body SAFENET was set up following an initiative by the regulatory agency EETT. The establishment of the hotline SAFELINE was an initiative by SAFENET.</td>
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<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
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<tr>
<td>SAFENET is supported by several Greek organisations including the largest Greek Internet Service Providers, the</td>
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</table>
including the largest Greek Internet Service Providers, the Greek national research network, the Greek association of Internet users, and the largest Greek consumers association.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation

Measures by third parties (e.g. NGOs)

The range of possible subjects of non-state action has to be limited to make the definition workable.

Both SAFENET and SAFELINE are supported by private funding (i.e. company contributions) and the hotline has the power to investigate complaints regarding illegal use of the Internet. It cooperates closely with the police and other European hotlines.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criteria</td>
<td>Cases excluded by this criterion</td>
<td>Explanation</td>
<td>Additional remarks</td>
</tr>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors)</td>
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<tr>
<td>Yes - the system is established to achieve public policy goals, including raising awareness and the protection of minors from accessing illegal and/or harmful Internet content.</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
<td></td>
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<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td></td>
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<tr>
<td>The establishment of SAFENET was an EETT initiative, but EETT has no legal provision to intervene or impose sanctions.</td>
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<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
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<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
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<tr>
<td>There is close cooperation between the regulatory body EETT and ISPs to promote public awareness. EETT influences the non-state regulatory system through publishing discussion papers and organising conferences in which non-state organs participate.</td>
<td></td>
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</tbody>
</table>
3. Part III: Assessment according to the criteria for determining which type of regulation are covered by the study

a) The non-state regulatory part of the system

The non-profit self-regulatory body SAFENET was set up following an initiative by the regulatory agency EETT. However, it was founded and supported by several Greek organisations including the largest Greek Internet Service Providers, the Greek national research network, the Greek association of Internet users, and the largest Greek consumers association. The establishment of the hotline SAFELINE was an initiative by SAFENET. Both SAFENET and SAFELINE are supported by private funding (i.e. company contributions) and the hotline has the power to investigate complaints regarding illegal use of the Internet. It cooperates closely with the police and other European hotlines. Therefore they can be considered as non-state bodies.

b) The link between the non-state part and state regulation

The establishment of SAFENET was an EETT initiative, but EETT has no legal provision to intervene or impose sanctions. However, there is close cooperation between the regulatory body EETT and ISPs to promote public awareness. EETT influences the non-state regulatory system through publishing discussion papers and organising conferences in which non-state organs participate.

Conclusion: There is little evidence of a substantial link between the co-regulatory system and the statutory regulation as exercised by EETT. Consequently the system of regulating online services cannot be considered as a co-regulatory system in the meaning of this study.

Bibliography


Letter ref. 6715/A/4777 datelined Brussels 1 August 2003 from Constantin Chalastanis of the Greek permanent representation to N.G. Van der Pas.
3.10. Hungary

I. Co-operative Regulatory Systems in the advertising sector

1. Part I: The co-operative regulatory system

The self-regulatory element of the Hungarian regulatory system related to advertising is characterised by the duality of the existing self-regulatory bodies. Beside this institutional duality it also has to be noted that both of the two self-regulatory bodies – the Hungarian Advertising Association (Magyar Reklámszövetség, MRSz)\(^1\) and the Hungarian Advertising Self-regulatory Board (Önszabályozó Reklám Testület, ÖRT)\(^2\) – apply the same code of conduct.

a) Development of the regulatory system

The beginnings of advertising regulation in Hungary date back to the early 1970’s. In 1968 - in a more or less unique way among the countries of the former Soviet sphere of interest - a set of economic reforms were introduced, adding a relatively liberal approach to the then existing system of planned economy. The appearance of economic advertising at that time was a sign of these changes of limited extent.

In 1975 the Hungarian Advertising Association (Magyar Reklámszövetség, MRSz) was founded. At the beginning the MRSz operated as a subordinate body of the Ministry of Internal Commerce, but in the late 1970’s it became institutionally independent. In 1981 the MRSz formed its Committee of Advertising Ethics (Reklámetikai Bizottság) acting as a self-regulatory organ. This committee has enacted the Code of Advertising Ethics (Magyar Reklámetikai Kódex)\(^3\), this being the first code of conduct of this nature in the Central-Eastern European region.

Amidst the constitutional and economic changes in 1989-1990 the MRSz preserved its role as the professional association of the Hungarian advertising industry. As a measure to adapt to

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1  www.mrsz.hu
2  www.ort.hu
3  Available from http://www.mrsz.hu/download.php?oid=Td06825240948e58495eb041a115342c;aid=Tf06815a4a94835a45524ba159da1a36
the changing economic environment its Committee of Advertising Ethics fundamentally revised the Code of Advertising Ethics in 1991. The current Hungarian advertising regulatory system has evolved to its present state in the years 1996-1997. In 1996 the Hungarian Advertising Self-regulatory Board (Önszabályozó Reklám Testület, ÖRT) was founded mainly by the largest advertisers and the major advertising agencies. The reason of establishing a new self-regulatory body was that these enterprises – as newcomers to the Hungarian market - felt that the MRSz could not provide proper representation for them at that time. The then ongoing preparatory works of the single act on economic advertising also gave a significant impetus to the foundation of ÖRT acting also as a representative of the industry in the legislative process. In 1997 Act LVIII. of 1997 on commercial advertising activities (Advertising Act) was adopted and entered into force. The adoption of this act induced a revision of the self-regulatory code. The most recent major revision of the code took place in 2001.

b) Subject-matter of the regulatory system

The objectives of the regulation can be summarised on the basis of the Advertising Act and Act XCVI. of 2001 aimed at the protection of the Hungarian language. The overall policy objectives of the advertising regulation laid down in these legal instruments can be identified as follows:

- the protection of minors and human dignity;
- the protection of the environment;
- the protection of minors and public morale by special regulation concerning products of sexual nature;
- the protection of health by special regulation provided for advertising medicines, medical treatments, alcoholic beverages and by banning advertising tobacco products;
- the protection of consumers against surreptitious or misleading advertisements.

The Advertising Act also serves as the conceptual basis of the Code of Advertising Ethics\(^4\). The subject matters of the self-regulatory component of the system appear in this code. This implemented the definitions of the act, and generally provides a more detailed regulation on

\(^4\) Code of Advertising Ethics Article 2.
this basis. In this respect the code has a clear complementary nature in relation with the existing statutory regulation.

This code provides rules – among others – on:

- general standards of advertising ethics, such as: the protection of natural, cultural and historical values, the protection of the Hungarian language, the protection of religious belief, the prohibition of discrimination among ethnic groups, the protection of health, etc… \(^5\);
- detailed rules concerning comparative advertising, and the prohibition of misleading advertising\(^6\);
- questions of making advertising clearly recognisable as such\(^7\);
- the protection of human dignity\(^8\);
- the protection of minors\(^9\);

The general purpose of the code is twofold. Its rules are of a clear consumer protection nature. Beside this the code is also aimed at solving the occasional internal conflicts of the advertising industry. In this respect the code provides rules – *inter alia* - on the prohibition of illicit use of brands and the protection of advertising ideas\(^10\).

c) *Basis of the co-operation*

The co-operation between the statutory and the self-regulatory elements of the system is characterised by mutual formal recognition and a definite distinction. The Hungarian regulatory framework does not provide clear legal basis for this co-operation. Self-regulation is mentioned in the preamble of the Advertising Act providing that the act was adopted “recognising the significance of the practice of industrial self-regulation”. The explanatory memorandum attached to the act explicitly mentions the Code of Advertising Ethics and the

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\(^5\) Code of Advertising Ethics Articles 4. and 7.  
\(^6\) Code of Advertising Ethics Article 5.  
\(^7\) Code of Advertising Ethics Article 6.  
\(^8\) Code of Advertising Ethics Article 10.  
\(^9\) Code of Advertising Ethics Article 11.  
\(^10\) Code of Advertising Ethics Article 9.
related activities of the MRSz, and refers to other professional codes applied in certain specific sectors (i.e. advertising of pharmaceutical products).

However, the statutory regulation does not go beyond these declaratory provisions and does not define the remit and the legal status of the self-regulatory associations in a legally binding way. As a result the self-regulatory initiatives of the advertising sector do not enjoy any special legal treatment. The self-regulatory associations act under the scope of *Act II. of 1989 on the right of forming associations* and of the *Civil Code* providing the general legal framework for all kinds of associations in Hungary.

*d) Institutions involved in the system*

As this has already been tackled among the introductory notes the Hungarian advertising industry has developed a multiplicity of self regulatory institutions. In this respect the *Hungarian Advertising Association (Magyar Reklámszövetség, MRSz)* and the *Hungarian Advertising Self-regulatory Board (Önszabályozó Reklám Testület, ÖRT)* are the most important.

**The Hungarian Advertising Association (Magyar Reklámszövetség, MRSz)**

The MRSz is a professional association of the advertising industry that pursues its self-regulatory activities beside its other functions, such as providing legal information to its members and organising conferences and trainings for advertising professionals. The overall remit of the MRSz – as this is defined in the statute of the organisation - is “to promote the functioning of the industry by advocating the interests of its members”\(^ {11}\). However, the statute also makes an explicit reference to the protection of the consumers’ interests\(^ {12}\).

The membership of the MRSz includes – *inter alia* - advertisers, agencies, and media enterprises covering almost the whole spectrum of actors of the Hungarian advertising industry. Currently the MRSz has approximately 400 institutional and 400 private members.

The management of the association is composed of a chairman, two vice chairpersons, further 38 members of the Presidency and the chairpersons of the various committees of the MRSz. Beside them a secretary general is responsible for the daily administrative functions of the organisation.

\(^{11}\) The Statute of the MRSz, 2. § (1)

\(^{12}\) The Statute of the MRSz, 2. § (3)
The Presidency is elected by the General Assembly of the MRSz. The secretary general is appointed by the president or the organisation.

From the regulatory aspect two committees of the association are to be noted. The Legal Committee of the MRSz was formed in 2001. This committee takes part in the legislative process by delivering opinions related to draft regulatory decisions and legal instruments on behalf of the MRSz. On the other hand the Committee of Advertising Ethics prepares the necessary changes to the Code of Advertising Ethics and also acts as the guardian of this code. The MRSz also operates a monitoring unit analysing the activities of the Hungarian advertising industry with a thematic approach. Such thematic surveys were carried out for example in relation with advertising of medical products or advertising of alcoholic beverages. The findings of these surveys were published on the website of the MRSz in the form of studies. The MRSz is a member of the Advertising Information Group (AIG)\(^\text{13}\). The financial background of the activities of the MRSz is provided by the fees paid by its members and by the income of its commercial activities. The MRSz is not entitled to any special subsidy or any other contribution of financial value provided by the state.

The Hungarian Advertising Self-regulatory Board (Önszabályozó Reklám Testület, ÖRT)

In contrary with the MRSz - which is a professional association with a general scope of activity - the ÖRT is a genuine self regulatory association.

Within the membership of the ÖRT three major categories of participants can be distinguished:

- the largest advertisers of Hungary (52 companies);
- the advertising agencies (33 companies constituting 95% of the Hungarian advertising agencies)
- media companies (30 members including broadcasters, editors and distributors of newspapers)

Beside these three major groups further 18 professional organisations of the Hungarian advertising industry are members to the ÖRT.

The ÖRT is chaired by its president. The operative tasks within the organisation are executed by the secretary general. They are elected by the General Assembly of the association. The ÖRT as an association takes part in the enactment of the Code of Advertising Ethics – the preparatory works of which taking place within the Committee of Advertising Ethics of the

\[^{13}\text{www.aig.org}\]
MRSz. On the other hand the ÖRT proceeds on the basis of this code of conduct acting via its ad-hoc committees. From 2004 the ÖRT also conducts thematic surveys concerning advertising activities in Hungary.

The ÖRT is an active member of the European Advertising Standards Alliance (EASA)\textsuperscript{14}. In 2005 the secretary general of the ÖRT was elected to the vice-presidency of this European organisation.

Similarly to the MRSz the ÖRT is also funded almost exclusively by the market players. The incomes of the organisation are therefore composed of the contributions paid by its members and the procedural fees due to be paid by non-members of the association when asking for the opinion of the ÖRT in the phase of planning an advertising campaign ("copy advice").

As to the relationship of the two self regulatory organisations it shall be emphasised first, that they cover almost the entire Hungarian advertising industry. Many enterprises and professional organisations active in this segment of the economy are members of both associations. Furthermore, the MRSz itself is a member to the ÖRT and vice versa. As regards the participation of the ÖRT in the work of the MRSz it shall be noted that currently\textsuperscript{15} both the president and the secretary general of the ÖRT are members of the presidency of the MRSz. As a forthcoming phase in the cooperation of the two professional associations, the MRSz and the ÖRT recently agreed to set up a joint body – the \textit{Council of Advertising Ethics (Reklámetikai Tanács)} – for handling the complaints received from consumers on the basis of the existing Code of Advertising Ethics. The procedural rules of this Council are expected to be enacted in the near future.

Concerning the side of statutory regulation, the role of two state authorities has to be mentioned. The \textit{Inspectorate for Consumer Protection (Fogyasztóvédelmi Főfelügyelőség)}\textsuperscript{16} is generally responsible for the enforcement of the provisions of the Advertising Act. On the other hand matters of advertising in broadcasting fall into the competence of the \textit{National Radio and Television Commission (Országos Rádió és Televízió Testület - ORTT)}\textsuperscript{17}. The

\textsuperscript{14} \url{www.easa-alliance.org}
\textsuperscript{15} The date of finalising this country report is 6\textsuperscript{th} June 2005
\textsuperscript{16} \url{www.fvf.hu}
\textsuperscript{17} \url{www.ortt.hu}
structure, the competences, and the financing of the two institutions have already been described in the first country report provided in the framework of this survey\textsuperscript{18}.

e) Functioning of the system

As to the functioning of the self-regulatory element first it shall be emphasised, that enterprises and private persons take part in its organisations purely on a voluntary basis. The reasons why the system evolved in a way to cover the whole segment of the advertising industry lay in the following factors:

- The self-regulatory associations also act in promoting the professional interests of their members. In this respect participation in the work of these associations provide the opportunity to members to influence the regulatory decisions brought in relation with the advertising industry.

- In the framework of self-regulation the advertisers have the possibility to obtain preliminary opinions on their planned advertising campaigns. Since the rules of the Code of Advertising Ethics are more detailed than the provisions of the Advertising Act, this forehand professional control provides them a certain level of increased certainty in planning their activities, even if these opinions do not bind the enterprise concerned and the relevant state authorities either.

- Beside their self-regulatory role the associations - especially the MRSz – conduct a set of other professional activities for the benefit of their members.

As to the rights and duties of the addressees of the self-regulation, besides paying the dues for their respective association, they are obliged to refrain from violations of the Code of Advertising Ethics. In this respect no other substantial duties can be identified on their behalf. The procedures of the MRSz and of the ÖRT as the safeguards of the professional code of conduct, and the characteristics of the involved decision-making bodies can be summarised as follows:

The procedures of the MRSz
Since 1981 the Committee of Advertising Ethics has been the body within the organisation of the MRSz actually performing the self-regulatory tasks. The committee proceeds according to

\textsuperscript{18} Media System of Hungary – 1.2.1.; 5.2.1
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

Code of Advertising Ethics and its rules of procedure\textsuperscript{19} adopted by the management of the MRSz.

This committee consists of a chairperson and four permanent members elected by the General Assembly of the association for a three years term of office\textsuperscript{20}. Following their appointment they also elect a vice chairperson among themselves\textsuperscript{21}. The members are not entitled to receive remuneration for their work. In performing their duties they enjoy equal rights and are bound by equal obligations. The chairperson has the right to invite other experts to take part in the committee’s work as consultants without the right to vote\textsuperscript{22}. The administrative background of the committee is provided by the secretariat of the MRSz. The cases submitted to the committee can be divided into two major categories:

- providing non-binding preliminary opinions in planning advertising concerning issues of ethic (copy advice);
- complaints by competitors or consumers related to advertisements published.

The committee launches its procedures on the basis of a related request or complaint. However, the members of the committee themselves are also in the position to submit such a complaint\textsuperscript{23}. In relation with the individual cases the members of the committee are subjects to rules of incompatibility. Those who, or whose relatives are concerned are excluded from the given review\textsuperscript{24}. The rules of procedure of the committee do not specify any deadline for the committee in a binding way. However, in most of the cases the procedures end within a reasonable period of time (a week in average). As to the workload of the committee it should be noted that the forum convenes generally once within a two weeks period of time and it deals with five cases each time in average.

The committee may bring its decisions if at least three of its members express their opinion\textsuperscript{25}. The decision is made by the simple majority of votes\textsuperscript{26}. It shall be noted that it is not empowered to impose sanctions in case of finding violation of the Code of Advertising Ethics.


\textsuperscript{20} MRSz Rules of Procedure 1. §

\textsuperscript{21} MRSz Rules of Procedure 2. §

\textsuperscript{22} MRSz Rules of Procedure 1. § (2)

\textsuperscript{23} MRSz Rules of Procedure 4. § (1)

\textsuperscript{24} MRSz Rules of Procedure 3. § (6)

\textsuperscript{25} MRSz Rules of Procedure 3. § (3)

\textsuperscript{26} MRSz Rules of Procedure 3. § (4)
The decision of the committee therefore is made in a form of opinion, delivered in writing to the parties concerned. The committee’s rules of procedure also enable the forum to publish its decisions without naming the enterprises subject to the procedure.

The procedures of the ÖRT

The self-regulatory activity within the framework of the ÖRT is carried out in ad-hoc committees of ethics. The procedures of these ad-hoc committees are regulated by the rules of procedures adopted by the association.

The ÖRT proceeds exclusively on the basis of requests or complaints. Within the individual cases the same categories can be distinguished as this could be seen in the case of the MRSz. However, the ÖRT deals almost exclusively with requests for copy advice, these constituting approximately the 90% of the initiatives received by the association.

The ad-hoc committees are composed of a chairperson and four members:

- a member representing the advertising agencies;
- a member representing the media enterprises;
- a member representing the advertisers,
- a legal expert.

The members – who are subject of strict incompatibility rules - are appointed by the secretary general of the ÖRT.

Having received the individual request or complaint the first stage of the ÖRT’s procedure is the proceeding of the secretary general in her capacity as the chairperson of the ad-hoc committee of ethics. In this phase the chairperson may – inter alia – call the parties concerned to compound and submit their agreement for approval to the committee. Otherwise the chairperson has mainly preparatory tasks in this phase.

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27 MRSz Rules of Procedure 5. § (2)
28 MRSz Rules of Procedure 5. § (2)
29 Rules of Procedure of the ad-hoc Committee of Ethics of the Hungarian Advertising Self-regulatory Board (Az Önszabályozó Reklám Testület Etikai ad-hoc Bizottságának eljárási szabályzata; ÖRT Rules of Procedure)
30 ÖRT Rules of Procedure 4. § (1)
31 ÖRT Rules of Procedure 5. § (4)
32 ÖRT Rules of Procedure 6. §
33 ÖRT Rules of Procedure 5. § (1)
34 ÖRT Rules of Procedure 11. §
The second stage of the procedure is the hearing of the committee. Following the hearing the committee brings its decision. If it establishes that a breach of the code of conduct has happened it may *inter alia*:

- oblige the party concerned to amend the respective advertising;
- oblige the party concerned to change the placement of the advertising;
- oblige the party concerned to cease its activity contrary with the rules of the code of conduct;
- may publish its decision in case of serious breaches of the code of conduct\(^{35}\).

The rules of procedure of the ad-hoc committee of ethics provide the opportunity for the parties concerned to submit an appeal against the decision of the committee to the chairperson of the ÖRT\(^{36}\). The appeal is reviewed by the chairperson of the association and two legal experts\(^{37}\).

In these procedures the ÖRT is bound by relatively close deadlines fixed by the rules of procedure. In the practice the decision of the ad-hoc committee is generally made within a week following the request. The procedures conducted by the ÖRT are not public\(^{38}\). The reason of this is that in most of the cases the ÖRT forms its opinion related to advertising campaigns under preparation. In this context the ÖRT puts great emphasis on the confidentiality of its procedures.

The activities of the MRSz and of the ÖRT are well known by the actors of the advertising industry in this respect the self-regulatory norms are generally recognised. However, related awareness-raising activities among consumers take place only at a limited level in Hungary.

*f) Supervision of the system*

The activity of the self-regulatory organisations is not subject to any supervision neither by the state nor by any other non governmental organisation.

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\(^{35}\) ÖRT Rules of Procedure 13. §
\(^{36}\) ÖRT Rules of Procedure 14. §
\(^{37}\) ÖRT Rules of Procedure 15. §
\(^{38}\) ÖRT Rules of Procedure 4. § (3)
**g) Impact assessment**

Impact assessment related to the self-regulatory mechanisms takes place solely within the framework of the organisations concerned. Apart from the studies summarising the findings gained in the course of monitoring activities of the two associations, there are no evaluation reports, annual reports or scientific estimations published in this respect. Statistics concerning the work conducted by the MRSz and the ÖRT for the year 2004 were made as a response for a questionnaire sent by the EASA to its member organisations. This stocktaking reflects that the overwhelming majority of the cases dealt with within the framework of the self-regulatory organisations are copy advice cases. In 2004 there were 279 of such procedures. On the other hand the self-regulatory associations handled complaints related to a total number of 33 advertisements in the same year.

**2. Part II: Leading Cases**

As a case study a television advertisement considered by the Committee of Advertising Ethics of the MRSz, and later by the National Radio and Television Commission is worth referring to.

The advertisement reviewed in the procedures was broadcasted on the national television channels in April 2004. The advertisement – actually a social advertisement – was made and published on behalf of the *Government Office for Equal Opportunities (Esélyegyenlőségi Kormányhivatal)* to promote the activity of a relief centre combating violence within the family.

The advertisement depicted two children, a boy and a girl. As they were playing as being farther and mother, the boy began to beat the girl, and threw away her puppet, clearly symbolising a child in the real life. Subsequently, information was provided on the respective relief centre. The advertisement had a shocking overall character\(^{39}\).

Following the reception of related complaints the Committee of Advertising Ethics made its decision on 3\(^{rd}\) May. In this decision the *forum* established, that the advertisement was in contrary with several provisions of the Code of Advertising Ethics, namely:

- with the principle that advertisements shall be produced with social responsibility\(^{40}\);

\(^{39}\) It shall be noted that the writer of this country report had no opportunity to watch this advertisement while preparing this study. The description of its content is therefore based on the establishments made by the Committee of Advertising Ethics and the ORTT in their respective decisions.

\(^{40}\) Code of Advertising Ethics Article 3. (2)
• with the principle that advertisements shall not contain elements offending the generally recognised moral standards of the society; 
• with the principle that advertisements shall not promote or justify violence.

The Committee of Advertising Ethics also found problematic that the respective spot was broadcasted in a time when it was likely that children watch it. Following the delivery of the decision of the Committee of Advertising Ethics the broadcasting of the advertising was shortly ceased by the respective broadcasters. Independently of the proceeding of the Committee of Advertising Ethics the National Radio and Television Commission (ORTT) as the competent authority also began an enquiry concerning the respective spot. The ORTT examined the spot on the basis of the provisions of the Broadcasting Act concerning protection of minors. On these grounds the ORTT also established the violation of the act and issued a warning to the broadcaster.

The office of the ORTT consulted the MRSz and used the decision of the Committee of Advertising Ethics of the MRSz in preparing the decision of the regulatory authority. As a result the two decisions are in line with each other, despite the fact that they were made on different legal bases (i.e. the Broadcasting Act and the code of conduct respectively), and the decision of the ORTT do not contain explicit reference to the opinion of the MRSz’s committee.

As to the time frame of the ORTT’s decision it shall be noted that the authority examined the programme of the concerned broadcaster transmitted in the period of 23rd-29th April 2004. The commission made its corresponding decision on 25th August 2005. The broadcaster submitted an appeal to the competent court. As a result - by the date of finalising this study - the decision has not been entered into force yet.

41 Code of Advertising Ethics Article 4. (1)
42 Code of Advertising Ethics Article 4. (7)
43 Decision 1049/2004. (VIII.25.) ORTT
44 Please see footnote 15.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Advertising sector

<table>
<thead>
<tr>
<th>Non-state regulatory system – the advertising sector (ÖRT; MRSz)</th>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The criterion is fulfilled.

The Hungarian Advertising Association (Magyar Reklámszövetség, MRSz) was founded in 1975. At the beginning the MRSz operated as a subordinate body of the Ministry of Internal Commerce, but in the late 1970’s it became institutionally independent. In 1981 the MRSz formed its Committee of Advertising Ethics (Reklámetikai Bizottság). This committee has enacted the Code of Advertising Ethics (Magyar Reklámetikai Kódex), the code of conduct for the advertising industry. The latest revision of the code took place in 2001.
The Hungarian Advertising Self-regulatory Board (Önszabályozó Reklám Testület, ÖRT) was founded in 1996 primarily by the largest advertisers and the major advertising agencies. To influence decisions by persons or, in the case of organisations, decisions by or within such entities, Pure consultation. The criterion is fulfilled.

The Code of Advertising Ethics is legally not binding on the actors of the advertising industry. However, its rules are generally accepted in the practice. Measures by third parties (e.g. NGOs). The range of possible subjects of non-state action has to be limited to make the definition workable. The criterion is fulfilled.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation,
The membership of the two respective self-regulatory associations covers almost the whole spectrum of actors of the Hungarian advertising industry including advertisers, agencies, and media enterprises.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criteria</td>
</tr>
<tr>
<td>The system is established to achieve public policy goals</td>
</tr>
</tbody>
</table>

The main objective of the two professional associations is to promote the interests of their members and the industry. Consumer protection appears only as an additional element in their functions.
<table>
<thead>
<tr>
<th>There is a legal basis for the non-state regulatory system</th>
<th>Informal agreements without any legal criteria to judge the functioning of non-state regulation</th>
<th>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The criterion is not fulfilled.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>There is no formal relationship between the statutory regulation and self-regulation. Self-regulation is mentioned in the preamble of the Advertising Act providing that the act was adopted “recognising the significance of the practice of industrial self-regulation”. However, this reference constitutes no formal legal obligation to any of the sides.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
</tr>
<tr>
<td>The criterion is not fulfilled.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No element of such “division of labour” is present in the Hungarian system. Statutory regulation and self-regulation</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
are performed in parallel; interactions are incidental.

| The state uses regulatory resources to influence the non-state regulatory system | Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system | Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation. |

The criterion is not fulfilled.

The state does not interfere with the operation of the self regulatory associations. There is no external evaluation of their activities and no financial resources are granted for them with regard to their special role.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

On the basis of the overview and the case study presented above the following characteristics of the self-regulatory element of the Hungarian advertising regulation can be defined:

Both the MRSz and the ÖRT are associations founded by the actors of the advertising industry with the primary purpose of promoting the common interests of the industry. The element of consumer protection appears only as an appendix in the activity of these organisations.

As a result the public policy goals and the function of promoting the industrial interests are not separated within the system of the advertising self-regulation.

However, it is also important to note that this characteristic is also the main reason for the general recognition of the self-regulatory norms by the actors of the industry. For the enterprises active in the advertising segment of the national economy the decisive factor to join the MRSz or the ÖRT is the efficiency of these associations as safeguards of their common interests. Given that these organisations – in the common perception of the industry - perform well in this respect, these companies are also ready to submit themselves to the scope of the industrial code of conduct by joining them.

- The segment of consumers is not represented in the decision-making process of the concerned self-regulatory organisations. It shall be noted that the awareness of consumers to the activities of the MRSz and of the ÖRT is at a low level in the country.

- The advertising self-regulatory associations enjoy no special legal status. As a result they have no special privileges granted by the state or special duties such as to cooperate with or report to competent authorities.

As to their role in the legislative process in the application of Act XI. of 1987 on Legislation, they enjoy the same consultative rights as any other non-governmental organisation.

They receive no special funding from the state. However they may take part on tenders published for supporting individual projects as professional associations with equal chances with other organisations of this kind.
b) The link between the non-state part and state regulation

Under the legislation in force there is no formal relationship between the statutory regulation and self-regulation in the case of advertising in Hungary. The reference to the activity of the self-regulatory associations included to the Advertising Act was made in a way that constitutes no formal legal obligation to either side.

As a result – as this is enlightened by the case study – the competent organs of the state and the self-regulatory associations proceed independently of each other. However an informal co-operation between the institutions can be experienced in certain cases, but not on a regular basis.

It shall also be noted – that given the more detailed nature of the industrial code of conduct – the practice of preliminary copy advice - widely accepted by the industry – also helps to prevent breeches of the Advertising Act in many cases.

**Conclusion:** Given the lack of legally binding definition of the relationship between the self-regulatory and the statutory element, the analysed regulatory system cannot be qualified as a co-regulatory scheme. As the consequence of this, the widely recognised self-regulation and the traditional command and control regulation basically co-exist separately in the Hungarian advertising regulation at the level of the daily practice.

II. Co-operative Regulatory Systems concerning online content services

1. Part I: The co-operative regulatory system

Concerning on-line content the self-regulatory element of the Hungarian regulatory system is provided most significantly\(^1\) by the *Hungarian Content Providers’ Association (Magyarországi Tartalomszolgáltatók Egyesülete, MTE)*\(^2\). In this respect the main role of the MTE is to enact a code of conduct for its members and to publish recommendations for the Hungarian on-line content providers.

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\(^1\) It shall be noted that beside the MTE the organisations mentioned in clause e) - the *Hungarian Association of Content Industry (Magyar Tartalomipari Szövetség – MaTiSz)* and the *INFORUM (Informatikai Érdekegyeztető Fórum)* - also perform certain self-regulatory tasks by operating a hotline (MaTiSz) and an arbitrary forum for users and for actors of the industry (INFORUM). However, the self-regulatory element is present only to a limited extent in the activities of these organisations in comparison with the MTE.

\(^2\) [www.mte.hu](http://www.mte.hu)
a) Development of the regulatory system

The MTE was formed in March 2001. It shall be noted that during the year 2000 officials of the Hungarian National Radio and Television Commission emphasised the need to review the existing audiovisual legislation with special regard to the regulatory challenges posed by the appearance and spreading of on-line content services. This was the direct antecedent of the foundation of the association; therefore the birth of the MTE can be qualified as the leading content providers’ response to the raising of this issue.

Following its foundation the MTE shortly enacted its code of conduct, the Code of Content Provision (Tartalomszolgáltatási Kódex). In early 2001, as one of its first results, the association concluded an agreement with the Hungarian Bureau for the Protection of Author’s Rights (Magyar Szerzői Jogvédő Iroda Egyesület - Artisjus) on behalf of its members on the application of the so called “notice and take down” procedure in cases of alleged violations of copyright rules. It is important to note that this procedure was later incorporated into Act CVIII. of 2001 on certain legal aspects of electronic commerce services and information society services (E-commerce Act) as the generally applicable procedure in these cases. The next major step in the development of the regulatory system was the adoption of the aforementioned E-commerce Act providing a general legal framework for on-line services. The scope of the act has already been described in the country report prepared within the first stage of this survey.

b) Subject-matter of the regulatory system

The main purpose of the E-commerce Act is to provide the necessary regulatory background in order to make the existing legal instruments of the Hungarian law – such as the Copyright Act, the Advertising Act, and the Civil Code – also applicable to the on-line services. The code of conduct adopted by the MTE – inter alia - defines rules on the responsibility of content providers, provisions on the applicability of the rules of the statutory regulation and on the co-operation with the competent authorities. It obliges the members of the association to

3 Available at: www.mte.hu/text/text2/doc/text21012101011/mte_kodex_2003_egyseges.htm
4 www.artisjus.hu
5 Media System of Hungary – 3.1.1.
6 Code of Content Provision 3.
7 Code of Content Provision 4.
archive their content for a certain period of time\textsuperscript{8}, and contains a commitment concerning the protection of minors\textsuperscript{9}. The appendices of the code address the journalistic principles of on-line news provision, issues of data protection and questions of moderation of user-generated content.

c) \textit{Basis of the co-operation}

Similarly to what could be seen in the case of the advertising sector, the statutory regulation refers to the self-regulatory role of the MTE only in a declaratory manner. According to the recent amendment\textsuperscript{10} of the E-commerce Act:

\textit{“In a manner defined in a separate law and while respecting their independence, the state supports the self-regulation activity (…) of these associations in order to:}

\begin{itemize}
  \item [a)] make available the codes of ethics in an electronic way, in Hungarian and in the official languages of the member states of the EEA (European Economic Area) as well, for those concerned who are residents of one of the member states of the EEA;
  \item [b)] operate alternative dispute resolutions in an electronic manner;
  \item [c)] inform the concerned of the codes of ethics, of the experiences of their application, and of their effect to e-commerce, in co-operation with the minister of informatics and communications – and in case the relevant service reaches any member state of the EEA, with the European Commission as well.”\textsuperscript{11}
\end{itemize}

It shall be noted that the separate act referred to in the text has not been enacted yet, and there is no public knowledge as to related preparatory works being carried on. In this respect the co-operation between the self-regulatory and the statutory element of the system has no clear legal basis in case of the on-line content services.

d) \textit{Institutions involved in the system}

Currently the MTE has 9 members. The membership of the organisation is voluntary; it is composed of the largest content providers of Hungary pursuing this activity on a professional

\begin{itemize}
  \item [10] Act XCVII of 2003 on the amendment of act No. CVIII. of 2001 on certain legal aspects of electronic commerce services and information society services.
\end{itemize}
basis. The MTE is led by its Presidency\textsuperscript{12}. This consists of the chairman and three other members. The four members of the presidency are elected by the General Assembly of the association. Following their appointment they elect the chairman of the MTE among themselves. The administrative functions of the association are carried out under the conduct of the secretary general\textsuperscript{13}.

In cases of alleged violations of the code of conduct or delivering a preliminary qualification concerning a given content upon a request the ad-hoc experts committees of the MTE are the competent organs\textsuperscript{14}. The three members of these ad-hoc committees are appointed by the chairman of the MTE. The MTE is financed exclusively by the contributions of its members. In this respect the state grants no resources to the association in any special form.

\textit{e) Functioning of the system}

The Statute of the MTE and the Rules of Procedure of the Ad-hoc Experts Committee provides the possibility for the following types of procedures:

- procedure following a complaint;
- a preliminary qualification of a given content to the request of the content provider concerned;
- issuing a proof in relation with a given content to the request of the content provider concerned\textsuperscript{15}.

If - on the basis of a complaint - the ad-hoc experts committee establishes that a violation of the code of conduct happened, it may impose a wide range of sanctions extending from a simple warning to the exclusion of the member concerned from the association\textsuperscript{16}. According to its rules of procedure the committee publishes its decisions\textsuperscript{17}.

It shall be noted that there is no public knowledge of any of such procedures actually conducted by the MTE.

\textsuperscript{12} The Statute of the MTE 3.3.
\textsuperscript{13} It shall be noted, that the Statute of the MTE contains no reference to how, for what term, and by whom the secretary general is elected.
\textsuperscript{14} The Statute of the MTE 3.4.
\textsuperscript{15} Rules of procedure of the ad-hoc experts committee 1. §
\textsuperscript{16} Rules of procedure of the ad-hoc experts committee 13. §
\textsuperscript{17} Rules of procedure of the ad-hoc experts committee 13. § (1) i)
Beyond the possibility to proceed in cases of violating the code of conduct, the MTE publishes recommendations serving also to the attention of Hungarian content providers being no members of the association. Such recommendations were published concerning:

- certain election campaigns;
- user-generated opinions appearing in Internet topics;
- handling debated Internet content;
- legal provisions on advertising services of sexual nature\(^\text{18}\).

The MTE is also taking part in awareness raising actions. The most recent example of such an action is the launch of the website under the name “Friendly Internet Forum” (Barátságos Internet Fórum)\(^\text{19}\), which is a common initiative of the MTE and two other professional organisations, the Hungarian Association of Content Industry (Magyar Tartalomipari Szövetség – MaTiSz)\(^\text{20}\) and the INFORUM (Informatikai Érdekegyeztető Fórum)\(^\text{21}\). The website contains information for children, parents and teachers on the safe use of the Internet.

\(f\) Supervision of the system

There is no external supervision related to the functioning of the MTE.

\(g\) Impact assessment

In general there is no external impact assessment carried out in relation with the activities of the MTE.

However, there are elements of such evaluation executed within the association. As an example, following the election campaigns the MTE regularly analyses the experiences of the application of its related code. Beyond that, the code of conduct stipulates that its application shall be at least annually reviewed by the presidency of the association.

\(^{18}\) The recommendations are available at: http://www.mte.hu/ajanlas/.
\(^{19}\) Available at: http://www.baratsagosinternet.hu/mss/alpha.
\(^{20}\) http://www.matisz.hu/
\(^{21}\) http://www.inforum.org.hu/
2. Part II: Leading Cases

As this has already been mentioned there is no public knowledge of any complaints handled by the MTE or preliminary opinions given by the forum on request. For this reason the monitoring activity of the MTE related to the coverage of election campaigns by Internet content providers is worth noting.

In 2001 the MTE adopted its Election Code of Conduct *(A Magyarországi Tartalomszolgáltatók Egyesületének a Választásokkal kapcsolatos internetes tartalomszolgáltatásra vonatkozó Működési, etikai és eljárási Kódexe)*\(^{22}\). The code was also approved by the *National Election Committee (Országos Választási Bizottság)*\(^{23}\), the relevant state authority responsible for organising elections and ensuring that they are conducted in a fair manner.

The code defines rules – *inter alia* – concerning the impartiality of Internet content providers, and defining methods how the legal provisions regarding the “reflection day” – i.e. the day preceding the day of the voting – shall be interpreted in the on-line environment. In each election campaign the MTE operates a monitoring unit in order to supervise how the Hungarian Internet content providers comply with the relevant provisions concerning the prohibition of promoting electoral messages on the reflection day. This also took place in the case of the general elections concerning Hungary’s accession to the European Union held in April 2003.

In connection with these elections the monitoring unit of the MTE detected 12 cases qualified as violations of the rules related to the reflection day. The association warned the content providers concerned. Following the warning 5 of these content providers decided to follow the guidelines of the MTE. During the campaign the MTE received no complaint. Following the elections the monitoring unit prepared a report on its experiences for the presidency of the MTE establishing that the Hungarian on-line media generally complied with the rules concerning the reflection day. The presidency of the MTE qualified the work of the monitoring unit as fruitful.


\(^{23}\) [http://www.election.hu/ovb/hu/](http://www.election.hu/ovb/hu/)
### 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

#### Table: Criteria / Online sector

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
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<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
</tr>
<tr>
<td>The criterion is fulfilled.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The MTE was formed in March 2001 as a professional organisation of the largest Hungarian Internet content providers. Following its foundation the MTE shortly enacted its code of conduct, the <em>Code of Content Provision (Tartalomszolgáltatási Kódex)</em>.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be</td>
<td></td>
</tr>
<tr>
<td>Criteria</td>
<td>Self-regulatory system</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td>Non-state action</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>------------------------</td>
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<td>-----------------</td>
</tr>
<tr>
<td>The criterion is fulfilled.</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>The membership of the MTE is bound by the <em>Code of Content Provision</em>.</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
<td></td>
</tr>
<tr>
<td>The criterion is partially fulfilled.</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>The MTE covers only the largest professional content providers of Hungary. The segment of minor content providers and private persons publishing content on the Internet are not covered by the self-regulatory element of the regulation. However, these actors are also addressed by a series of recommendations published by the association.</td>
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</table>

**Link between the non-state-regulatory system and state regulation**
<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
</tr>
<tr>
<td>The criterion is not entirely fulfilled.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The functions of pursuing public policy objectives and the promotion of industrial interests are not separated from each other within the framework of the MTE.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
</tr>
<tr>
<td>The criterion is substantially not fulfilled.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The E-commerce Act refers to the promotion of self-regulatory initiatives. However, this produces neither actual</td>
<td></td>
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</tr>
<tr>
<td>Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems</td>
<td></td>
<td></td>
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<tr>
<td>--------------------------------------------------</td>
<td></td>
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<tr>
<td>legal obligation for the state nor actual additional rights of the self-regulatory associations.</td>
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<tr>
<td>In this respect much depend on the content of the separate law referred to by the respective provision of the E-commerce Act, as to be enacted in the future.</td>
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<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
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<td>Traditional regulation</td>
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<td>No element of such “division of labour” is present in the Hungarian system. Statutory regulation and self-regulation are performed in parallel; interactions are incidental.</td>
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<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not
The criterion is not fulfilled.

The state does not interfere with the operation of the self-regulatory association. There is no external evaluation of the MTE’s activities and no financial resources are granted for it with regard to its special role.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

In contrary with the self-regulatory associations of the advertising industry the MTE covers only a part of the segment of Hungarian on-line content providers. It shall be recalled that the association is formed by the largest professional content providers of Hungary. As a result, the segment of minor content providers and private persons publishing content on the Internet is not covered by the self-regulatory element.

It shall also be noted that – similarly to the ÖRT and to the MRSz - the functions of pursuing public policy objectives and promoting industrial interests are not separated from each other within the existing framework of self-regulation for on-line services.

However the element of awareness raising among consumers is much more clearly present in the activity of the MTE than it could be seen in the case of the MRSz and the ÖRT. The previously referred website - the Friendly Internet Forum – is a clear example for that.

b) The link between the non-state part and state regulation

In the case of on-line content services the link between the self regulatory element and the state regulation can be evaluated as substantially identical to the experience gained while examining the advertising regulation. The reference made by the E-commerce Act to the promotion of self-regulatory initiatives produces neither actual legal obligation on behalf of the state nor actual additional rights of the self-regulatory associations. However, in this respect much depend on the content of the separate law referred to by the quoted provision of the E-commerce Act to be enacted in the future.

Conclusion: Similarly to the experience related to the Hungarian advertising regulation, currently there is no substantial link present in the system between the self-regulation and the statutory regulation that would legally bind the actors. As a result, the present system of regulating on-line content services shall not be qualified as a co-regulatory one.

It shall also be noted that by the intention of the Parliament to enact a separate act related to self-regulatory measures in the sector – as expressed by the quoted provision of the E-commerce Act - there is a possibility to transform the present system into a co-regulatory
scheme. However there is no public knowledge of ongoing preparatory works of such nature at the moment.
3.11. Ireland

I. Co-operative Regulatory Systems in the press sector

1. Part I: The co-operative regulatory system

   a) Development of the regulatory system

   A co-operative system in the press sector is contained in a new Defamation Bill, which received the approval of the Cabinet on 14 June 2005. It arises in the context of defamation law reform, which has been campaigned for by the media since 1986 and has been included in the legislative programmes of successive governments for over a decade. It was supported by recommendations of the Law Reform Commission in 1991 and by the Government appointed Commission on the Newspaper Industry in 1996. While a Private Member’s Bill was introduced in the Oireachtas (Parliament) in 1995, it was not debated or passed. When the current government took office, the Minister for Justice, Equality and Law Reform announced his intention to bring in new defamation legislation in tandem with provisions for a press council and for protection of privacy. The heads of a new Bill were drafted and contained provisions for a press council and press ombudsman. They did not contain provisions in relation to privacy, as the Minister indicated his preference for privacy to be protected through the courts on the basis of the guarantee of privacy in the Irish Constitution and Article 8 ECHR. The Cabinet gave the go-ahead for the drafting of the Bill on 14 June 2005, subject to the setting-up of a working group to examine the need for privacy legislation. The provisions for a press council and ombudsman, along the lines of the Swedish model, is a novelty, as to date the only complaints mechanisms in the press have been entirely self-regulatory and confined to in-house readers’ representatives or recourse to the editor. The setting-up of a press ombudsman had been recommended by the Newspaper Commission in 1996.

   b) Subject matter of the regulatory system

   The purpose of the proposed Press Council and Ombudsman is to provide an effective complaints’ mechanism for the public and an alternative avenue of redress. At present, a member
of the public who feels aggrieved at newspaper content may complain to the editor, contact the readers’ representative (if there is one, as not all newspapers have one) or if the complaint gives rise to a cause of action, proceed to the courts. The proposed new bodies will have a variety of means available to them to respond to complaints (see below).

Following publication of the report of the Newspaper Commission in 1996, the national newspapers began a process aimed at setting up a press ombudsman or complaints commission on a self-regulatory basis. The umbrella organization, NNI (National Newspapers of Ireland), commissioned research on self-regulatory mechanisms and best practice in European and other jurisdictions. It also joined and became actively engaged in the activities of the AIPCE (Alliance of Independent Press Councils of Europe). It later brought together the regional newspapers association, the British newspapers circulating in Ireland, the magazine publishers association and the National Union of Journalists to develop the scheme. By the time the Minister for Justice, Equality and Law Reform began the process of preparing a new defamation bill, the press plans were at an advanced stage. The combined press groups listed above had decided on the Swedish model and had already developed a code of practice on foot of which the (self-regulatory) ombudsman and press council would operate. However, the press had not yet introduced the scheme but was in regular contact with the Minister about its proposals. The reason for the delay in introducing the scheme was the press’s belief that the burden imposed by the archaic defamation laws needed to be addressed first.

The Minister for Justice, Equality and Law Reform in 2003 had established a Legal Advisory Group on Defamation to advise him on reform of the defamation laws and to consider the need for a statutory press council. That body reported to the Minister, recommending inter alia that a statutory press council be established, whose members would be appointed by government, along the lines of the statutory Broadcasting Complaints Commission (first established under the Broadcasting Authority (Amendment) Act 1976, now under the Broadcasting Act 2001) and which would have a range of powers at its disposal. The proposal for a statutory press council met with much criticism, mainly from the media themselves and from academic commentators, who stressed the importance of freedom of the press and the need for the press to be free from government interference.

Following a consultation process (www.justice.ie), the Minister intimated his preference for a press council that would not be statutory in nature, would not be appointed by government, for example, but would be recognized in statute. This would effectively mean the statutory
recognition of the scheme as proposed by the press. However, the provisions of the bill go further than mere recognition. While the scheme will not be statutory in the traditional sense of being government-appointed, operating on the basis of standards and procedures imposed by government and set out in the legislation (as in the case of the Broadcasting Complaints Commission, for example), it will not be purely self-regulatory either. By virtue of the statutory provisions, it will be a form of co-operation.

The proposed statutory provisions, which have been approved by Cabinet, envisage the establishment by ministerial order of the Press Council of Ireland, as a company limited by guarantee, whereby members will “guarantee” to pay a fixed sum in the event of the company being wound up while they are still members or within a year of their leaving. (This is a structure suitable for professional organizations, trade associations and such like where the activities are non-profit making and can be funded by subscriptions.) The Council will be financially self-sufficient and completely independent in the discharge of its functions, with a majority representation of public interest directors who are broadly representative of civil society. It will operate a code of standards and employ a press ombudsman. The Minister will have power to amend or revoke an order establishing the council but only if the council has first been given an opportunity to respond and only if a resolution has been passed by each House of the Oireachtas (Parliament).

Schedule II of the new legislation will set out matters relating to the press council and to the ombudsman. It will set out the overriding principles to which the council will have regard. These include freedom of expression and freedom of the press; the protection of the public’s interest in ethical, accurate and truthful reporting; the maintenance of minimum ethical and professional standards of journalism, and the proper protection of rights of privacy and dignity of the individual. The constitution of the council will also be required by statute to provide for at least 11 directors, of whom at least 6 will be public interest directors, 4 will be representatives of publishers and 1 of journalists. An open and transparent method of appointment will be required. All press organisations subscribing to the council will be required to publish with due prominence decisions of the council. The code of standards adopted by the press council must specify standards to be complied with and rules and practices to be observed, standards of journalistic ethics and practice, the accuracy of facts and information, intimidation or harassment of, or the unreasonable encroachment upon the integrity, dignity or privacy of, any person, or group of persons. In relation to the press ombudsman, the schedule will provide that in the first
instance expeditious and informal resolution of a complaint by the newspaper itself will be attempted but, failing that, the matter shall be adjudicated by the press ombudsman. Remedial action may require the publisher concerned to desist from the publication of any material pending investigation by the ombudsman (this provision is likely to be greatly criticised), to publish the ombudsman’s decision, publish a correction of inaccurate facts or information, publish a retraction or follow any other action which the ombudsman might deem appropriate.

c) Basis of the co-operation

The legal basis for this co-regulatory scheme will be the new Defamation Act when enacted. The Act will set out the framework for the council and ombudsman. The press will then be able to apply for recognition for their own scheme, and as long as that scheme meets the basic criteria set out in the Act, the Minister will make an order designating it the Press Council of Ireland. The press will then be able to use essentially their own scheme to appoint the members of the council and ombudsman, and allow the system to operate on foot of a code drafted by the code committee established by them.

The basis of the co-operation will be the application by the press to the Minister for recognition and the ministerial order giving that recognition and establishing the council and ombudsman. The individual publishers will sign up to the scheme, that is, to the press council, ombudsman and code, by way of contract. The contract will be part of the scheme developed by the press organizations themselves. Where individual publishers decide not to sign up to the scheme, it is envisaged in the new defamation legislation that their stance can be taken into account by a court if any defamation proceedings are taken against them.

d) Institutions involved in the system

The institutions involved include the press Steering Committee, which was established by the press to agree the formalities of the system and put the structure into practice. The functions of the Steering Committee include agreeing policy and a structure for establishing a press council and ombudsman; agreeing a code of standards in consultation with editors; ensuring adequate funding for the press council and the office of ombudsman through collection of levies and fees from press organisations; agreeing and putting in place procedures for appointments to the press
council. Two sub-committees have also been created: an Administration Committee and a Code Committee, both of which report to the Steering Committee.

The independent chairman of the Steering Committee will appoint the chairman of the press council having consulted with all interested parties. The independent chairman of the Steering Committee, in conjunction with the chairman of the press council, will appoint the members of the press council. The press council, having advertised the position and consulted with all interested parties, including the independent chairman of the Steering Committee, will appoint the press ombudsman.

The system will be funded by press members on a levy basis. The Steering Committee has agreed an overall budget and the breakdown of funding for each press group.

e) Functioning of the system

The addressees of the regulation are the press organisations. Their rights and duties are set out above.

While the scheme has been agreed by all of the print media organisations in Ireland, participation will remain voluntary. However, it is envisaged in the draft legislation (heads of the bill) that in relation to one of the proposed new defences to defamation, namely the defence of fair and reasonable publication, a court will be entitled to take into account whether the defendant press organisation subscribes to the council and ombudsman system.

The framework for membership, appointment, funding, independence, etc. of the decision-making bodies will be set out in the legislation and the detail will be provided by the press themselves in the scheme they submit to the Minister for regulation (see details above).

The Steering Committee has drawn up a scheme for decision-making, a code of standards and procedures for responding to complaints from the public. While these have been presented to the Minister, they have not yet been made public. Transparency in the process will be mandated by the legislation. Guidelines and similar material for the public will be made available in due course.
f) Supervision of the system

The system is three-tiered: 1) attempt at resolution of complaints informally between newspaper/publication and complainant; 2) failing that, decision by ombudsman; 3) if complainant still dissatisfied, appeal to press council. Depending on the nature of the complaint, for example, defamation, where there is a cause of action, it may be possible to proceed to the court. Since the complaints system will have statutory recognition, it is likely that decisions of the ombudsman and council will be subject to judicial review in the courts. The ombudsman and council will also be given immunity from actions for defamation in the new legislation.

g) Impact assessment

The ombudsman will publish an annual report in which s/he will review the operation of the system. The report will detail the number of complaints and how they were handled, how many upheld, etc. As the scheme is not yet in operation, there is no data available.

2. Part II: Leading Cases

As the system is not yet in operation and only the heads of the bill have been prepared there are no cases to date. The Bill will now have to be drafted and then debated in both Houses of the Oireachtas (Parliament) before becoming law.

Data is available, however, on the functioning, caseload, complaint-handling and outcomes, etc., in relation to the (self-regulatory) readers’ representatives which have been in operation in the national newspapers since 1989 (see Boyle and McGonagle, Media Accountability: The Readers’ Representative in Irish Newspapers, Dublin, 1995).
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

**Table: Criteria /press sector**

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<td><strong>Criteria</strong></td>
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<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting</td>
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<tr>
<td>The system (not yet operative) envisages the creation of a press council and ombudsman to be independent, setting its own code and procedures, but given statutory recognition. It has also involved the setting up for this specific purpose of other industry bodies, e.g. the Steering Committee, Administration Committee and Code Committee.</td>
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<td>This is an innovative form of regulation and has a sustainable and formal setting.</td>
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<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
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<tr>
<td>The press council and ombudsman will establish and operate a code of standards and handle complaints from the public regarding alleged breaches of that code. The system will also provide a built-in appeals system. The government will retain ultimate control to give recognition and to remove it in certain situations but subject to stated</td>
<td>It is not just a case of pure consultation</td>
<td>The non-state component is regulation in itself</td>
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safeguards.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation, measures by third parties (e.g. NGOs)

The range of possible subjects of non-state action has to be limited to make the definition workable.

The press council and ombudsman will be established by the industry itself, with wider public representation and will set standards and procedures for the print media to follow and adhere to.

The system is one to be developed by the industry for the industry and to respond to public concerns regarding content standards.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
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<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
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<tr>
<td>The system is established to achieve the public policy goal of setting standards in the print media and affording the public an alternative, non-court based, means of</td>
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<td><strong>Co-regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems</strong></td>
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<td>complaining and gaining redress where those standards are breached.</td>
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<td>There is a legal basis for the non-state regulatory system</td>
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<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
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<td>The legal basis for the non-state regulatory system will be the new Defamation Act.</td>
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<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
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<td>The state will provide statutory recognition and a statutory framework for the new press council and ombudsman but will leave the detailed drafting of the code and its operation to the industry bodies themselves.</td>
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<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
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<td>There will be real “division of labour” between non-state and state actors.</td>
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<td>The state uses regulatory resources to influence the non-state regulatory system</td>
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<tr>
<td>state-regulatory system</td>
<td>between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
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<tr>
<td>The state will use legislation (the proposed now Defamation Act) and other state resources (e.g. bringing the scheme before the two Houses of the Oireachtas) to influence the non-state regulatory system.</td>
<td>This is a clearly innovative form of regulation, with a real “division of labour” between non-state and state actors. Although not yet in operation or indeed passed by the parliament, it appears to be a strong example of co-regulation.</td>
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**Conclusion:** In my view, given the assessment criteria as set out in the table above, the system envisaged is a clear example of co-operation. It must be emphasized however that it is not yet in operation – the Bill has still to be drafted and debated in the parliament.

**II. Co-operative Regulatory Systems in the internet sector**

1. **Part I: The co-operative regulatory system**

   **a) Development of the regulatory system**

   Internet regulation in Ireland can best be described as self-regulatory. There is, however, an element of co-operation between government and the industry in that the Internet Advisory Board was established on foot of a recommendation by a government-appointed body (see below). The system, which is similar to that operating in other European countries, is outlined below.

   The Internet Service Providers Association of Ireland ([www.ispai.ie](http://www.ispai.ie)) was established by the Internet Service Providers in 1998 and is funded by the industry on a cost-sharing basis. Along with the EU it funds the hotline launched at the end of 1999 to enable members of the public to report complaints of child pornography in particular but also other harmful Internet content ([www.hotline.ie](http://www.hotline.ie)). (The Irish Government, through the Information Technology Fund, provided funds for the initial promotion and launch of the hotline.) In 2002, following extensive consultations with government, it published its first code of practice and ethics, drawn up in association with the Internet Advisory Board, which was established by government. When complaints are received the hotline service endeavours to trace the material concerned and if located on a server in Ireland, issues a notice to the Internet Service Provider to remove the material. It also informs the police. If the material is located in another State that is a member of the INHOPE association, the hotline service hands the matter over to the service in that State.

   The Internet Advisory Board ([www.iab.ie](http://www.iab.ie)) was set up in March 2000 on foot of a recommendation in the 1998 Government report on the Illegal and Harmful Use of the
Internet (report available at www.justice.ie). It is not a statutory body. It was established by the Minister for Justice, Equality and Law Reform with a general remit to supervise a system of self-regulation by the Irish Internet Service Provider Industry. It was set up as a non-statutory body to provide maximum flexibility of operation in a fast changing environment. It comprises a chairman, a manager and 17 members drawn from a wide cross-section of society. Its purpose is to ensure that the system of self-regulation (ISPAI and hotline) works in practice and to monitor developments in this area. It assists the industry in producing codes of practice and promotes awareness of potential dangers for children. It commissions research, for example on children and their use of the new media. It operates by facilitation and cooperation with all parties concerned with the illegal and harmful use of the Internet. It also set up a helpline, staffed by the secretariat, in December 2002, as part of its public awareness campaign. In order to progress its work the Board initially set up four subgroups on cybercrime, awareness, research and codes of conduct.

The overall scheme is one of liaison with the police authorities and with self-regulatory groups in other countries through INHOPE (www.inhope.org)

b) Subject matter of the regulatory system

The subject-matter of the regulatory system is illegal and harmful content on the Internet. The purpose is to protect minors in particular from such content. It operates in tandem with specific legislation aimed at criminalizing child pornography – the Child Trafficking and Pornography Act 1998. Members of the public can use the hotline to report complaints of child pornography and other harmful Internet content.

c) Basis of the co-operation

The basis of the co-operation is multi-dimensional. Members of the public can report illegal or harmful content to the hotline. The complaint can then be investigated and may lead to either the Internet Service Provider being ordered to remove the material or the
police being informed, which may in relevant circumstances lead to a prosecution under the Child Trafficking and Pornography Act, or if the material is located in another State that is a member of the INHOPE association, the hotline service hands the matter over to the service in that State.

The system is overseen by the Internet Advisory Board, which ensures the effectiveness of the system, promotes awareness and commissions research.

d) Institutions involved in the system

The institutions involved in the system are: the Internet Advisory Board, the Internet Service Providers Association of Ireland, the INHOPE association, the police, the hotline service, the EU as part - funder.

The Internet Service Providers Association of Ireland ([www.ispai.ie](http://www.ispai.ie)) was established by the Internet Service Providers in 1998 and is funded by the industry on a cost-sharing basis. It comprises a chairman, a manager and 16 members drawn from a wide cross-section of society.

The Internet Advisory Board was established to help the industry to self-regulate and to monitor developments in relation to illegal and harmful use of the Internet. It operates by providing appropriate complaints facilities (hotline), encouraging and facilitating best practice and procedures, and by providing advice and facilitating research on internet-related issues as appropriate. It comprises an independent chairman and 17 members drawn from the service providers, censor’s office, government, garda (police), education sectors, child protection interests and the legal profession. For example, the current membership includes the general manager of the hotline, a garda superintendent, the deputy data protection commissioner, the director general of INHOPE, three civil servants, a child psychologist and others. It is the body that reviews the operation of the hotline.

The hotline service was established in 1999 and is funded by the service providers and the EU. Its terms of reference include responding to complaints about illegal internet content. Measures taken include blocking and liaison with hotlines in other jurisdictions.
The hotline has a role also in encouraging the development of rating systems for Irish websites and disseminating information.

\textit{e) Functioning of the system}

The addressees of the regulation are the industry, the internet service providers. The scheme involves codes of practice and various forms of liaison between the public, industry and law enforcement agencies in the State. The framework for membership, appointment, funding, independence, etc. of the decision-making bodies is as follows: The Internet Advisory Board is a government body mandated to supervise Internet self-regulation in Ireland. It works closely with the hotline and continues to support and encourage its activities to ensure Internet safety. The Secretariat for the Board is provided by the Department of Justice, Equality and Law Reform. Funding for projects undertaken has been provided by the Information Society Fund. This fund is administered by the Department of Finance with an evaluation team from that Department and the Department of the Taoiseach (Prime Minister). It is a fast-track mechanism to resource public sector initiatives that progress the objectives of the Government’s Information Society Action Plan.

The hotline is supported and funded by the Internet Services Providers Association. Its chairman is a former Director of Public Prosecutions. It receives 50% financial support from the EU Safer Internet Action Plan. It is supervised by the government’s Internet Advisory Board. The hotline is a founding member of the INHOPE Association, the Internet Hotline Providers in Europe. INHOPE co-ordinates the activities of the individual hotlines and through regular meetings ensures the extensive sharing of information and best practices for the operation of Internet hotlines and tracing of illegal child pornography. There are 13 member hotlines and two associate members in the US and Australia.

Decision-making is based around a code of standards and procedures for responding to complaints from the public. Between its establishment in November 1999 and June 2001, the hotline had received more than 670 complaints from the public.
Transparency in the process is addressed through regular reporting, conferences, press releases, issuing of safety tips for parents and children, radio and web advertising and public notice campaigns to raise awareness. Research is commissioned and the findings widely publicized.

The Internet Advisory Board does all of the above. The hotline reports both to the public and to the Internet Advisory Board on all matters which require advice, discussions or decisions by the Board, including new internet developments which need to be reported to the Board. Guidelines and similar material for the public are provided by the Advisory Board and Hotline.

f) Supervision of the system

Supervision of the system is by the government’s Internet Advisory Board, which monitors the activities of the Hotline and developments in general regarding Internet use.

g) Impact assessment

Impact assessment takes place via periodic reports from each of the bodies involved, commissioned research and oversight by the Advisory Board.

2. Part II: Leading cases

The first report of the hotline (November 1999-June 2001) and the second report (July 2001-June 2003) give details of all reports (complaints) received concerning Internet content. They also outline the procedures adopted from logging the report to trace attempt, assessment as to whether the material reported is potentially illegal under the Child Pornography and Trafficking Act 1998, notice to the Garda Síochána (police) and Internet Service Provider (ISP). The decision as to prosecution is a matter for the Garda Síochána, while the timely removal of the specified potentially illegal material is a matter for the ISP. Once this notification is complete, the hotline can close the case. Under the

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1 [www.iab.de](http://www.iab.de)
auspices of the IAB, a protocol or system for the controlled exchange of information has been developed, as well as standardized request and response forms.

Summary of issues detailed in first report of hotline:
A total of 671 reports were received, approximately 85% of which were described by the complainant as involving child pornography. However, of the 671 reports, 50% were not found, only 39 of those found concerned child pornography, and 49 in total were forwarded to the US Cybertipline, the Garda Síochána or ISP. A few samples are given in the report.

Summary of issues detailed in second report of hotline:
The hotline reported that very few of the reports submitted alleged that illegal content is hosted on or distributed from servers in Ireland run by members of the ISPAI. Almost all referred to sites outside the jurisdiction or to spam received from abroad. This is substantiated by the fact that no reports had been forwarded by INHOPE organizations around the world where after investigation the content was found to have been hosted or distributed from servers in Ireland.

During the two year period (2001-3) the hotline received 1792 reports. No valid report was received by the hotline where the content was confirmed as probably illegal and the source of the material provided to be in Ireland. Of the reports received 16% proved to be child pornography from abroad and 39% were assessed as not illegal but 42% of the reports could not be found, mainly because of inaccurate or overly broad information being submitted in the report. The hotline identified an issue with advertising standards in the adult pornography industry, which was outside the hotline’s remit. It also identified the problems of developing technology (e.g. peer-to-peer file-sharing) and techniques to avoid detection.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / internet sector

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The organisations involved are the Internet Services Providers Association, the Internet Advisory Board, Hotline and INHOPE. The Internet Advisory Board was established to help the industry to self-regulate and to monitor developments in relation to illegal and harmful use of the Internet. It operates by providing appropriate complaints facilities (hotline), liaising with similar bodies in other jurisdictions (INHOPE), encouraging and facilitating best practice and procedures, and by providing advice and facilitating research on internet-related issues.

A complaints process is created by the Advisory Board through the hotline.

To influence decisions by persons or, in the case of organisations, decisions by or within such entities

| | Pure consultation | The non-state component should at least in a nutshell be regulation in itself; |
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

| The system sets standards for the industry players to adhere to and to protect the users of the Internet, particularly children. The hotline provides a mechanism for reporting illegal and harmful content and a means of dealing with such complaints/reports. | otherwise it would be practically impossible to single out pure knowledge exchange. |
| The non-state component, particularly the hotline, is an element of regulation in itself. |
| As long as this is performed by or within the organisations or parts of society that are addressees of the regulation | Measures by third parties (e.g. NGOs) |
| The range of possible subjects of non-state action has to be limited to make the definition workable. |
| The purpose of the system is to protect minors in particular from illegal and harmful content on the Internet. Members of the public can use the hotline to report complaints of child pornography and other harmful Internet content. The operation of the hotline is performed by the internet organisations themselves that are addressees of the regulation | |

**Link between the non-state-regulatory system and state regulation**
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<td>The scheme involves codes of practice and various forms of liaison between the public, industry and law enforcement agencies in the State. The system is overseen by the</td>
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government’s Internet Advisory Board. Decision-making is based around a code of standards and procedures for responding to complaints from the public.

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<tr>
<th>The state/EU leaves discretionary power to a non-state regulatory system</th>
<th>Traditional regulation</th>
<th>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</th>
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The Irish system is part of the INHOPE system of Europe. It is supervised by the government’s Internet Advisory Board, which monitors the activities of the Hotline and developments in general regarding Internet use.

<table>
<thead>
<tr>
<th>There is real “division of labour” between government on the one hand and the government’s Advisory Board and the industry hotline, on the other.</th>
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</thead>
</table>

The state uses regulatory resources to influence the non-state regulatory system

| Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system | Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation. |
|---|---|---|

It is not a case of pure
There is a clear division of labour. The Child Trafficking and Pornography Act creates offences, which are prosecuted in the courts. The hotline operates a complaints and reporting system, whereby the public can report any findings of illegal or harmful content on the Internet. The hotline has set procedures to follow in responding to such complaints or notifications. Its operation is overseen by the government’s Advisory Board.

The state thus uses regulatory resources to influence the non-state regulatory system.
**Conclusion:** The system, although widely described as “self-regulatory”, involves considerable input from government, primarily through the role of the Internet Advisory Board (IAB). To that extent, it involves a high level of co-operation between government and all industry bodies. However, the IAB is not a statutory body, i.e. it is not established by legislation, which may weaken its claim to be a co-regulatory scheme in accordance with the criteria above. Nonetheless it is linked to legislation, namely the Child Pornography and Trafficking Act 1998. In my view it is more than a mere self-regulatory scheme and should be considered as a co-regulatory scheme.

### III. Co-operative Regulatory Systems in the film and video games sector

#### 1. Part I: The co-operative regulatory system

*a) Development of the regulatory system*

Regulation of film and video in Ireland is primarily statutory. However, one aspect of control of video games involves co-operation between the relevant statutory body (the office of the film censor) and the industry. The system is outlined below.

The principal legislation governing films is the Censorship of Films Acts 1923-1992. The Acts establish the office of film censor and the Censorship of Films Appeal Board. The Video Recordings Acts 1989-1992 extended the role of the film censor and appeal board to cover videos also. The role of the censor is to provide certificates for public showing of films and supply certificates for videos. Video games are expressly excluded from the licensing and certification system contained in the Video Recordings Act and a certificate need not be sought unless a video game contains matter that might ground refusal of a certificate.

The grounds are set out in the Video Recordings Act. Video games are accorded age classifications. A voluntary system was agreed with distributors in 2000. The ELSPA rating and labelling system was adopted. The distributors recommended to their members that all games rated in the categories “over 15” or “over 18” should be submitted to the
film censor for classification and certification. The ELSPA system has since been replaced by the PEGI system and the relevant ages are “16” and “18”.

b) Subject matter of the regulatory system

The subject-matter of the regulatory system is video games, which largely fall outside the main thrust of the statutory scheme for regulation of videos, which dates from 1989. The primary aim is the protection of children from violent or other harmful content. The primary means of achieving this aim is by providing guidance to parents by indicating ratings and labelling the nature of the content.

c) Basis of the co-operation

The basis of the co-operation is an agreement as to rating and labelling between the industry (the distributors) and the (statutory) film censor, whose office regulates the showing of cinematographic films and the supply of videos to the public. The film censor’s office asks all distributors to submit all “18” and some “16” video games to them and while nearly all do, there is no obligation on them to do so. If a complaint is received from a member of the public concerning a video game, the film censor’s office will look at it.

d) Institutions involved in the system

The institutions involved in the system are the office of the film censor, the video distributors and initially ELSPA, the European Leisure Software Providers Association, now PEGI, the Pan European Games Information. The film censor is appointed by government. There is also a deputy film censor and 10 part-time assistant censors, as well as an office manager, six civil servants and two projectionists. The office is funded by Government and from fees, levied according to film footage, imposed on the industry when certificates for public showing or public supply are sought from the censor.
e) Functioning of the system

The addressees of the regulation are the industry distributors. The system functions in three ways:
A certificate must be sought from the film censor if a video game contains matter such as gross violence or cruelty, incitement to hatred or obscenity that might ground refusal of a certificate. Video games are accorded age classifications by the censor. A voluntary system was agreed with distributors in 2000. The ELSPA rating and labelling system was adopted, later replaced by PEGI. The film censor’s office asks all distributors to submit all “18” and some “16” video games to them and nearly all do.

f) Supervision of the system

The Minister for Justice is designated in the legislation as the person charged with supervision of the film censor system.
The legislation provides for a register of films and videos, including details of decisions of the film censor regarding certification. The film censor’s office has a website on which it provides information on its decisions and reasons for applying particular age categories, etc. For example, the nature of the content, whether it contains violence, drugs, sex or nudity, or offensive language, is indicated in each case. The film censor’s office also conducts research, for example as to the views and concerns of parents.

g) Impact assessment

Apart from research (above) the film censor’s office regularly reviews the age classifications and other regulatory measures. Changes are made periodically.

2. Part II: Leading Cases

The film censor’s office instanced two cases in 2004, namely Manhunt and The Punisher, in relation to a murder case in the UK.
### 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

#### Table: Criteria / film and video games sector

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
</tr>
</tbody>
</table>

Regulation of film and video in Ireland is primarily statutory. However, one aspect of control of video games involves co-operation between the relevant statutory body (the office of the film censor) and the industry.

It takes the form of a voluntary system agreed with distributors in 2000 that initially the ELSPA, and now the PEGI, rating and labelling system for video games be adopted. All games rated in the categories “over 16” or “over 18” should be submitted to the film censor for checking regarding classification and certification.

This arrangement, while voluntary, is a pragmatic and convenient way to address the problem that arose with video games and that was not addressed by the relevant legislation.

| To influence decisions by persons or, in the case of organisations, decisions by or within such entities | Pure consultation | The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to |
The rating and labelling system has the advantage of clarity and wide use, as it is the one adopted across Europe. It complements the statutory system by encouraging distributors to submit video games with potentially harmful content to the state film censor for classification and certification.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation, it is not a case of pure consultation but rather a form of co-operation between government and industry on a specific matter, i.e. exerting some kind of control on the distribution of certain video games in the interest of protecting minors.

The system involves the video games distributors and the rating and labelling system adopted initially by ELSPA for Europe and now PEGI. It involves co-operation with the state’s film censor’s office and feeds into the state regulatory system.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criteria</strong></td>
</tr>
<tr>
<td>The system is established to achieve public policy goals</td>
</tr>
</tbody>
</table>
The system is established to achieve the public policy goal of protecting children from harmful content in video games and providing guidance for parents in that regard. The rating and labelling system and the recommendation to submit certain categories of video games to the state censor for classification and certification contribute to achieving the policy goal.

There is a legal basis for the non-state regulatory system only insofar as it feeds into the state censorship process and provides a remedy where the legislation failed to do so. Also, the system involves and is overseen by the state censor, whose office was established by legislation.

There is a legal basis for the non-state regulatory system in the sense that it is an arrangement between the industry and state censor. Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of traditional regulation.

<table>
<thead>
<tr>
<th>The system is established to achieve the public policy goal of protecting children from harmful content in video games and providing guidance for parents in that regard.</th>
<th>The rating and labelling system and the recommendation to submit certain categories of video games to the state censor for classification and certification contribute to achieving the policy goal.</th>
</tr>
</thead>
<tbody>
<tr>
<td>There is a legal basis for the non-state regulatory system only insofar as it feeds into the state censorship process and provides a remedy where the legislation failed to do so. Also, the system involves and is overseen by the state censor, whose office was established by legislation.</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
</tr>
<tr>
<td>The legislation did not provide for regulation of certain kinds of video games and this arrangement was adopted to address the omission.</td>
<td>It is not therefore a form of traditional regulation.</td>
</tr>
<tr>
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</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
</tr>
<tr>
<td>The film censor’s office is the focal point for the regulation to which the distributors and PEGI system contribute.</td>
<td></td>
</tr>
</tbody>
</table>
Conclusion: In my view, the system is a pragmatic one permitted rather than expressly authorised by the legislation (Video Recordings Act 1989). In practice, the film censor’s office adopts the PEGI ratings and does some checking by asking the distributors to submit the “18” categories and some “16”s. It also checks in individual cases where members of the public complain. It could therefore be categorised as self-regulation with a degree of monitoring by a statutory body.

IV. Co-operative Regulatory Systems in the mobile phone sector

1. Part I: The co-operative regulatory system

   a) Development of the regulatory system

   Telecommunications in Ireland are regulated primarily by the Commission for Communications Regulation (ComReg, www.comreg.ie) in accordance with the Communications Regulation Act 2002 and on foot of policy directions from the Government’s Department of Communications, Marine and Natural Resources. The Irish Cellular Industry Association (ICIA) is the organisation which represents the mobile telephone industry. It is an alliance of the main mobile telephone operators – Vodafone, O2, Meteor and the mobile handset manufacturers, Nokia and Siemens. ICIA is affiliated to the Telecommunications and Internet Federation, which is part of ICT Ireland, the voice of technology within the Employers’ organisation, IBEC. In June 2004, the ICIA launched the Irish mobile operators Code of Practice for the responsible and secure use of mobile services (full text of code available at www.icia.ie). It also launched a parental guide to mobile services and a mobile content filtering trial.

   b) Subject matter of the regulatory system

   The subject-matter of the regulatory system is the establishment of standards that mobile operators will adhere to on the issues of parental controls for access by minors to mobile services, malicious or offensive person-to-person communications, unsolicited commercial communications (Spam), internet access and premium rate services. The
standards are set out in the industry code of practice. The primary concern is the protection of children from inappropriate content.

c) Basis of the co-operation

The basis for the co-operation is a code of practice, developed and operated by the industry. The code includes the facilitation by operators of parental access to children’s accounts. It requires operators to establish telephone lines for the reporting of unsolicited commercial communications (Spam) and to report and co-ordinate with Regtel (the industry regulator of premium rate services) and the Data Protection Commission, if necessary. The code operates alongside that of Regtel, in respect of premium rate services, and that of the Internet Service Providers (ISPAI), which links it into the system for dealing with child pornography and other illegal and harmful use of the Internet (see above). These two industry codes apply to mobile operators as well as the ICIA code. (The Regtel code is revised periodically, most recently in January 2004.)

In response, the Government announced in 2004 its intention to set up, in close consultation with the industry, a national registration system for all 3G mobile phones sold in Ireland that are capable of carrying video clips. This is regarded by the Minister for Communications as increasing safety. The register is not yet in operation, but proposals for legislation are being considered to empower the Minister to provide for it.

d) Institutions involved in the system

The Department of Communications, Marine and Natural Resources has separate divisions, one of which has as its key role the development of effective policies for the regulation of the electronic communications sector and management of the radio frequency spectrum. Responsibility for the implementation of policies lies with the Commission for Communications Regulation (ComReg).

ComReg is an independent body under the aegis of the Department of Communications, Marine and Natural Resources. It is a statutory body established under the 2002 Act and has responsibility for the regulation of the electronic communications sector.
(telecommunications, radio-communications and broadcasting transmission), as well as the postal sector. Its remit includes regulation of mobile operators providing voice and data services. It promotes competition by facilitating market entry and regulating access to networks, as well as providing the framework for new services, such as 3G. It focuses on operators and business and individual users. It is responsible for protecting consumers and for encouraging innovation in the sector.

ComReg comprises a chairperson and two other commissioners. It operates through 5 main divisions, supported by senior legal and economic advisers. It operates as a collegiate body, with decisions taken collectively by the three commissioners. On a day-to-day basis, however, each of the three commissioners assumes one of the three main roles, namely promoting competition, protecting the consumer, and encouraging innovation.

The service providers have primary responsibility for taking action for consumers who wish to unsubscribe, for example, and for dealing with consumer queries. Regtel (outlined in first report), which is the regulator of premium rate SMS services, is responsible for ensuring that unsubscribe codes and service provider contact details are readily available to customers. Regtel, which was formed in 1995 as a not-for-profit limited company, financed by a levy placed on the industry, also investigates issues of legality, decency, honesty, etc. in relation to the content of such services. The ICIA (above), which represents the mobile telephone industry, operates a Code of Practice for the responsible and secure use of mobile services. It has also issued a guide for parents and a content filtering scheme.

**e) Functioning of the system**

The addressees of the regulation are the industry operators, with a view to protecting the consumer, particularly children. The Department of Communications, Marine and Natural Resources develops policies for regulation of the sector. The policies are implemented by ComReg, a statutory body under the aegis of the Department. The mobile telephone scheme involves formal regulation emanating from the Department and ComReg, as well as its own and other industry codes of practice (ICIA, Regtel, ISPAI),
and various forms of liaison and reporting between the government, industry and consumers. Regtel sets standards through a Code of Practice with which the industry must comply. It investigates complaints concerning matters covered by the Code of Practice and monitors samples of premium rate services from time to time to ensure that they comply with the code and can take action to ensure compliance in cases where breaches of the code are found (see below).

The ICIA code obliges operators to take specific steps in relation to parental controls, person-to-person communication, Spam, Internet access and premium rate services. It contains an enforcement section, which includes, for instance, various requirements to report, to fully co-operate with the garda (police), to prominently display a link to the ISPAI and hotline (above), to maintain and revise their acceptable use policy when appropriate. The ICIA code is essentially a self-regulatory code, welcomed by government, which through its Department and ComReg oversees the implementation of policies and regulation.

f) Supervision of the system

Supervision of the Internet-related part of the regulation is as set out in the previous section above.

g) Impact assessment

Regular review of the code. The code will be updated in line with technological developments.

2. Part II: Leading cases

The annual reports of the various bodies detail their experience, difficulties (e.g. Regtel in its 2004 report instanced the difficulty of unauthorised services, misleading promotion and unsolicited texts) and various types of complaints and how they are being dealt with.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / mobile phone sector

<table>
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<tr>
<th>Non-state regulatory system</th>
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<td>The creation of organisations, rules or processes</td>
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<td>The Irish Cellular Industry Association (ICIA) is an alliance of the main mobile telephone operators. It operates a code of practice for the responsible and secure use of mobile services (full text of code available at <a href="http://www.icia.ie">www.icia.ie</a>), which includes an enforcement section. ICIA also launched a parental guide to mobile services and a mobile content filtering trial in 2004.</td>
<td></td>
<td>The system comprises a set of codes laying down standards for various types of content. The interoperability of the codes, involving several industry bodies appears to be an innovative way to deal with complex technologies and diverse areas of content</td>
<td></td>
</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge</td>
<td></td>
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</tbody>
</table>
The purpose of the code is to establish standards that mobile operators will adhere to on the issues of parental controls for access by minors to mobile services, malicious or offensive person-to-person communications, unsolicited commercial communications (Spam), internet access and premium rate services.

The code operates alongside that of Regtel, in respect of premium rate services, and that of the Internet Service Providers (ISPAI), which links it into the system for dealing with child pornography and other illegal and harmful use of the Internet (see above). These two codes apply to mobile operators as well as the ICIA code.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation

<table>
<thead>
<tr>
<th>Measures by third parties (e.g. NGOs)</th>
<th>The range of possible subjects of non-state action has to be limited to make the definition workable.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The addressees of the regulation are the industry operators, who must adhere to the standards set out in the code, with a view to protecting the consumer, particularly children.</td>
<td>The subjects are the industry operators who must adhere to the standards set out in the code for the protection of users, particularly children.</td>
</tr>
</tbody>
</table>

The ICIA code obliges operators to take specific steps in relation to parental controls, person-to-person communication, Spam, Internet access and premium rate services. It contains an enforcement section, which includes, for instance, various requirements to report, to fully cooperate with the garda (police), to prominently display a link to the ISPAI and hotline (above), to maintain and revise

| exchange. | See above |
their acceptable use policy when appropriate.

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<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
<td></td>
</tr>
</tbody>
</table>

The mobile telephone scheme involves:

(i) formal regulation emanating from the (government) Department of Communications, Marine and Natural Resources, which sets public policy goals, and

(ii) ComReg, a statutory body, which implements the government’s policy directions, as well as

(iii) the mobile industry’s own code (ICIA code) and other industry codes of practice (Regtel, ISPAI), and

(iv) various forms of liaison and reporting between the government, law enforcement, industry and consumers.
<table>
<thead>
<tr>
<th>The primary public policy goal addressed in the ICIA code is the protection of minors.</th>
<th>Informal agreements without any legal criteria to judge the functioning of non-state regulation</th>
<th>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</th>
</tr>
</thead>
<tbody>
<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td>The code itself is a form of self-regulation which complements or fits within the overall scheme, which involves legal criteria.</td>
<td></td>
</tr>
<tr>
<td>The legal basis for regulation of the sector is the Communications Regulation Act 2002. The ICIA code is a self-regulatory mechanism, a minimum set of standards, in fulfillment of the industry’s (contractual) responsibilities to the consumer. It has been welcomed, if not formally endorsed(?), by the government, and is in general accordance with the wider schemes prompted by government through its Internet Advisory Board for regulation of the Internet.</td>
<td>Traditional regulation</td>
<td></td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
<td></td>
</tr>
<tr>
<td>ComReg implements the EU Framework Directives. ComReg is a statutory body.</td>
<td>The role of ComReg itself marks a departure from traditional regulation. Prior to the setting up of the office of the Director of Communications</td>
<td>The system is still primarily regulated by government and ComReg. However, the</td>
</tr>
<tr>
<td>ComReg has overall responsibility for implementing the government’s policies on the sector. The code established by the ICIA sets out the detailed responses the industry operators will adhere to.</td>
<td>Regulation (ODTR), the forerunner of ComReg, under legislation in 1996, the government regulated directly through the relevant Minister and Department.</td>
<td>Adoption of industry codes means that the industry itself has a defined role in “policing” itself.</td>
</tr>
<tr>
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</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
</tr>
<tr>
<td>The industry initiative is but one element in the overall regulatory system. The government encourages industry involvement but continues to play an active role itself, for instance in announcing the G3 register at the launch of the industry code.</td>
<td>The industry code is a useful element in the overall system.</td>
<td>The industry code is a useful way of dealing with the detail of day-to-day regulation and operation of the system to protect users, particularly children.</td>
</tr>
</tbody>
</table>
Conclusion: In my view, while the overall system involves state and non-state actors, this is probably an example of self-regulation rather than co-regulation. The broad issues are determined by the government and ComReg, while the more detailed elements of the scheme are operated by the industry bodies themselves through codes, which do not appear to have any government involvement.
3.12. Italy

I. Co-operative Regulatory Systems in the broadcasting sector

1. Part I: The co-operative regulatory system

The Italian broadcasting sector (i.e. Radio and Television) has been regulated by an increasingly intricate patchwork of co-operative regulations. Each of those bodies of rules significantly differs from the others, as each one expressly addresses a specific issue of the broadcasting sector. Furthermore, each co-operative regulatory system is based on a different legal basis, holds a distinct legal status and is enforced by separate bodies and institutions. In this part, three distinct co-operative regulatory systems will be examined:

i. The Code of Self-Regulation for Advertising (Codice dell'Autodisciplina Pubblicitaria Italiana)

ii. The Self-Regulation Code for TV and Children (Codice di Autoregolamentazione TV e Minori)

iii. The Self-Regulation Code for TV sales (Codice di autoregolamentazione in materia di televendite spot di televendita di beni e servizi)

a) Development of the regulatory system

i. Advertising: The establishment of a self-regulatory system for advertising dates back to October 1963, when the 7th National Conference on Advertising approved a motion whereby the principles and aims of the advertising voluntary control were laid down. Indeed, at the time Italy lacked of an advertising regulation aimed at protecting customers, as it was only adopted in 1992. Pursuant to the guidelines and objectives enshrined in the 1963 motion, the first edition of the Code of Self-Regulation for Advertising was adopted by the Institute for Advertising Self-Regulation (Istituto dell’Autodisciplina Pubblicitaria) in 1966. Since then, the Code has been updated 35 times, in order to effectively regulate the advertising sector, by
means of introducing both substantial and procedural improvements to the self-regulation system. The current version of the Code, its 36th edition, entered into force on 22 July 2004. As a general remark, the Self-Regulation Code has played a vital role in the regulation of advertising over the last four decades for several different reasons. Indeed, as it has been noted above, the self-regulatory system set out by the Code has been the only set of rules regulating advertising for almost thirty years. In the early 90’s, however, our legislature adopted an absolute deluge of State-regulation: indeed, the Italian Parliament approved something like ten different statutes in two years. As a result, this intricate patchwork of statutes and regulations created a great deal of uncertainty as to the competences of the entities (e.g. courts, independent commissions etc.) in charge of ensuring the lawfulness and correctness of advertising. Since then, however, the Code of Self-Regulation for Advertising has distinguished itself both for the clarity and precision of its rules and for the effectiveness of their enforcement by the relevant bodies [see sections d) and e) for further details].

ii. **TV and Children:** the Code does not deal with a previously unregulated matter, as the protection of minors had already been the aim both of state (*inter alia:* art. 8 of law 6 August 1990, n. 223) and non-state regulation (e.g. art. 11 of the Code of Self-Regulation for Advertising). Once a mere agreement under private law, the Code has been recently formally acknowledged by law 112/2004, resulting in its obligations to be legally binding even for companies which are not signatories (see section c) ii for further information on the issue of the interaction between the Code and law 112/2004).

iii. **TV sales:** TV sales are the object of an intricate patchwork of state-regulation, *inter alia:* law n. 112/2004, Law n. 223/1990, AGCom Regulation n. 538/01/CSP, Law 30 April 1998, n. 122, d.lgs 50/1992, d.lgs 185/1999, dpr 420/1995, dm 385/1995, l. 650/1996. However, according to the Self-regulation Code’s preamble, TV sales of goods and services such as astrology, lotteries etc. required more detailed provisions than those embodied by the above mentioned state-regulation instruments. For this reason, the signatories of the Self-Regulation Code decided to introduce a document setting a stricter and higher standard of protection than that provided for the state-regulation.
b) Subject-matter of the regulatory system

i. Advertising: the rules set out by the Code of Self-Regulation (the so-called Rules of Behaviour) define what is deemed correct and lawful communication with reference to advertising. Such rules apply to any advertising message, irrespective of the medium used and of the product/service offered. The Code's objectives are clearly stated under the section named "Preliminary and General Rules", which stipulates that the object of the Code is "to ensure that advertising, in playing its role which is particularly useful in the economic process, should be realised as a service for the public, with specific reference to its influence on the consumer". Furthermore, "the Code gives a definition of the activities in contrast with such object, even though they may conform to the legislation in force; its rules, taken as a whole, by defining the behaviour to which the advertising industry must conform, provide the legislative basis for Advertising Self-Regulation". As regards the substantive content of the rules set out by the Code, they deal with: the principle of fairness in advertising; the prohibition of misleading advertising; the use of scientific terms and statistic data; the authenticity of testimonials; the presentation of mandatory and additional guarantees; the principle that advertising must be recognisable and must respect moral, civil, and religious beliefs as well as human dignity, with a special commitment to the protection of children and Adolescents. Moreover, the Code mandates that advertising shall not exploit superstition, credulity and fear, shall not be vulgar, violent or indecent. As the Code enshrines a prohibition to imitate, confuse or exploit the notoriety of others, on the other hand it allows indirect comparison. Finally, the Code provides for a set of special rules for specific sales systems (e.g. distance selling, promotional activities etc.) as well as for certain products (e.g. alcoholic beverages, food supplementers and dietetic products, medicinal products and curative treatments etc.).

ii. "TV and children": According to its preamble, the Code of Self-Regulation "TV and children" is aimed to the protection of the mental and moral integrity of children, with a special commitment to the safeguards of younger children (0-14 years). Therefore the Code provides for a comprehensive set of rules concerning the participation of children to TV broadcasts and the contents of TV programmes. In this respect, the Code sets some general principles which apply to all TV programs (prohibition to display children which were perpetrators, witnesses
or victims of a crime etc.) and provides for several different groups of rules which apply to a
certain time frame (e.g. “TV for children” 16.00-19.00) and that specifically address
advertising.

iii. **TV sales**: The Code of Self-Regulation for TV sales regulates TV sales and ads sales
advertisements of goods and services such as astrology, cards reading and similar services
(e.g. lottery number prediction etc.). As regards the concept of TV sales and ads sales
services, the Code expressly recalls the definition provided for by AGCom decision
538/01/CONS, i.e. “a direct offer broadcasted to the general public via TV, with a view of
supplying, in return for payment the payment of a fee, goods or services, including
immovable property, rights and obligations”.

c) **Basis of the co-operation**

i. **Advertising**: The Code has no legal basis, as affiliation to the Institute for Advertising Self-
Regulation is strictly voluntary. The institute is a non-profit organisation with legal
personality ruled by a Statute and financed by its members. As a consequence of the private
nature of both the Institute and the Code, the latter’s provisions are binding only for its
members. Nonetheless, the dependability, the flexibility and the rapidity of the self-regulatory
system have been formally acknowledged by the State on several occasions. Most recently,
two forms of legal interaction between state-regulation and the self-Regulatory system have
been established, namely: (a) with reference to the approval for the advertising of
pharmaceutical products; (b) on the subject of the repression of misleading advertising. See
below for further details.

ii. **"TV and children"**: in the beginning, the "TV and Children" Code had no legal basis as it was
merely an agreement between some TV broadcasters, thus imposing obligations only to its
adherents. Nonetheless, the Code provides for a Surveillance Committee whose members
were officially appointed by a decree of the Ministry of Communications adopted in
accordance with AGCom (i.e. Italian Communication Authority); moreover, the Code
stipulates that the said committee shall cooperate with AGCom, *inter alia* by identifying
broadcasts which infringe the relevant legislation for the protection of children. However,
nowadays the Code at issue has been enshrined in statute law, namely by law 112/2004, whose art. 10.1 mandates that all TV broadcasters must comply with the provisions in the Code and that amendments and integrations to the Code shall be adopted by means of a decree of the Ministry for Communications. Furthermore, art. 10 stipulates that AGCom is in charge of the enforcement of the rules set out by the Code and that it may issue penalties for the infringement of those rules.

iii. TV sales: as regards the legal basis of the co-operative system concerning TV sales, it consists both of state and non-state regulation. As concerns the former Law l. 112/04 mandates that government adopts a regulation with a view of reducing or discontinuing state aids and funding in favour of the broadcasters which fail to comply with the self-regulation Code. At the present time, such regulation has not been adopted yet. Moreover, art. 1.3 of the Decree of the Ministry of Communication n° 292/2004 requires the adhesion to the self-regulation code on TV sales for broadcasters to be eligible for the concession of state aids. Likewise, art. 1.2 lit. h) of a Decree of the Ministry of 31 January 2003 requires the commitment to respect the Code as a condition for the concession of state aids to local broadcasters. As regards the non-state regulation, it is only based on two sources: the self-regulation Code and the Regulation of the TV sales Surveillance Committee are setting up procedural rules. The former is an agreement signed by several national and local TV broadcasters, whereby such broadcasters commit themselves to the compliance with a set of rules (i.e. the Code) when broadcasting TV sales and establish a Surveillance Committee in charge of ensuring such compliance. The latter was the first achievement of the said Committee, which adopted such a regulation as it believed that more detailed procedural rules were needed to implement the Code.

d) Institutions involved in the system

i. Advertising: the Institute for Advertising Self-Regulation is responsible for the drafting and updating of the rules of the Code, the enforcement of such rules and the settlement of disputes which may arise with respect to the breach of the advertising rules. The jurisdictional and monitoring activity on advertising is carried out by two organs: the Advertising Review Board (Comitato di controllo) and the Jury (Giuri). These are backed by a Secretariat, in charge of the organisation in general as well as of first screening.
ii. "TV and children": at the outset, the implementation and the enforcement of the Code were mainly carried out by the Surveillance Committee, a joint organisation made up of representatives both of broadcasters and institutions (including inter alia: AGCom, CoReCom, National Council of Users etc.). The Council of Users is a collegiate body composed of eleven members appointed by the Italian Regulation Authority for Communications (AGCom). The members are chosen among experts designated by Users' Associations for radio and TV. As regards the Council of Users' funding, AGCom decision n° 54/99 stipulates that AGCom itself is to provide structures, personnel and funding for the Council activities. In sum, the Council is funded by public resources, namely by the Italian independent regulation authority for communications. As to the funding of the Surveillance Committee, it benefits from contribution by broadcasters’ associations as well as logistic and technical assistance from the Ministry of Communications, which provides both staff and accommodation to the Surveillance Committee.

iii. TV sales: the enforcement and compliance with the Code is ensured by a Surveillance Committee, which resides at and is funded by the Ministry of Communications and whose twelve members are officially appointed by the Minister of Communications. Six of those members represent private and public as well as local and national broadcasters while the others represent State institutions, i.e the Ministry of Communication, AGCom (the Italian Regulation Authority for the media), the Ministerial Commission for Radio and TV (Commissione per l’assetto radiotelevisivo), the Regional Communication Committees (Co.Re.Com.), the Regional Radio and TV Committees (Co.Re.Rat.), the National Users’ Council. The appointment of such members by the Minister of Communication is not conditional upon the fulfilment of any technical or professional prerequisite.

e) Functioning of the system

i. Advertising: as referred to above, the Institute for Advertising Self-Regulation's main scope of action is the review and enforcement of the Self-regulation Code on Advertising, which embodies a broad set of obligations for its members on the subject of the correctness and
lawfulness of advertising. As to the enforcement of such rules of behaviour, art. 36 of the Code stipulates that anyone who believes he has suffered prejudice from advertising activities in breach of the Code may file a complaint to the Jury requesting such body to adopt a decision against those who have undertaken such activities, provided that the alleged perpetrators of the violation have accepted the Code. Moreover, individuals as well as consumers’ associations may submit a complaint to the Advertising Review Board if they deem that some advertising activities infringe the rules of the Code protecting the general interests of consumers. Both the Jury and the Review Board are collegiate bodies, composed respectively of nine to fifteen and ten to fifteen members appointed by the Institute for a period of two years. As to the prerequisites for such appointment, both members of the Jury and of the Review Board are chosen among experts in law, consumer issues, and advertising communications. In addition, in order to ensure the impartiality of their decisions, members from both bodies cannot be chosen from among experts who practice their professional activities in advertising self-regulation matter. Moving back to the issue of the decision-making process, the Code mandates that, upon the receipt of a complaint, the Jury invites both the complainant and the respondent to submit documents and summons them before the Jury for a hearing. At the end of such discussion, the Jury may either issue a decision or seek additional evidence. If the Jury finds that the advertising does not comply with the rules of the Code, it adopts a decision whereby it orders that the interested parties have to refrain from broadcasting it. The Jury’s decisions may not be appealed and are published on the Institutes’s website. The Jury may also order that abstracts of decisions be disclosed to the public under the terms and in such media that are deemed appropriate. However, no other sanctions may be imposed by the Jury. Besides, if the advertising being examined appears to constitute a clear violation of the Code, the President of the Review Board may issue a desist order, requesting the advertiser to discontinue such advertising. The Review Board may not impose other sanctions, however, failure to file opposition to its desist orders causes them to become final. As regards the effect of the Jury’s decisions, it must be noted that, by means of adhering to the Code, signatories have committed themselves to observe the rules of the Code and to have them accepted by their members, as well as to make the Jury’s decisions adequately known and to adopt appropriate measures with respect to those members which fail to comply with such decisions. Nonetheless, the non-observance of the decision of the Jury, which has hitherto been relatively infrequent, may not be the object of further sanctions.
As regards the Institute’s authority with respect to the advertising of pharmaceutical products, the legislative decree of 30 December 1992, n. 541, art. 6.1 mandates that all advertisements of such products shall be submitted to the ministry of Health for prior authorisation. Alternatively, according to art. 6.5 lit. b) of such decree, companies who advertise pharmaceutical products sold over the counter may submit their advertisements to a "self-regulation institute", namely to the Institute for Advertising Self-Regulation, as clarified by a decree of the Health Ministry of 18 June 1993. Accordingly, companies may submit their advertisements to a special sub-committee of the Review Board (composed of a lawyer, a physician and a pharmacologist), which adopts a decision whereby it may either approve the ad or reject it. In this case, a detailed technical statement of reasons is attached to the decision. As to the effects of the sub-committee’s decision, it (i) prevents the Review Board from submitting motu proprio a complaint to the Jury with regards to the ad approved by its sub-Committee, and (ii) is acknowledged by the Health Ministry, which may authorise the ad on the grounds of the sub-committee’s positive appraisal. In this respect, the sub-Committee’s ex ante review mechanism is alternative to – and usually significantly faster than – the assessment of the ad by the relevant Ministerial Commission. However, even though both procedures may ultimately lead to the same result (i.e. the authorisation of the ad by the Ministry), only the latter ends with an act of public law, since the Institute – and thus its sub-committee – may not be deemed a public entity and thus may only adopt acts of private law. Moreover, with reference to the repression of misleading advertising, the legislative decree of 25 January 1992, n. 74 assigned a general competence on the subject to the Antitrust Authority, but at the same time acknowledged the worth of the self-regulation. Namely, art.8 of the said decree expressly authorises parties to file complaints concerning misleading advertising to self-regulation institutes. In addition, according to paragraph 2 of said article, parties may agree to commit themselves not to address the Antitrust Authority until the self-regulation entities adopt their decision on the issue. Finally, if the same dispute has been brought before both the Antitrust Authority and self-regulation institutes, parties may request the former to suspend the proceeding for a maximum of 30 days.

ii. "TV and children": the Code embodies a number of obligations for broadcasters regulating the issues of the participation of children to TV broadcasts, as well as the contents of
transmissions. As said before, the Code provides for some general principles for all TV broadcasts, such as the prohibition to display children which were perpetrators, witnesses or victims of a crime etc. Additionally, the Code sets rules to specific time frames (e.g. “TV for children” 16.00-19.00) and that specifically regulate advertising. At the outset, participation to this self-regulatory system was entirely voluntary and the Code only imposed obligations to its members. However, since Law 112/2004 entered into force, its rules are legally binding for all TV broadcasters, irrespective of their affiliation to the Code. Compliance to the rules embodied by the Code is ensured by the Surveillance Committee, which may assess the compliance of a given transmission either *motu proprio* or upon a complaint from interested parties. The notion of “interested parties” has been hitherto construed quite broadly by the Committee’s case-law, so that both individual and companies may file a complaint even in lack of an individual prejudice.

If the Committee finds a broadcast to be inconsistent with such rules, it adopts a resolution and, depending on the circumstances, determines how it must be publicised. Additionally, the Committee may request the broadcaster to discontinue such TV programme and to comply with the rules embodied in the Code. The adoption of such a resolution requires the approval of two-thirds of the members of the Committee. These resolutions may not impose further sanctions and may not be appealed. Conversely, AGCom’s decisions, which may be adopted on the grounds of a notice submitted by the Committee, may impose fines and other sanctions, but may be appealed before regional administrative tribunals (*T.A.R.*). As a matter of fact, AGCom’s decisions, as opposed to the Committee’s, may negatively affect the concerned party’s rights and legitimate interests, thus falling within the scope of art. 24 of the Italian Constitution, which entitles such party to address to Courts in order to safeguard his/her prerogatives.

As opposed to the nature of the Committee’s decisions, AGCom’s are unquestionably acts of public law, as they are adopted by an Administrative Independent Authority. As regards the Committee’s decisions, in the first place it must be determined whether such entity is or is not a public body, i.e. part of the Public Administration. To sum up, since the Committee (i) pursues public policy goals; (ii) is, to a certain extent, part of the Ministry of Communications; (iii) is funded by public resources (i.e. personnel, structures, logistics etc.) it may be concluded that it is a public body an thus may adopt acts of public law.
Last but not least, it must be noted that the Surveillance Committee’s decision-making process is governed by a regulation adopted by the Committee itself, which ensures the respect of the principle of due process throughout the proceedings.

iii. **TV sales**: the adherents commit themselves to the respect of a set of rules concerning TV sales. Consequently, such broadcasters have the self-imposed duty not to broadcast TV sales which are misleading, which exploit superstition, fear and credulity etc. Participation to the system is, in principle, voluntary, as the Code only imposes obligations to its adherents. Nonetheless, the above mentioned provisions, which require broadcasters to adhere to or to commit themselves to respect the Code as a condition for the concession of State aids, do create an economic incentive for operators to join this voluntary self-regulation system. As regards the decision-making bodies, the Surveillance Committee, whose composition has been described above, is divided into three sections, composed by four members each. The Committee ensures the respect of the Code upon complaints filed by individuals, associations or companies according to a form, available on the internet. Each complaint is dealt with by a section, which may adopt a decision by consensus. If consensus is not reached, the plenary may adopt it by ordinary majority. Due process is guaranteed throughout the decision-making process: the company whose infringement to the Code is being assessed by the Committee must be invited to present its observations; the company or individuals which have filed the complaint are informed on and may participate to the proceedings; the decision is public and shall be notified to the parties. If an infringement to the Code’s provision is ascertained, the Committee’s decision may request the company to discontinue to broadcast such transmission. In the most serious cases, as well as in occasion of repeated violations, the Committee may impose the company to communicate the decision to its users. In case of immediate necessity or of a clear and grievous violation of the Code, the Committee may also adopt temporary decisions such as admonitions and requests to discontinue the broadcasts until the outcome of the decision making process.

**f) Supervision of the system**

i. **Advertising**: the Institute operates in close contact with both the Ministry for Communications and the Italian Communications Authority, AGCom. In this respect, it must
be noted that the Institute's field of action is – to a certain extent – overlapping with AGCom’s. Nonetheless, the mentioned provisions, which allow AGCom proceedings to be suspended until the Giuri decisions are adopted, solve any potential positive conflict of attributions between these two entities.

ii. "TV and children": as said above, the resolutions of the Surveillance Committee may not be appealed. However, in a number of occasions, RAI indirectly challenged the findings of the Committee, as those reasons served as a basis for the adoption of a subsequent AGCom decision, which was appealed before the regional administrative tribunals (T.A.R.).

iii. TV sales: the supervision of the system is carried out by the Ministry of Communication. Namely, art. 3.8 of the Code mandates that the Surveillance Committee must draft an annual report for the Ministry describing the implementation of the Code, assessing the achievements of the year etc. The Committee’s decisions, whose declaration of non-compliance only entails a public negative appraisal of the broadcaster, may not be appealed before courts.

g) Impact assessment

i. Advertising: as opposed to the other forms of co-regulation examined in this paper, which are rather recent, the system governed by the Institute has a 40-year tradition. In this period, the Giuri has distinguished itself for several key features, such as the brevity and informality of the proceedings aimed to reach a Jury’s decision, which nonetheless fully respect the principle of due process and have hitherto proved quite effective in hindering the diffusion of unlawful advertisements. In this respect, it must be noted that the Code of Self-Regulation for Advertising only embodies soft-law, as the Istituto’s decisions may neither impose sanctions (e.g. fines) nor grant compensations to consumers and competitors harmed by the unlawful ad. However, it must be noted that, although alternative proceeding which may grant such remedies are available (i.e. before Courts and before AGCM in case of misleading advertising), the Istituto handles a momentous number of cases, as shown by the table below:
Institute for Advertising Self-Regulation

<table>
<thead>
<tr>
<th></th>
<th>Review Board activities</th>
<th>Jury decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Prior appraisal decisions (**)</td>
<td>Fast-track decisions (**)</td>
</tr>
<tr>
<td>2004</td>
<td>89</td>
<td>681</td>
</tr>
<tr>
<td>2003</td>
<td>75</td>
<td>655</td>
</tr>
</tbody>
</table>

(*) since 1981.

(**) In these cases the advertiser spontaneously amended the ad according to the Review Board’s remarks.

(***)) since 1985.

As to the procedural and substantial peculiarities of the system which may be deemed of scientific interest, the inversion of the burden of proof provided for by the Code is a very relevant aspect: it is the advertiser who bears the burden to prove, at all times, that what it says is true and correct. It must also be noted that the fact that Giurì decisions may not be appealed does constitute an appealing solution for the advertising sector, as its rapidity leaves no scope for after-effects which may damage consumers, honest advertisers and ultimately the system itself. Last but not least, both the Jury and Review Board are absolutely independent, as their members are chosen among experts who are not connected in any way with the advertising industry and may thus issue their judgements being completely impartial.

Indeed, even before such acknowledgement, the Committee was extremely active in the pursuit of the protection of children, as showed by the considerable number of infringement resolutions adopted by the Committee in its two years of activity. Furthermore, the annual report emphasises the importance of the Committee's recommendations, which have contributed to the creation of case-law. Indeed the Committee has adopted a number of programmatic documents, concerning *inter alia*: behavioural rules of the participants to reality shows, rules concerning the display of the female body in TV broadcasts, the limitation of the display of 18+ movies trailers etc. These are the Committee's activity statistics, according to the 2004 annual report:

<table>
<thead>
<tr>
<th>TV and Children Surveillance Committee</th>
<th>2005</th>
<th>2004</th>
<th>2003</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases Handled</td>
<td>n.a.</td>
<td>512</td>
<td>355</td>
<td>867</td>
</tr>
<tr>
<td>Proceedings activated</td>
<td>n.a.</td>
<td>146</td>
<td>90</td>
<td>236</td>
</tr>
<tr>
<td>Infringement resolutions</td>
<td>13</td>
<td>53</td>
<td>32</td>
<td>98</td>
</tr>
<tr>
<td>Complaints handed over to AGCom</td>
<td>n.a.</td>
<td>48</td>
<td>11</td>
<td>59</td>
</tr>
</tbody>
</table>

In its 2004 annual report the Committee insisted on the importance of improving the co-ordination between itself and AGCom, concluding that exploiting the existing synergies between the two bodies would be extremely effective in order to achieve higher protection standards in the safeguard of children.

iii. *TV sales*: according to the annual reports of the Surveillance Committee, its activity has hitherto been modest, due to the reduced number of complaints filed by individuals. Thus, at the moment, the burden of monitoring TV programs lies solely upon the Italian Media Regulation Authority (AGCom), in co-operation with the Regional Communication Committees (Co.Re.Com.). Nonetheless, such co-operation has not yet been established. Furthermore, the Surveillance Committee deprecates a deficiency in the knowledge of the
public about its scope of operation (i.e. TV sales of astrology etc.), as most of the complaints concern issues which fall outside the Committee's jurisdiction.

2. Part II: Leading Cases

i. Advertising: highly emblematical of the Istituto’s ability to deal with intricate issues in a relatively short time is decision n. 195/2004, adopted by the Jury on 26 November 2004. G. Citterio Salumificio s.p.a., one of Italy’s largest ham and salami producer, was the author of a TV commercial for its "Grancotto di Vignola" ham which was found to be inconsistent with art. 2 of the Code, which stipulates that “Advertising must avoid any statement or representation likely to mislead consumers […] particularly regarding the characteristics and effects of the product, its price, […] prizes or awards." Indeed the ad displayed several people eating ham and like products alternating such scenes with written messages, such as “Parma Ham”; “Alto Adige. Speck”; “San Daniele. Ham” followed by “Vignola. Ham”. Now, Parma ham, Alto Adige speck and San Daniele ham are all trade marks, namely DOPs or IGP, and have received a specific EU certification of their origin and production process. On the contrary, Vignola ham has not obtained any of the said certifications. In this respect, the Jury upheld the Review Board’s finding that the progression of such messages is extremely likely to make the consumers believe that Vignola Ham is a certified product, just like the previous ones. Since it is not the case, the Jury declared the advertising at issue to be inconsistent with art. 2 and requested the advertiser to discontinue its broadcast.

ii. TV and Children: Resolution n. 6/2005, adopted on 8 February 2005, represents a true leading case in the clarification and establishment of the Committee’s authority and attributions. Indeed, on that occasion RAI, the Italian broadcaster responsible for the public service, challenged the Committee’s authority to perform any activity with external relevance ascertaining a violation of the Code by the broadcasters. Besides, RAI raised a number of procedural issues concerning the lawfulness of the notice whereby it had been informed that a procedure concerning one of its broadcasts had been initiated. The Committee overruled both arguments: as to the first, it gave a thorough and detailed account of the legal basis for the Committee’s authorities and attributions, as well as of its relations with AGCom; on the second point, the Committee found that the notice was clear, accurate and comprehensive and
Co-Regulation Measures in the Media Sector: Annex 5: Coutnry reports on possible co-regulatory systems

thus fully allowed RAI to exercise its right of defence, in the outmost pursuance with the principle of due process.

iii. *TV sales*: up to now, several infringement procedures have been started by the Committee. Nonetheless, none of them resulted in a final, public violation-ascertaining decision. Therefore the names of the parties, as well as other data in this respect, remain strictly confidential.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Advertising

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criteria</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
</tr>
<tr>
<td>The Advertising Self-Regulation Codes has long been the only source of regulation for advertising and still remains a comprehensive framework of substantive rules which deal with many different aspects of advertising issues. The Istituto has developed effective procedural rules as well as a complex yet agile system of bodies and sub-bodies with specialised attributions.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
<td></td>
</tr>
</tbody>
</table>
Yes, the Code seeks to influence the behaviour of advertisers and it has hitherto succeeded in achieving such goal by means of a rapid and effective system of moral sanctions imposed to those in breach of the rules set out by the Code.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation Measures by third parties (e.g. NGOs) The range of possible subjects of non-state action has to be limited to make the definition workable.

Such condition is fulfilled, since the Code is intended for advertisers and is enforced without the help of external instances (e.g. the Ministries, ONGs etc.)

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criteria</strong></td>
</tr>
<tr>
<td>The system is established to achieve public policy goals</td>
</tr>
</tbody>
</table>
Yes, the Code explicitly seeks to hinder the broadcast of unlawful and misleading advertising which is undoubtedly a public policy goal, as it is also the aim of public institutions, such as AGCM.

| There is a legal basis for the non-state regulatory system | Informal agreements without any legal criteria to judge the functioning of non-state regulation |

If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.

As shown before, there are several legal interactions between State-regulation and the system embodied by the Code. Indeed, the Sub-Committee positive appraisal on pharmaceutical products ads is considered as a valid alternative to the Ministerial Commission’s review. Moreover, the right to suspend the proceedings before the AGCM may be considered an implicit acknowledgment of the worth of the advertising review mechanism set out by the Code.

The state/EU leaves discretionary power to a non-state regulatory system

Traditional regulation

Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.

Yes, indeed the Istituto’s findings and assessments are so well accepted and authoritative that in the two forms of...
well-respected and authoritative that in the two forms of interaction illustrated above the State takes advantage of them to pursue its public policy objectives, although it never directly took part in the drafting or in the review of the Code.

The state uses regulatory resources to influence the non-state regulatory system

Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system

Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.

Yes, as the authority granted by the State to the Istituto’s findings may well influence the decision-making process. However the impartiality of the members of the Istituto’s bodies is respected and ensured at all times.
i. Advertising

a) The non-state regulatory part of the system

- The creation of organisations, rules and processes…: the Advertising Self-Regulation Codes has long been the only source of regulation for advertising and still remains a comprehensive framework of substantive rules which deal with many different aspect of advertising issues. The Istituto has developed effective procedural rules as well as a complex yet agile system of bodies and sub-bodies with specialised attributions.

- …to influence decisions of persons or decisions of or within organisations: Yes, the Code seeks to influence the behaviour of advertisers and it has hitherto succeeded in achieving such goal by means of a rapid and effective system of moral sanctions imposed to those in breach of the rules set out by the Code.

- …as long as the setting up is conducted by or within the organisations or parts of society whose members are addressees of the regulation: such condition is fulfilled, since the Code is intended for advertisers and is enforced without the help of external instances (e.g. the Ministries, ONGs etc.)

b) The link between the non-state part and state regulation

- The system is established to achieve public policy goals targeted to social processes: yes, the Code explicitly seeks to hinder the broadcast of unlawful and misleading advertising which is undoubtedly a public policy goal, as it is also the aim of public institutions, such as AGCM.

- There is a legal basis for the non-state regulatory system (however, it is not necessary that the use of non-state regulation is mentioned in the laws): as shown before, there are several legal interactions between State-regulation and the system embodied by the Code. Indeed, the Sub-Committee positive appraisal on pharmaceutical products ads is considered as a valid alternative to the Ministerial Commission’s review. Moreover, the right to suspend the proceedings before the AGCM may be considered an implicit acknowledgment of the worth of the advertising review mechanism set out by the Code.
• The state leaves discretionary power to a non-state regulatory system: yes, indeed the Istituto’s findings and assessments are so well-respected and authoritative that in the two forms of interaction illustrated above the State takes advantage of them to pursue its public policy objectives, although it never directly took part in the drafting or in the review of the Code.

• The state uses regulatory resources to influence the non-state regulatory system (power, publicity, money etc.): yes, as the authority granted by the State to the Istituto’s findings may well influence the decision-making process. However the impartiality of the members of the Istituto’s bodies is respected and ensured at all times.

**Conclusion:** Code of Self-Regulation for Advertising is unquestionably a co-regulatory system, as all of the relevant criteria are met in every respect.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / "TV and Children"

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
</tr>
<tr>
<td>The Code provides for a detailed set of substantial general rules on the issue of the effects of TV on children as well as on the participation of children to TV programs. The institutions and the decision making process of the review mechanism is also thoroughly regulated by the Code.</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td></td>
</tr>
<tr>
<td>Yes, the Code aims at protecting children by means of imposing moral sanctions on subjects which infringe the Code’s rules. Moreover, the system takes advantage of the</td>
<td></td>
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</tr>
</tbody>
</table>
deterrent consisting of the pecuniary sanctions which may be imposed by AGCom on the grounds of the Surveillance Committee’s notices.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation

Measures by third parties (e.g. NGOs)

The range of possible subjects of non-state action has to be limited to make the definition workable.

Such condition is met, as the Code is intended for broadcasters and is put into effect within the same system, in spite of the significant assistance provided by AGCom sanction-imposing power.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Criteria</td>
<td>Cases excluded by this criterion</td>
<td>Explanation</td>
</tr>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
</tr>
<tr>
<td>Yes, the Code plainly pursues the protection of children from harmful and objectionable broadcasts which may be</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
from harmful and unlawful broadcasts, which may be deemed a public policy goal, as it is also addressed by a number of state-regulations.

<table>
<thead>
<tr>
<th>Co-regulation Measures in the Media Sector: Annex 5: Coutnry reports on possible co-regulatory systems</th>
</tr>
</thead>
<tbody>
<tr>
<td>There is a legal basis for the non-state regulatory system</td>
</tr>
<tr>
<td>The formal acknowledgment by law 112/2004 is extremely significant as not only it recognises the worth of the Code and its enforcement mechanism, but it also grants it a general authority, as it now applies also to subjects which are not adherents to the Code.</td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
</tr>
<tr>
<td>Yes, the Surveillance Committee is free to reach its own conclusions, which are considered very reliable as they may constitute the basis for AGCom’s decisions.</td>
</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
</tr>
<tr>
<td>Yes, the funding and other aspects may well influence the activity of the Committee, as well as the interaction with AGCom is likely to improve the synergies between the two institutions.</td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td>between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
</tr>
</tbody>
</table>
ii. "TV and Children"

a) The non-state regulatory part of the system

- The creation of organisations, rules and processes...: the Code provides for a detailed set of substantial general rules on the issue of the effects of TV on children as well as on the participation of children to TV programs. The institutions and the decision making process of the review mechanism is also thoroughly regulated by the Code.
- To influence decisions of persons or decisions of or within organisations: yes, the Code aims at protecting children by means of imposing moral sanctions on subjects which infringe the Code’s rules. Moreover, the system takes advantage of the deterrent consisting of the pecuniary sanctions which may be imposed by AGCom on the grounds of the Surveillance Committee’s notices.
- As long as the setting up is conducted by or within the organisations or parts of society whose members are addressees of the regulation: such condition is met, as the Code is intended for broadcasters and is put into effect within the same system, in spite of the significant assistance provided by AGCom sanction-imposing power.

b) The link between the non-state part and state regulation

- The system is established to achieve public policy goals targeted to social processes: yes, the Code plainly pursues the protection of children from harmful and unlawful broadcasts, which may be deemed a public policy goal, as it is also addressed by a number of state-regulations.
- There is a legal basis for the non-state regulatory system (however, it is not necessary that the use of non-state regulation is mentioned in the laws): the formal acknowledgment by law 112/2004 is extremely significant as not only it recognises the worth of the Code and its enforcement mechanism, but it also grants it a general authority, as it now applies also to subjects which are not adherents to the Code.
• The state leaves discretionary power to a non-state regulatory system: yes, the Surveillance Committee is free to reach its own conclusions, which are considered very reliable as they may constitute the basis for AGCom’s decisions.

• The state uses regulatory resources to influence the non-state regulatory system (power, publicity, money etc.): yes, the funding and other aspects may well influence the activity of the Committee, as well as the interaction with AGCom is likely to improve the synergies between the two institutions.

**Conclusion:** The Self-Regulation Code for "TV and children" is still a co-regulatory system, although to a lesser extent than the Code in the field of advertising.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

**Table: Criteria / TV sales**

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
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<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
<td></td>
</tr>
<tr>
<td>The Code provides for a number of substantial general rules regulating a specific issue, i.e. TV sales. Moreover, the Code lays down a quite sophisticated review mechanism and regulates several features of the Committee.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td><em>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</em></td>
<td></td>
</tr>
<tr>
<td>Yes, the Code seeks to protect consumers from unlawful TV sales by means of publicising a negative appraisal for those who do not comply with the Code. Furthermore, several state-regulation acts make the concession of state aids</td>
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</tbody>
</table>
conditional upon the respect of the Code.

<table>
<thead>
<tr>
<th>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</th>
<th>Measures by third parties (e.g. NGOs)</th>
<th>The range of possible subjects of non-state action has to be limited to make the definition workable.</th>
</tr>
</thead>
</table>

Such condition is met, as the Code is intended for broadcasters and is put into effect within the same system, regardless of the abovementioned provisions concerning the concession of state aids.

| Link between the non-state-regulatory system and state regulation |
|---|---|---|---|

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
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</tr>
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</table>

The system is established to achieve public policy goals

<p>| Yes, the Code unmistakably pursuits the protection of consumers from misleading TV sales and such is undoubtedly a public policy goal, as it is very similar to the |
|---|---|---|---|</p>
<table>
<thead>
<tr>
<th>Goal of the provisions concerning misleading advertising.</th>
<th>Informal agreements without any legal criteria to judge the functioning of non-state regulation</th>
<th>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</th>
</tr>
</thead>
<tbody>
<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td>As noted above there have been several formal acknowledgments, resulting in a number of interactions between the compliance to this system and the concession of State aids.</td>
<td></td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Yes, the Committee may independently assess the lawfulness of TV sales and such decisions are deemed extremely dependable as the may lead to the denial of state aids.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
</tr>
</tbody>
</table>

Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system | Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation |
<table>
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<tr>
<th></th>
<th></th>
<th>of non-state rules does not promise innovation.</th>
</tr>
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<tbody>
<tr>
<td>Yes, once again the funding and the other forms of supports provided by the Ministry may influence the Committee’s decision, as well as the interaction with aids-granting provisions significantly increases the system effectiveness.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
iii. TV sales

a) The non-state regulatory part of the system

- The creation of organisations, rules and processes...: the Code provides for a number of substantial general rules regulating a specific issue, i.e. TV sales. Moreover, the Code lays down a quite sophisticated review mechanism and regulates several features of the Committee.
- To influence decisions of persons or decisions of or within organisations: yes, the Code seeks to protect consumers from unlawful TV sales by means of publicising a negative appraisal for those who do not comply with the Code. Furthermore, several state-regulation acts make the concession of state aids conditional upon the respect of the Code.
- As long as the setting up is conducted by or within the organisations or parts of society whose members are addressees of the regulation: such condition is met, as the Code is intended for broadcasters and is put into effect within the same system, regardless of the abovementioned provisions concerning the concession of state aids.

b) The link between the non-state part and state regulation

- The system is established to achieve public policy goals targeted to social processes: yes, the Code unmistakably pursues the protection of consumers from misleading TV sales and such is undoubtedly a public policy goal, as it is very similar to the goal of the provisions concerning misleading advertising.
- There is a legal basis for the non-state regulatory system (however, it is not necessary that the use of non-state regulation is mentioned in the laws): as noted above there have been several formal acknowledgments, resulting in a number of interactions between the compliance to this system and the concession of State aids.
- The state leaves discretionary power to a non-state regulatory system: yes, the Committee may independently assess the lawfulness of TV sales and such decisions are deemed extremely dependable as the may lead to the denial of state aids.
The state uses regulatory resources to influence the non-state regulatory system (power, publicity, money etc.): yes, once again the funding and the other forms of supports provided by the Ministry may influence the Committee’s decision, as well as the interaction with aids-granting provisions significantly increases the system effectiveness.

**Conclusion:** The Self-Regulation Code for TV sales is still a co-regulatory system, although to a lesser extent than the system in place in the advertising sector.

**II. Co-operative Regulatory Systems in the internet sector**

**1. Part I: The co-operative regulatory system**

Unlike the broadcasting sector, the Italian internet and online services sector is not intensively regulated. The existing state regulation mainly deals with aspects such as the protection of intellectual property rights, the prevention and suppression of online frauds and crimes in general etc. In this partially unregulated field, an experience of self – regulation has recently been introduced: the Self-Regulation Code "Internet and Children", addressing the issue of the protection of children which come into contact with the net.

**a) Development of the regulatory system**

The Self-Regulation Code "Internet and Children" has been signed in Rome on 19 November 2003. As said above, the sector of internet and online services was only regulated by specific provisions, which dealt with isolated aspects. The Code represents therefore a substantial innovation, as it introduces a comprehensive and – to some extent – complete set of rules aimed to protecting children from the dangers of the internet.

**b) Subject-matter of the regulatory system**

The Self-regulation Code aims at protecting children form the hazards of the internet. Namely, the Code seeks to prevent children from coming into contact with unlawful contents, as well as contents which may be detrimental to their moral and psychic integrity. Additionally, the Code
aims at safeguarding the children's privacy and personal data and at promoting equitable and secure access to internet resources, with a view of implementing the existing EU and Italian legislation concerning the protection of minors from unsolicited commercial information and from the exploitation of their vulnerability. Finally, the Code seeks to collaborate with the existing legislation and the competent authorities, with a view to preventing, restricting and repressing cyber-crime, with a special commitment to the fight against sexual tourism and children prostitution and pornography.

According to art.1 of the Code, any subject conducting Internet business activities, even in absence of commercial consideration, is considered an "adherent" as he or she agrees to accept the code either directly or through an association.

c) Basis of the co-operation

With respect to the protection of minors from unsolicited commercial services and the exploitation of their vulnerability, the Code is conceived to implement existing legislation, namely d.lgs 70/2003 (implementing directive 2000/31/EC, concerning the offer of services by the information society). Nonetheless, such aim does not constitute the legal basis of the self-regulatory system. Indeed, the Code only constitutes an agreement between individuals, associations, the Minister of Communications and the Minister of Technology and Innovation, open to adhesion from any subject conducting Internet business activities. Therefore, the Code does not create legal obligations, as the adhesion of the Ministers only constitutes a political statement. [See also subsequent paragraph d])

d) Institutions involved in the system

A Guarantee Committee, referred to in art. 6 of the Code and established on 10 March 2004 by an interministerial decree issued by the Minister for Communication and the Minister for Innovation and Technology, is responsible for supervising the correct implementation and for the enforcement of the Code. Such Committee is made up of eleven experts, who are officially appointed (for three years) by a ministerial decree issued by the Minister for Communications. As to the choice of the members of the Committee, four are designated by the signatory associations,
two represent the Ministry for Communications, two the Presidency of the Council of ministers and the others are designated by association committed to the protection of minors and the National Users Council.

e) Functioning of the system

All adherents are subject to a number of self-imposed obligations, under art. 3 of the Code. Moreover, the Code sets the adherent's responsibilities in accordance with the kind of activity they perform (e.g. access providers, content providers etc.). Participation to this self-regulatory system is voluntary and allows adherents to display a sign certifying their affiliation to the Code, provided that members (i) integrally accept the contents of the Code and, in particular, the surveillance activities and the sanctions therein, and (ii) adapt the contractual conditions of the services provided to the provisions of the Code.

The Guarantee Committee is responsible for the enforcement of the rules embodied by the Code. In this respect, the Code stipulates that whoever deems that its provisions have been infringed by one of the adherents may file a complaint to the Guarantee Committee. The adherent being investigated is immediately informed of the proceedings by the Committee and, in pursuance to the principle of due process, may (i) submit documents and (ii) request a hearing. The Committee adopts, if a two-thirds majority is reached, a decision, within 60 days from the start of the proceedings. Such decision may impose sanctions to the adherent ranging from a negative remark to a suspension of the right to display the "Internet and children" sign. Some guidelines concerning the minimal contents of the information each adherent must display on his/her website have recently been issued and published on the Ministry for Communications website.

f) Impact assessment

Due to the recent establishment of the Guarantee Committee, only some partial considerations may be made on the subject of its impact and its effectiveness. In a recent conference, held in Rome on 13 December 2004, several representatives of institutions, associations and religious communities examined the issues of the internet hazards and the dependability of the existing solutions, such as the self-regulation system at issue. In sum, all the remarks showed concern for
the problems at issue, but at the same time were extremely supportive in relation to the Self-
Regulation Code and its Guarantee Committee. As to the cases handled by the Guarantee
Committee, several procedures have been started, but none has yet led to a decision ascertaining a
violation of the Code, as the concerned parties spontaneously corrected their behaviour during the
proceedings.

2. Part II: Leading Cases

As exposed in part I lit f), no procedure has yet led to a decision, as the concerned party
spontaneously put an end to their violations. Therefore, data concerning the cases (e.g. names of
the parties, alleged violations etc.) still remain strictly confidential and will not be disclosed by
the Committee. Thus, no leading cases may be examined.
## 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

**Table: Criteria / "Internet and Children"**

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Such condition is met, indeed the Code of Conduct is a formal agreement which deals with a previously-unregulated matter setting general rules for all signatories. Moreover, the Code provides for a review mechanism whereby the respect of the Code’s obligations is assessed as well as a Guarantee Committee, which is responsible for the enforcement of the rules embodied by the Code and may discontinue the right to display the "Internet and children" sign.

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Yes, indeed the Code is aimed to influence the conduct of internet providers and webmasters by means of creating a moral incentive (i.e. the right to display a socially appreciated and relatively popular logo) to comply with the rules of the Code.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation

Such requisite is met, since the Code is intended for internet users and is promoted by its Committee and by its signatories.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
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<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of</td>
<td></td>
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</tr>
<tr>
<td>Yes, the Code expressly aims at protecting children from the hazards of the internet by preventing them from coming into contact with unlawful or dangerous contents as well as at safeguarding the children's privacy and personal data and at promoting equitable and secure access to internet resources.</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
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<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td>Indeed, the Code is conceived to implement existing legislation (d.lgs 70/2003) and its Guarantee Committee was established by means of an interministerial decree, which thus constitutes a formal acknowledgment of this non-state regulatory system. Moreover, the Code seeks to collaborate with the existing legislation and the competent authorities in repressing cyber-crime.</td>
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<p>| The state/EU leaves discretionary power to a non-state regulatory system | Traditional regulation | Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation. |</p>
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<th>Yes, although the substantive rules of the Code are designed to implement state-regulation, the signatories were allowed to freely determine the contents of the Code. Moreover, the Guarantee Committee is relatively independent from the influence of political power.</th>
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<td>The state uses regulatory resources to influence the non-state regulatory system</td>
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</tr>
</tbody>
</table>
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

- The creation of organisations, rules and processes: such condition is met, indeed the Code of Conduct is a formal agreement which deals with a previously-unregulated matter setting general rules for all signatories. Moreover, the Code provides for a review mechanism whereby the respect of the Code’s obligations is assessed as well as a Guarantee Committee, which is responsible for the enforcement of the rules embodied by the Code and may discontinue the right to display the "Internet and children" sign.
- To influence decisions of persons or decisions of or within organisations: yes, indeed the Code is aimed to influence the conduct of internet providers and webmasters by means of creating a moral incentive (i.e. the right to display a socially appreciated and relatively popular logo) to comply with the rules of the Code.
- As long as the setting up is conducted by or within the organisations or parts of society whose members are addressees of the regulation: such requisite is met, since the Code is intended for internet users and is promoted by its Committee and by its signatories.

b) The link between the non-state part and state regulation

- The system is established to achieve public policy goals targeted to social processes: yes, the Code expressly aims at protecting children from the hazards of the internet by preventing them from coming into contact with unlawful or dangerous contents as well as at safeguarding the children's privacy and personal data and at promoting equitable and secure access to internet resources.
- There is a legal basis for the non-state regulatory system (however, it is not necessary that the use of non-state regulation is mentioned in the laws): indeed, the Code is conceived to implement existing legislation (d.lgs 70/2003) and its Guarantee Committee was established by means of an interministerial decree, which thus constitutes a formal acknowledgment of
this non-state regulatory system. Moreover, the Code seeks to collaborate with the existing legislation and the competent authorities in repressing cyber-crime.

- **The state leaves discretionary power to a non-state regulatory system:** yes, although the substantive rules of the Code are designed to implement state-regulation, the signatories were allowed to freely determine the contents of the Code. Moreover, the Guarantee Committee is relatively independent from the influence of political power.

- **The state uses regulatory resources to influence the non-state regulatory system (power, publicity, money etc.):** yes, as it may not be denied that the funding, the choice of the personnel and other aspects do affect the activity of the Committee, with a view of a comprehensive integration with the other entities in charge of the protection of minors.

**Conclusion:** The Self-Regulation Code "Internet and Children" is still a co-regulatory system in the meaning of this study.

### III. Co-operative Regulatory Systems in the mobile sector

#### 1. Part I: The co-operative regulatory system

Although the sector of telecommunications falls within the scope of a number of statutes, decrees and regulations, the matter of premium services provided by mobile phone operators has hitherto been an unregulated area. For this reason, Italian main mobile phone operators have signed, under the auspices of the Ministry of Communications, the “Code of Conduct for the Provision of Premium Services and the Protection of Children” (hereinafter: “Code of Conduct”).

Only in regard to the distribution of audiovisual content through mobile phones, the Broadcasting Act no 112/2004 applies. Art. 2 of the Act considers television programmes as the whole programming as it has been scheduled by a content provider and united by the same brand and destined to the public through television broadcasting by any means, and thus also through mobiles.
a) Development of the regulatory system

As explained above, the Code of Conduct has been a novelty, in the sense that, until its adoption, premium services provided by mobile phone operators were not regulated neither by state-regulation nor by self-regulation. Nonetheless, to be specific, it must be pointed out that the matter at issue was actually the object of informal agreements and contracts concluded by the operators, as expressly stated under recital n. 4 “Mobile communication operators subscribing to the present code already have internal procedures and systems that regulate the utilisation of premium services on mobile handsets”. Nevertheless, according to recital n. 5, “A code of conduct was deemed necessary by mobile communication operators to regulate the utilisation of the said services”. For this reason, on 16 February 2005, Tim, H3G, Vodafone, Wind (i.e. Italian foremost mobile phone operators) signed, under the auspices of the Ministry of Communications, a self-regulation Code, the so-called Code of Conduct which aims at protecting children and safeguarding human dignity, as well as ensuring consumers’ information.

b) Subject-matter of the regulation

As expressed above, the Code of Conduct deals with the matter of premium services provided by mobile phone operators and provides for a set of rules whose aim is to ensure that such services are provided in pursuance of the protection of children and the safeguarding human dignity, as well as the consumers’ right to be informed. This is an extremely delicate issue, since, according to the preamble, “there is a need to balance various possibly conflicting fundamental rights, such as the protection of children, the right of information, freedom of expression and opinion”. For this reason, the Code of Conduct lays down a set of provisions concerning the type and content of the services provided, imposes obligations to its signatories and also deals with the relations between mobile operators and third parties (i.e. the premium services providers).

c) Basis of the co-operation

The Code of Conduct has no legal basis by itself, as it may only be deemed an agreement between companies under private law. However, two provisions shall be specifically taken into
account in this respect: (i) Article 6.1 stipulates that “Signatories are to append the present Code of Conduct to contracts stipulated with third parties for the provision of premium services on mobile operator networks. Contracts are to include a proviso that third party services face suspension if the Code of Conduct is not respected.” (ii) Article 3 lit b) requires signatories to “refer to the provisions of the present Code of Conduct in their services charter”.

(i) As to art. 6.1, which requires that the contracts stipulated between mobile operators and third parties include a proviso whereby the latter’s failure to comply with the Code will result in the suspension of its services by the mobile operators, it must be noted that such third parties are not legally bound to accept such a provision. Indeed, the Code of Conduct only creates obligations for its signatories, according to the principle *pacta tertiis nec nocent nec prosunt*. Besides, according to art. 1381 of the Italian Civil Code, which applies to the Code of Conduct as it is an agreement under private law, if the third-party refuses to assume such an obligation, the party which has promised such assumption must provide compensation to the other parties.

(ii) Article 3 lit b) is, on the other hand, an extremely relevant provision, as it mandates the inclusion of the Code of Conduct in the Services Charter of each of the signatories. Namely, legislative decree n 286/1999 requires companies concerned in the supply of a public service to adopt a Services Charter, regulating the conditions of such service, pursuant to the guidelines issued by the Prime Minister. In sum, art. 3 lit b) does constitute the link between the Code of Conduct and State-regulation.

d) Institutions involved in the system

The Code mandates the establishment of a Guarantee Committee, whose task is to coordinate the activities aimed at updating and revising the present provisions of the Code of Conduct. The Committee is a collegiate body composed of representatives both of the mobile phone operators, the Ministry of Communications and the Fondazione Ugo Bordoni. The latter is a Foundation under private law established in 1952 by State entities as well as private companies involved in the telecommunications market. Since then, the Foundation has carried out significant research projects for the Ministry of Communications as well as for other entities. The Foundation has been formally acknowledged as a "istituzione privata di alta cultura" by law 16 gennaio 2003 n.3.
At the moment it is funded both by private companies and public resources, namely by the Ministry of Communications. The Committee’s President is to be chosen among the representatives of the last two entities. Moreover, the Guarantee Committee is to meet at least once a year in order to revise the Code, to assess problems emerging from its application and to identify possible solutions. The Guarantee Committee is also legally bound to draft an annual report containing an up-to-date list of third parties, premium services, services directed exclusively at children, and specific procedures for the application of the regulations stipulated in the Code.

e) Functioning of the system

The operators which have signed the Code of Conduct commit themselves to “respect it, modify it in accordance with developments in the mobile services sector, and take any necessary action to guarantee the observance of the principles contained therein.” Therefore, the Code does create legally binding private law obligations for its signatories, while it has no effect \textit{vis-à-vis} the operators which have not signed it. Nonetheless, the code is open to new subscribers, as clarified in art.10: “The present Code of Conduct can be signed by any mobile operator intending to respect the obligations contained therein”. As to complaint procedures and remedies to the infringement of the Code’s rules, the Code of Conduct only provides for self-disciplinary measures, that is to say that breaches may be reported to the operator concerned which, according to art. 9.2, is legally bound to “answer reported violations and reasoned requests in accordance with the provisions laid down in the operator’s services charter.”

Since the Code of Conduct will enter into force within 6 months from its adoption – which took place in February – such provisions have not yet been applied as well as no regulations on the decision-making process have been hitherto adopted.

f) Supervision of the process

According to the legal text of Code of Conduct, no supervisory instances have been provided for. The Code only provides for the Guarantee Committee’s obligation “to assess any problems
emerging from the application of the […] Code and identify possible solutions” (art. 8.3), as well as its authority to “coordinate activities aimed at updating and revising the […] Code” (art. 8.1).

**g) Impact assessment**

Since the Code is not yet fully operational, no considerations may be made as regards its impact and worth in regulating the matter of premium services. Besides, both official comments and scientific evaluation of the Code have thus far been relatively supportive.

**2. Part II: Leading Cases**

Recalling the considerations made under Part I, lit. g), the Code is still inoperative, therefore the signatories have not yet handled any case.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

**Table: Criteria / Code of Conduct for the Provision of Premium Services and the Protection of Children**

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<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
</tr>
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<td>Such requisite is fulfilled, as the Code of Conduct is a formal agreement (it actually replaces previous informal, case-by-case agreements between the operators) laying down general rules for all signatories (i.e. the foremost operators in the Italian mobile phone market). In addition the Code does provide for a complaint procedure (although it may not be deemed very relevant, as complaints are to be assessed by the concerned operator) and an embryonic form of organisation (i.e. the Guarantee Committee, whose main function is the revision of the Code)</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to</td>
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</table>
Such condition is met, as although this system is at a developing stage and it provides for an inconsequential organisation, no review mechanisms and no sanctions, it is unquestionable that the Code is at least intended to affect the behaviour both of operators and of third parties’ decisions, as shown by art. 6.1 and art. 3 lit. b) (see Part I.c for further details)

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation Measures by third parties (e.g. NGOs) The range of possible subjects of non-state action has to be limited to make the definition workable.

Such requisite is met, as the Code of Conduct is a document originating from the operators and intended for the operators and content providers.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy</td>
<td></td>
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<tr>
<td>Goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
<td>Yes, namely the Code of Conducts pursues the safeguard of children, of consumers and the respect of human dignity.</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation.</td>
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<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
<td>There is a legal basis for the non-state regulatory system.</td>
<td>Indeed there is a legal basis, as art. 3 lit. b) mandates the inclusion of the Code into Services Charters, which do have a legal basis (Legislative Decree 30 July 1999, n. 286). However, the absence of supervisory instances and other legal interactions with state-regulation makes the link between the non-state part and state-regulation rather tenuous and feeble.</td>
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<tr>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
<td>Indeed there is a legal basis, as art. 3 lit. b) mandates the inclusion of the Code into Services Charters, which do have a legal basis (Legislative Decree 30 July 1999, n. 286). However, the absence of supervisory instances and other legal interactions with state-regulation makes the link between the non-state part and state-regulation rather tenuous and feeble.</td>
<td>The state/EU leaves discretionary power to a non-state regulatory system.</td>
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<tr>
<td>Yes, as companies in charge of a public service may discretionally set the contents of their services charters.</td>
<td>Traditional regulation</td>
<td></td>
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<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
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<tr>
<td>As it has referred above, the interaction between state-regulation and the system established by Code of Conduct is rather weak at the moment. Doubtless, the presence of a representative of the Ministry of Communications within the Guarantee Committee is likely to influence the revision of the Code. However, since the Code has not been updated yet, it is too early to draw conclusions on the State’s influence on the Code’s regulatory system.</td>
<td><em>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</em></td>
<td></td>
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</tr>
</tbody>
</table>
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

- The creation of organisations, rules and processes...: such requisite is fulfilled, as the Code of Conduct is a formal agreement (it actually replaces previous informal, case-by-case agreements between the operators) laying down general rules for all signatories (i.e. the foremost operators in the Italian mobile phone market). In addition the Code does provide for a complaint procedure (although it may not be deemed very relevant, as complaints are to be assessed by the concerned operator) and an embryonic form of organisation (i.e. the Guarantee Committee, whose main function is the revision of the Code).

- To influence decisions of persons or decisions of or within organisations: such condition is met, as although this system is at a developing stage and it provides for an inconsequential organisation, no review mechanisms and no sanctions, it is unquestionable that the Code is at least intended to affect the behaviour both of operators and of third parties’ decisions, as shown by art. 6.1 and art. 3 lit. b) (see Part I.c for further details)

- As long as the setting up is conducted by or within the organisations or parts of society whose members are addressees of the regulation: such requisite is met, as the Code of Conduct is a document originating from the operators and intended for the operators and content providers.

b) The link between the non-state part and state regulation

- The system is established to achieve public policy goals targeted to social processes: yes, namely the Code of Conducts pursuits the safeguard of children, of consumers and the respect of human dignity.

- There is a legal basis for the non-state regulatory system (however, it is not necessary that the use of non-state regulation is mentioned in the laws): indeed there is a legal basis, as art. 3 lit. b) mandates the inclusion of the Code into Services Charters, which do have a legal basis (Legislative Decree 30 July 1999, n. 286). However, the absence of supervisory instances and other legal interactions with state-regulation makes the link between the non-state part and state-regulation rather tenuous and feeble.
• The state leaves discretionary power to a non-state regulatory system: yes, as companies in charge of a public service may discretionally set the contents of their services charter provided that they respect the guidelines issued by the Prime minister. As a result, mobile phones operator are entitled to recall the Code of Conduct in their own charters.

• The state uses regulatory resources to influence the non-state regulatory system (power, publicity, money etc.): as it has referred above, the interaction between state-regulation and the system established by Code of Conduct is rather weak at the moment. Doubtless, the presence of a representative of the Ministry of Communications within the Guarantee Committee is likely to influence the revision of the Code. However, since the Code has not been updated yet, it is too early to draw conclusions on the State’s influence on the Code’s regulatory system.

**Conclusion:** The Code of Conduct for the Provision of Premium Services and the Protection of Children, may be deemed a borderline case, as it falls within the scope of the co-regulation as described by the provided criteria, although some of them are only partially fulfilled (e.g. the link between the non-state part and state regulation is rather feeble, the organisation is still at an embryonic stage etc.).
3.13. Lithuania

I. Co-operative Regulatory Systems in the media sector

1. Part I: The co-operative regulatory system

a) Development of the regulatory system

As in most postcommunist regime countries which lack deep democratic traditions, in Lithuania systems of non state regulation of media are very weak. It is a usual practice that journalists and publishers do not follow the regulations provided in the laws. They also are infringing ethic behaviour norms provided in the ethic code of journalist and publishers. From the time of establishment until now most of journalists and publishers are very sceptical about activities of non state regulation bodies in the media sector.

In Lithuania the system of co-operative regulation of media sector was established in the year 1996 by enacting the 2 July 1996 Law of the Republic of Lithuania No I-1418 on Provision of Information to the Public1 (hereinafter referred to as the Law). The following non state regulatory and state regulatory institutions except the Ministry of Culture of the Republic of Lithuania were established by the Law:

(1) **The Ministry of Culture** – the Government authorised institution in the field of the provision of public information (Article 46 of the Law). It has got tasks of coordination of the implementation of state policy in the field of providing information to the public.

(2) **The Ethics Commission of Journalists and Publishers** (Article 47 of the Law). It is a non state regulatory institution of public information producers and disseminators.

(3) **The Radio and Television Commission of Lithuania** (Articles 48-49 of the Law). The Radio and Television Commission of Lithuania is an independent institution accountable to the Seimas, which regulates and controls the activities of radio and television broadcasters and re-broadcasters falling under the jurisdiction of the Republic of Lithuania. The Commission shall participate in the formation of national

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1 Official Gazette *Valstybės žinios*, 2000 n. 75-2272;
audiovisual policy. It shall act as a body of experts for the Seimas and Government on the issues of radio and television broadcasting and re-broadcasting.

(4) The Inspector of Journalist Ethics (Articles 50-51 of the Law). The Inspector of Journalist Ethics is a State Officer who shall supervise the implementation of the provisions of the Law on Provision of Information to the Public.

All the above mentioned four institutions form the system of co-operative regulation of media sector. The Ethics Commission of Journalists and Publishers, the Radio and Television Commission of Lithuania and the Inspector of Journalist Ethics are of the biggest interest for the purposes of this report. Hereinafter altogether they are referred to as the Institutions.

There are also other institutions where activities relate to media sector, however, they are not of particular importance for the interests of this report:
- Education, science and culture committee of Seimas of the Republic of Lithuania;
- Information society development committee of Seimas of the Republic of Lithuania;
- Communications regulatory authority;
- Media support foundation;
- Council of the Lithuanian national radio and television;
- National consumers’ rights protection board under the Ministry of Justice of the Republic of Lithuania;
- Competition council of the Republic of Lithuania.

National Consumer Rights Protection Board under the Ministry of Justice of the Republic of Lithuania is state institution embodied to protect consumers’ rights. Its main functions according to the Law on Consumers’ Rights Protection are:
- to coordinate state institutions' activities on protection of consumers;
- protect consumers' public interest;
- perform alternative consumers' disputes resolution;
- undertake control over practice of unfair terms specified in the contracts with consumers;
- coordinate and implement protection of consumer economic interests, supervise market of consumer products and services;
- carry out-of-court examination of consumer complaints resulting from consumers' disputes with credit providers;
- organise and carries out education of consumers, sellers, producers and services providers.'

It should be noted that National Consumers’ Rights Protection Board exercising its main function to protect consumers’ rights also undertakes control on how requirements for advertising stipulated in the Law of Advertising are complied with. Therefore it has some influence on the media sector either, but only through the control of advertising in the media aspect; for example, National Consumers’ Rights Protection Board according to Article 7 of the Law on Advertising controls that operators of advertising activity (including advertising in the media) shall follow the prohibition to cause moral and physical detrimental influence to children by:

- exploiting children’s trust in parents, guardians (providers), teachers or other adults;
- directly exhorting children to persuade their parents or other persons, to purchase the advertised goods or services, taking advantage of their inexperience and credulity;
- forming children’s opinion linking consumption of certain goods or services with the enhancement of their physical, psychological or social advantages before the members of their peer group;
- unreasonably showing children in situations which pose danger to their health and life.

According to Article 18 of the Law on Advertising, National Consumer Protection Board controlling advertising shall have the right to:

- obtain from the state and local government institutions and agencies, and other persons, the information and documents necessary for investigation of the violation of this Law;
- obtain from advertising activity operators information and documents, and if necessary, some samples of advertised goods, required in investigating a violation of this Law. Upon completion of the investigation of the violation, and if the decision by the National Consumer Board has been appealed in court, following the entry into force of the court decision, the ample of advertised goods and documents shall be refunded to operators of advertising activity;
• to request that the operators of advertising activity or heads thereof, as well as other persons who are responsible for the use of advertising, would come and provide verbal or written explanations,

• to obligate operators of advertisement activity to cease the advertising that does not meet the requirements set forth by this Law;

• to warn the operators of advertising activity, that failure to cease the use of advertisement that does not meet the requirements set forth by this Law during the time limit set by the National Consumer Rights Protection Board, that the fines established in Article 222 shall be imposed;

• to set fines in cases established by laws.

b) Subject-matter of the regulatory system

(1) The Ministry of Culture has the following established functions (Paragraph 2 of Article 46 of the Law):

1) summarise the practice of the application of laws and other legal acts governing the provision of information to the public and submit proposals regarding the drafting of laws and other legal acts as well as regarding the amendment and supplementation of effective legal acts;

2) draft in co-operation with organisations of public information producers and disseminators, the laws and other legal acts proposed by the Government in the field of provision of information to the public;

3) implement in co-operation with other institutions operating in the field of provision of information to the public, the provisions of international treaties of the Republic of Lithuania related to provision of information to the public;

2 According to Paragraph 3, 4 and 6 of Article 22 of the Law on Advertising, for failure to comply with the request of the National Consumers’ Protection Board to furnish information and documents, and if necessary, samples of advertised goods, needed for investigation of this case or inappropriate implementation thereof, operators of advertising activity shall be given a fine from 1 to 10 000 LTL; for use of the advertising of illegal or prohibited by laws activity or services, operators of advertising activity shall be given a fine from 5 to 20 000 LT; for failure to comply with the requirements of advertising concerned with children or identifiable advertising or advertisement in movies theatres or Video Halls, operators of advertising activity shall be fined from 1 to 10 000 LTL.
4) provide legal consultations and methodological assistance regarding the provision of information to the public;
5) organise conferences, seminars, and practical trainings regarding the provision of information to the public;
6) co-operate with relevant foreign institutions and international organisations operating in the field of provision of information to the public.

(2) The Ethics Commission of Journalists and Publishers has the following established functions (Paragraph 4 of Article 47 of the Law):

1) focus on the education of the professional ethics of journalism;
2) examine the violations of professional ethics committed in the course of providing information to the public by journalists, producers of public information or responsible persons appointed by the participants therein;
3) ascribe press publications, feature and video films, radio and television programmes or broadcasts to the media category of pornographic, erotic and/or violent nature;
4) supervise compliance by the producers and disseminators of public information with the requirements laid down in the laws and other legal acts regarding the public showing, reproduction and distribution of feature films, video films and video programmes, their circulation and distribution, the public showing of events of erotic nature, and the procedure for disseminating printed matter of erotic and violent nature;
5) supervise the compliance of disseminated public information with the provisions laid down in the laws, prohibiting the incitement of national, racial, religious, social or gender hatred, libel and disinformation.

The Ethics Commission acts upon request from the third persons (for instance in court dispute the court may approach for the opinion of the Ethics Commission) or on the initiative of the member of the Commission.

In order to be able to ascribe press publications, feature and video films, radio and television programmes or broadcasts to the media category of pornographic, erotic and/ or violent nature the Ethics Commission has adopted recommendations whereby it introduced the concrete criteria for a certain material to be ascribed to separate category. For instance such material shall be ascribed to the category of violent: i) containing visual violence – killing of people, physical violence and consequences thereof and descriptions or scenes of this kind prevail in
the material; or ii) which uses psychological violence – libel, blackmail, intrude to private life without consent; or iii) showing torture of animals. However the Commission admits that sometimes it is hard to find objective criteria to ascribe the material to a concrete category and decisions adopted also have subjective aspects.

In implementing its supervisory functions the Ethics Commission also acts upon the request of the third persons (usually private persons who are not contended with the information supplied by the journalists). Although the Commission may also act on the initiative of its members, however it does not have any special supervision programs or monitoring systems and such cases are not very frequent.

(3) The Radio and Television Commission of Lithuania has the following established functions (Paragraph 1 of Article 49 of the Law):

1) in conjunction with the Communications Regulatory Authority, draw up the Strategy for Assigning Radio Frequencies to Broadcast and Transmit Radio and Television Programmes; also, in conjunction with the Communications Regulatory Authority and in accordance with the Strategy for Assigning Radio Frequencies to Broadcast and Transmit Radio and Television Programmes, draw up and approve the Strategic Plan for the Assignment of Radio Frequencies to Broadcasting and Transmission of Radio and Television Programmes;
2) announce and organise, in accordance with the procedure established by this Law and the Rules for Licensing Broadcasting and Re-broadcasting Activities, tenders for obtaining broadcasting and/or re-broadcasting licences, determine the terms and conditions of these tenders and licences, and issue licences;
3) set the rate of the licence fee and the rate of the fee for the examination of licence applications;
4) maintain control over compliance by broadcasters and re-broadcasters with the obligations undertaken by them, also with licence conditions and the decisions adopted by the Commission
5) maintain, within its sphere of competence, supervision over the implementation of the provisions of the Law on the Protection of Minors against Detrimental Effect of Public Information;
6) establish the procedure for adhering to the requirements laid down in the laws and the requirements of the European Union concerning the structure and content of programmes as well as the broadcasting of advertisements;
7) maintain control over compliance by broadcasters with the provisions of this Law concerning the proportion of European works and works by independent producers in the programmes broadcast, the right to broadcast events of major importance to society as well as with the requirements laid down in paragraphs 10 and 11 of Article 39 of this Law concerning television advertising and provisions on the sponsorship of programmes;
8) maintain control over compliance by re-broadcasters with the provisions of this Law concerning the re-broadcasting of programmes;
9) monitor broadcasters’ and re-broadcasters’ programmes to maintain control over compliance with the laws and Commission decisions regulating the activities of broadcasters and re-broadcasters as well as with licence conditions;
10) impose, in accordance with the procedure established by the law, the following penalties on broadcasters and re-broadcasters who have violated the requirements of this Law, licence conditions or who do not comply with the decisions adopted by the Commission: reprimands, monetary penalties prescribed by the Code of Administrative Offences of the Republic of Lithuania, suspension of licence for a period of up to 3 months or revocation of licence;
11) submit proposals concerning the drafting of laws governing the activities of broadcasters and re-broadcasters as well as other legal acts related to these activities;
12) initiate the termination of illegal broadcasting and re-broadcasting activities;
13) collect information about broadcasters, re-broadcasters and common-use reception networks, analyse their activities, publish information about the participants therein, prepare information and methodical materials on these issues;
14) prepare and submit every 2 years to the Seimas an analytical survey of the implementation of Lithuania’s audiovisual policy, the development of the market of audiovisual services, and the prospects for the expansion of national audiovisual sector, including the statistical data on the progress necessary to comply with the provisions of paragraphs 3 and 4 of Article 38 achieved by all the broadcasters falling under the jurisdiction of the Republic of Lithuania, also stating the reasons that impede the implementation of the said provisions and remedial measures taken or to be taken.
15) cooperate with the institutions of the European Union and other foreign countries which perform equivalent functions, also represent, within the sphere of its competence, the Republic of Lithuania in international organisations;
16) establish the procedure for encoding the programmes broadcast and/or re-broadcast;
17) perform other functions specified in the laws and other legal acts.
(4) The Inspector of Journalist Ethics has the following established functions (Paragraph 1 of Article 51 of the Law):

1) examine the complaints of interested persons regarding violation of their honour and dignity in the media;
2) examine the complaints of interested persons regarding violation of the right to privacy in the media;
3) assess compliance with the principles of providing information to the public set forth in this and other laws, submit proposals to state institutions for improving their implementation;
4) cooperate with counterpart institutions of the European Union and other countries as well as represent, within the sphere of his competence, the Republic of Lithuania in international organisations;
5) draw up and publish every two years an analytical survey intended to establish the guidelines for the development of a democratic culture in the field of provision of information to the public.

In addition, the Inspector of Journalist Ethics shall exercise supervision of the implementation of the provisions of the 10 September 2002 Law of the Republic of Lithuania No IX-1067 on the Protection of Minors against detrimental Effect of the Public Information:

1) take care of the implementation of the provisions of this Law and supervise observance thereof;
2) analyse the application of this Law;
3) initiate that producers, disseminators of public information and owners thereof, as well as journalists should assume voluntary obligations based upon non state regulation with respect to the protection of minors against a detrimental impact of public information;
4) cooperate with all the State and municipal institutions and agencies and other legal persons, striving to ensure the implementation of the provisions of this Law;

For example, the Inspector annually arranges meetings with producers of public broadcastings in order to discuss situation/measures how to improve the protection of minors against a detrimental impact of public information; on July 1, 2004, he summoned owners of the Internet portals for the measures of the protection of minors against a detrimental impact of public information placed in their Internet portals; on April 15, 2005 amended Code of Ethics of Lithuanian Journalists and Publishers can be also named as initiative of the Inspector regarding producers, disseminators of public information and owners thereof, as well as journalists voluntary obligations based upon self-regulation. However, not every Inspector's initiative is acceptable, e.g. proposal for the owners of Internet portals to assume voluntary obligations with respect to the protection of minors against a detrimental impact of public information has not implemented yet.

458
5) submit recommendations to the producers, disseminators of public information and the owners thereof as well as journalists and other interested persons regarding the application of the provisions of this Law;
6) taking into account the conclusions of the institutions of non state regulation and experts, shall devise a system of audio-visual measures of labelling public information which causes detriment to the development of minors;
7) draft and submit to the responsible institutions drafts of legal acts, relating to the implementation of the provisions of this Law;
8) examine the claims which concern violations and failure to adhere to the provisions of this Law;
9) publish his decisions in the supplement “Informational Bulletin” (“Informaciniai Pranešimai”) to “Official Gazette” (Valstybės Žinios);
10) annually, by March 15th publish a report on its work and every two years prepare analytical material regarding the implementation of the provisions of this Law.

Regarding item 6 mentioned above, it should be noted that system of audio-visual measures of labelling public information which causes a detrimental impact to the development of minors, was adopted by the decision No. 681 of the Government of the Republic of Lithuania on 2 of June, 2004. According to it producers, disseminators of public information and the owners thereof as well as journalists shall evaluate and classify information of TV broadcasts, films and other TV or Radio programmes or information in the electronic media according to the content and criteria set in Article 4 of the Law on Minors.

Article 4 of the Law on Minors defines public information, that causes physical, mental or moral detriment to the development of minors shall be deemed to be information:
1) which relates to portrayal of physical or psychological violence: when the killing, mutilation or torture of people and animals are portrayed in detail, also vandalism, a positive assessment of violence and coercion or cruelty are being indulged in;
2) which displays a dead or cruelly mutilated body of a person, except in cases when such a portrayal is necessary for identification purposes;
3) which is erotic in nature: when sexual desire is aroused, sexual intercourse or an imitation thereof or other sexual gratification and genitals and sex paraphernalia are displayed;

4 It should be emphasize that labelling system is designed not only for TV programmes, but also for radio and electronic media.
4) which arouses fear or horror;
5) in which addiction to drugs, psychotropic substances, tobacco or alcohol, is favourably assessed and the use, production, distribution or acquisition thereof is promoted;
6) which encourages self-mutilation or suicide;
7) in which criminal activity is assessed favourably or criminals are idealised;
8) which is related to the imitation of criminal activity;
9) which contains an incitement to discrimination on the basis of nationality, race, gender, origin, disability, sexual orientation, religion or other affiliation;
10) in which obscene language, words and gestures are frequently employed;
11) in relation to criminal activities or other violations of the law making available to the public of the personal data of a minor, who is not hiding from the law enforcement institutions or the court following the perpetration of a crime by a suspect, accused, being tried, judged, convicted, or a minor who has been the victim of a criminal action or other violations of the law, on the basis of which, his personal identity could be established.

Besides, the Inspector has adopted on June 15, 2004 the Recommendations for producers, disseminators of public information and the owners thereof as well as journalists on public information attribution to prohibited and restricted to make available to public information category which methodically recommend how to evaluate such information according to the criteria set in the Law on Minors. The Recommendations also state that only producers, disseminators of public information and the owners thereof as well as journalists themselves shall evaluate and classify such information. Decision No. 681 of the Government of the Republic of Lithuania on system of audio-visual measures of labelling public information which causes a detrimental impact to the development of minors was prepared by the Inspector. Lithuanian Radio and Television Commission, Ministry of Culture of the Republic of Lithuania, Lithuanian Radio and Television Association and the Inspector’s experts (working together with the Inspector according to the Regulation of the Inspector’s of Journalist Ethics activity) participated in this systems preparation either.

It sometimes might be difficult to draw a line between the competence of the Inspector of Journalist Ethics and the Ethics Commission of Journalists and Publishers. In general terms the Inspector of Journalist Ethics mostly deals with the complaints of persons regarding

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5 Participation in creation of the explanatory system is the only relation/interaction between the Radio and Television Commission and the Inspector in this regard.
violation of their honour and dignity while the role Ethics Commission of Journalists and Publishers is to examine the violations of general professional ethics.

The above mentioned institutions may investigate any disseminated public information (TV, radio, newspapers, books and etc.) and activities of the entities which prepare and/ or disseminate public information. For more detailed information it can be referred to the functions of the institutions commented above.

c) Basis of the co-operation

(1) **The Ministry of Culture** – the Government authorised institution in the field of the provision of public information (Article 46 of the Law);

(2) **The Ethics Commission of Journalists and Publishers** (Article 47 of the Law);

(3) **The Radio and Television Commission of Lithuania** (Articles 48-49 of the Law);

(4) **The Inspector of Journalist Ethics** (Articles 50-51 of the Law).

The above mentioned institutions are established in accordance with the Law. However, in their activities they may apply different legal acts governing media sector:

- the Law:
- *The 18 May 1999 Law of the Republic of Lithuania No VI-1185 on Copyright and Related Rights*\(^6\);
- *The 1989 European Convention on Transfrontier Television which is legally effective for the Republic of Lithuania from 17 February 2000*\(^7\);
- *The 15 April 2004 Law of the Republic of Lithuania No IX-2135 on Electronic Communications*\(^9\);

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\(^6\) Official Gazette *Valstybės žinios*, 1999 n. 50-1598;
\(^7\) Official Gazette *Valstybės žinios*, 2000 n. 29-805;
\(^8\) Official Gazette *Valstybės žinios*, 2000, n. 64-1937;
\(^9\) Official Gazette *Valstybės žinios*, 2004, n. 69-2382;
\(^10\) Official Gazette *Valstybės žinios*, 2000, n. 58-1712;
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

- The 10 September 2002 Law of the Republic of Lithuania No IX-1067 on the Protection of Minors against detrimental Effect of the Public Information;
- The 18 July 2000 Civil Code of the Republic of Lithuania;
- The 13 December 1984 Code of Administrative Offences of the Republic of Lithuania;
- The 26 September 2000 Criminal Code of the Republic of Lithuania;
- The 26 September 1995 Resolution of Seimas of the Republic of Lithuania No I-1046 on Approval for Resolution of European Council’s Parliament Assembly regarding Journalists Ethics No 1003 (1993);
- The Code of Ethics of Lithuanian Journalists and Publishers, 1996,
as well as other legal acts.

d) Institutions involved in the system

(1) The Ministry of Culture;
(2) The Ethics Commission of Journalists and Publishers;
(3) The Radio and Television Commission of Lithuania;
(4) The Inspector of Journalist Ethics.

The functions of the above mentioned institutions are described above.

The funding of the different institutions is as follows:

The Ethics Commission of Journalists and Publishers
The Media Support Foundation has to ensure the funding of the necessary work by the Ethics Commission of Journalists and Publishers experts as well as the Commission’s information

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11 Official Gazette Valstybės žinios, 2002, n. 91-3890;
12 Official Gazette Valstybės žinios, 2000, n. 74-2262;
13 Official Gazette Valstybės žinios, 2004, n. 185-6836;
14 Official Gazette Valstybės žinios, 2000, n. 89-2741;
15 Official Gazette Valstybės žinios, 2003, n. 24-1002;
16 Official Gazette Valstybės žinios, 1995, n. 85-1918;
and technical servicing. The Media Support Foundation was established on 2 September 1996. It is regarded as an independent public institution and its establishers are different art and educational organisations. However, the Media Support Foundation the main funds for financing of its projects receives from the State. The following donations from the State were received during past years:

1997 – 4.560.000 Litas;
1998 – 4.534.000 Litas;
1999 – 3.767.000 Litas;
2000 – 2.802.000 Litas;
2001 – 1.993.400 Litas;
2002 – 2.844.000 Litas.\(^\text{17}\)

The Radio and Television Commission of Lithuania:

For the purpose of financing the activities of the Radio and Television Commission of Lithuania, the broadcasters and re-broadcasters (except for the LRT (national radio and television channel)) that receive earnings from broadcasting and/or re-broadcasting activity must transfer every month to the Radio and Television Commission’s of Lithuania account 0.8 % of their earnings from advertising, subscription fees and other activities related to broadcasting and/or re-broadcasting. Payments from broadcasters or re-broadcasters shall be enforced through court if they fail to transfer the funds to the Radio and Television Commission's of Lithuania account within a period of 3 months after the fixed date. The Radio and Television Commission of Lithuania may be financed from other sources as well: funds received for examining licence applications, other payments for provided services, support funds, publishing activities, etc.

Dependence of the Radio and Television Commission of Lithuania from financing of the broadcasters and re-broadcasters creates risks for its impartiality.

The Inspector of Journalist Ethics

The activities of the Inspector of Journalist Ethics and his employees who perform information and technical work are financed from the State budget directly. The funds allocated for this purpose are listed under a separate budget item.

\(^{17}\) http://srtrf.lms.lt; the current fixed exchange rate of 1 EUR is 3.4528 Litas
e) Functioning of the system

The Ministry of Culture of the Republic of Lithuania as being the Government authorised institution shall have the right to receive information necessary to perform its functions from associations of public information producers and disseminators, regulatory institutions governing the activities of producers and disseminators of public information and non state regulatory institutions, state and municipal institutions and agencies. The Ministry of Culture of the Republic of Lithuania shall be prohibited from disseminating information which is a commercial secret of broadcasters and/or operators.

The Radio and Television Commission of Lithuania shall have the right to obtain free of charge from broadcasters and re-broadcasters, state and municipal institutions and agencies as well as other legal persons the information necessary to discharge its functions. Members of the Radio and Television Commission of Lithuania Commission and the Administration shall be prohibited from disseminating information which is a commercial secret of broadcasters and re-broadcasters.

In discharging the functions the Inspector of Journalist Ethics may:

- reprimand the producers and disseminators of public information about the noticed violations of legal acts governing the provision of information to the public and request that they be eliminated;
- request that a producer or disseminator of public information refute in accordance with the established procedure published false information, degrading the honour and dignity of a person or damaging his legitimate interests, or provide that person with a possibility to reply and deny such information;
- appeal to competent state institutions and the Ethics Commission of Journalists and Publishers in respect of the noticed violations of this Law and other legal acts governing the provision of information to the public.

In accordance with the 10 September 2002 Law of the Republic of Lithuania No IX-1067 on the Protection of Minors against detrimental Effect of the Public Information, the Inspector of Journalist Ethics shall have the right to:
warn the producers, disseminators of public information and owners thereof as well as journalists and other persons about the violations of this Law and require that the provisions of this Law and agreements of this Law as well as the legal acts related to it be observed;

• make public the fact that specific producers, disseminators of information and the owners thereof and journalists or other persons fail to adhere to the provisions of this Law or mutual agreements18;

• punish in accordance with administrative procedure the producers, disseminators of public information and the owners thereof and journalists and other persons for violations of this Law;

• address the appropriate institutions, so that they would apply within the scope of their competence, liability measures to violators of this Law;

• In the presence of elements of crimes, related to the provisions of this Law, to apply to law enforcement institutions for the institution of criminal proceedings;

• obtain information free of charge, which is necessary in performing the functions of the Inspector, from the public information producers and disseminators, State and municipal institutions and agencies and the institutions responsible for the supervision of the implementation of the provisions of this Law and also, to make use the observation (monitoring) data of the Radio and Television Commission of Lithuania.

Decisions of the Ethics Commission of Journalists and Publishers shall be binding upon the parties. However, if newspaper, journal, radio or television station does not publish/ inform public about the decision of the Ethics Commission of Journalists and Publishers, there are no sanctions for such ignorance. Therefore, in most of the cases newspapers, journals, radio or television stations do not publish/ inform public about the decisions of the Ethics Commission of Journalists and Publishers.

Producers and disseminators of public information who disagree with the decisions made by the Commission may apply to the court regarding such. However, they must publish them according to the procedure established by the Law on Provision of Information to the Public.

Administrative sanctions, which could be imposed by the Radio and Television Commission

\[18\] For example, the Code of Ethics of Lithuanian Journalists and Publishers is “mutual agreement”, because it was adopted by the assembly of the representatives of journalists’ and publishers’ organisations, i.e. it is not a legal act; it is a mutual agreement of the journalists’ and publishers’ organisations.
of Lithuania (and by the Inspector of Journalist Ethics in certain specific cases), may be the following:

Article 214-19 of the Code on Administrative Offences of the Republic of Lithuania provides for a fine up to 3,000 Litas for preparation and dissemination of public information having negative effect to the development of minors.

Article 214-20 of the Code on Administrative Offences of the Republic of Lithuania provides for a fine up to 7,000 Litas for not compliance with the requirements indicated in the permissions and licenses for broadcast and rebroadcast, as well as not performance of the decisions issued by the Radio and Television Commission of Lithuania Commission.

Article 214-21 of the Code on Administrative Offences of the Republic of Lithuania provides for a fine up to 7,000 Litas for not compliance with the requirements for placing part of European authors' works in TV.

Article 214-22 of the Code on Administrative Offences of the Republic of Lithuania provides for a fine up to 10,000 Litas for not compliance with the requirements for TV and radio advertising or funding of editions.

Administrative liability may be applicable only in respect of a physical person, thus, companies as legal persons may not subject to administrative liability. Also, administrative liability is provided for very limited list of infringements. The 10 September 2002 Law of the Republic of Lithuania No IX-1067 on the Protection of Minors against detrimental Effect of the Public Information provided that the Code on Administrative Offences of the Republic of Lithuania should be amended to provide for liability in respect of the infringements specified in this law.

In addition to the regulatory rights of the institutions mentioned above, both natural and legal persons may apply to court for compensation of material and non-material damages for infringing their right to honour, dignity or business reputation; also (natural persons) – for infringing their rights to image, privacy and secrecy. Mentioned persons through the court procedure may also enforce publication of their refutation of the erroneous data about them publicised by a mass medium (in case the mass medium does not publish the refutation in good faith).
When the Institutions are hearing the cases belonging to their competence it is not mandatory for representatives of the media entities which interest are concerned by such cases to participate in the hearings.

The Ethics Commission of Journalists and Publishers is comprised of 12 members to be appointed each by the Lithuanian Centre for Human Rights, the Lithuanian Psychiatric Association, the Lithuanian Bishops’ Conference, the Lithuanian Periodical Press Publishers’ Association, the Lithuanian Radio and Television Association, the Lithuanian Cable Television Association, Regional Televisions’ Association, and the Lithuanian Journalists’ Union, the Lithuanian Journalists’ Society, the Lithuanian Journalism Centre, National Radio and Television of Lithuania and the Lithuanian Chapter of International Advertising Association. Members of the Ethics Commission of Journalists and Publishers are appointed for a term of three years. The composition of the Ethics Commission is fixed in the Law of the Republic of Lithuania on Provision of Information to the Public (Article 47).

It should be noted that situation if associations temporize or not appoint a candidate to the Ethics Commission of Journalist and Publishers is not defined in the Law on Provision of Information to the Public or in the Regulations of Ethics Commission of Lithuania activities (besides, there was any occasion of such situation in all Commissions activity period). Therefore we are of the opinion that in such situation the Commission will not be comprised and will not start its activity until all members are appointed. Dissolution of one of the mentioned associations is hardly possible situation either because existence of these associations is defined in the Law on Provision of Information to the Public.

According to Article 47 of the explanatory Law, the associations are free to nominate a person to the Commission and the Commission doesn’t analyse nominative persons’ candidature (doesn’t question his aptitude). On the other hand, there is a possibility to remove the nominated person: if a member of Ethics Commission without serious reason 3 times consecutively doesn’t participate in the activity of the Commission, the Commission applies to the organisation which delegated him with a request to appoint another person (Paragraph 4 of Article 5, Ethics Commission of Journalist and Publishers Regulation, enacted on December 18, 2000). The work of the Ethics Commission of Journalists and Publishers is organised by its Chairman, who shall be elected by the Ethics Commission of Journalists and Publishers from among its members for a term of one year.
The Inspector of Journalist Ethics is a State Officer who shall supervise the implementation of the provisions of the Law. The Inspector of Journalist Ethics is appointed for 5 years by the Seimas of the Republic of Lithuania on a proposal from the Ethics Commission of Journalists and Publishers. Only a citizen of the Republic of Lithuania of good repute with higher education qualifications and the competence necessary to perform his duties shall be appointed the Inspector of Journalist Ethics. Members of Seimas and Government of the Republic of Lithuania as well as public servants of political (personal) confidence may not be appointed as the Inspector of Journalist Ethics. The Inspector of Journalist Ethics and members of his family may not be linked with producers and/or disseminators of public information by virtue of employment and may not have the shares of the producers and/or disseminators of public information. The Inspector of Journalist Ethics may not hold any other elective or appointive office and receive any other remuneration, except for that prescribed for his current position and payments for pedagogical or creative activity.

The Radio and Television Commission of Lithuania shall comprise 13 members: one member shall be appointed by the President of the Republic, three members shall be appointed by the Seimas on a proposal from the Committee on Education, Science and Culture, one member each shall be appointed by the Lithuanian Artists’ Association, the Lithuanian Cinematographers’ Union, the Lithuanian Composers’ Union, the Lithuanian Writers’ Union, the Lithuanian Theatres’ Union, the Lithuanian Journalists’ Union, the Lithuanian Journalists’ Society, the Lithuanian Bishops’ Conference, and the Lithuanian Periodical Press Publishers’ Association. Members of the Radio and Television Commission of Lithuania shall be appointed for the entire term of office of the appointing institution or the entire term of powers of the appointing organisation’s management body. Only a person of good repute may be appointed as member of the Radio and Television Commission of Lithuania. No appointed member of the Radio and Television Commission of Lithuania shall serve more than two consecutive terms. The legal grounds for a member’s work in the Radio and Television Commission of Lithuania shall be a decision adopted by the appointing institution or organisation.

Member of the Radio and Television Commission of Lithuania shall not be recalled from office until the term of his powers expires, except where:

19 Situation of dissolution of the association or lack of appointment of the member to the Commission is not defined in legal acts and have not happen yet.
- member of the Radio and Television Commission of Lithuania resigns;
- member of the Radio and Television Commission of Lithuania had not attended its meetings for more than 4 consecutive months without a valid excuse;
- member of the Radio and Television Commission of Lithuania has been convicted by a final judgement;
- member of the Radio and Television Commission of Lithuania loses citizenship of the Republic of Lithuania;
- member of the Radio and Television Commission of Lithuania is determined by court as having legal incapacity;
- member of the Radio and Television Commission of Lithuania cannot perform his duties for health reasons;
- member of the Radio and Television Commission of Lithuania discredits the status of a member of the Commission.

In the event that a member of the Radio and Television Commission of Lithuania is recalled from office on the grounds provided for in this Article, the Chairman of the Radio and Television Commission of Lithuania shall request the institution which has appointed the member in question to appoint a new member of the Radio and Television Commission of Lithuania for the remainder of the term of the member of the Radio and Television Commission of Lithuania who has resigned or has been recalled. Information about the composition of the Radio and Television Commission of Lithuania and any changes thereof shall be published in the official gazette Valstybės Žinios.

The powers of a member of the Radio and Television Commission of Lithuania shall expire when a decision on appointing a new member by the appointing institution or organisation’s managing body comes into force.

Members of the Seimas and Government, members of the Council of the National Radio and Television of Lithuania, public servants of political (personal) confidence, persons linked with broadcasters and re-broadcasters by virtue of employment, also persons having a participating interest in the broadcasters and re-broadcasters may not be appointed as members of the Radio and Television Commission of Lithuania. Family members of members of the Radio and Television Commission of Lithuania may not have a participating interest in broadcasters or re-broadcasters. If appointed to the Radio and Television Commission of Lithuania, members of political parties and organisations shall suspend their membership in a political
party or organisation and participation in the activities thereof until the end of their term in the Radio and Television Commission of Lithuania.

Members of the Radio and Television Commission of Lithuania shall elect by a majority vote the Chairman for a term of two years.

Meetings shall be the main form of work of the Radio and Television Commission of Lithuania. Meetings shall be convened at least once a month by the Chairman of the Radio and Television Commission of Lithuania on his own initiative or at the request of at least one-third of the members of the Radio and Television Commission of Lithuania. Information about planned meetings and their agenda shall be published in the press or placed on the Radio and Television Commission’s of Lithuania Web page.

Meetings of the Radio and Television Commission of Lithuania shall be open to the public. A meeting of the Radio and Television Commission of Lithuania may be closed where there is a need to protect the privacy or property of a person, also if a public hearing may disclose state, professional or commercial secrets.

Meetings of the Radio and Television Commission of Lithuania shall be deemed valid if they are attended by at least two-thirds of its members. Decisions shall be adopted by a simple majority vote of all the members of the Radio and Television Commission of Lithuania, except for cases specified in the Law. Decisions on issuing or refusing to issue a licence, also on penalties, changes in licence conditions, the suspension of tender conditions and tender results, also the suspension or revocation of a licence shall be adopted by at least a two-third majority of all members of the Radio and Television Commission of Lithuania. The abovementioned decisions, except for the decisions on changes in licence conditions and tender conditions, shall be adopted by a secret vote.

Decisions of the Radio and Television Commission of Lithuania shall be signed by its Chairman or any other person authorized by the Radio and Television Commission of Lithuania. Decisions of the Radio and Television Commission of Lithuania shall be binding for broadcasters and re-broadcasters. They will be published in the official gazette Valstybės Žinios and shall come into force on the next day of their publication, unless a later date of their coming into force is specified in the said decisions.
Decisions of the Ethics Commission of Journalists and Publishers are adopted by majority of votes. If votes in favour and against are equal, the deciding vote shall be the Chairman’s. Decisions of the Ethics Commission of Journalists and Publishers regarding ethics shall be passed by not less than a half of members that took part in the meeting, however, the meeting should consist of not less than 2/3 of all members of the Commission.

As the office of the Inspector of Journalist Ethics is concerned, there are no voting procedures.

Decisions of the institutions (as they are regarded as administrative institutions) may be appealed to a District Administrative Court and the Supreme Administrative Court of Lithuania as the final court instance.

The decisions of the Inspector of Journalist Ethics may be appealed against in court within 30 days after the day of their publication.

Decisions of the Radio and Television Commission of Lithuania are published in the official gazette Valstybės Žinios and come into force on the next day of their publication, unless a later date of their coming into force is specified in the said decisions. Persons may appeal to court against the abovementioned decisions within 30 days of the date of their coming into force.

Decisions of the Ethics Commission of Journalists and Publishers concerning the violations of professional ethics or other violations shall be published immediately in the same media where the Ethics Commission of Journalists and Publishers has established these violations. If a producer and/or disseminator of public information fails to publish the decision of the Ethics Commission of Journalists and Publishers pertaining to the violations of professional ethics or other violations in its own media, the decision shall be announced on the National Radio of Lithuania. The producers or disseminators of public information who disagree with the decisions of the Ethics Commission of Journalists and Publishers may appeal against them in court (in 30 days) but they must nevertheless publish them.

All interested parties may participate in the meetings of the Institutions which are open to public. The meetings may be closed where there is a need to protect the privacy or property of a person, also if a public hearing may disclose state, professional or commercial secrets. Complaint procedures were commented above.
The Radio and Television Commission of Lithuania is acting in accordance of regulations of its activities which were approved by itself on 4 August 2004, decision No. 67.

The Ethics Commission of Journalists and Publishers is acting in accordance of regulations of its activities which were approved by itself on 18 December 2000.

Paragraph 11 of Article 50 of the Law provides that the Inspector of Journalist Ethics should work under the regulations approved by Seimas of the Republic of Lithuania. Therefore the Inspector of Journalist Ethics is acting in accordance of regulations of its activities which where approved by the Decision No. IX-2341 of the Seimas of the Republic of Lithuania on July 8, 2004.

\( f) \) Supervision of the system

The Radio and Television Commission of Lithuania and the Inspector of Journalist Ethics are accountable to the Seimas of the Republic of Lithuania. They present their annual reports, however, the Seimas of the Republic of Lithuania has no capacities of direct supervision of the said institutions.

The Ethics Commission of Journalists and Publishers is not accountable to any State institution.

\( g) \) Impact assessment

The Chairman of the Radio and Television Commission of Lithuania shall report at least once a year about the activities of the Radio and Television Commission of Lithuania at a plenary meeting of the Seimas of the Republic of Lithuania and shall submit the Radio and Television Commission’s of Lithuania financial report.

The Inspector of Journalist Ethics shall report at least once a year about his work to the Seimas of the Republic of Lithuania.

The Ethics Commission of Journalists and Publishers has no obligation to prepare annual reports.
During the year 2004 the Radio and Television Commission of Lithuania imposed 6 fines (for Administrative infringements) and 8 warnings.20
During the year 2004 the Inspector of Journalist Ethics passed 10 decisions for 48 cases of disseminated public information.21
In a year the Ethics Commission of Journalists and Publishers gets and hears 150-170 complaints.22

2. Part II: Leading Cases

It should be noted that there are very few cases when decisions of the Institutions were argued before the court. In the data base of decisions of the Supreme Administrative Court of Lithuania it was found the only decision which is commented below. It is also enclosed the decision of the Ethics Commission of Journalists and Publishers regarding publications in one of the biggest Lithuanian newspaper “Respublika” where they were recognised as infringing journalists ethics. There have not been any cases where the Institutions jointly or in cooperative manner have taken the decisions.

Supreme Administrative Court of Lithuania
3 March 2005 Administrative case No. A2-224-05
An administrative case was opened based on the appeal of UAB Anykštos Redakcija (private company the Anykšta Editors), the Appellant, against the Decision passed by the Journalists and Publishers Ethics Commission, the Respondent.

In its complaint the Appellant requested for a reversal of the Decision of the Journalists and Publishers Ethics Commission dated 21 June 2004 whereby a conclusion was made that Anykšta Editors infringed the provisions of Article 55 of the Code of Ethics of Lithuanian Journalists and Publishers which says that neither individual journalists nor individual editors should get square with each other through mass media, since such their behaviour is detrimental not only to themselves but also to the goodwill of the profession. The Appellant pointed out that it did not violate the Code of Ethics of Lithuanian Journalists and Publishers

20  www.rtk.lt;
and was not getting square either with other journalists or with other editors. The Decision of the Respondent has no grounds. The Appellant was not informed about the complaint received by the Respondent therefore was not able to replicate or provide any materials. The Respondent assessed only the Appellant’s publications but left with no attention those published in the paper Šilelis which were the ones that made the Appellant deny the disinformation about the Appellant spread through the Šilelis. All facts mentioned in the paper Anykšta are true and this is not any kind of making even. The Appellant pointed out that the Respondent with no reason expanded the sphere of application of Article 55 of the Code of Ethics of Lithuanian Journalists and Publishers. That Article does not prohibit from publishing about other publications or their editors and journalists, the competitors among them.

The Respondent requested that the Appellant’s appeal should be rejected. The Respondent pointed out that upon receipt of a complaint against the Appellant’s publications, the Respondent did not have to request any additional explanations from the Appellant, since the very contents of the publications constituted sufficient grounds for conclusions. The Respondent pointed out that the Appellant in its publications was “making even” with the colleagues, which is against the professional ethics.

The panel of judges stated that the 21 June 2004 Decision of the Journalists and Publishers Ethics Commission on the paper Anykšta shall be overruled and that the Authority shall re-consider the request of the third party concerned on the articles in the paper Anykšta.

It is established in item 3 Article 44 and sub-item 4.2 Article 47 of the Law on Provision of Information to the Public that the Ethics Commission of Journalists and Publishers shall carry out supervision over compliance of the producers and disseminators of public information and of journalists with the requirements of professional ethics and that the Commission shall examine violations of professional ethics committed in the course of providing information to the public by journalists, producers of public information or responsible persons appointed by the owners thereof. In item 8 Article 47 of the Law on Provision of Information to the Public it is stipulated that decisions of the Commission concerning violations in professional ethics

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or other violations, must be published in those same mass media in which the Commission had established these violations.

In view of the mentioned provisions of the Law it follows that the type of activity of the Ethics Commission of Journalists and Publishers in supervision over adherence to the norms of professional ethics is that of public administration as defined in item 1 Article 3 of the Law on Public Administration. The purpose of that function carried out by the Commission is the enforcement of certain provisions of the Law on Provision of Information to the Public and the provisions of the pertaining secondary legislation regulating the matters of journalist ethics. In the process of supervision over adherence to the norms of professional ethics, the Commission may take a decision whereby it states the violation of ethics. Such decision has a negative effect on the violator and its business (reputation) and due to such its nature is deemed to be a measure of legal sanction (control) used to enforce the law and other legal acts on journalist ethics.

Since the activity of the Ethics Commission of Journalists and Publishers in the process of supervision over adherence to the norms of ethics, handling violations and application of the mentioned legal sanctions is the activity of public administration, it is therefore subject to the principles of public administration set forth in the Law on Public Administration. One of such principles is the principle of objectivity embedded in sub-item 1.2 Article 4 of the Law on Public Administration. This principle means that prior to decision-making the entity of public administration must make the disputed material available to all persons concerned and must declare its own position on the matter. Also, the decision of the entity of public administration carrying out its activities under the provisions of Article 8 of the Law on Public Administration must be well-grounded (based on the established facts and norms laid down in legal acts).

Such principles embedded in the Law on Public Administration were neglected in that particular case. The Respondent did not notify the Appellant about the disputed matter and did not give a chance to the Appellant to review the materials in the Respondent’s possession and to provide oral or written explanations in respect of the accusations against the Appellant of violating norms of professional ethics. The Respondent has not given any material grounds for its decision. No concrete reasons for such decision are given either in the minutes of the Respondent’s sitting of 21 June 2004 where the contested decision is mentioned or in the
notice sent to the Appellant on such decision. There is no indication in the Decision in what way exactly the violation actually occurred; neither is indicated the material based on which certain facts were determined, nor are any concrete reasons given why such facts should be qualified as a violation of Article 55 of the Code of Ethics of Lithuanian Journalists and Publishers.

It follows that in the process of passing the Decision appealed against the violation of major procedures took place. This constitutes the grounds for overruling of the Respondent’s Decision appealed against and for obligating the Respondent to hold a de novo hearing (sub-item 1.3 Article 89 of the Law on Administrative Proceedings).

**Evaluations and Conclusions by the Journalists and Publishers Ethics Commission Regarding V.Tomkus’ Essays "Kas valdo pasaulį?" (Who rules the world?) and other publications**

On March 4 of this year the Journalists and Publishers Ethics Commission received an enquiry from the General Prosecutor’s Office “Re evaluation of the publications in the daily “Respublika””, requesting to evaluate if V.Tomkus’ essays “Kas valdo pasaulį?” (Who rules the world?) contain mockery, slight, incitement of hatred, instigation to discriminate people of Jewish nationality and non-traditional sexual orientation. Copies of these publications were attached to the enquiry. The Commission has also received similar enquiries from the State Security Department and Inspector of Journalist Ethics. Having familiarized itself with the above publications and other public information related to these publications, the Journalists and Publishers Ethics Commission, being aware of the liability under Article 235 of the Criminal Code of the Republic of Lithuania “False evidence, conclusions and translation“, during the sitting on March 15 of this year attended by the chairman of the Commission G. Songaila, deputy chairman L. Tapinas, members: G. Daukšaitė, A. Matusas, L. Remeika, L. Slušnys, S. Pabedinskas, S. Židonis, E. Žiobienė, V. Žukienė, decided to approve the following evaluation:

The essays “Kas valdo pasaulį?” (Who rules the world?) by V.Tomkus, the editor-in-chief of “Respublika”, (hereinafter referred to as “the author”) should be evaluated not individually, but together with the entire series of the author’s publications in this newspaper issued from February 18 till March 6 of this year (hereinafter referred to as “the series of publications”), as well as taking into account the general context of such publications. It is also important to
note that the publications under the titles “/…/laiška mano skaitytojams” (letter to my readers) were also republished in other newspapers of “Respublika” group. Since the author of the publications series is also the editor-in-chief of the daily “Respublika”, it is expedient to evaluate the text of his essays together with the caricatures, announcements and various titles presented, i.e., as a total complex. It should be noted that it would be erroneous in this regard to fully use the publications reissued in the special addition to the newspaper of March 13 of this year, because in comparison with the initial original they have been changed in part.

1. Comments regarding the content of the publications issued in the daily “Respublika” under the common title “Kas valdo pasaulį” (“Who rules the world?) (printed in the daily “Respublika” on 20, 21 and 23 of February of this year).

1.1. The introductory titles of the first essay (“Kas valdo pasaulį? (Who rules the world?) (1); “Respublika”, 20.02.2004) on the first page of the newspaper contain the following statements (accusations):

“They scatter people’s savings, European funds in millions and banks. They lie. They privatize. They dictate “all out thoughts”. They send our state heads like messengers to all directions. They do not obey any laws. They desire concord and stability. Is it really worth while making peace with THEM?”.

1.2. Since a question is raised in the introductory part of the publication “is it really worth while making peace with THEM [capitalized by the author of the publication]?.. ”, then a collective image of wreckers or even criminals is created in respect of a group of people not expressly defined in the text, hostility among readers is incited. Such statements about “THEM” are compared not only with the title of the article, but also with the sub-title of the publication “Dvi temos, prieš kurias bejėgis “Respublikos” vyriausiasis redaktorius” (Two topics in respect of which the editor-in-chief of “Respublika” is helpless) and with the caricature depicting the characters of a “Jewish” and “gay” holding the globe. Such arrangement creates an impression that namely these groups of people are the powerful wreckers (hereinafter it is referred to as the “introductory arrangement”).

1.3. Only after getting familiar with the entire text of the publication of February 20 (likewise with the entire series of publications) it becomes clear that the introductory accusations contained therein are related to the political “elite”, “bosses”, “power” or even “all powers” of
the country, besides, the author ascribes to “THEM” large-scale businessmen, as well as competitors of its own publications (or even himself). As an example can be presented the introductory part of the publication of February 21: “I promised to tell the entire truth. However, in order to do that, it is necessary to become pre-disposed towards living in Lithuania for some time without the power, without large-scale businessmen and bosses of media (also including me). In freedom only a group of criminal elements recently set free, who have already served their sentence, would remain to rule. All others would be confined.”

Nevertheless, in some miraculous way the author happens to occur on the side of those Lithuanian people who do not belong to this elite of lying wreckers and even call himself an ordinary “litovec” (Lithuanian) (see the “letter” of February 19). Besides, in this letter the author commits to disclose “the entire truth about what is happening in Lithuania”, thus, he undertakes to unmask “THEM”, and also its intransigent competitor who is not only on the side of this elite being in criminal power, but, according to the author, who even “rules the state” (see the “letter of February 20). In his “letters” the author seems to draw the front line between “us”, i.e. those Lithuanian people who have neither money nor power (the author calls them “serfs”) and THEM”, i.e. “bosses” who harm such people. The author ascribes for some reason to “our” side not only himself, but also “our president”.

1.4. In this context in the “letters to readers” of February 20 and February 23 the author presents considerations stating that he, although having been committed to the readers to tell the “entire truth”, however, he “will not be able to do that in any way”, because: “/…/ there are two topics in respect of which I am helpless. It is the Jewish and gays.” The author also formulates its own arguments why he will “only be able to drop hints” about people who belong to these groups. According to the author, persons of Jewish nationality are protected against disclose of their role “by the genocide memory and global compassion”, and persons of homosexual orientation – the aureole of “anonymity” and “the enlightened”.

It remains unclear from the publications how in particular the “Jewish” and “gays” take part in “THEIR” harmful activity, however it is obvious that the author ascribes these groups of people to the highly powerful ones, and, in view of the multiply reissued caricature, even to the crucial powers. The author relates the role of these people to the following “rhetoric questions”: “Who rules the world and money?”, “Who dictates the politics?”, “What is propagated by TV and show business?” and states that “Those who tried to answer these
questions in essence, do not raise questions any more. All keep completely silent about it.”
Thus, the author creates an impression that these two groups of people are dangerous to other
people in some way, however he does not explain in an understandable manner how and why
they are dangerous. The author tries to suggest to the readers that those persons who intended
to clarify the role of the “Jewish” and “gays”, somehow suffer themselves, therefore, he will
also try himself to be “extremely cautious” when talking about these groups of people.

1.5. In its “letter to the readers” of February 22 the author contra-poses all “westerners” and
their allegedly negative impact on Lithuania against the comfortable life of Lithuanians in the
Soviet Union. He states that: “we, Lithuanian, while being in the Soviet Union, used to rob
…/ the Russians. For our sausages, we used to empty the budget of Moscow, build highways,
developed the agriculture and shipping.” Meanwhile, it becomes clear from the author’s
considerations that, on the contrary, in his opinion, the “westerners” steal from the
Lithuanians and cheat them, and the Lithuanian authorities grovel to them and even have
caused formation of a “complex” in Lithuanians that the “westerners” are cleverer. Such
author’s opinion is based in principle solely on the privatization story of “Mažeikių nafta”. He
also advises the readers to “particularly beware Americans, because America is ruled by the
Jewish. And they are very clever. We, Lithuanians still need to learn much from them. For
example, tolerance towards each other. Goodwill, first of all, for own people, and not for
aliens.”

The author bases its conclusions about overall power of money over the United States politics
on its personal experience, when nine years ago one person “having big impact in the United
States Congress and Jewish society” proposed for money to invite to Lithuania the US
congressmen and defend the daily “Respublika” attacked by the authorities in power at that
time. The author also retells the argument of this person to the effect that a visit of the US
congressmen would help “Respublika”, /…/ “because the entire world is afraid of
Americans”.

1.6. The author tries to argue the concept of the allegedly big and covert impact of “gays”
pressed upon the readers at the beginning of the “letter” of February 23, where in principle he
states that sanctions imposed by the Journalists and Publishers Commission a few years ago
on the newspaper “Vakaro žinios” were the “closure of the newspaper” organized by “gays”.
And a “strong contra-propaganda attack” organized by them was as a response to the series of
publications “Juos vadina géjais” (They are called gays) issued by this newspaper at that time, in which the intention was to clear up “who is called gays in Lithuania”. The author keeps silent that the Commission at that time also evaluated other, not less scandalous, publications of “Vakaro žinios” as a psychological violence employed systematically by this publication, and they were not related to “gays”.

1.7. Solely in view of the above highly doubtful grounds, the author draws the conclusion that there are many “gays” in Lithuania and “They are cool! And “being cool” always causes anxiety to the public. Especially if “cool gays” occupy influential posts and disguise themselves well: one cannot even know who and why attacks you.” The author has also disseminated fully unjustified allegations as to where, in his opinion, such people exist and even where they are most numerous. E.g., the circumstance that the Prime Minister Gediminas Vagnorius could not be allegedly retained in his post even by Gedvydas Vainauskas, “the mighty editor-in-chief of “Lietu vos rytas””, is related by the author to a possibly big number of “gays” in the staff of the President V.Adamkus.

The author also relates the televisions which, according to him, “both at that time and now savagely attack “Respublika””, to the influence of “gays” and “on that occasion” proposes to take a closer look at “what is propagated by our TV show programs and film serials: there are almost no such TV production left which would not contain the main character – a blue character - gay!”, however the author mentions only three programs which involved the characters “gays”.

1.8. The author protests against, as he puts it, “crawling of gays” “/…/ from blue screens into my home each evening“/…/”, as well as “/…/forcing their life style upon our children and grandchildren /…/”. The author also says that: “If my logic is acceptable to you, may be my logical question will also be acceptable to you: how could we safeguard our childs against evil-minded people if the society does not know them? Have you seen what happened to our President when he finally learnt whom he and his staff deals with?”

However, then the author “explains” to the readers that, even if the President has learnt in time about his staff, this information nevertheless would “not have saved our President”, because that staff is related by remote ties with the “horrible Kikalashvili” who communicated
with Josif Kobzon “whose title is the godfather of the entire Russian mafia. Besides, he is a Jewish, i.e. a representative of the most powerful and influential nation in the world“.

1.9. It becomes clear from the “letter to my readers” of February 23 that the only reason or motive, formulated openly and directly, for which the editor-in-chief of “Respublika” placed the above introductory arrangement on the first page of the February 20 edition of this daily (titles and caricature with the Globe), is the events which occurred ten year ago when the criminal group, containing also persons of Jewish nationality, killed the author’s colleague.

The author raises a problem: why these criminals tried to suggest that they are persecuted because of their Jewish nationality, and the Lithuanian and international Jewish society did not react to that and tolerated such their tactics. The author also blames the Lithuanian Jewish community for thus allowing the mafia to “cover its bloody works /.../ with the memory of the Holocaust victims”, and otherwise manipulate the genocide tragedy for their defense. The author even states that the “Jewish nationality” and the memory of its genocide victims was just a good cover for the mafia’s impunity”, and the Lithuanian Jewish society “/.../ does not understand it or does not wish to understand it /.../ and has not so far dissociated itself from their fellow-countrymen bandits /.../” and “go on demonstrating to everybody how it is good to hide their crimes under a reliable cover”.

1.10. However the author has failed in the above “letters” to explain to his readers under which grounds the entire Lithuanian Jewish society should be liable for the actions of some persons, real or alleged “fellow-countrymen“. The author has neither presented any evidence to the effect that all persons of the Jewish nationality in Lithuania, i.e. including criminals and honest Lithuanian citizens, make up or can make up a certain common union.

The author also “does not say anything“about why the crimes committed ten years ago are investigated today and what it specifically has to do with the harmful activity of wealthy and influential “bosses” of Lithuania argued by the author in the publications.
### 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
<td>Yes.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>The following non-state institutions were established by the Law of the Republic of Lithuania on Provision of Information to the Public (hereinafter referred to as the Law): the Ethics Commission of Journalists and Publishers (Article 47 of the Law) and the Radio and Television Commission of Lithuania (Articles 48-49 of the Law).</td>
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<td></td>
<td></td>
<td></td>
<td>There are also other non-state institutions which activities relate to media sector: - Communications regulatory authority; - Media support foundation.</td>
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<td></td>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td><em>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</em></td>
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<td></td>
<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td><em>The range of possible subjects of non-state action has to be limited to make the definition workable.</em></td>
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<tr>
<td></td>
<td>Yes.</td>
<td></td>
<td>In Lithuania the system of co-operative</td>
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</table>
regulation of media sector was established in the year 1996 by enacting the 2 July 1996 Law of the Republic of Lithuania No I-1418 on Provision of Information to the Public.

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
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</tr>
<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td><strong>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</strong></td>
<td></td>
</tr>
</tbody>
</table>

Yes. |  |  |

Legal basis for the Ethics Commission of Journalists and Publishers is Article 47 of the Law; for the Radio and Television Commission of Lithuania - Articles 48-49 of |
<table>
<thead>
<tr>
<th>The state/EU leaves discretionary power to a non-state regulatory system</th>
<th>Traditional regulation</th>
<th>The Radio and Television Commission of Lithuania is also acting in accordance of regulations of its activities which were approved by itself on 4 August 2004, decision No. 67. The Ethics Commission of Journalists and Publishers is acting in accordance of regulations of its activities which were approved by itself on 18 December 2000.</th>
</tr>
</thead>
<tbody>
<tr>
<td>No.</td>
<td></td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td></td>
</tr>
<tr>
<td>Yes.</td>
<td></td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>The Radio and Television Commission of Lithuania is being formed from different public organisations. That means that the State has not got direct influence on activities of this institution. However, the institution is financed from fixed contributions of entities acting in broadcast activities and private interests may have influence in decision making of this institution.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>The Ethics Commission of Journalists and Publishers may be claimed to be really independent institution, however, it gets financing from the State. That means that the State may have influence on activities in this Institution.</td>
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</tbody>
</table>
It may be stated that Lithuania has a co-regulatory system. The Radio and Television Commission of Lithuania is being formed from different public organisations. That means that the State has not got direct influence on activities of this institution. However, the institution is financed from fixed contributions of entities acting in broadcast activities and private interests may have influence in decision making of this institution.

The Ethics Commission of Journalists and Publishers may be claimed to be really independent institution, however, it gets financing from the State. That means that the State may have influence on activities in this Institution. Also, it has not got legal tools (the institution may not appoint administrative sanctions) to ensure effectiveness of its activities. Also its competencies are mixed with the competencies of the Inspector of Journalist Ethics.

The Inspector of Journalist Ethics is a State official. From this point of view he is independent in its activities from different commercial interests. However, he has also got very limited options for application of legal sanctions what essentially decreases effectiveness of this institution.

**Conclusion:** In my opinion, the regulatory system described is a co-regulatory system in the meaning of this study. However, it does not operate effectively due to limitation of possible legal sanctions which the institutions may apply.
3.14. Luxembourg

I. Co-operative Regulatory Systems in the media sector (in general)

General developments in regulatory policy

For regulation in the media sector, the main objective is to achieve a best possible balance between freedom of expression and personal rights, which is a complex task. Media operators wish to have as few regulations as possible, and clearly prefer self-regulation to mandatory state regulation or even to co-regulation (“Self-regulation if possible, co-regulation if necessary”). On the other side, the “users” (who are sometimes also the “subjects”) of the media, wish to protect their personal rights and prefer a safe authoritarian regulation of international range, or at least a co-operative system where their interests are strongly enough represented. Thus, co-regulation might be the compromise.

In Luxembourg, the media have had their reflexes of corporatism, preferring to impose upon themselves own rules of self-discipline in order to prevent hampering legislation. But pragmatism and search for consensus were also always major driving forces, so that in the end the regulatory framework of this media landscape is close to co-regulation, even if this is not really institutionalised (i.a. in terms of enforcement) and presently subject to a certain hesitation on the best choice of implementation (work in progress in the press and broadcasting sectors, as we will see hereafter).

Part I: Co-regulatory systems of general application to all media

I.1. Processing of personal data

The law of 2 August 2002 on the protection of persons with regard to the processing of personal data provides for co-regulation in this matter, by encouraging the development of codes of conduct from the professionals concerned and by granting the possibility for the operators of personal data processing to appoint an independent data protection officer, to be approved by the national commission for data protection (“Commission Nationale pour la Protection des Données (CNPD)”), which has investigative powers to ensure compliance of the data processing operator with the legal provisions.
According to article 2 of the law, “codes of conduct are drawn up at a national or community level by professional associations and other organisations representing the controllers, and may optionally be submitted to the Commission Nationale or the group for the protection of individuals with regard to the processing of personal data, as provided under Article 29 of Directive 95/46/EC.” According to article 32 of the law, the national commission for data protection CNPD has the mission i.a. “to …. approve codes of conduct relating to a processing operation or a set of processing operations submitted to it by professional associations which represent the controllers”.

To my knowledge such codes of conduct have not yet been worked out, at least there has been no public announcement or publication in this respect, up to now.

I.2. Advertising

Alongside the legislation on advertising, such as the law of 30 July 2002 on commercial practices and fair competition, regulating i.a. comparative and misleading advertisement in all media, there is a non-state self-regulatory system originated by the professional community. The commission for ethics in advertisement (“Commission Luxembourgeoise pour l’Ethique en Publicité - CLEP”) has been put in place in the mid-nineties by the Luxembourg council for advertising (“Conseil Luxembourgeois de la Publicité”), a non-profit association of private law formed by the major players active in the fields of marketing and commercial communication in the Grand-Duchy of Luxembourg: the agencies - through their federation named Markcom -, the electronic and print media, and the advertising businesses - through the Confederation of Commerce.

CLEP is a member of the international organisation EASA (« Alliance Européenne pour l’Ethique en Publicité »). It is indeed important for the Luxembourg ethics commission to be part of such an international federation, as many advertisements distributed in this country are of foreign origin, so that trans-border connections are needed to have a possibility of intervention against disputable advertisements.

CLEP is a committee of twelve members from the different sectors of the advertising community, appointed by the privately organised Luxembourg council for advertising among its own members. The committee is chaired by a thirteenth person elected by majority vote by the CLEP members themselves. The costs of such ethics committee are borne by the above mentioned advertisement council, which is financed by annual contributions from its members. Thus, CLEP is a self-regulatory body, independent from public authority, which
considers itself as being the guarantor for loyalty and ethics in advertisements appearing in any media on the territory of the Grand-Duchy of Luxembourg.

The committee monitors advertising messages from the point of view of the public. It may get active on its own initiative or upon complaint of any party. The committee may also be asked by an advertiser for a preliminary opinion about a planned advertisement prior to publication. The requests for advice and the complaints have to be made in writing; they must be motivated and their author must be identified (no anonymous complaints). CLEP takes its decisions by majority vote of its members, present or represented. In case of parity, the chairman has a casting vote. Members of the committee are bound to strict confidentiality.

The preliminary opinions are addressed only to the applicant, without any public communication. For the complaints, the decision is communicated to the plaintiff and to the advertiser concerned, and may possibly be made public.

CLEP has no jurisdictional power, only a moral weight. In case the committee considers that a given advertisement violates applicable rules (like the Code of advertising practices, mentioned hereafter), it advises the advertiser to comply and, in case of refusal, addresses to the faulty advertiser a written blame (which might be made public, in case of serious violation). The faulty party may also be excluded from its professional association or federation having adhered to the code of advertising practices. There are no other sanctions than those mentioned, which are more of moral impact. But there is always a possibility for legal complaints before the ordinary courts based upon the applicable legislation, procedures for which a decision or opinion of CLEP might have a certain weight.

Such Luxembourg commission for ethics in advertisement has worked out a code of advertising practices (Code de déontologie de la publicité), which sets a number of rules based on the legislation in force and on principles like decency, honesty, social responsibility, truthful presentation, to be observed in all commercial communication. The code is aiming at a balance between the values of freedom of expression, transparency in competition, respect of human dignity, privacy and personal data, and freedom of undertaking. The code applies to all professionals of commercial communication and marketing in Luxembourg. It is not legally binding as a general provision, but by adhering to their federation MarkCom for
instance, the advertising agencies expressly accept the terms and conditions of such code of conduct, and thus are contractually bound to comply with.

The code contains a number of general provisions, regarding the basic rules to be observed for any commercial advertising message, which must be:

1. truthful, by abstaining from any false allegation, omission, exaggeration, or ambiguity which might mislead the recipient of the message;
2. loyal, by not abusing of the confidence or of the lack of experience of the consumer;
3. honest, by identifying the advertisement as such and by abstaining from inadequate or exaggerated scientific testimony, quotation or reference;
4. decent, by taking into account vulnerability of human feelings and by respecting generally accepted standards of behaviour;
5. socially responsible, being aware of direct influence on public opinion;
6. respectful of the law, more particularly as concerns restrictions imposed on advertising and prohibition of unfair competition; and which must
7. rely upon verifiable and loyally chosen facts for any comparison between products or services;
8. not create fear or stimulate superstition, for instance through an exaggerated presentation of risks and dangers;
9. not encourage violence or preconceived opinions in relation with religion, race, sex, physical or mental capacities, or membership of a certain social group;
10. strictly observe the rules protecting privacy, in particular by abstaining from using personal documents for advertising purposes;
11. comply with the specific rules of the “Code de déontologie de la publicité” and of the International Code of Advertising Practice adopted by the International Chamber of Commerce.

The Code goes on with specific provisions for advertisements in all media in several sectors, some of which are also regulated by law, such as tobacco (law of 24 March 1989 restricting advertising for tobacco), alcoholic beverages, or pharmaceutical products (law of 11 April 1983 regulating advertising for medicine). The essentials of such particular self-regulatory provisions can be summarized as follows:
a) Presentation of men and women

- Respect of dignity; no offence, no denigration, no contempt towards either women or men;
- Representation of the human body in advertising must be decent and without connotation of voyeurism or degradation; representation of sexual attributes is only justified if a relation with the promoted product is established;
- No use of indecent terminology; no representation of acts of violence against women.

b) Protection of minors

- No misuse of credulity, lack of experience and sensitivities of the children and minors;
- Avoidance of any message likely to cause de-consideration or abnegation of the parental authority in case of refusal to purchase a given product;
- Advertisements shall not endanger the dignity of the child. An acting child appearing in an advertisement must be presented in a customary material and emotional environment.

c) Health care

- Advertisements for pharmaceutical products must clearly refer to their nature of medicine and specify that it is recommended to the consumer to ask his physician or his pharmacist for advice;
- Advertisements shall not encourage the abusive consumption of medical drugs;
- Cosmetic products must be clearly identified as such, without any reference to curative or preventive properties, in order to avoid any confusion with a medical drug.

d) Environmental issues

- Responsible behaviour with respect to the environment;
- Advertisements shall not mislead the consumer as to ecological advantages of a product, or to measures taken by the advertiser for environmental protection;
- Technical demonstrations or scientific conclusions relating to environmental impact may only be used if they are based on scientific work of high quality.

e) Tobacco products

- No encouragement of initiation to tobacco or of abusive consumption thereof;
• Abstention from suggesting a relation between the consumption of tobacco and the professional success or the increase in the capacities of work and intellectual concentration;
• Messages shall not be based on suggestive specificities aiming at minimizing the tar or nicotine content of the advertised tobacco product.

f) Alcoholic beverages
• Advertisements for alcoholic beverages shall not encourage irresponsible and excessive consumption by underlining the momentarily pleasant effects of alcohol; no communication of a negative image of abstinence or sobriety;
• Abstention from making use of personalities particularly admired by the minors with the purpose of encouraging them to alcoholic consumption;
• No connection between alcohol consumption and car driving.

g) Automobiles
• No encouragement to break the law or elementary rules of safe driving, by showing situations of illegal or imprudent behaviour;
• Indications relating to power and performance of a car may not be presented without mentioning other technical specifications, nor in a way encouraging extreme driving.
• Respect of other drivers; promotion of safety.

In this connection, it might be interesting to mention that an agreement had been signed already in June 1989 between the Minister for Transport and the Luxembourg federation of car sellers Fégarlux about advertisements for automobiles, based upon similar principles.

h) Financial services
• The advertisement must state in a comprehensive and clear way possible engagements to be taken by the customer;
• No exaggeration in terms of competence or qualifications of the financial services provider;
• No use of attributes linked to national sovereignty like tax regulations or bank secrecy as a commercial argument.

i) Electronic commerce
• Clear identification of the supplier;
• Transparency of sales conditions;
• Respect of the consumer and of his personal data.

Some of the above principles proclaimed in 1995 have been adopted, developed or contradicted by later legislation (tobacco; e-commerce, alcohol…).

The Luxembourg commission for ethics in advertisement CLEP had not many cases to handle up to now, most of them being, by the way, subject to ordinary legislation and jurisdiction. The very first case related to an advertisement for a mobile phone set offered for sale by a telecom network operator for 1.- Luxembourg franc. In fact such offer was combined with the subscription of services of the operator, which was however expressed not clearly enough in the commercial message. Thus, it was a case of misleading advertisement sanctioned by law, for which CLEP had not to intervene in particular.

Another case, which CLEP had actually to decide upon, related to a pun (mis-)used by a veranda manufacturer who played on the French word "châssis" in a slogan for promoting the frames of his verandas … by showing the “figure” of a beautiful woman instead of the “frame” of his products. In this case, the ethics commission gave a firm opinion clearly condemning such advertisement, for the reason that there was evidently no link between the exposed female body and the advertised product. CLEP asked both the advertising firm and the media to stop such advertisement, which caused heavy discussion. It was the first test of authority for CLEP.

In the same register of sexist connotation of an advertisement, the commission had to rule upon several complaints criticising an advertisement for underwear appearing for the departure of the 2002 “Tour de France” in Luxembourg on posters placed in bus shelters, which showed 3 women cyclists from the back just wearing a “string”. CLEP considered that such presentation could possibly be interpreted as a lack of decency and an offence to women’s dignity, but that in this particular case there was no evident violation of the rules of ethics, so that the commission abstained from sanctioning the advertisement, expressing however its reserves towards the kind of presentation involved.

I.3. Protection of minors against harmful contents in the media

Besides the general regulations on protection of minors, it might be interesting to mention that in its session of 7 November 2003, the Luxembourg government decided to initiate the elaboration of an amendment to article 383 of the criminal code for including the repression
of violent contents in the media in addition to the existing regulation on sexual contents, and to create a legal basis for sectorial systems of self- and co-regulation in such fields. This governmental intention has however not yet been implemented by law for the time being.

II. Co-operative Regulatory Systems in the broadcasting sector

II.1. Legislation

The law of 27 July 1991 on electronic media, as amended (Mémorial A 1991 page 972, and Mémorial A 2001 page 924) provides for a system of licences granted by the government or, for medium range and local radio operations, by the independent broadcast commission (“Commission Indépendante de la Radiodiffusion”).

The law contains general provisions on program content, advertising rules, and items to be possibly addressed in the schedule of obligations attached to the different broadcasting licenses. For television, a specific chapter of the law is dedicated to the transposition of the Directive “Television without frontiers” 89/552/EEC as amended by the Directive 97/36 EC. Article 6 of the media law provides for quality standards and obligations in content to be observed in general by all licensed programs, based upon the principles of respect of the audience, decency, non-discrimination, protection of minors (through a rather generic “no harm” obligation), etc. According to article 7 of the law of 1991, the licensed programs may carry advertisements, subject to prohibitions or limitations established by law, decree or schedule of obligations (paragraph 3 of such article 7 expressly prohibits advertising for tobacco products). Article 10 of the law provides that the schedules of obligations attached to the broadcasting licenses may provide for obligations to pay a royalty to the state or to perform specific cultural services in the general interest of the country. Other conditions which may be imposed upon the licensees in the schedules of obligations are impartiality and objectivity in the presentation of the news, respect of pluralism, promotion of culture and creative activities, limitations in advertising, compulsory broadcast of governmental communications, provision of technical facilities, etc. Chapter 5 of the law of 27 July 1991, as amended, is devoted to the European rules for television, transposed from the relevant directives mentioned above. Besides the rules about the proportion of European works in the transmission of television programs and the access to major events, the law provides (in article 28) for regulations on advertising, sponsoring and tele-shopping. Such rules are detailed in a grand-ducal decree of 5 April 2001.
According to article 31 of the media law, the national program council (“Conseil National des Programmes (CNP)”) is in charge of i.a. “advising the government for the supervision of all kinds of programs licensed, authorised or distributed in the Grand-Duchy of Luxembourg, as to their compliance with program content regulations”. According to article 35 paragraph 2 of the media law of 1991 (as amended), if the national program council notices a violation by a program under its supervision of a provision of the law or of the licence terms and conditions, the council has no direct sanction power, but has to inform the Minister competent for the media, who will then be responsible for initiating against the licence holder the procedure which might end in a withdrawal of the licence.

The national program council has a maximum of 25 members delegated for 5 years by the representative organisations of the social and cultural circles of the country, including recognised religions and political parliamentary groups, trade unions and employers’ organisations, national federations of associations active in the fields of culture, sports, family, charity, ecology, youth and immigration. A grand-ducal decree dated 27 February 1992 governs the internal organisation of the council. The council can make decisions only if the majority of its members are present; if this quorum is not reached, the chairman of the council convenes a new meeting, which will be able to decide if at least a third of the members are present. The decisions are made by majority of the expressed votes. In the event of parity, the chairman has a casting vote. The chairman may invite experts who attend the meetings of the council without a voting right. Besides a refund of their travelling expenses, the members of the council, the secretary and the experts are entitled to an attendance fee to be determined by the government.

The national program council considers itself as a co-regulator in the fields of electronic media. It has launched several program monitoring studies in cooperation with the University of Trier (Germany) and is elaborating - on its own initiative - a code of conduct for radio and television.

In March 2002, the Luxembourg government published a policy paper on basic orientations for a reform of the legislation on electronic media (“Orientations pour une nouvelle législation sur la radio et la télévision”) outlining its intention for the upcoming reform of the existing legislation on electronic media. An important section of the policy paper sets out
proposals for a new regulatory framework that would involve the creation of a new independent regulatory authority ("Autorité de Régulation Indépendante (ARI)"), which would be in charge of both the authorisation process and the control of authorised activities, including the power to impose sanctions.

In June 2002, the Luxembourg Parliament had a large debate on future orientation of the media regulatory framework and recommended in a resolution i.a. that the program operators and - in general - all those active in the fields of media should be submitted to a code of conduct, the existence of which should be established in the law.

II.2. Contractual arrangements

Licences and in particular the set of concessions of CLT-UFA

Besides the legal requirements, the concession agreement made in January 1997 between the government and CLT-UFA provides for particular obligations in the corporate structure and for certain performances of public service in the Luxembourg speaking radio and television programs of the license holder. Thus, both RTL Radio Lëtzebuerg and RTL Télé Lëtzebuerg must broadcast - for a determined minimum of time within their ordinary schedule - programs devoted to news, culture, sports, foreign speaking communities and transmit a number of events of national interest. By virtue of the license agreement, RTL’s income from advertising in the Luxembourg territory has been limited - in television - to an annual maximum amount, the surplus of costs of the national TV program being borne by the broadcaster. In radio, the costs for RTL Radio Lëtzebuerg are to be covered by advertising revenue (limited in daily time) and to be fully borne by the broadcaster CLT-UFA, provided however that the possible losses of such radio exploitation are contractually limited to a certain annual amount, the excess of which would entitle the broadcaster to get a compensation from the Government. The fulfilment of these obligations is supervised by a government commissioner, who has a right of prior intervention for possibly preventing CLT-UFA from performing contrary to the concession agreement. The license holder has a right of appeal against possible decisions of opposition of the commissioner (first the government itself and thereafter the administrative courts). The concession agreement of CLT-UFA presently runs until the end of 2010.

II.3. Future performance of public service
In June 2002, the parliament invited the government, by a motion adopted with a large majority, to define public service television and explore new ways of financing such service, and to entrust by contract one or more private operators with such missions of public service (instead of creating a state financed public organisation). Presently the question remains open, if the public service mission of CLT-UFA will be renewed or if other operators might be in charge of one or the other aspect thereof.

II.4. Self-regulation or co-regulation for the broadcasting sector

Apart from the code of conduct on advertising practices and the deontology code of the press (mentioned hereafter) applicable to all media, and the specific broadcasting legislation and concession agreement, the commercial broadcaster CLT-UFA has adopted in 2003 a charter for its journalists, followed in January 2004 by the institution of an internal supervisory board named “Conseil des sages” (council of the wise), in charge of an overall supervision of the content of the Luxembourg speaking RTL radio and television programs. Such self-regulatory system has been put into place by CLT-UFA as a reaction against critics and proposals for co-regulation made by the national program council (“Conseil national des Programmes”) established by the media law of 1991. Such self-regulatory body of five members (from the management and the news departments of the stations concerned) handles possible complaints from viewers or listeners and delivers opinions to the station concerned.

The charter of RTL journalists in Luxembourg (also named a deontology code and a code of conduct by its authors) refers to the democratic values of freedom of expression and social responsibility and takes into account the concession agreement between the government and CLT-UFA, the particular organisation of the Luxembourg radio and television operations of CLT-UFA and their position in the broadcasting landscape, for stressing the objectives of pluralism, globally balanced objectivity and impartiality to which RTL journalists are specifically bound. The charter then details the rights and obligations of RTL journalists, largely inspired by the principles of the Universal Declaration and the European Convention on Human Rights and by the provisions of the general press code, explained hereafter. Furthermore, the charter rules that a journalist of RTL may not make use of its privileged position on the media scene for getting a political advantage for himself, a party or an organisation. Consequently a journalist who wants to be a candidate at political elections, will be prohibited from appearing in the media for a period of time to be determined by the general management of the company.
In a press release dated January 2004, CLT-UFA explained that such charter and the supervising council were meant as an efficient and professional self-regulation system, based upon the applicable legislation, the contractual license obligations and the existing international codes of conducts, accepted by both the operator CLT-UFA and its employees.

In a press release of 10 February 2004, the National Program Council expressed its satisfaction on such initiative of RTL, but insisted on the necessity of co-regulation through an organisation which should be independent from the media operators.

Thus the question is not definitely resolved and the legislator will have to arbitrate.

III. Co-operative Regulatory Systems in the press sector

Replacing the old legislation of 20 July 1869 on the press and on criminal offences committed by the different means of publication, the law of 8 June 2004 on freedom of expression in the media (Mémorial A 2004 n° 85) applies in all cases where a person communicates to the public by way of any media, irrespective the technology and the vector used.

The new legislation sets - in its chapters IV. and V. - the rights and obligations of journalists.

Freedom of expression comprises the right to search for and to receive information and to decide to communicate such information to the public in a freely chosen way, as well as to criticise and to comment on such information, provided such comment is identified as being distinct from the presentation of the fact. Article 7 of the law introduces the protection of journalistic sources, whereby a journalist gets the right to refuse to reveal his sources when testifying in court, except in matters of blood crime, drug dealing, money laundering, terrorism or attack on state security.

Copyright of journalistic work is also confirmed as a basic right for journalists.

On the side of the duties derived from the freedom of expression, the law requires accuracy and truthfulness for the communication of facts, which the journalist has the duty to thoroughly investigate and verify prior to any publication, as regards content and origin of the information. As a corollary, any inaccurate fact published must be spontaneously rectified as soon as this is established or known by the journalist or the media.
Concerning journalistic duties towards the individual citizen, the law confirms the principle of protection of privacy (article 14) and the exceptions thereto (article 15), and introduces the principles of presumption of innocence and the right of information follow-up (“droit d’information postérieure”) of any person involved in criminal proceedings. The right of reply, formerly regulated separately for the written press and for the electronic media, has been harmonized and united in one set of rules applicable to all media. Furthermore, the law regulates the protection of reputation and dignity (article 16) and the exceptions thereto (article 17), and protection of minors in the information media (article 18) and the exceptions thereto (article 19).

Following the opinion of the Council of State (“Conseil d’Etat”) and of the Chamber of Commerce, referring to decisions, recommendations and resolutions of the Council of Europe, the legislator has decreed the mandatory obligation for the press community to establish a code of conduct taking into account the new legislative situation. According to a motion unanimously adopted on 13 May 2004 by the parliament, such code could replace the provisions of the law relating to the deontology of the media, which would be better handled by the professionals themselves. By such motion, the parliament invited the government to provide for an assessment of the application of the new law three years after its entry into force and to propose the necessary adaptations of the law taking into account the provisions of a code of ethics possibly worked out in the meantime by the media professionals. As we will see hereafter, the Press Council had adopted already in December 1995 a self-regulatory code of conduct named “Code de déontologie de la presse”, but such code needs to be reviewed in the light of the new legal provisions.

The Press Council (“Conseil de Presse”) has originally been created by the law of 20 December 1979 on the recognition and the protection of the professional title of journalist (Mémorial A 1979 nr. 98 and Mémorial A 1998 nr. 81) with the main mission of handling the attribution or withdrawal of press cards.

The law of 8 June 2004 on freedom of expression in the media provides for a re-organisation of the Press Council, which will henceforth have a real mission of self- and co-regulation.

The Press Council is composed of a minimum of 14 members, appointed by grand-ducal decree, half of which represent the publishers and half represent the journalists, upon proposal
of their respective professional sector. The Council is chaired alternatively for a period of 2
years by a representative of the publishers and a representative of the journalists. The
Luxembourg Press Council is a member of the international organisation Alliance of
Independent Press Councils of Europe (AIPCE).

The Press Council remains competent for deciding upon the attribution or the withdrawal of
press cards through a special commission organised under articles 27 to 30 of the new law.
The commission of press cards is composed of eight members, among which the president of
the Press Council, who chairs also such commission. Half of the members are appointed upon
proposal of the journalists associations, and for the other half by the publishers, for a
renewable period of 2 years. The Press Council determines the procedures to be followed
before the commission. The decisions of the commission of press cards may be appealed
before the administrative courts.

Beyond such traditional mission, article 23 paragraph (2) of the law of 8 June 2004 provides
that the Press Council is henceforth in charge of (a) working out a deontology code defining
the rights and obligations of the journalists and publishers, (b) putting in place a complaints
commission for handling possible complaints from individuals about publication of news and
statements in the press, and (3) studying all questions relating to freedom of expression in the
media. The Press Council is furthermore entitled to issue recommendations and directives for
the work of journalists and publishers and may organise professional training for them.

The complaints commission is organised under articles 32 to 35 of the new press law. It has 5
members, two of which represent the publishers and two others represent the journalists, the
fifth member representing “the public” and chairing the commission. Such neutral and
impartial personality, who must be a lawyer, is appointed by grand-ducal decree, upon
proposal of the Press Council. The procedures to be followed before the complaints
commission are determined by the Press Council. The complaints commission may accept or
dismiss a complaint. It can issue recommendations or pronounce a blame (public or not)
addressed to the responsible person(s). The commission has however no jurisdictional power.

The Press Council has adopted in December 1995 a self-regulatory code of conduct named
“Code de déontologie de la presse”, which states that the right of information and the freedom
of expression guaranteed by the Constitution and the Declaration on human rights has as a
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

counterpart the responsibility of the journalist and of the publisher, and that such responsibility implies certain obligations in terms of truth, fairness, identification and verification of the information, respect of human dignity and privacy, prohibition of piracy, offence, libel and discrimination, and the observance of news embargo upon exceptional and legitimate constraints. On the other hand, such responsibility implies also that the journalist and the publisher enjoy certain indispensable rights, such as access to all information sources, refusal of obeying to anything contrary to the personal conviction of the journalist or to an agreed editorial policy, and the right to refuse any pressure or influence from the advertising industry. The code applies without distinction to the written and to the audiovisual press, but does not constitute a legally binding and constraining regulation.

This code of conduct is currently under review in the light of the provisions of the new press law mentioned above. The Press Council has put in place a working group of about fifteen persons for such purpose. The outcome of such self-regulatory exercise will be important for the follow-up of the new legislation and, in practice, for the set-up of real co-regulation in the press sector.

IV. Co-operative Regulatory Systems in the online sector

There is no code of conduct specifically for online services, except that the code of advertising practices of the Luxembourg federation of marketing and advertising agencies (mentioned above) has dedicated one special chapter 2.9. to self-regulatory provisions applying to advertisements in electronic commerce. To some extent the set of references (of 41 criteria on identification, presentation of products and services, handling of complaints, customer protection, advertisement…etc) to be fulfilled by a candidate for the award of the Luxembourg e-commerce certification (mentioned hereafter) could be considered as some kind of a code of conduct for service providers over the Internet (www.e-certification.lu).

According to the program declaration of the government of August 2004, the future independent media regulatory authority “Autorité de Régulation Indépendante (ARI)” will get the mission to assure the respect of human dignity and the protection of minors in all audiovisual media, including online services.

As regards the technical matters involved, the government has worked out a new set of rules for electronic communications, derived from the so-called “Telecom Directives Package” (Framework Directive (2002/21/EC); Authorization Directive (2002/20/EC); Access Directive (2002/19/EC); Universal Service Directive (2002/22/EC); Radio Spectrum Decision
(676/2002/EC)) favouring technological neutrality and equal access, and securing safety of the electronic communication networks and services. Four laws dated 30 May 2005 on networks and services, on management of radio-electric frequencies, on re-organisation of the regulating body *ILR*, and on protection of personal data have been voted and published in the official gazette *Mémorial A* nr. 73 of 7 June 2005.
3.15. Netherlands

I. Co-operative Regulatory Systems in the TV sector

1. Part I: The co-operative regulatory system

a) Development of the regulatory system

The introduction of the NICAM-system resulted from a broad shared opinion in the Netherlands during the late 90’s that there was a need for a multimedia approach to protect minors against harmful content. In the document “Niet voor alle leeftijden: audiovisuele media en de bescherming van jeugdigen” (“Not for all ages: audiovisual media and the protection of youngsters”) of 1997, the Dutch government referred to new technical developments and changed scientific views which required an entirely new system. The underpinning principle in this paper was that all media actors should take their own responsibility for the classification of their products. Government announced it would be willing to bare the costs of founding a classification institute in which all relevant media organisations would participate. In August 1999 the foundation of the NICAM by all involved media sector platform organisations was a fact.

It replaced the existing system in which cinema movies were rated by the “Nederlandse Filmkeuring” (“Dutch Film Rating Board”). According to this system films which were rated suitable for viewing by youngsters of 12 years and older were not allowed to be shown on TV before 8.00 pm. Films rated for 16 years and older were prohibited to be broadcast before 9 pm. (later changed into 10. pm.). If broadcasters did not meet these provisions, the Dutch media authority, Commissariaat voor de Media, could impose sanctions. Regarding all other programmes the broadcasters had to decide themselves at what time it was suitable to be broadcast on TV. This system had some failures. First, it was not obliged to have films rated by the Film Rating Board. Films that were not shown in (Dutch) cinema before and/or primarily intended for TV were not rated. Second, there was a general sense that not all broadcasters dealt in a proper way with their own responsibility regarding unrated movies. This was also pointed out by an investigation of the Commissariaat voor de Media in 1997, whose findings have been described in the report “De omroep gekeurd” (“The broadcaster rated”) of 31 October 1997. One of the main findings of the report of the media authority was that especially private broadcasters on a regular basis broadcasted programme unsuitable for
youngsters at a too early time. Also promo spots for programmes and films were due to their content often considered broadcast too early. Another shortcoming of the system existing at that time was that it only applied to film and TV broadcasts. Taking into consideration new technical developments it was felt a more multimedia approach was preferable.

b) Subject-matter of the regulatory system

The main objective is to protect youth from harmful content on TV, in film, video, DVD and videogames. This objective should be met by classification of all audiovisual media content and by adequate information aimed at the consumers, especially parents and others responsible for raising up children.

The classification system, called “Kijkwijzer” (in the double meaning of “Watch wiser” or “Viewing guide”) was developed by independent experts and launched on 22 February 2001 by NICAM. It introduces a uniform classification system for film, TV, video, DVD and includes clear self-regulatory components. The system is based on a classification by age (all ages, not suitable for children younger than 6, 12 or 16 years old) and content descriptors, e.g. indications on what the ‘harmful content’ consists of (violence, sex, fear, discrimination, drugs and alcohol abuse and coarse language). The organisations affiliated to NICAM classify productions themselves on the basis of the Kijkwijzer coding form. Concretely, the in-house rater/coder who is trained by NICAM uses the Kijkwijzer coding form which is a user-friendly computerised questionnaire. By using this system, every audiovisual work gets one classification which is valid for as long as it exists. The final age rating is determined by the highest content descriptor score. Following the NICAM regulations, television programmes classified as suitable for age twelve and older must not be broadcast before 8 pm. A second watershed states programmes classified as age sixteen and older should not be broadcast before 10 pm.

c) Basis of the co-operation

As far as TV is concerned the Media Act provides the legal framework for the establishment of NICAM and lays down additional provisions relating to the control of harmful content on TV. As an implementation of article 22, paragraph 1 of the TWF Directive, article 52d, paragraph 1 of the Media Act states that broadcasters should not transmit any programmes which might seriously impair the physical, mental or moral development of persons under the
age of sixteen. The CvdM is responsible for monitoring compliance with this rule by following the principle that programmes containing illegal content or hardcore pornography combined with gratuitous violence constitute serious impairment to the development of minors.

Programmes that may impair the physical, mental or moral development of persons under the age of sixteen can only be broadcast if the operators are members of an organisation accredited by the government on the criteria laid down in article 53, paragraph 1 of the Media Act, and are subject to the rules and supervision of that accredited organisation. Already in August 1999 the NICAM was founded to deal with all necessary preparations and develop the Kijkwijzer classification.

According to article 53, paragraph 3 of the Media Act an organisation will classify for accreditation only if:

“(a) independent supervision by the organisation of compliance with the regulations referred to in subsection 1 is guaranteed;

(b) provision has been made for adequate involvement of stakeholders, including in any event consumer representatives, establishments which have obtained broadcasting time, experts in the field of audiovisual media and producers of audiovisual media;

(c) the financial position of the organisation ensures proper implementation of the activities.”

Following article 53, paragraph 1 of the Media Act the NICAM was by decision of government of 22 February 2001 officially accredited.

Since the Commissariaat voor de Media has a role in the system as well – namely with regard to programmes which can be seriously harmful and towards broadcasters which do not participate – a covenant has been signed between NICAM and the Commissariaat. In this covenant – the last version has come into effect on 1 March 2005 – arrangements between NICAM and Commissariaat have been made regarding complaints. The covenant points out to which extent both authorities deal with complaints and how they should inform each other. In a supplement to the covenant it is stated which data regarding the internal quality control of the system by NICAM should be submitted yearly to the Commissariaat. So far NICAM and CvdM did never disagree on any classification. The covenant points out to which extent both authorities deal with complaints and how they should inform each other.
d) Institutions involved in the system

NICAM, established in 1999: this institute is responsible for:

- setting up of and further development of the classification of audiovisual material of its members;
- drafting regulations for classification and the time of broadcasting on TV;
- information to the audience;
- supervising compliance including the handling of complaints;
- imposing fines, if necessary, maximum has recently been lifted to € 135,000.00;
- revoking the NICAM-membership, only in the case of very severe or repeatedly violations.

Normally warnings and fines will be issued by NICAM.

The Commissariaat voor de Media: this independent regulatory authority has to supervise the absolute prohibition on broadcasting content that can cause serious damage to minors following article 52d, paragraph 1 of the Media Act. Furthermore the Commissariaat has to control whether the non-members to NICAM do not broadcast any programmes that could be harmful to minors. Every broadcaster that becomes member to NICAM should submit a written declaration of membership to the Commissariaat. Also NICAM informs the Commissariaat regularly on broadcasters that have become member. Recently the Commissariaat has obtained the task to perform so-called “meta supervision” of the NICAM. This means each year NICAM will have to report to the Commissariaat on how it will safeguard the quality of the classification. Also NICAM should demonstrate to the Commissariaat to what extent the classifications are reliable, valid, stable, consistent and precise. Further arrangements regarding this check by the Commissariaat have been laid down in a supplement to a covenant between both parties.

Unfortunately there is no text available in English. Regarding the “meta supervision” of the CvdM: the check of the quality of the classification system of NICAM, the following is stated.

- NICAM should demonstrate to the Commissariaat to what extent the classifications are reliable, valid, stable, consistent and precisely;
- each year before 1 March the NICAM will submit all necessary data to the CvdM.
• each year before 1 July the CvdM will report to the state secretary about its “meta supervision” on NICAM/Kijkwijzer.

According to the supplement of the covenant between CvdM and NICAM, the following data should be reported each year:

• overview of complaints lodged with NICAM (numbers and contents analyses);
• overview of results of checks by NICAM of classifications (intern quality check);
• description of other activities performed by NICAM for the intern quality check;
• summary of test with codeur –DVD.

At least once in two years there should be a comparison with classifications in other European countries. Furthermore data of most recent audience research should be included in the report.

The NICAM is funded by both industry and state. The state contribution in 2003 was € 532,000.00, which is 73% of the total costs. The intention of government is to decline its contribution the next years, which started in 2004 (65%). In 2004 the state contribution was 50%. The aim of government is to subsidise maximum 40% of NICAM costs in 2006.

\textit{e) Functioning of the system}

Members to NICAM have to respect all the rules regarding the classification, the use of symbols describing the audiovisual content and the time of broadcasts.

According to article 53, paragraph 1 of the Media Act, the regulations shall in any event relate to:
“(a) criteria for the classification of programmes, including in any event the extent to which:
1º fear is aroused;
2º violent behaviour is shown or justified;
3º the use of drugs is made to look attractive or is condoned;
4º pornography is involved;
5º products are not suitable to be shown to certain categories of persons under the age of sixteen on other grounds, according to generally held opinions;
(b) the broadcasting times of the above-mentioned programmes;
(c) the manner in which the broadcasting of these programmes will be preceded by or accompanied by symbols or warnings.”

To all audiovisual media organisations participation is fully voluntary. But in the field of TV there is an important pressure to broadcasters to become member of NICAM since those who do not opt for membership of NICAM cannot broadcast programmes who can be harmful to minors. Consequently they will also fall directly under the supervision of the Commissariaat voor de Media.

The broadcasters that are not a member are:

- either cable text operators who have a broadcasting license but for whom membership to NICAM is not relevant because they only broadcast text TV and no real programmes;
- broadcasters which just started and with whom negotiations to join NICAM are still going on.

So, de facto there are no broadcasters that do not want to join NICAM although it is relevant for them because they broadcast TV programmes.

The NICAM has the structure of a foundation. It has a bureau, existing of one director, a staff of five people and an office manager. The following platform organisations have joined the NICAM:

- NOS: Netherlands Broadcasting Organisation, representing the national public service broadcasters;
- Vestra: Association of Television and Radio Programme Suppliers, representing the (national) private broadcasters;
- NVDO: Netherlands Video Retails Organisations, representing the video rent stores;
- NVGD: Netherlands Association of Gramophone Record Retailers, representing the big stores that sell videos and DVD’s;
- NVPI: Netherlands Association of Producers and Importers of Picture and Sound carriers, representing production and import sector;
- NFC: Netherlands Cinematography Federation: representing the film sector.

Through these umbrella organisations practically all audiovisual parties are member to the NICAM. Those parties who are not member are approached by NICAM.

The NICAM has a general board of nine people (including an independent chairman) and a daily board of four people (most representatives of the member organisations). Furthermore the NICAM has several committees:
• Complaints commission: this committee of seven people is handling complaints of the audience and is fully independent of NICAM;
• Appeals commission: this committee of four people is dealing with appeals to decisions of the previous committee, lodged by the compliant or the involved member, and gives the final decision in a case. This commission also operates independent from NICAM;
• Science commission: this committee of four people evaluates the classification system and develops and updates it.
• Coders commission: this committee of four people advises when a coder has doubts about the classification given. It is voluntary to follow the advice or not. But if there will be a complaint by the audience regarding a classification, the party that has followed the advice has a stronger position in the procedure.
• Advisory commission: this committee of 27 people advises on different aspects of the NICAM system to the general board, either on request of the NICAM or on own initiative.

The way appointments of members of different commissions take place is stated in the statutes. These are not published now but are available for everyone who asks for them. The future statues will be published on the NICAM-website.

• Advisory commission: members are appointed by the general board following an absolute majority decision. The members are representatives of the affiliated sectors, as well as scientists, consumers and representatives of organisations form society.
• Science commission: members are appointed by the general board following an absolute majority decision. The members are scientists, specialized in subjects ‘child and media’ and ‘media and violence’.
• Complaints commission: members are appointed by the general board following an absolute majority decision. This commission has an independent chairman, six members (amongst which a vice –chairman) and three observers. At least two and at most three members are appointed on recommendation of the member NVPI (interactive department). At least two and at most three members are appointed on recommendation of the members NVP (video department), NVDO, NVGD and film sector together. At least two and at most
three members are appointed on recommendation of the broadcasting sector. At most three observers can be appointed by the general board without any recommendation.

- Appeals commission: members are appointed by the general board following an absolute majority decision. These members should be fully independent of the affiliated sectors, founders or members of NICAM. Of course membership of complaints and appeals commission at the same time is absolutely prohibited.

The independence of the complaints commission is safeguarded by following conditions:
Members of complaints commission are not working in the sector nor have any financial, managerial or other interest in the audiovisual sector, founders or members of NICAM. The chairman of the complaints commission will be appointed by general board, independently from other members of the complaints commission. The chairman has to be an experienced jurist, completely independent from audiovisual sectors, founders or members of NICAM. The chairman is appointed for four years and can be re elected once. The complaints commission operates autonomous and decisions are made after majority.

Each citizen can complain to the Kijkwijzer system. Most people complain if they think the classification of an audiovisual product is not correct or if a programme is broadcast at a too early time. Any person identifying an infringement to the Kijkwijzer rules has six weeks to submit a complaint through the NICAM. On the website of NICAM/Kijkwijzer (www.kijkwijzer.nl) there is a standard complaint form which can also be obtained by post from NICAM. Every complainant is notified in writing when a complaint has been accepted for an adjudication by the complaints commission. Decisions of the commission are issued within eight weeks of an adjudication and the complainant will be informed on the decision. Not all complaints are dealt with by the complaints commission. Most complaints are dealt with by the NICAM bureau on behalf of the chairman of the complaints commission. Only cases in which there exists serious doubts about the classification are referred to the complaints commission. Each complainant receives the decision relating in writing. Decisions are also communicated through the website of NICAM. Complainant and the involved broadcaster or other party are invited for the hearings of the complaints and appeals commission but are not obliged to attend.
The average duration of the procedure – i.e. the period between issuing the complaint and the decision of the commission – was four months but in 2003 measures were taken to decrease the procedure to three months. For that reason the term for the involved party to submit a written reply has been declined from four to three weeks. Also the frequency of meetings of the commission has been increased. In 2003 the complaints commission has gathered 12 times. Also a special procedure of two weeks for urgent cases has been introduced for instance when a movie has just been introduced in cinema and rapid clarity on the correct classification is needed. Furthermore the NICAM bureau has taken more efficient measures and the secretariat of the commissions has been enforced. At the end of 2003 the NICAM decided to abolish the own fee of € 250 for organisations connected to the costs of procedure in case a complaint was upheld.

In the system of Kijkwijzer the pictograms describing the content of an audiovisual product and the age for which it considered not-damaging play a crucial role as guidance to the audience. Especially in the introduction year NICAM has informed the public and involved parties in very different ways about Kijkwijzer.

Regarding the participating parties NICAM provided for:
   • in company presentations;
   • editorial content in professional magazines;
   • news letters, digital and in writing;
   • information brochures;
   • manual guides/instructions for people involved in the classification process (coders) and front desk employees in video stores, shops and cinema’s.

Regarding the public NICAM provided for:
   • information spots in cinema;
   • campaign on national private and public TV channels;
   • advertising campaign in newspapers;
   • explanation of Kijkwijzer in film listings;
   • flyers and other information material;
   • website about Kijkwijzer.

Furthermore in 2002 NICAM organised a conference because the Kijkwijzer existed one year. Also a programme broadcast on a national public TV channel was produced together with an educational broadcaster. In 2003 a new campaign by written information material about possible damaging effect of audiovisual material was launched by NICAM. Also in 2003
NICAM started publishing so-called “NICAM dossiers” aimed at professionals working in the
NICAM area. Since December 2003 the Kijkwijzer classification can be consulted during all
TV programmes on national public and private TV channels through a special teletext page
(page number 282).

*f) Supervision of the system*

NICAM-decisions fall under private law. A broadcaster or other party can lodge higher appeal
at court after a decision of appeals commission. If the NICAM would not meet any longer the
legal conditions stated in article 53, paragraph 3 of the Media Act, the government can decide
to withdraw the accreditation following article 53, paragraph 5 of the Media Act.

Article 53, paragraph 5, Media Act:
“Our Minister shall withdraw an accreditation if the organisation no longer complies with the
requirements laid down by or pursuant to subsection 1 or 3. Our Minister may also withdraw
an accreditation if the organisation fails to satisfy the conditions referred to in subsection 2 or
the further and other requirements referred to in subsection 4. Decisions to revoke an
accreditation shall be announced in the Government Gazette.”

*g) Impact assessment*

From the end of 2000 until half 2002 an investigation was taken out by research bureau
Intomart to evaluate the implementation of the NICAM system in the different sectors. On 26
November 2002 the final report of Intomart, called “Onderzoek zelfregulering audiovisuele
producten” (“Investigation self regulation audiovisual products”) was sent to Second
Chamber of Parliament. The following aspects of NICAM have been evaluated: the degree of
participation by the industry, quality of the classification by the participating parties,
compliance to rules and arrangements; functioning of complaints procedure and effects on
audience. In general the NICAM was considered as working very well and effective. Some
recommendations which have been made in the evaluation were:

- there is a bigger need for publicity campaigns;
- the pictograms on promotion material need to be improved;
- front desk employees in cinema, video rent shops and store should comply
  more to the rules;
• some parts of the classification form regarding the aspects sex, fear and violence need to be improved.
• the procedure with the complaints commissions should be shortened.

Each year NICAM publishes an annual report.
In June 2003 an investigation of Intomart pointed out that:
• 95% of the parents consider Kijkwijzer as a useful system;
• 86% of the parents appreciate the combination of advices regarding age and pictograms regarding content;
• 77% of the parents use the advices of Kijkwijzer in practice.

The number of cases/complaints in 2001:
TV: 187
Cinema: 42
Video/DVD: 33
Websites: 13
Other: 53
Total complaints: 329
In 2001 the complaints commission decided in 10 cases, of which 8 complaints were upheld. 4 cases could not be finished for the end of 2001. The rest of the complaints were dealt with by the bureau of the NICAM.

The number of cases/complaints in 2002:
TV: 256
Cinema: 99
Video/DVD: 52
Websites: 6
Other: 83
Total complaints: 496
In 2002 the complaints commission decided in 20 cases (including 4 cases started in 2001) of which 13 complaints were upheld. The rest of the complaints was dealt with by the bureau of the NICAM.

The number of cases/complaints in 2003:
TV: 219
Cinema: 130
Video/DVD: 56
Other: 48
Total complaints: 453

In 2003 the complaints commission decided in 53 cases (including 12 cases started already in 2002) of which 39 cases were upheld. The rest of the complaints was dealt with by the bureau of the NICAM. The appeals commission decided in 5 cases (including 3 cases started in 2002). In all cases the decision of the complaints commission was upheld.

Following the evaluation by Intomart, also the Commissariaat voor de Media gave on 18 December 2002 its comments to the NICAM system. The media authority was satisfied with the results so far, especially if was taken into account the short period of two years that NICAM and Kijkwijzer existed. More clarity and unity in treatment of audiovisual products has already been achieved in the two years of existence. Just like Intomart the Commissariaat made some recommendations. The Commissariaat suggested NICAM should:

- consider the (at random) control on own initiative of classifications;
- get the possibility to revoke membership of parties as a sanction;
- encourage membership of some parties, especially subscription channels and broadcasters aimed at other countries;
- adapt the complaints procedure on some aspects, like shorten its duration;
- investigate if it's possible to show age-pictograms permanent on screen;
- encourage a universal way of showing pictograms in programme guides and newspapers.

A summary in English of the Intomart report and of the comments of the Commissariaat voor de Media are enclosed. On 21 November 2003 the Dutch government sent its opinion called “Meekijken gewenst” (“Jointly watching desirable”) to Second Chamber of Parliament. Government was satisfied with the NICAM system and considered the co-regulation as effective and flexible. Nevertheless, government made some recommendations following the evaluation of Intomart, the reply of NICAM to that and comments of the Commissariaat. According to government improvements of the system could be achieved by:

- more international comparative surveys;
- systematic observance of quality (for instance through re-classification);
- more participation of parents in the system (for instance by appointing parents organisations in advisory commission of NICAM);
investigation if age descriptors should be shown on screen permanently;
• adaptation of promo spots during daytime for the broadcast of (violent) films later in the evening by taking into account that young children watch;
• better compliance to regulations by front office employees (in cinema, video rent shops and stores);
• bigger role of the complaints commission in the handling of complaints by NICAM bureau.

The Kijkwijzer classification is developed by independent scientists. In September 2003 the third version (version 1.2) of the classification system came into effect. Furthermore NICAM's own science commission can advise NICAM permanently on issues related to the validity and reliability of the classification taking into consideration new technical developments and changing opinions of society.

2. Part II: Leading Cases

With regard to the broadcast of programmes and films on TV the following cases could be mentioned:

In 2001 in total (so regarding all audiovisual products) eight complaints have been upheld but did not result in a fine since it was the first time the respective parties infringed the regulations and it was decided to issue only a warning. One of the cases was dealing with an episode of the criminal serial Ein Fall für Zwei. With regard to serials the policy is as follows: a broadcaster is not obliged to classify all episodes separately but can restrict itself to classification of a selection at random. The other episodes follow the first classification. If a complaint deals with a specific episode which has not been classified individually, normally no sanction will be imposed.

In 2002 in total thirteen complaints have been upheld. A fine has been imposed to the private broadcaster RTL/Holland Media Groep s.a. for broadcasting on its channel Yorin at a too early time the movie Saving Private Ryan. The movie was classified sixteen years and older and as a consequence of that was not allowed to be broadcast before 10.00 pm. Nevertheless the broadcaster scheduled the movie at 9.00 pm. Because the broadcaster was held fully responsible for this decision, the (at that time) maximum fine of € 22,725.00 has been imposed. The broadcaster lodged an appeal but it was dismissed by the appeals commission.
Also a fine of € 2500 and the obligation of a re-classification were issued to the broadcaster TV 10 B.V. because of a wrong classification of an episode of the serial *Buffy The Vampire Slayer*. The episode was classified six years and older but had to be classified sixteen years and older. Therefore the episode was not allowed to be broadcast before 10.00 pm. Furthermore in 2002 some other complaints were upheld but did not result in a fine since it was the first time the respective broadcasters infringed the regulations and it was decided to issue only a warning.

In 2003 in total 53 complaints have been upheld by the complaints commission and five by the appeals commission. Regarding TV the following cases are worth mentioning:

A fine of € 1135 was imposed to private broadcaster RTL/Holland Media Groep s.a. because of broadcasting on the channel Yorin the movie *American Pie* which has been classified on a wrong age: all ages instead of twelve years and older. In the second case a fine of € 1500 was imposed to private broadcaster RTL/Holland Media Groep s.a. because of broadcasting the movie *A Shot Through The Heart* which has been classified on a wrong age: six years and older instead of twelve years and older. Also a fine of € 1135 was imposed to public broadcaster AVRO because of broadcasting the movie *Lieve Jongens* which has been classified on a wrong age: twelve years and older instead of sixteen years and older.

Before the NICAM/Kijkwijzer system came into force, the Commissariaat voor de Media incidentally fined broadcasters for scheduling at a too early time films rated by the Dutch Film Board or for failing to mention the rating in advance. For instance in 1998 public broadcaster NPS was sanctioned with a fine of 10,000 Dutch guilders because of broadcasting too early the film *Malcolm X* which was rated twelve years and older. As mentioned before the old system was considered rather unsatisfactory because not all films were submitted for rating to the Dutch Film Board. For those films not rated and TV programmes the broadcasters held an own responsibility, which was quite difficult to monitor by the Commissariaat voor de Media. Following an investigation in 1997 the Commissariaat made critical comments on the performance of the own responsibility of broadcasters. Also with regard to promotion spots for programmes and films the situation was not always very clear. As a principle the spots followed the rating of the movie itself. If broadcasters wanted to show a promo earlier than the rating of the movie pointed out, they had to let it rate separately, but in practice this was not always the case.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / NICAM/Kijkwijzer

<table>
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<th>Non-state regulatory system</th>
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<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
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Yes: the members of NICAM are responsible for the classification according to the criteria of Kijkwijzer. Decisions following complaints are taken by the bureau of NICAM or the independent complaints commission.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation

Measures by third parties (e.g. NGOs)

The range of possible subjects of non-state action has to be limited to make the definition workable.

The setting up of NICAM and all regulations and the developing of the classification system Kijkwijzer was carried out by the audiovisual sectors who are also the addressees of the regulation.

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<td>Yes: the legal basis of NICAM can be found in article 53 of the Media Act, which is an implementation of article 22 of the TWF Directive.</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
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<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
<td></td>
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<tr>
<td>Yes; NICAM has discretionary power in the developing of the classification system, setting up regulations, handling complaints and if necessary imposing fines.</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
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<td>The state uses regulatory resources to influence the non-</td>
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<td>Yes: both industry and state fund the NICAM. The intention of government is to decline its contribution the next years, which started in 2004. The aim is to subsidise maximum 40% of NICAM costs in 2006.</td>
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3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

*a) The non-state regulatory part of the system*

The NICAM has been set up by industry in 1999 and accredited by government in 2001. This institute is responsible for the classification of audiovisual products, including TV-programmes, films, video’s, DVD’s and computer games.

The members of NICAM are responsible for the classification according to the criteria of Kijkwijzer. Decisions following complaints are taken by the bureau of NICAM or the independent complaints commission.

The setting up of NICAM and all regulations and the developing of the classification system Kijkwijzer was carried out by the audiovisual sectors who are also the addressees of the regulation.

*b) The link between the non-state part and state regulation*

The public policy goal of NICAM is to protect minors from harmful audiovisual content.

The legal basis of NICAM can be found in article 53 of the Media Act, which is an implementation of article 22 of the TWF Directive. NICAM has discretionary power in the developing of the classification system, setting up regulations, handling complaints and if necessary imposing fines. Both industry and state fund the NICAM. The intention of government is to decline its contribution the next years, which started in 2004. The aim is to subsidise maximum 40% of NICAM costs in 2006.

**Conclusion:** The NICAM/Kijkwijzer system meets conditions which are typical for co-regulation. The public policy goal is to protect minors from harmful audiovisual content. The set-up of NICAM and the developing of Kijkwijzer by industry was heavily supported by government. By the NICAM, industry itself is responsible for classification of the audiovisual products and supervising the regulations of the system. Meanwhile the government is involved by (partly) funding the system and carrying out evaluations. The independent media authority is in the field of TV responsible for supervising non-members, the observance of the prohibition of broadcasting material that can be seriously harmful to minors and the meta supervision of NICAM. Membership of NICAM is voluntary but in practice almost all parties of the involved industries participate. Especially regarding TV there is a big stimulation for
broadcasting organisations to join NICAM since otherwise they will not be allowed to broadcast any (possible) harmful material and fall directly under supervision of the Commissariaat.

II. Co-operative Regulatory Systems in the film and mobile phone sector

1. Part I: The co-operative regulatory system

Very recently, Kijkwijzer has been extended to include content for mobile phones. As soon as a mobile phone user searches for pornographic images or text, a Kijkwijzer icon pops up with a recommended age restriction. For the moment Kijkwijzer only applies to sexually explicit content, but there are plans to extend the application to other types of sensitive material. NICAM signed a contract with mobile operators KPN Mobile, Orange, Telfort, T-Mobile and Vodafone. These five operators introduced the Kijkwijzer system on 1 April. The contract between NICAM and telecom operators is not available in English. The regular complaints procedure does not apply to mobile content yet. This is due to being changed in future after the mobile operators have fully introduced the Kijkwijzer symbols.

All aspects of the NICAM/Kijkwijzer system, as described in the previous part, fully applies to cinema film, video and DVD as well, so are deemed unnecessary to repeat her again.

2. Part II: Leading Cases

With regard to the broadcast of films, video and DVD the following cases could be mentioned:

In 2001 some complaints regarding cinema movies have been upheld by the complaints commission but did not result in a fine since it was the first time the distributors infringed the regulations and it was decided to issue only a warning. In four cases of cinema movies: The Gift, Dungeons and Dragons, Jurassic Park III and Lara Kroft: Tomb Raider, the complaints commission decided the Kijkwijzer classification was wrong and set on a too low age.

In 2002 three complaints regarding cinema movies have been upheld by the complaints commission. Since the involved film distributors violated the regulations for the first time, only a warning was issued. In three cases of cinema movies: Panic Room, Lilo & Stitch and The Crow (trailer), the complaints commission decided the Kijkwijzer classification was wrong and set on a too low age.
If a movie is classified on sixteen years and older, younger children are not allowed to obtain a ticket for the film in question or rent or buy the video or DVD. Many parents complaint it was their own responsibility to allow their children to see movies which are classified for a higher age. Nevertheless cinema, video rent shop and store personnel should respect the NICAM regulations and refuse to give entrance, rent or sell the movie on video or DVD to children which are younger than the age of classification. This is also regulated by Section 240a of the Dutch Penal Code which prohibits the display to children younger than 16 years of objects or images that may be considered damaging for persons younger than 16. Possible sanctions are imprisonment not exceeding two months or second category fine (€ 2,250).

In 2003 there were 28 complaints regarding film in cinema, on video or DVD dealt with by the complaints commission of which 19 were upheld. In eight of these cases a fine has been imposed. Cases were dealing with:

- wrong classification of cinema films by film distributors. Fourteen complaints of which ten have been upheld by the complaints commission.
- wrong or incomplete information about classification of cinema films by cinema exploiters in film screenings or other publicity or showing a trailer before a movie classified for a younger age than the previous trailer. Seven complaints which all have been upheld by the complaints commission.
- wrong classification of films on DVD or video or containing a trailer which is classified higher than the following movie. Five complaints of which one has been upheld by the complaints commission.

3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

All aspects of the NICAM/Kijkwijzer system, as described in the previous part, fully applies to cinema film, video and DVD as well, so are deemed unnecessary to repeat her again.

III. Co-operative Regulatory Systems in the advertising sector

1. Part I: The co-operative regulatory system

   a) Development of the regulatory system
The TWF Directive stipulations concerning the content of advertisements have not been implemented in the Dutch media legislation but in a self-regulatory code called the Dutch Advertising Code (Nederlandse Reclame Code). It contains a body of rules and regulations to which all forms of advertising are subject, regardless of whether they are broadcast on radio or TV or published in a press magazine. It is divided into a general section and a special section. The general section, based on the ICC Code, stipulates, among other things, that advertisements may not be misleading or untrue. This section also contains a number of subjective standards, one of which stipulates that advertising must not be gratuitously offensive or at odds with good taste and decency. The special section contains special advertising codes and the related stipulations for specific products and services.

b) Subject-matter of the regulatory system

The public policy goal is to protect the public (especially children) from misleading and harmful advertising and to make advertising in general – regardless of the media in which it is offered – accountable.

All parties affiliated with the Dutch Advertising Code must respect the regulations regarding form and content of advertising in this code. This code is drawn up by the Advertising Code Foundation (Stichting Reclame Code), founded in 1963, in which eight organizations associated with the advertising branch in the Netherlands participate. The code must ensure that advertising is accountable and consists of rules like stating that advertisements should not encourage minors to dangerous behaviour, should not be untrue, misleading or gratuitously offensive. Compliance with the Advertising Code is monitored by the Advertising Code Committee to which complaints can be submitted by every citizen or organisation. The Committee decides on every complaint about advertising regardless if the advertiser or the medium concerned is affiliated with the Foundation.

c) Basis of the co-operation

The Dutch Advertising Code contains a body of rules and regulations to which all forms of advertising are subject. It is divided into a General Section and a Special Section. The former stipulates, among other things, that advertisements may not be misleading or untrue. This section also contains a number of subjective standards, one of which stipulates that advertising must not be gratuitously offensive or at odds with good taste and decency.
The Special Section of the Code contains special advertising codes and the related stipulations for specific products and services. These stipulations supplement the general provisions of the Code. Participating in the Advertising Code Foundation is voluntary but the Dutch Media Act obliges both public and private broadcasters to affiliate with the Dutch Advertising Code if they want to include advertisements in their programmes. In that respect they are forced to opt for the system of self-regulation.

d) Institutions involved in the system

The bureau of the Advertising Code Foundation consists of a secretariat of six people and one director. The Advertising Code Committee consists of five members. Complaints are handled by the Advertising Code Committee, consisting of the following:

- a member appointed by the media affiliated in SRC;
- a member appointed by the BVA/Association of Dutch Advertisers;
- a member appointed by the VEA Association of Communication Consultancies;
- a member appointed by the Consumers' Association;
- an independent member, who is also the chairman, appointed by the Stichting Reclame Code.

The Dutch Advertising Foundation is fully funded by industry.

e) Functioning of the system

Following a complaint the Advertising Code Committee can issue a recommendation to the advertiser to stop using it in its current form. In the event of a repeated offence or a serious violation of the code, the media will be asked to stop publishing the advertisement concerned. The organizations which are members of the Dutch Advertising Code pursuant to the Media Act are obliged to reject advertisements against which such a type of ban has been issued. When the complaint is allowed by the Committee, it can moreover:

- set conditions on the broadcast time of the radio and/or TV commercial submitted for evaluation;
- stipulate for the party whose advertising is found to violate the Advertising Code, a term during which the recommendation of the committee is to be complied with;
• impose measures as described in the contracts concluded between the Advertising Code Foundation and the organizations in consultation with which a Special Advertising Code was laid down.

After 14 days, any decision by the Advertising Code Committee is irrevocable. In urgent cases the decision is irrevocable after 7 days. If the complainant and/or advertiser disagree with the decision, it can lodge an appeal within 14 days or 7 days, respectively with the Board of Appeal.

Should an organization affiliated under the Media Act consider advertising offered to it impermissible under the Dutch Advertising Code, it should bring this decision in writing with reasons given, to the attention of the advertiser with due speed and if possible, within two weeks after receipt of the advertising.

Several articles of the Dutch Media Act require both public and private broadcasters to ensure that, either through direct membership or through an interest group, they are covered by the Dutch Advertising Code or some other comparable scheme established by the Advertising Code Foundation and, in that context, are subject to the supervision of the Foundation. They are required to prove that this is the case by submitting a written statement from the Advertising Code Foundation to the Commissariaat voor de Media.

**Local and regional public broadcasting**

Section 43b, paragraph 2 Media Act

“Local and regional broadcasting establishments which provide programmes as referred to in section 43a shall be required to ensure that, either through direct membership or through an interest group, they are covered by the Dutch Advertising Code (*Nederlandse Reclame Code*) or some other comparable scheme established by the Advertising Code Foundation (*Stichting Reclame Code*) and, in that context, are subject to the supervision of the Advertising Code Foundation. They shall be required to prove that this is the case by submitting a written statement from the Advertising Code Foundation to the Media Authority.”

**National public broadcasting**

Section 61a Media Act

“The Radio and Television Advertising Foundation shall ensure that it is covered by the Advertising Code or some other comparable scheme established by the Advertising Code
Foundation and, in that context, that it is subject to the supervision of the Advertising Code Foundation. The Radio and Television Advertising Foundation shall be required to prove that this is the case by submitting a written statement from the Advertising Code Foundation to the Media Authority.”

**Private broadcasting**

Article 52b Media Decree

“A commercial broadcasting establishment which provides programmes consisting of advertising messages shall ensure that it is covered by the Advertising Code (*Nederlandse Reclame Code*) or some other comparable scheme established by the Advertising Code Foundation (*Stichting Reclame Code*) and, in that context, that it is subject to the supervision of the Advertising Code Foundation. The commercial broadcasting establishment shall be required to prove that this is the case by submitting a written statement from the Advertising Code Foundation to the Media Authority.”

There are no data on the number of parties, not affiliated to the Advertising Code Committee, available. Since all complaints on advertising will be dealt with by the Advertising Code Committee, regardless if the advertiser or medium is a member, it is not very relevant either.

Parties which are non-member usually have in their general conditions stated that advertising should not be in contravention of legislation or self-regulation. Decisions of the Advertising Code Committee also have effect because media report on it, so consumers will know.

The Board of Appeal is put together in the same way as the Advertising Code Committee. All member organisations, including the consumers association, appoint a member of the Advertising Code Committee. The members must judge complaints in complete independence. If requested by a complainant, a member (because he can not be considered objective in a specific case) could be replaced. A member can also decide to excuse himself (be exempted) in a case in which he might be involved and cannot judge independent. The chairman of the Advertising Code Committee is appointed by the Advertising Code Foundation. In practice this is a jurist, usually experienced for many years as a judge for (high) court. The same goes for the members of the Board of Appeal. Of course nobody can be member of both Advertising Code Committee and Board of Appeal.
Decisions are based on a normal majority. If votes are equal, the chairman’s vote is decisive. All complaints must be submitted in writing. Submission by e-mail is possible via the electronic complaint form (see www.reclamecode.nl).

A copy (including name and address of the complainant) is made of any complaint sent to the Advertising Code Committee and then sent to the advertiser. The advertiser is given 14 days to put forward a defence. A copy of the defence is sent to the complainant. Should the chairman of the Advertising Code Committee consider the measure justified, he can invite parties to file additional written statements. A date is then set for handling the complaint, the defence and any other documents. If desired, the complainant and the advertiser can explain their standpoint orally at this meeting.

Should the chairman of the Advertising Code Committee consider a case urgent, he can rule that it is handled within 14 days.

Some complaints are not accepted by the Advertising Code Committee. The chairman of the Committee can set aside a complaint if he feels that:

- the Committee will not allow the complaint;
- the complaint should not be handled by the Advertising Code Committee, but pursuant to the procedure for cross-border advertising, should be sent on to another EASA member.

If a complaint is set aside by the chairman, the complainant is informed to this effect in writing. If he feels that the complaint was wrongly set aside, he can lodge an objection with the entire Advertising Code Committee (see Section 7). The chairman is also authorized to grant what is known as a “chairman’s allowance”. The chairman can make use of this option when he feels that the complaint will prompt the Committee to make a private recommendation. This situation may arise in the following cases:

- when the party at whom the complaint is directed has admitted its validity or;
- when, after receipt of the defence the chairman thinks that the complaint can be dealt with by means of a chairman's allowance.

If a complaint is allowed by the chairman, the complainant and advertiser are informed to this effect in writing. If the advertiser feels that the complaint has been wrongly allowed, he can lodge an objection (free of charge) with the entire Advertising Code Committee.
Should a large number of complaints be submitted about certain advertising, the chairman can refuse to handle complaints of the same nature or purport filed after a certain date.

The average duration of a complaints procedure (from lodging the complaint until the decision) is around eight weeks.

The meetings of the Complaints Committee are public if, and in so far as one or both parties give an oral explanation. Either party, however, can object, giving reasons, to a public hearing. A request for holding the hearing behind closed doors is granted only when there is good reason to refrain from holding a public hearing. The chairman of the Advertising Code Committee (or Board of Appeals) decides on such a request. If necessary, parties can request a hearing behind closed doors as late as the session itself. The hearing of the case in chambers is not public. The Committee hands down its decision in writing and sends it to the parties involved.

A recommendation can be made privately or in public. In the former case the Advertising Code Committee informs only the parties involved of its ruling; in the latter case the Committee distributes a press release announcing its ruling.

Nevertheless third parties are entitled to take cognisance of private and public recommendations alike (including the names of the parties involved).

The recommendation is moreover sent to:

- the administration of the Advertising Code Foundation
- the organizations affiliated with the Foundation
- various media
- other third parties decided upon by the Committee.

"Opinion without commitment" can be either private or public.

The public recommendations can also be consulted for free on the website. For the non-public recommendations a subscription is needed since 2003. The decisions can also be consulted at the bureau of the Advertising Code Foundation.

In 2005 the Dutch Advertising Code and the Stichting Reklame Rakkers (Foundation “Advertising Kids”) will jointly publish a guide (“De Kinderreclame Wijzer”) in order to promote responsible advertising aimed at children.

_f) Supervision of the system_
Every party - even a non-member - who is involved in a case can lodge an appeal. If the system of self regulation would no longer function the government would be able to intervene following article 169 of the Dutch Media Act:

“Our Minister shall lay down rules implementing articles 12, 15 and 16 of the European Directive in so far as it is Our Minister's opinion that one or more of these articles have not been incorporated, or have been incorporated insufficiently, incorrectly or late, into the Advertising Code (Nederlandse Reclame Code) or some other comparable regulation established by the Advertising Code Foundation (Stichting Reclame Code), or if the Advertising Code Foundation fails in its supervisory duties.”

**g) Impact assessment**

The Advertising Code Foundation publishes yearly an annual report.
The number of complaints as mentioned below do only include complaints which have resulted in a procedure at the Advertising Code Committee. More complaints about the same advertising message/expression are considered and counted in as one complaint in the data below. So in total there are more complaints, but some are about the same advertising or do not lead to an official procedure at the Advertising Code Commission. The total amount of complaints each year is in between 2,500 and 3,000.

**2001:** 1375 complaints of which 699 were related to radio and TV.
The Advertising Code Committee gave 431 recommendations and 294 refusals.
31 (52%) decisions of the Advertising Code Committee were upheld by the Board of Appeals.

**2002:** 1129 complaints of which 510 were related to radio and TV;
The Advertising Code Committee gave 317 recommendations and 230 refusals.
24 (48%) decisions of the Advertising Code Committee were upheld by the Board of Appeals.

**2003:** 1024 complaints of which 486 were related to radio and TV.
The Advertising Code Committee gave 270 recommendations and 212 refusals.
24 (48%) decisions of the Advertising Code Committee were upheld by the Board of Appeals.

**2. Part II: Leading Cases**

Some years ago an advertisement for crisps was recommended not to be broadcast anymore since it was considered to be lacking respect of and being offensive to elderly people: a granny was hit by a popular singer because he wanted to steal her crisps. In 2004 a
commercial for a loan company was considered to be misleading since it had the setting of a serious talk show and the anchorman involved was acting like he was providing objective information to the audience. But meanwhile he was promoting a commercial loan company.

Recently the television advertisement of the margarine product “Becel Pro Active” was assessed. The Advertising Code Committee as well as the Commission of Appeal ruled that the claim that the butter decreases cholesterol level was allowed. Furthermore the advertisement was allowed because it did not suggest the margarine could prevent or cure human diseases. But the advertisement was lacking necessary additional information that it could be harmful for people who were already on a cholesterol low diet. In that respect the advertisement was considered to be a violation of article 7 of the Dutch Advertising Code.

A current commercial for “Versatel”, a broadband internet provider, which is offering matches of the national football competition via ADSL, led to many complaints. There is a reference made to God influencing a match by touching the ball with his fingertip and scoring. The Advertising Code Committee considered the advertisement according to the rules and refused to give a recommendation following the complaints. According to the Committee the commercial only consisted of a reference to “the hand of God” incident of the football player Maradona 20 years ago during a World Championship and was therefore not gratuitously offensive to religion or in contravention of good decency.
### 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

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<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
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general and some special codes, deals with complaints and issues recommendations.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation

Measures by third parties (e.g. NGOs)

The range of possible subjects of non-state action has to be limited to make the definition workable.

Yes: the setting up of the codes was carried out by the Dutch Advertising Code Foundation in which parties participate who are also the addressees of the regulation.

### Link between the non-state-regulatory system and state regulation

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<td>No: except for the audiovisual part where the Media Act states in several provisions that all broadcasters should affiliate with the Dutch Advertising Code if they want to include advertisements and should be subject to decisions of rulings of the Advertising Code Committee. Article 169 of the Media Act provides the legal basis to lay down legal provisions in order to implement the obligations of the TWF Directive if self regulation would no longer be adequate.</td>
<td></td>
<td></td>
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<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
<td></td>
</tr>
<tr>
<td>Yes: the Dutch Advertising Code Foundation has discretionary power in setting up regulations, handling complaints and if necessary issue recommendations.</td>
<td></td>
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<tr>
<td>The state uses regulatory resources to influence the non-</td>
<td>Incorporation of codes set by the industry without</td>
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<tr>
<td>State regulatory system</td>
<td>Influencing the regulatory process within the non-state-regulatory system</td>
<td>Be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
<td></td>
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<tr>
<td>------------------------</td>
<td>--------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>No: the Dutch Advertising Code Foundation is fully funded by the industry.</td>
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</tr>
</tbody>
</table>
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

The Dutch Advertising Code Foundation has been set up, including an Advertising Code Committee dealing with complaints and a Board of Appeal. The Dutch Advertising Code Foundation has laid down regulations for the content and form of advertisements in a general and some special codes, deals with complaints and issues recommendations. The setting up of the codes was carried out by the Dutch Advertising Code Foundation in which parties participate who are also the addressees of the regulation.

b) The link between the non-state part and state regulation

The aim is to protect the public, especially minors, from misleading or in other sense harmful advertising. No legal basis except for the audiovisual part where the Media Act states in several provisions that all broadcasters should affiliate with the Dutch Advertising Code if they want to include advertisements and should be subject to decisions of rulings of the Advertising Code Committee. Article 169 of the Media Act provides the legal basis to lay down legal provisions in order to implement the obligations of the TWF Directive if self regulation would no longer be adequate. The Dutch Advertising Code Foundation has discretionary power in setting up regulations, handling complaints and if necessary issue recommendations. The Dutch Advertising Code Foundation is funded by the industry.

Conclusion: The only real co-regulation aspect of the system previously described applies to broadcasting. The Media Act states in several provisions that all broadcasters should affiliate with the Dutch Advertising Code if they want to include advertisements and should be subject to decisions of rulings of the Advertising Code Committee. Dutch government considers supervision by the Dutch Advertising Code Foundation/The Advertising Code Committee as adequate self-regulation. The system is not without obligations: all broadcasters who broadcast advertisements have to ensure that they are covered by the Advertising Code or some other comparable scheme established by the Advertising Code Foundation and, in that context, that they are subject to the supervision of the Advertising Code Foundation. The broadcasters are required to prove that this is the case by submitting a written statement from the Advertising Code Foundation to the Commissariaat voor de Media.
If an organisation affiliated under the Media Act refuses advertising because it considers the advertising in violation of the Dutch Advertising Code, it should send a motivated decision in writing to the advertiser with due speed and if possible, within two weeks after receipt of the advertising. The advertiser can lodge an objection to such a decision by a motivated letter, directed to the Advertising Code Committee. In near future a general consumers authority will be introduced in the Netherlands as a consequence of European legislation (Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws) also known as the Regulation on consumer protection cooperation. It is due to be expected that there will be cooperation between this future authority and the Advertising Code Foundation, especially in the area of transfrontier violations of advertising provisions. Also the European Commission considers the Dutch system of self regulation with regard to the content of advertisements adequate. Following a complaint about alcohol advertising on Dutch TV, the Commission stated in a letter of 17th November 2003 that “this system is – due to its binding nature on all public and commercial broadcasters – suitable, sufficient and appropriate to achieve the aims of the respective Directive provision, i.e. Article 15.”
3.16. Portugal

Preliminary remarks

As already underlined in the first part of this report, co and self-regulatory mechanisms still play a small relevant role in the Portuguese media regulatory landscape, without prejudice of the growing recognition of their importance and of the emergence of more or less important examples in this context.

In response to the kind request addressed both by HBI and EMR as to carry on with the work already done about this subject, the second part of this report shall obviously be based on the definition of co-regulation or co-operative regulation adopted by the appointed institutions for the purposes of their study on co-regulatory measures in the media sector. Moreover, due attention shall also be made with regard to the guidelines that were rendered available for the fulfilment of the present task.

Accordingly with the approach suggested, the following considerations on the co-operative forms of regulation existing in Portugal shall essentially be confined to the examples pointed out by the EMR as corresponding to forms of co-operative regulation that could merit a more in-depth analysis: the Agreement on the depiction of violence on television, of July 1997, and the Protocol between RTP, SIC and TVI, of August 2003, both related with the television broadcasting sector. Although it had been clearly highlighted that such examples should not be regarded as exhaustive, it appear that – recalling all of the examples mentioned in the first part of this work, and having in mind the considerations to be further expressed – these might precisely be the most adequate ones that could be elected for the relevant purposes of the second part of this report.

I. Co-operative Regulatory Systems in the television broadcasting sector

a) Development of the regulatory system

The beginning of the cooperation – in the sense above mentioned – was formally established on 9 July 1997 with the signature of the Agreement on the depiction of violence on television (hereinafter «the Agreement») by television operators RTP, SIC and TVI, following a proposal of AACS, and further implemented on a voluntary basis in the various programme services explored by the appointed TV operators.

b) Subject-matter of the regulatory system

Even if not expressly stated in its terms, the agreement was basically intended to clarify and/or to develop the consequences deriving from the solutions embodied in the legal framework adopted by Article 17 of the Television Act then in force (1), which at that time corresponded, with some differences, to the transposition of the pertinent provisions embodied in Chapter V of the so-called «Television without Frontiers» Directive (2). Indeed – and notwithstanding the fact that national law already provided solutions sufficiently consistent with the community requirements (3) – the need was felt as to allow further improvement of the minimum standards determined both by Community and national provisions with regard to the broadcasting of harmful content in television programming and the parallel need to protect sensitive viewers. Thus, the Agreement was a way to draw more

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(1) Law 58/90, of 7 September 1990. Its Article 17 stated as follows: «(1) The transmission of pornographic or obscene programmes shall not be allowed. (2) The transmission of programmes containing any incitement to violence or to the practice of crimes, or that in general violates fundamental rights, freedoms and guarantees, shall not be allowed. (3) The transmission of programmes which might adversely affect the free development of children or adolescents, or impress other particularly vulnerable members of the public, inter alia through the exhibition of particularly violent or shocking scenes, shall be preceded by an express warning and identified by an appropriate symbol, and always take place during a night schedule. (4) For the purposes of the previous paragraph, it is understood as night schedule [i.e. the relevant watershed] the broadcasting time period after 10.00 p.m.».


(3) For instance, it can be affirmed that the Television Act of 1990 already complied with the requirements that were only brought about in 1997, by Directive 97/36/CE. And the subsequent Television Acts of 1998 and of 2003 have both also adopted – with regard to the TWF Directive – more detailed rules in this context.
precise boundaries to these indisputable limits attached to the general principle of freedom of programming, in which TV broadcasting activity is based. Such limits were at that time considered as insufficiently defined both by law and by the practice of TV operators, furthermore when recalling the concerns with a growing number of examples of undue depiction of violence in TV programmes, understood as a consequence of a ruthless competition for audience shares between TV operators.

Moreover, and apart from its specific importance as a counterbalance against the appointed trend, the Agreement also had revealed its own merits as an act under which and by which TV operators – following a initiative of AACS – have voluntarily highlighted their self-commitment and willingness to meet with the existing requirements in this field.

On the other hand, attention should be drawn to the fact that, in this specific context, and unlike the TWF Directive, the scope of the law and of the Agreement were both inscribed under a concern wider than the protection of minors as seen in isolated terms, given that these instruments also had in mind «other particularly vulnerable members of the public» likely to be affected by the depiction of violence in TV programmes.

In which refers to the content and structure of the Agreement, a fundamental separation was made between «programming» and «information» items, even if these were both substantially assembled by the aforementioned concern on the undue depiction of violence (4) in television programmes, which was at the basis of the Agreement.

With regard to the «programming» item, the following points were covered, with the aim of protect viewers from unsuitable content and to enable them to make informed and timely choices in this context:

- The adoption and use of a common warning symbol (5) to indicate content unsuitableness of some programmes with regard to more sensitive viewers (Clause I.1 of the Agreement);

(4) The reference made to «violence» should be understood in broad terms (see infra).
(5) Later defined as a red circle to be exhibited in one of the upper corners of the screen.
• The publicity concerning such symbol and its exhibition in different elements of the TV programming (Clause I.2);

• The appropriateness (in terms of content and of exhibition schedules) of promotional spots vis-à-vis the vulnerability of each viewing public (Clause I.3); and

• The availableness of more specific information on child programming, as a way to provide adequate guidance for parental control (Clause I.4).

With regard to the «information» item, after recognising violence as «an inevitable reality», and that «the media can only present it in harmony with their constitutional duty to inform», TV operators declared their attention to the fact that «aspects of such treatment may however shock certain more sensitive viewers» and, therefore, «reaffirm[ed] that the journalistic criteria used by their respective information departments [were] based on respect for the rules of ethics in force, and taking into account the need to portray violence in its due context, avoiding the exploitation of suffering, unhealthy feelings and sensationalism» (Clause II of the Agreement).

c) - d) Basis of the co-operation and the Institutions involved

On 25 March 1998, the implementation of the Agreement was positively assessed both by AACS and the TV operators. Compliance with its clauses, «in general terms», was then widely recognised. Also, opportunity was taken to specify some of the terms of the Agreement, which were introduced with regard to: a duration of 15” for the exhibition of the symbol indicating content unsuitableness (6); the requirement that such symbol should be exhibited at the beginning of each part of a given programme; and the need to extend to other information providers of television programming (newspapers, magazines, etc.) the information on the depiction of violence and the corresponding visual symbol.

The Agreement was further re-evaluated on 10 May 2000 by AACS and the undersigned TV operators. Its application was deemed and publicly announced as positive by the latter, whose

(6) At that time, the exhibition of the warning symbol was not expressly required to be «permanent».
did not see any need to formally extend it with regard to programming with sexual content, since it was understood that this topic was already covered by the terms of the Agreement.

e) - f) Functioning and Supervision of the system

The Agreement was entirely silent about the terms of its concrete functioning, and also refrained from establishing any evaluation clauses or particular instances for its supervision, since that it apparently remained clear that such a task should be informally performed by the TV operators involved, under reciprocal terms, and also by the AACS. Likewise, no particular complaint mechanism or penalties were foreseen for the non-compliance of its clauses, understood as a natural and/or logical complement of the solutions already set in law.

g) Impact assessment

With regard to information on a possible impact assessment of the Agreement, not much can be said in objective terms about the results deriving from its application. Apart from the already mentioned evaluations made in March 1998 and in May 2000, no ‘official’ impact assessment was effectively ever made, supported in quantitative and qualitative data (7). No procedure or sanction was ever taken as a result of an isolated breach of a clause of the Agreement. Generally speaking, it can be affirmed that even in the known cases where the existence and importance of the Agreement is recalled and emphasized, the evaluation and final decisions adopted by the AACS are basically determined by the inherent rules set out in television act(s). Conceptually, it can also be said that the system worked according to two different patterns related with the time aspect of the control of content: an \textit{ex ante} control, performed by each one of the TV operators involved, and ensured previously to the transmission of their programmes; and an \textit{ex post} control, ensured by the competent regulatory authority (AACS).

It is difficult to accurately state on what is the effective \textit{status} of the Agreement nowadays, concerning its validity or, in other words, the question to know on whether it still remains effectively in force. Despite the fact that the Agreement has never been formally revoked by its initial subscribers, it is also undeniable that, in its decisions, AACS ceased to refer to this
conventional instrument (8). The Agreement’s self-notoriety vanished. A possible explanation to this can probably be found in the strictly related terms existing between the rules enshrined in the Television Acts and those foreseen in the Agreement. Some of its clauses had in some cases been widely assimilated by the practice of TV operators, while in other cases even inspired the evolution of television legislation in this regard. Perhaps the most paradigmatic case that could be underlined in this context is the one concerning the requirements to observe for the transmission of sensitive content in news services (9).

2. Part II: Leading Cases

As previously stated, due to the nature and characteristics of the Agreement, there are no cases which have led to decisions taken only by the «non-state regulatory part» (i.e., the TV operators). However, reference can be made to some cases dealt by the AACS involving depiction of violence in which at least a reference to the Agreement was made. Its description could be helpful to understand, even if only in part, the positive aspects of the system, as well as its shortcomings.

1. In a deliberation approved in June 1998 (10), the AACS took a stand on a private complaint against RTP and SIC, concerning the exhibition, in their respective 8.00 p.m. news services of 14 March 1998, of images about conflicts in the region of Israel/Palestine, where a person (later identified as a journalist) was shown being seriously injured by the shot of a gun. Unlike the case of SIC, the pivot of RTP previously alerted viewers for the violent nature of the images in question.

The AACS considered herself competent for the appreciation of this issue, invoking, among other provisions, Article 17 of the Television Act then in force (11) and recalling the existence

(1) There are no specific concrete references either in the AACS’ annual activity reports to this topic.

(8) The last known AACS’ decision where the Agreement is mentioned is dated of 19 June 2002 (see infra, Part II: leading cases, nº4).

(9) See infra, Part II: leading cases.

(10) Deliberation on a complaint made by Mr. João Paulo Fidalgo Carvalho against RTP and SIC, unanimously approved in the AACS’ plenary meeting of 25 June 1998.
of the Agreement of 9 July 1997 and, in particular, the precise terms of the item regarding «information», applicable to news services (12). While acknowledging the «clear» violent nature of the images in question, which were likely to shock more sensitive viewers, AACS underlined that this was insufficient to consider that the complaint was well-founded. Quoting the terms of the Agreement, AACS stressed that violence should be recognised as «an inevitable reality», which television operators could not be prevented to broadcast, although it was advisable that in such cases viewers were always previously informed about the nature of the images to be transmitted (13). In the concrete case, AACS considered that the images in question, although effectively violent, matched with the terms of the legitimate exercise of the right to inform, since that they were perfectly in context with the report and avoided exploitation of suffering, unhealthy feelings and sensationalism.

2. In other complaint (14), the AACS analysed both the contents of a self-promotion transmitted by TV operator TVI on 11 March 2000 (a Saturday), around 4.30 p.m., concerning a report about a television programme entitled «Brasil Surpresa» («Brazil Surprise») devoted to a so-called reality-show, where partial nudes were shown, and a report included in a news service broadcasted also by TVI at 8.00 p.m. of the same day, concerning a resort for nudists recently created in the surroundings of a small Portuguese village, presenting images of completely naked people.

Whilst reminding the requirements foreseen in Article 21 of the Television Act then in force (15) and the intertwined connection between the existence and application of this provision

(11) See supra, footnote 1.

(12) See supra, clause II of the Agreement.

(13) This precision was extremely important, since that there were doubts on whether the requirements set in Art. 17(3) of Law 58/90 could be applied as such to the particular case of news services. At least apparently, their ratio was not intended to cover the specific situations of shocking images presented in such programmes. The point deserved specific treatment in the Television Acts subsequently approved – first, in Art. 21(3) of Law 31/98, of 14 July 1998, and later in Art. 24(6) of Law 33/2003, of 22 August 2003 (currently in force). See infra.

(14) Deliberation on complaints made by Mr. Paulo Manuel Cardoso against TV operators based on an alleged violation of legal limits to the freedom of programming, unanimously approved in the AACS’ plenary meeting of 29 November 2000.
and the Agreement of 9 July 1997 (16), the AACS expressed its doubts on whether the appointed images could be classified as «particularly violent» and, even if regarded as «shocking» by some viewers, capable of adversely affect the development of children or adolescents. AACS draw nevertheless the attention of TVI for the need to take into account the sensibility of younger and/or more vulnerable viewers, considering that the exhibition of the questioned images after 10.00 p.m. and preceded by an adequate warning would constitute a more balanced conduct in this context.

3. On 27 February 2002, a film entitled «Detective de Homicídio» («Homicide Detective»), was transmitted by public service broadcaster RTP. Despite its high level of physical and psychological violence, the transmission began at 9:52 p.m. (before the timetable allowed), and it was not preceded of the required express warning concerning its nature. The AACS appreciated this case particularly on the basis of the requirements set in Article 21 of the Television Act then in force (17) and also referring to the terms of the Agreement of 9 July 1997. In its decision (18), AACS underlined that the transmission of a film with such a nature without the full respect of the requirements of the Television Act also constituted a violation of the Agreement of 9 July 1997. However – and in contrast with other more severe decisions

(15) Law 31-A/98, of 14 July 1998. Article 21 of this law stated as follows: «(1) Any broadcasting that violates fundamental rights, freedoms and guarantees, attempts against the dignity of the human being or encourages the practice of crimes shall not be allowed. (2) Broadcasts which might adversely affect the free development of children or adolescents, or affect other more vulnerable members of the public, inter alia through the exhibition of particularly violent or shocking images, shall be preceded by an express warning and identified by the permanent display of an appropriate symbol, and shall only take place after 10.00 p.m.. (3) Images referred to in the previous paragraph may nevertheless be transmitted in any news services when they are of journalistic relevance and are presented with respect the ethical rules of the profession and preceded by a warning concerning their nature. (4) The television broadcasting of works which have been subject to age rating systems for the purposes of cinematographic or videographic distribution shall be preceded by a mention of the rating that they have been given by the competent commission, and are mandatory subject to the requirements referred to in paragraph 2 whenever the rating in question considers access to such works inadvisable for minors under 16 years of age. (5) For the purposes of this law, the concept of broadcast comprehends any elements of programming, including advertising or extracts aimed at the promotion of programmes».

(16) Which, in the present case, was expressly labelled by the AACS as an auto-regulation agreement.


(18) Deliberation on the violation by RTP of Article 21(2) of the Television Act, unanimously approved in the AACS’ plenary meeting of 26 June 2002.
adopted in less serious cases of a similar nature –, instead of the application of a financial penalty the AACS merely issued a recommendation to RTP on the need of a scrupulous compliance with the terms of law, and also refrained to underline the particular behaviour that public service broadcasting is supposed to assume in this context.

4. On 9 May 2002, in its news service of 8.00 p.m., RTP transmitted a news report about «fighting dogs», containing violent scenes which gave cause to complaints by some viewers. In the appreciation made by AACS (19), this regulatory authority underlined that the report in question had been unanimously considered as a work with a high journalistic interest, and that the violence inherent to the questioned images was an element of its social relevance and entirely adequate with regard to the importance and seriousness of the theme in focus, from which sensationalism or exploitation of unhealthy feelings were therefore entirely absent. Furthermore, its presentation had been preceded by a clear warning on the shocking nature of some of the images shown. However, and at least in the understanding of the majority of its members (20), the AACS stated that, taking into consideration sensibility reasons and the respect for particular vulnerable viewers, the broadcasting of the news report without some of the most cruel images could have been a more adequate choice.

In the decision taken, the AACS focused mainly its attention on the terms of Article 21(3) of the Television Act then in force (21), stressing that a similar concern was also hosted in the Agreement of July 1997, and reproducing the exact terms of the item regarding «information», applicable to news services (22).

(19) Deliberation on a complaint made by Mr. Luís Catarino against RTP, approved (with two votes against) in the AACS’ plenary meeting of 19 June 2002.

(20) Two members voted against this point, considering that AACS should not undertake the role of a moral tutor and supervisor of the criteria and style pursued by the public service broadcaster, and also keeping in mind that the 8.00 p.m. news service is (basically) aimed to adult viewers and that the questioned scenes exhibited were in case reduced to a minimum.


(22) See supra, clause II of the Agreement.
As a general observation, attention should be drawn to the fact that the AACS issued on such precise matters several decisions about cases which were comparable to these previously mentioned, but where no reference was made to the Agreement, in explicit or implicit terms. Furthermore, it shall also be pointed out the relatively unbalanced and inconsistent nature of the appreciation carried out by AACS on the requirements (23) about this important topic.

(23) Currently set in Arts. 24 and 25 of the Television Act in force (Law 32/2003), which states as follows:

Article 24: «(1) All items of programme services shall respect, in their presentation and content, the dignity of the human being, the fundamental rights and the free development of children and adolescents and shall not include gratuitous violence or incitement to hatred, racism or xenophobia, nor under any circumstances include pornography within a service available on a free-to-air basis. (2) Any other programmes which may adversely affect the development of children or adolescents or affect any other vulnerable members of the public may only be broadcast between the hours of 11.00 p.m. and 6.00 a.m. and shall be identified by the permanent display of an appropriate visual symbol. (3) The television broadcasting of works which have been subject to age rating systems for the purposes of cinematographic or videographic distribution shall be preceded by a mention of the rating that they have been given by the competent authority, and are subject to the requirements referred to in the previous paragraph whenever the rating in question considers access to such works inadvisable for minors under 16 years of age. (4) Transmission of programme services in encoded form are exempted from the provisions of paragraphs 2 and 3. (5) The provisions of the previous paragraphs are applicable to all items of programming, including advertising and messages, extracts or any images of self-promotion. (6) Images with the characteristics referred to in paragraph 2 may be transmitted in news services when they are of journalistic relevance and are presented with respect for the ethical rules of the profession and preceded by a warning concerning their nature. (7) The provision of paragraph 1 is applicable to the retransmission of programme services, namely by means of a cable distribution network.»;
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

**Table: Criteria / Agreement**

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
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</tr>
<tr>
<td>Following a proposal of the regulatory authority AACS, a set of rules concerning the depiction of violence in television was established in the Agreement signed in July 1997 between TV operators RTP, SIC and TVI, and further implemented in the various programme services explored by these TV operators.</td>
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<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge</td>
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</table>
With the signature of the Agreement, TV operators committed themselves to take into account the rules therein established in their editorial decisions concerning programming matters involving the depiction of violence (understood in broad terms).

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation

An *ex ante* control of the programming content was performed by each one of the TV operators involved, and previously to the transmission of their television programmes. This was aimed to ensure compliance with the terms of the Agreement (and, naturally, with the pertinent legal applicable provisions as well).

| Link between the non-state-regulatory system and state regulation |
|-------------------|-------------------|-------------------|
| Criteria | Cases excluded by this criterion | Explanation | Additional remarks |
| The system is established to achieve public policy goals | Measures to meet individual interests | The fields for potential implementation of... |
The agreement was basically intended to clarify and/or to develop the consequences deriving from the solutions embodied in legal framework then in force concerning the broadcasting of harmful content in TV programming and the parallel need to protect sensitive viewers – in particular, to allow further improvement of the minimum standards already applicable in this context.

There is a legal basis for the non-state regulatory system Informal agreements without any legal criteria to judge the functioning of non-state regulation

If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.

Along with the existence of public entities endowed with regulatory functions, the existence of co and/or self-regulatory mechanisms is not prevented by the Portuguese constitutional system. Furthermore, solutions adopted by the clauses of the Agreement were understood as natural and/or
a logical complement of the solutions already set in law.

<table>
<thead>
<tr>
<th>Traditional regulation</th>
<th>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</th>
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<tbody>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
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As explained above, an *ex ante* control concerning the programming content was performed and ensured by the TV operators involved, previously to the transmission of their programmes and, at least in principle, materialized by means of the self-respect of the rules foreseen in the Agreement (together with the rules of the state legislation in force). This control was made by each one of the TV operators, without any reciprocal evaluation by the others. The possible – and decisive – interference of state regulation would only occur in a later stage, under certain terms (see *infra, «cases excluded by this criterion»

(See observations *supra* on the criterion concerning «discretionary power»)

An *ex post* control was ensured by a representative of the state regulatory system – the AACS – on an exclusive basis, and focused in the decisive evaluation of controversial issues related with the televised transmission of unsuitable content and the parallel protection of sensitive viewers. However, no procedure or sanction was ever adopted as a result of an isolated breach of a clause of the Agreement. And even in cases where the Agreement or its clauses were taken in to consideration in the evaluation and final decisions of the AACS, these were basically determined by the inherent rules set in the state legislation (i.e., the television acts).
<table>
<thead>
<tr>
<th>The state uses regulatory resources to influence the non-state regulatory system</th>
<th>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</th>
<th>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</th>
</tr>
</thead>
<tbody>
<tr>
<td>In the present case, the assessment of this particular criterion is mainly connected with the question related with the current validity of the Agreement, as referred to in (A) Part I. The main aspect that should be underlined in this context is focused in the strictly related terms existing between the rules enshrined in the different Portuguese Television Acts and those foreseen in the Agreement (see infra, «cases excluded by this criterion»)</td>
<td>(see observations supra on the criterion concerning the «use of regulatory resources») Some of the clauses of the Agreement had in some cases been widely assimilated by the practice of TV operators, while in other cases even inspired the evolution of television legislation in this regard (this is/was e.g. the case of the requirements to observe for the transmission of sensitive content in news services)</td>
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</table>
a) The non-state regulatory part of the system

As regards to the definition of the scope of co-regulation that is of interest for the study carried out by HBI and EMR – as described in their guidelines, and further explained in the presentation of the preliminary results of the study – it seems unquestionable that the Agreement meet the criteria related to the non-state regulatory part of the system.

b) The link between the non-state part and state regulation

The same conclusion, however, will not necessarily be reached with regard to the essential link that is deemed to exist between this non-state regulatory system and state regulation. Doubts are mainly centred with the criterion on the discretionary power of the non-state regulatory system.

As previously mentioned, and from a conceptual point of view, it can be said that the system of the Agreement worked according to two different patterns related with the time aspect of the control of content: an ex ante and an ex post control.

The first type of control was performed and ensured by the TV operators involved, previously to the transmission of their programmes and, at least in principle, materialized by means of the self-respect of the rules foreseen in the Agreement (together with the rules of the state legislation in force). This control was made by each one of the TV operators, without any reciprocal evaluation by the others. The possible – and decisive – interference of state regulation would only occur in a later stage, under certain terms. The ex post control was ensured by a representative of the state regulatory system – the AACS – on an exclusive basis, and focused in the decisive evaluation of controversial issues related with the televised transmission of unsuitable content and the parallel protection of sensitive viewers. However and as already noted, no procedure or sanction was ever adopted as a result of an isolated breach of a clause of the Agreement. And even in cases where the Agreement or its clauses were taken in to consideration in the evaluation and final decisions of the AACS, these were basically determined by the inherent rules set in the state legislation (i.e. the television acts).
Conclusion: Taking into due account the preceding observations, the regulatory system described cannot be considered as a co-regulatory system in the meaning of this study.

1. Part I: The co-operative regulatory system No. 2 - The Protocol between RTP, SIC and TVI (2003)

a) - b) Development and Subject matter of the regulatory system

On 21 August 2003, TV operators RTP, SIC and TVI signed between themselves a Protocol establishing different levels of cooperation in their field of activity. As such, the Protocol did represent an innovation on the self-centred positioning traditionally assumed by these TV operators, making evident the assumption that, in the medium or long term, cooperation efforts could render mutual benefits to them and to other interested parties of the audiovisual sector, and contribute for the development of the latter.

Although aimed at the fulfilment of several objectives, the Protocol has been adopted and implemented on the assumption of a fixation of certain advertising time limits to PSB’s programme services «RTP 1» and «A Dois:» (formerly, «RTP 2»), subsequently confirmed in the Public Service Concession Contracts signed with the Portuguese State in September and November 2003: an hourly limit of 6 minutes for «RTP 1», and a total ban of commercial advertising for «A Dois:»\(^1\)(\(^2\)).

In itself, such a limitation did not represent a novelty, since that according to the terms of the previous Contract Concession of December 1996, «RTP 1» was already obliged to respect a hourly limit of 7 ½ minutes, while «RTP 2» could not broadcast any commercial advertising at all.

\(^1\) Clause 13(1) of the General Public Service Concession Contract of 22 September 2003, concerning «RTP 1», and clause 8(1) of the Special Public Service Concession Contract of 17 November 2003, concerning «A Dois:».

\(^2\) The Protocol also contains an Appendix 1, in which stricter obligations for private operators SIC and TVI are foreseen, in the event of a future governmental decision establishing lower hourly limits (4 ½ minutes) for «RTP 1».
However, be that as it may, the establishment (and acceptance) of stricter restrictions on RTP with regard to general advertising time limits (\(^3\)) was entirely in line with the Governmental thoughts expressed on this topic in the document «New options for the Audiovisual»(\(^4\)), where it was advocated that «in coherence with the concept of a standard-setting public service and as an incentive for a programming not oriented to audience shares, RTP should not depend in future from advertising incomes as a support for its regular functioning»(\(^5\)), albeit this was not intended to signify a complete renounce to this financial source, understood as essential e.g. to assure the maintenance of a certain necessary balance in the TV advertising market.

c) Basis of the co-operation

In identical terms, the Government also obviously welcomed the intentions announced in the Protocol, according to which it was of the general interest to promote interaction for sharing experiences and content between the public service operator RTP and private television operators, within the scope of normalization of their existing relations (\(^6\)).

For these reasons, together considered with a set of positive measures to be implemented, the Protocol was homologated (\(^7\)) by the Government.

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(\(^3\)) Established both at Community and at national level, respectively, in Art. 18(2) of the TWF Directive, and in Art. 36(4) of the Television Act in force (Law 32/2003). A preliminary reference to this topic is also made in the Interim Report, Appendix 2: Media Systems (Country Reports), p. 341.


(\(^5\)) «Novas opções para o Audiovisual», cit., n.º 9.3, p. 34. A similar statement is also made in the first recital of the Protocol.

(\(^6\)) This point is enhanced in the second recital of the Protocol.
d) - e) Institutions involved in the system and its functioning

In return for the aforementioned fixation of stricter advertising time limits on the Portuguese PSB, an exchange of cooperation at different levels between RTP, SIC and TVI was established, involving the acceptance of certain obligations by TV private operators in the following areas: (a) support to, and financing of, independent productions; (b) provision of content for RTP’s international programme services; and (c) transmission of cultural programming and support to people with hearing disabilities.

Generally, it can be affirmed that the compromises herein involved are a voluntary complement of some obligations already determined by law and, to a certain extent, by the public service’s concession contracts.

Moreover, attention should also be drawn to the protocol’s imposition on the PSB’ programme service «RTP 1» of obligations quantitatively higher than the amount of those imposed to both private TV operators SIC and TVI, under the terms of clause I.3.

(a) As regards the support and financing of independent productions (8), SIC and TVI both committed themselves to apply 0.5% of their annual advertising net income in direct investments in independent production, understood as the production which is carried out by an independent producer, i.e., a production company whose capital share

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(7) Homologation is a concept existing in the Portuguese Administrative Law, which is understood as an administrative act that absorbs both the grounds and conclusions of a concrete proposal or opinion presented by other organ: Diogo Freitas do Amaral, *Curso de Direito Administrativo*, vol. II, Ed. Almedina, 2002 (repr.), p. 265. In this concrete case, it should be understood as a voluntary Governmental acceptance of the terms of the protocol which was agreed only between TV operators RTP, SIC and TVI.

(8) The sixth recital of the Protocol underlines the «important role» of TV operators «on the support, promotion and exhibition of audiovisual independent production». 
is not participated by a broadcasting organisation in a percentage larger than 25%\(^9\). SIC and TVI also determined themselves to promote the audiovisual works financed (and selected) by ICAM, in promotional campaigns with an estimated value of 0,5% of their annual advertising net income.

The obligations of the Protocol on independent production should not be confounded with other already foreseen in national and Community law \(^10\), being complementary to these.

(b) Under the terms of the Protocol, SIC and TVI should each render available to RTP’s international programme services – «RTP-Internacional» and «RTP-África», currently – the amount of one daily hour of their own and/or informative contents \(^11\)(\(^12\)). The integrity of such audiovisual works should in any case be preserved, and its exhibition in RTP programme services should always display the logo of the TV operator of origin \(^13\).

\(^9\) Clause II.A.2. of the Protocol. It has to be appointed that the densification of such a concept is not entirely consistent with the one being assumed at the EU level in the context of the TWF Directive, namely by the European Commission: see recital 31 of Directive 97/36/CE and also the «Suggested new guidelines for monitoring the application of Articles 4 and 5 of the ‘television without frontiers’ directive», as Annex 1 to Doc. COM (2000) 442 final, of 17 July 2000, point 6, p. 69-70.

\(^10\) Art.42 of the Television Act transposes Art. 5 of the TWF Directive. It states: «Television operators which run TV programme services with national coverage shall ensure that at least 10% of their respective programming, excluding the time appointed to news, sports events, games, advertising, teleshopping and teletext services, is reserved to the transmission of European works, created by producers who are independent of television operators, and produced less than five years ago».

\(^11\) Clause II.B.1. of the Protocol. This point is also highlighted in the fifth recital of the Protocol: «Whereas (…) that a possibility exist as to not circumscribe RTP’s international programme services to the public television’s content, enriching them with an alternative programming from private operators;».

\(^12\) The appointed differentiation between «informative» and «own» content is dubious, to say the least, since that in many cases the latter may have an informative component as well.

\(^13\) Clauses II.B.2.6. and II.B.2.5. of the Protocol.
(c) Finally, as regards cultural programming and support to people with hearing disabilities (14), SIC and TVI are obliged to meet the following demands, under the terms of the Protocol:

– private operators SIC and TVI commit themselves to broadcast a minimum of 2 ½ hours per week of news and current affairs, educational, cultural, recreative or religious (15) programmes, with recourse to sign language, in a timetable set between 8.00 a.m. and 0.00 p.m.;

– private operators SIC and TVI also commit themselves to broadcast fiction programmes or documentaries with subtitles through the use of teletext, with a minimum length of 5 hours a week (16) (it shall be noted that, in some cases, recourse to subtitles does take into account the special needs of people with hearing disabilities, e.g., by means of including a transcription of sound effects);

– in addition to other pre-existent legal obligations on cultural programming, SIC and TVI also oblige themselves to broadcast: (a) 2 monthly hours of cultural

(14) The fourth recital of the Protocol also expressly focus on this last topic: «Whereas (…) that, as regards to television programming, there is a need to increase the support to viewers with disabilities». However, a certain lack of ambition evidenced by the Protocol in this context shall be underlined, since that its measures are only aimed to people with hearing disabilities. Even if these standards are consistent with the promotion of the possibility of access to TV programmes by deaf or hard of hearing people, as a «general duty» imposed by law to public service broadcasting (Art. 47(2), lit. (f) of the Television Act), on the other hand they are situated in a level well below from the one which is emphasized in the PSB’s Concession Contracts of 2003, under which terms the concessionaire shall inter alia «promote the possibility of access to programmes for the deaf or hard of hearing people or with other type of disability foreseen in Law, particularly in a way that assures that such possibility, including informative content, will not be inferior to the performances accomplished by the ensemble of general private operators»: clause 5th(2), lit. (f), of the General Public Service Television Concession Contract, and clause 7th of the Special Public Service Television Contract.

(15) Religious programmes were included in this clause by the amendment to the Protocol of 15 February 2005 (see infra).

(16) Before the amendments made to the Protocol on 15 February 2005 (see infra), these programmes were broadcasted between Mondays and Fridays.
programming (17), between 8.00 p.m. and 2.30 a.m. (18), with a minimum duration of 15 minutes per programme; (b) 18 annual hours of national fictional works, including, *inter alia*, historical and biographic fiction, and literary adaptations; and (c) 30 weekly minutes of programming aimed at ethnical, religious or cultural minorities, in a timetable set between 6:30 (19) and 9.00 a.m..

*f)* - *g)* **Supervision of the system and Impact assessment**

Under the terms of the Protocol, compliance with obligations therein assumed by RTP, SIC and TVI shall be evaluated in meetings taking place every three months, and based on monthly reports presented by each of the television operators to the cabinet of the Ministry of Presidency, to other TV operators and to the regulatory authorities of the sector (20), within 10 days after the end of each month (clause I.4 of the Protocol). Without prejudice to other sanctions established in legislation concerning television activity, failing to comply with any of the quantified obligations of the Protocol shall determine its accumulation with those of the next trimester, with the exception of the obligations inherent to the limits of advertising to be exhibited, whose shall be accumulated with the ones of next year’s homologous trimester (clause I.6 of the Protocol).

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(17) Understood as «the presentation, debate and divulgation of artistic areas, namely, literature, cinema, theatre, dance, painting, architecture, music, plastic arts, audiovisual production and *design*, as well as of the heritage, history, uses and other country’s expressions of cultural identity»: clause II.C.3., lit. (a), of the Protocol.

(18) «Between 8.00 p.m. and 2.00 a.m.», in the version in force before the amendments of 15 February 2005 (see infra).

(19) «Between 6.00 and 9.00 a.m.», in the version in force before the amendments of 15 February 2005 (see infra).

(20) Reference shall be made in this point to the fact that AACS approved in its plenary meeting of 27 August 2003 a deliberation in which it was affirmed that it was only due to the *media* that took knowledge of «the celebration of a so-called co-regulation “Protocol” between the State, RTP, SIC and TVI». Moreover, AACS stated that, since AACS had not taken part in the preparation and signature of such a Protocol, it could not assume responsibilities neither for its monitoring nor for mediating possible disputes on the interpretation and application of its content.
Under the terms of its Clause I.8, the Protocol entered into force on 1 September 2003. Since this date, and although the monthly periodicity foreseen in clause I.4 has not always been entirely observed by TV operators, the ICS (\textsuperscript{21}) has received on a regular basis the necessary reports for the evaluation of the obligations of the Protocol. Some aspects are worth to be mentioned in this context.

First of all, a successful evaluation of the application of the Protocol is largely dependent on the good faith and willingness of its addressees, i.e., the TV operators which have voluntarily adhered to such an initiative. This is particularly clear with regard to certain points of the Protocol more strictly related with its implementation, and which assessment is based on data provided by the TV operators that needs to be accurate, trustworthy and duly discriminated.

Evaluation exercises made so far are essentially supported in elements collected, selected, ‘customized’ and presented by the very same entities whose performances shall be examined. Therefore, they are in principle deprived of any other desirable sort of confrontation, since that the monitoring services of ICS are in general terms helpless to perform such a task in the appropriate (i.e., exhaustive) terms, which would represent an unbearable increase of the work impending on such services in addition to the one they normally carry out already.

This is without prejudice to that, with some frequency, and where possible (\textsuperscript{22}), a monitoring analysis is made, particularly in situations considered as doubtful by ICS. Moreover, certain other situations have been clearly regarded as inconsistent with the

\textsuperscript{21} ICS’ responsibilities with regard to this matter should be understood as based on the terms of the abovementioned clause I.4 of the Protocol, and also as a result of its close institutional connection with the member of the Government responsible for the media sector. On the other hand, AACS self-renounced to any eventual responsibilities related to the interpretation or application of this Protocol (see previous footnote).

\textsuperscript{22} Some situations are objectively impossible to be confirmed by ICS’ services (at least in the context of a regular monitoring procedure), such as, e.g., the confirmation of values attributed by TV operators for the purposes of the promotional campaigns referred to in clause II.A.3.1.: see \textit{supra}, II (a).
basic requirements of the Protocol: e.g., the inclusion, in the category foreseen in clause II.A of the Protocol, of producers which do not obviously fit in with the concept of independent producer; or the undue consideration of compliance with the requirements on programming aimed to religious minorities – clause II.C.3, lit. (c), of the Protocol – by catholic TV broadcastings, in a country where this religion is widely dominant.

Taking into consideration the precedent observations, a definitive balance by the ICS on the effective results of the application of the Protocol will have to be considered with particular precautions, as to avoid rash conclusions. However, it can be taken for granted that an overall positive evaluation can be observed on the accomplishment of the quoted measures regarding people with hearing disabilities, in the benefit of the specific viewers involved; private operators in particular have made significant improvements, when recalling its initial standards in this area.

However, a more enthusiastic opinion about this subject was made in a joint declaration of the television operators dated of 15 February 2005, in which the representatives of RTP, SIC and TVI expressed their satisfaction for the overall positive evaluation verified with regard to the compliance with the commitments of the Protocol, and also considering that such level of compliance was positive for the national television market (23). In fact, and according to the very broad terms of such statement, it appears that all compromises have been generally accomplished. Likewise, and as a consequence, a similar appreciation is expressed in the amendment made by TV operators, on the same date, to the terms of the Protocol. In fact, in the second recital of the pertinent addendum it is stated that the time elapsed since the signature of the Protocol had demonstrated «the benefits of the co-regulation model» (24) since that such an initiative contributed to a substantial improvement of the mutual relations existing between the

(23) It is assumed that this statement was based on the results of the parallel evaluation of the Protocol carried out by TV operators among themselves, presumably in the trimester meetings referred to in clause I.4. The outcome of such meetings has not, however, been made available to the general public.

(24) It shall be recalled that the initial version of the Protocol also claimed, in its third recital, that «co-regulation is one of the effective ways of regulating the media sector».  

565
TV operators involved, and also for a positive global attitude on the compliance of the aims it pursued.

Modifications introduced to the Protocol are of minor importance. They concern clauses II.C.1, 2, 3 (a) and (c), and clause II.C. of Appendix 1 (25), and are displayed above (26). According to the terms of the third recital of the addendum, these modifications are based on the general interest to continue to promote interaction between TV operators for sharing experiences and content, enriching such interaction with an evolitional adaptation in order to improve its functioning.

2. Part II: Leading Cases

There is nothing specifically relevant to be pointed out in this context, given the low experience obtained in consolidated terms since the entry in to force of the Protocol, and also as a result of the particular approach of this initiative taken over the issues covered by it. The levels of conflict which the Protocol is per se able to induce are extremely reduced. The specificity of the matters at stake and the logic of the system in which they are inserted are not particularly suitable to lead to decisions in the technical sense of the term, and likely to be further contested.

(25) See footnote 25, supra.

(26) See supra, II (c), and footnotes 38, 39, 41 and 42.
### 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

**Table: Criteria / Protocol**

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
<td></td>
</tr>
</tbody>
</table>

In August 2003, TV operators RTP, SIC and TVI signed between themselves a Protocol establishing different levels of cooperation in their fields of activity. This Protocol has been adopted and implemented on the assumption of a fixation of certain TV advertising time limits to PSB’s programme services «RTP 1» and «A Dois:».

|                             | To influence decisions by persons or, in the case of organisations, decisions by or within such entities | Pure consultation | |

*The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge.*
With the signature of the Protocol, participant TV operators established between themselves an exchange of cooperation at different levels, involving the acceptance of certain obligations: (a) support to, and financing of, independent productions; (b) provision of content for RTP’s international programme services; and (c) transmission of cultural programming and support to people with hearing disabilities.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation Measures by third parties (e.g. NGOs)

The range of possible subjects of non-state action has to be limited to make the definition workable.

See information concerning the previous criterion.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are</td>
<td></td>
</tr>
</tbody>
</table>
According to the intentions announced in the Protocol, it was of the general interest to promote interaction for sharing experiences and content between the public service operator RTP and private television operators, within the scope of normalization of their existing mutual relations.

It was assumed that cooperation efforts could render mutual benefits to them and to other interested parties of the audiovisual sector, and contribute for the development of the latter.

Also worth to mention is the introduction of stricter restrictions on RTP with regard to general advertising time limits, in coherence with the concept of a standard-setting public service and as an incentive for a programming not oriented to audience shares.

There is a legal basis for the non-state regulatory system

Informal agreements without any legal criteria to judge the functioning of non-state regulation

If there were no limits on the link to non-state regulation all forms of interaction would come to

| According to the intentions announced in the Protocol, it was of the general interest to promote interaction for sharing experiences and content between the public service operator RTP and private television operators, within the scope of normalization of their existing mutual relations. It was assumed that cooperation efforts could render mutual benefits to them and to other interested parties of the audiovisual sector, and contribute for the development of the latter. Also worth to mention is the introduction of stricter restrictions on RTP with regard to general advertising time limits, in coherence with the concept of a standard-setting public service and as an incentive for a programming not oriented to audience shares. There is a legal basis for the non-state regulatory system | Informal agreements without any legal criteria to judge the functioning of non-state regulation | If there were no limits on the link to non-state regulation all forms of interaction would come to |
Along with the existence of public entities endowed with regulatory functions, the existence of co and/or self-regulatory mechanisms is not prevented by the Portuguese constitutional system. On the other hand, the compromises foreseen in the Protocol are a voluntary complement of some obligations already determined by law and, to a certain extent, by the public service’s concession contracts.

The state/EU leaves discretionary power to a non-state regulatory system

<table>
<thead>
<tr>
<th>Traditional regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
</tr>
</tbody>
</table>

The terms of the protocol which was agreed between TV operators were voluntarily accepted by the Government (homologation).

The system institutionalized by the Protocol largely benefit from a discretionary power. This is particularly evident with regard to its two-headed evaluation model, incumbent both on TV operators and the ICS, but essentially supported in elements collected, selected, ‘customized’ and presented by the very same entities whose performances shall be
examined. Furthermore – and although this point is not entirely clear – it appear that TV operators are the best positioned entities to appreciate the level of compliance of the quantified obligations of the Protocol and therefore to eventually determine the application of the sanctions foreseen in clause I.6: see (B) Part I.

There also obviously exists a large margin of discretionarily with regard to the inherent and concrete choices made on an exclusive basis by TV operators for the fulfilment of the obligations of the Protocol.

The specificity of the matters at stake in the Protocol and the logic of the system in which they are inserted are not particularly suitable to lead to decisions in the technical sense of the term, and likely to be further contested.

<table>
<thead>
<tr>
<th>The state uses regulatory resources to influence the non-state regulatory system</th>
<th>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</th>
<th>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</th>
</tr>
</thead>
</table>

See information concerning the previous criterion.
a) The non-state regulatory part of the system

Similarly to what is verified with the Agreement on the depiction of violence, it is evident that the Protocol complies with the already mentioned criteria related with the non-state regulatory part of the system.

b) The link between the non-state part and state regulation

An identical conclusion can apparently be attained with regard to the connection that is necessary to exist between the Protocol and state regulation, as to demonstrate the existence of a relevant co-operative regulation system: admittedly, the listed criteria on this subject are entirely fulfilled, in the precise terms of the description provided above in Part I, particularly by points I and III.

**Conclusion:** Taking into due accounts the preceding observations, the regulatory system described can be considered as a co-regulatory system in the meaning of this study.
3.17. Slovenia

I. Co-operative Regulatory Systems in the broadcasting sector

1. Part 1: The co-operative regulatory system - Agreement regarding the television programming unsuitable for children and other minors

a) Development of the regulatory system


The Agreement has been a novelty in the television sector in Slovenia especially since it introduced system of classification of programming to protect minors, and requested from the publishers to follow it, and use appropriate signs for the programme items. At the same time it has been a novelty for the viewers since they had to learn the meaning of the classification and the signs.

Unfortunately the information and awareness campaign towards viewers wasn't extensive enough to result with understanding and effectiveness of the system.

In societal and policy framework we can link the introduction of the Agreement to the decision of the Media Inspector in February 2003 and the debate that followed the decision. Namely, on 7 February 2003, the Media Inspector issued an order on prohibition of programmes with pornography, including the time between 12 a.m. and 5 a.m. The decision was based on Art. 84 of the Mass Media Act. If followed complaints by a family Mihic and other viewers, and referred to the programming of two cable operators, R-channel from Ribnica and Telemach channel from Ljubljana. The ban of the pornographic programming caused lively debate in the media, in most cases negative to the action of the Media Inspector, and resulted with the action of the Parliament (see infra).


2 The law is available on the web site of the Ministry of Culture (in English language): http://www.kultura.gov.si/bin?bin.svc=objc&bin.id=2547 (accessed on 9 June 2005).
b) Subject-matter of the regulatory system

The classification of programmes and the use of appropriate programme items should protect minors from harmful content. The Agreement includes recommendations to television stations regarding structuring and editing of their programmes. It introduces two types of visual symbols for TV programming aired between 5 a.m. and 12 a.m. depending on how suitable they are for children and other minors under fifteen. It divides implementation of the Agreement in two periods – introductory/promotion period (from the day of signature i.e. 2 July 2003 until 30 August 2003) and the period after the introductory/promotion.

c) Basis of the co-operation

The agreement follows provisions of the Mass Media Act (Art. 84), adopted in 2001, and the European Convention on Transfrontier Television (Art. 7/2, 3), ratified in 1999. Furthermore the Slovenian Parliament adopted in June 2003 the interpretation of this Art. 84 on the proposal of the Liberal Democracy of Slovenia, the ruling parliamentary party.

3 On the basis of Article 152 of the Rules of Procedure of the National Assembly (Official Gazette RS, No. 35/2002), the National Assembly of the Republic of Slovenia adopted, at the session held on June 18, 2003, the following

Interpretation of the first and the third paragraph of Article 84 of the Mass Media Act – ORZMed84
(Official Gazette RS No. 35/2001/Uradni list RS, št. 35/2001)

The text of the interpretation is as follows:

In accordance with the first paragraph of Article 84 of the Mass Media Act, it is forbidden to broadcast content that could seriously harm the mental, moral or physical development of children and minors; it is forbidden to broadcast the scenes showing unjustified or excessive violence such as torture of people or animals, pornographic scenes such as those showing zoophilia, necrophilia, pedophilia, sadomasochism, sadism, rape or other repulsive or violent scene in pornographic or other programs that could seriously harm the mental, moral or physical development of children or minors.
According to this interpretation, certain extreme forms of the pornographic genre are prohibited, while pornography in the form that is most common is implicitly categorized as eroticism, given that the Mass Media Act does not include the definitions of pornography and eroticism\(^4\).

d) **Institutions involved in the system**

The agreement was signed by the President of the Broadcasting Council and the Program Managers of TV stations with national coverage, including public service broadcasting, and one local TV station.\(^5\)

e) **Functioning of the system**

In the introduction, referring to the legal grounding, the Agreement quotes Art. 84 of the Mass Media Act (2001):

**Article 84**

(1) *Television stations may not present scenes of unjustified or excessive violence or pornography or other programmes that could seriously harm the mental, moral or physical development of children and other minors.*

The wording of the third paragraphs of this article is interpreted as follows: the programming content mentioned in this paragraph is content that could harm the mental, moral or physical development of children and minors, and because of that its broadcasting is limited to the period between 12 a.m. and 5 a.m. so that children and minors mainly cannot see it, or most of them cannot see it. This programming content includes broadcasts containing images of sex and violence that can be categorized as meeting socially acceptable aesthetic and ethical criteria, i.e. images whose broadcasting is not prohibited under the first paragraph of this article.

\(^4\) In July 2003, some experts for gender and media policy and NGOs active in the field issued an appeal which was aimed at drawing attention to the inconsistency in the interpretation of the law and to the resulting negative implications for the protection of children and minors, but it failed to elicit response from the Slovenian Ministry of Culture, the Liberal Democracy MPs or other MPs, and the media.

\(^5\) POP TV, Kanal A, RTV Slovenija, TV3 and TV Pika.
(2) Irrespective of the provision of the previous paragraph, taking account of basic aesthetic and moral criteria approved by the publisher in accordance with the principle of objective reporting on real-life events, scenes of violence may be shown in news and current affairs programmes.

(3) Taking into account the criteria specified in the first and second paragraphs of this article, a television station may between 12 am and 5 am present programming that contains scenes of violence and erotic material.

(4) The programming specified in the previous paragraph must be clearly and understandably designated by a visual symbol; prior to the presentation thereof an audio and visual warning must be given that such programming is not suitable for children under the age of fifteen.

(5) The sense of the provisions of this article shall also apply to radio stations.

(6) The responsible minister may prescribe additional measures for the protection of children and other minors in accordance with the present act.

(7) The measures specified in the previous paragraph may also relate to the protection of children and other minors against the dissemination of programming specified in this article via printed media and electronic publications.

The Agreement also quotes Art. 7/2, 3 of the European Convention on Transfrontier Television. It recommends that programming between 5 a.m. and 12 a.m. should be acceptable for wide audience, including children and minors under fifteen. Sooner the programme is on schedule more it has to be suitable for children and minors under fifteen who watch television alone, without company of parents or other adults. Programming that contains scenes of violence and erotic material has to be clearly and understandably designated by two visual symbols – a small round for programming which because of scenes of violence and erotic is not suitable for children and minors under fifteen, and small triangle for programming which includes elements of violence and erotic scenes, suitable for children and minors only if they watch television in company of parents or other adults who can give
them explanation of the scenes. 6 When deciding about classification the broadcasters should consider not only violence and erotic, but also abuse of alcohol and drugs, fear, discrimination and swearing. These principles are valid also for animated programming.

The Agreement recommends that during the introductory/promotion period the visual symbols appear throughout the whole relevant programme until the visual symbols are included in TV guides in the print media. After the symbols are included in TV guides the broadcaster can reduce the appearance of the visual symbol to each 10 minutes of the relevant programme (in upper left or right corner of TV screen). At the same time announcements in the print media should include the symbols and short explanation of their meaning.

Before beginning of the programming with violent or erotic scenes a visual or acoustic warning should be aired, where both symbols are presented and explained. It is recommended that broadcasters air such presentation and explanation of the visual symbols during the introductory period even when there isn’t programme with violent or erotic scenes on schedule.

After the introductory period, a visual or acoustic warning should be aired before beginning of the programming with violent or erotic scenes. To provide continuous awareness, it is recommended to use several seconds of the same visual presentation which was used during the introductory period. Also the visual symbols should appear at the beginning of the respective programming in the upper left or right corner of the screen for 10 seconds, and the same should happen after each commercial or similar break of the respective programming. Announcements of the respective programming in the television programme shouldn’t include the symbols, but timing of the broadcasting of the announcements should be carefully chosen, considering the possibility that it will be seen by children or minors under fifteen. Fragments with violent or erotic scenes shouldn’t be aired without context, especially not beyond the time when broadcasting of such programming is allowed (between 5 a.m. and 12 a.m.). Special attention should be given to the programming aired in the period when lot of children and minors watch television. At that period the broadcasters should avoid violent and other harmful programming, and should consider sensitiveness of children and minors for suffering of other children and minors; suffering of animals should be shown cautiously and presentation of violence as simple solutions of problems should be avoided.

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6
The final provision of the agreement refers to its implementation by saying that “in the case of
disrespect for provisions of the Agreement and in the cases of complaints regarding the
designations of the programming, it will be discussed among the signatories of the
Agreement, if the Broadcasting Council find such proceeding necessary”. The Agreement
includes pictogram of two visual symbols and call to other broadcasters of TV programmes to
respect the provisions of the Agreement.

Classification of the programme is done by the editors. According to Gorazd Slak, Program
Director of Pro Plus, a broadcaster of two TV channels – POP TV and A Kanal, editors of
both channels are responsible for review and classification of the programme following the
Agreement and guidelines adopted at the programming staff meeting of Pro Plus. Classification of the programme is done by the editors. According to Gorazd Slak, Program
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both channels are responsible for review and classification of the programme following the
Agreement and guidelines adopted at the programming staff meeting of Pro Plus.7

Programmes of public service broadcasting TV Slovenija (two channels: TV Slovenija 1 and
TV Slovenija 2) are classified by seven editors of programme units such as news and
educational programmes, cultural and art programmes, entertainment and sport programmes
etc. The editors review programmes and determine under which category established within
the Agreement to classify certain programme item and which mark to use.8

f) Supervision of the system

There hasn’t been organized monitoring of the implementation of the Agreement, and
according to the President of the Broadcasting Council9 no complaints have been submitted to
the Council, therefore no further proceedings are made. Since the Media Inspector of the
Ministry of Culture supervises the implementation of the Mass Media Act it is possible to
submit complaints to the Inspector with regard to implementation of provisions in the Art.
84/4. Any viewer can submit a complaint with regard to the designation of concrete TV
programming with violent or erotic scenes, or with regard to designation of such
programming on certain TV channel in general, and the Inspector acts in due period. If the
complaint refers to concrete TV programming it is important to submit it quickly to make the
Inspector able to request from the broadcaster a copy of the programming in the period of 15
days for which the broadcasters have to keep the copies of the programming according to the
Mass Media Act. The Inspector doesn’t run regular monitoring of any programme or channel
but can make proposal to the Broadcasting Council to introduce monitoring (which is then

7  Gorazd Slak, 24 June 2005.
8  The information is provided by PR department of RTV Slovenija on 24 June 2005.
9  Sandra B. Hrvatin, President of the Broadcasting Council, 9 June 2005.
done by the Agency for Post and Electronic Communication\textsuperscript{10}). The Inspector can act with oral or written request for abolition of the deficiency, and can also introduce a fine. Oral request is used when immediate action is needed.\textsuperscript{11}

According to Art. 129/1 of the Mass Media Act, a fine of at least 2,500,000 tolars (approx. 10,000 EUR) for an infringement shall be imposed upon a TV broadcaster (legal person) if “it presents scenes of unjustified or excessive violence or pornography or other programmes that could seriously harm the mental, moral or physical development of children and other minors (first paragraph of Article 84), in contravention of the present act fails to clearly and understandably designate with a visual symbol the programming specified in the third paragraph of Article 84, or fails prior to the presentation thereof to give an audio and visual warning that such programming is not suitable for children and minors under the age of 15 (fourth paragraph of Article 84)”. A fine of 350,000 tolars (approx. 1,400 EUR) shall be imposed upon the responsible officer of a broadcaster that commits above described infringement.

Ad-hoc review of TV guides published in daily newspapers and TV programming itself in early June 2004 shows that only one of daily newspapers publish the visual symbols along with the title of the programming with violent or erotic scenes scheduled between 5 a.m. and 12 a.m., while TV stations use the visual symbols to warn on such programming in TV schedules published on their web sites and at the beginning of the programming itself, but within very few programme items are classified for “suitable for watching by children and minors in company of parents” (triangle) while almost no programme item is classified for “non-suitable for watching by children and minors”.

\textit{g) Impact assessment}

According to the report of the Media Inspector, in 2003 there were three complaints with regard to the implementation of Art. 84, and for one of them his decision was to order to abolish the irregularity. According to the report for 2004 there were no complaints referring to the Article 84 and no action taken by the Inspector in that field.

\textsuperscript{10} It is the new name of the former Agency for Telecommunications, Broadcasting and the Post. See http://apek.si.

\textsuperscript{11} Ivan Pal, Acting Media Inspector within the Ministry of Culture, 23 June 2005.
2. Part II: Leading Cases

The leading case is related to the implementation of the provisions in Art. 84 of the Mass Media Act on presentation of scenes of unjustified or excessive violence or pornography or other TV programmes that could seriously harm the mental, moral or physical development of children and other minors. Namely, it was the abolition of the pornographic programming aired by two cable operators, R-channel from Ribnica and Telemach channel from Ljubljana, including the interval between 12 a.m. and 5 a.m.. The abolition was introduced on 7 February 2003 by the Media Inspector following complaints by a family Mihic and other viewers, and referred to the Italian SCT pornographic programming. The case caused lively debate in the media, in most cases negative to the action of the Media Inspector, and resulted with the action of the Parliament. In June 2003 the Parliament adopted the interpretation of the provisions in the Art. 84/1,3 on the proposal of the Liberal Democracy of Slovenia, the ruling parliamentary party. According to this interpretation, certain extreme forms of the pornographic genre are prohibited, while pornography in the form that is most common is implicitly categorized as eroticism, given that the Mass Media Act does not include the definitions of pornography and eroticism. The Agreement between the Broadcasting Council and the broadcasters of TV programmes regarding the television programming unsuitable for children and other minors chronologically followed these developments (it was signed in July 2003).
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Agreement regarding the television programming unsuitable for children and other minors

Non-state regulatory system: No data provided by correspondent

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
</tr>
<tr>
<td></td>
<td>The system is established to achieve public policy goals in</td>
<td></td>
<td>The system is not designed to meet individual interests.</td>
</tr>
<tr>
<td></td>
<td>the broadcasting sector, mainly protection of minors from</td>
<td></td>
<td>The system is a non-state regulatory system since it brings together on voluntary basis TV broadcasters to agree upon joint rules and symbols for classification and designation of the programming with violent and erotic scenes, but it is</td>
</tr>
<tr>
<td></td>
<td>violent and pornographic TV programming.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The Agreement between the Broadcasting Council and the broadcasters</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>of TV programmes regarding television programming unsuitable for</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>children and other minors was signed on 2 July 2003 by the President</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>of the Broadcasting Council and the program managers of TV stations</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>with national coverage, including public service broadcasting.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
and one local TV station.

<table>
<thead>
<tr>
<th>Co-regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>There is a legal basis for the non-state regulatory system</strong></td>
</tr>
<tr>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
</tr>
<tr>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
</tr>
</tbody>
</table>

The Agreement follows provisions of the Mass Media Act and the European Convention on Transfrontier Television, and play role of supplementary system to the state regulation.

It introduces two types of visual symbols for TV programming aired between 5. a.m. and 12. a.m. depending how suitable they are for children and other minors under fifteen.

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<tr>
<td>Although the Agreement use form of recommendation and has no own monitoring and sanction system to supervise the implementation, it is more than informal agreement.</td>
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<tr>
<td>Article 84/4 of the Mass Media Act requests from broadcasters of TV programmes to clearly and understandably designate programming that contains scenes of violence and erotic material by a visual symbol, and to give prior to the presentation thereof an audio and visual warning that such programming is not suitable for children under the age of fifteen.</td>
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To implement the
The state/EU leaves discretionary power to a non-state regulatory system | Traditional regulation | **Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.**

The system relies on the voluntary implementation of the Agreement by TV broadcasters who signed it. The Mass Media Act requests from the broadcasters to clearly designate TV programming unsuitable for children and other minors, and the Agreement as a non-state regulatory system provides unified instrument for TV broadcasters which designation to use. | The system is a supplementary system to the traditional regulation. | The Agreement as a non-state system is created on voluntary basis to make the implementation of the media regulation easier for TV broadcasters, addresses of the regulation. It can be understood as a pure execution of state regulation, but still it establishes link between state regulation and non-
<p>| | | state instrument and enable TV broadcasters to jointly set their own rules and propositions for designation of TV programming. |</p>
<table>
<thead>
<tr>
<th>The state uses regulatory resources to influence the non-state regulatory system</th>
<th>Incorporation of codes set by the industry without influencing the regulatory process within the non-state regulatory system</th>
<th><strong>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</strong></th>
</tr>
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<td>The Agreement as a non-state regulatory system is influenced by the state regulation i.e. by the provision in the Mass Media Act that request from TV broadcasters to clearly designate programming unsuitable for children and other minors.</td>
<td>The system is built to influence and make easier the implementation of the state regulation.</td>
<td>There is division of labour between state regulators and this non-state system. On one hand the system is initiated by the regulatory body – the Broadcasting Council – and is linked to the state regulation, but it is made possible by good will of TV broadcasters to agree on joint principles and rules for designation of programming unsuitable for children and other minors. The independent broadcasting regulatory body (a broadcasting council) established by the state supervise implementation of the regulation, but at the same time a separate non-state system is created on the initiative of that regulator body to make the implementation of the regulation easier for TV broadcasters. That system</td>
</tr>
</tbody>
</table>
Conclusion: The Agreement between the Broadcasting Council and the broadcasters of TV programmes regarding the television programming unsuitable for children and other minors was signed between the broadcasting regulatory body and the television industry representatives. It follows provisions of the Article 84 of the Mass Media Act, adopted in 2001, and provisions of the Art. 7/2,3 of the European Convention on Transfrontier Television, ratified in 1999. As such it can be understood as a link between the non state regulatory system and the state regulation. It brings together on voluntary basis representatives of the TV broadcasters to self-regulate part of their activities for the purpose of implementation of the state regulation. That system is established to contribute to public policy goals in the field of protection of minors and uses certain innovative and cooperative approach to serve that purpose. In critical assessment of the system it would be necessary to reflect its effectiveness and how much it serves public policy goals or serves the interest of the broadcasting industry.

II. Co-operative Regulatory Systems in the advertising sector

1. Part I: The co-operative regulatory system - The Code of Advertising Practice
   
a) Development of the regulatory system

The Slovenian Code of Advertising Practice (hereinafter the Code) was adopted by the General Assembly of the Slovenian Advertising Chamber\(^1\) in 1994 following introduction of market economy after the break of socialism and aiming to prevent arbitrary state regulation in the field.\(^2\) It reflected also recognition by the advertising professionals that association and common standards are necessary, and that they should use good practices known in other European countries.

b) Subject-matter of the regulatory system

The Code represents a supplement to the existing legal acts regulating advertising practices as well as the regulations arising from the nature and system of information provision in the Republic of Slovenia, a constituent part of which is advertising or paid transmission of

\(^1\) http://www.sozi.si.
\(^2\) Ana Predovic, acting director of the Slovenian Advertising Chamber, 8 June 2005.
information to businesses and other organizations and individuals on their products, services, offers, ideas, etc..

c) Basis of the co-operation

The Act on Protection of Consumers from 1998 directly referred to the Code of Advertising Practice when described which advertising practices are defined as improper (Art. 12):

“The indecent advertisement of goods and services shall be any advertisement that contains elements which are offensive or might be offensive to consumers, readers, listeners or viewers, or elements which offend moral standards and is defined as indecent or misleading in the Code of Advertising Practice.”

In the 2003 amendments to the Act on Protection of Consumers that explicit reference to the Code was abolished. In the Article 12a the Act now says:

“The indecent advertisement of goods and services shall be any advertisement that contains elements which are offensive or might be offensive to consumers, readers, listeners or viewers, or elements which offend moral standards.”

The Act on Protection of Consumers from 2003 (Art. 13) gives power to the relevant advertising chamber to give on own initiative or on the request of state bodies or consumer associations an opinion whether certain advertising is improper or misleading.³ In the following article, Art. 14, the Act defines the Slovene Advertising Chamber.

Article 13
At the request of a state body, a consumer organisation, a consumer or on its own initiative, the relevant advertising chamber shall provide an opinion as to whether a certain advertisement is indecent or misleading.

Article 14
Legal and natural persons, either national or foreign, engaged in advertising activities in the territory of the Republic of Slovenia may join the Slovene Advertising Chamber.
The Chamber shall be a legal person. Its organisation and operations shall be determined through the applicable statute.

³ The Act on Protection of Consumers from 1998 in the Art. 13 directly and explicitly referred to the Slovenian Advertising Chamber, giving to it the power «to give on own initiative or on the request of state bodies or consumer associations an opinion whether certain advertising is improper or misleading». 590
The Act prescribes (Art. 15) that the advertising should not contain any elements which cause or could cause physical, mental or other harm to children, or uses or could use their trustfulness and lack of experiences:

*Article 15*

*Advertising may not include elements which cause or which might cause physical, mental or other harm to children, or elements which exploit or which might exploit, their trusting nature or inexperience.*

The Act (Art. 75) also give power to the Advertising Chamber to sue its member which use advertising practices contrary to the regulation and good manners, and request abandoning of such practices:

*Article 75*

*The lawsuit referred to in the preceding article may be filed by any organisation operating with the status of a legal person founded with the view to protect the rights and interests of consumers, provided that no less than one year has elapsed between the founding of the organisation and the instituting of the legal action, and that the organisation is actually operating.*

*A lawsuit referred to in the preceding article may also be filed by the chamber or business association of which the defendant enterprise is a member.*

d) *Institutions involved in the system*

The Slovenian Advertising Chamber, in particular the Advertising Arbitration Court. The Code applies to all natural persons and legal entities engaged in the advertising process in Slovenia, including the advertiser, advertising agencies as well as the media.

e) *Functioning of the system*

The Code functions in such a way that every advertisement appearing in Slovenian mass media and aimed at Slovene audiences can be assessed by means of its rules and principles. The procedure of accord evaluation of an advertisement with the Code can be initiated by any legal entity or natural person. The Code applies to all natural persons and legal entities
engaged in the advertising process in Slovenia, including the advertiser, advertising agencies as well as the media.

In the introduction of the Code there are three exemptions listed where it can’t be applied. The Code doesn’t apply to advertisements aimed at foreign audiences, regardless of where they are broadcast or published. It doesn’t apply to promotional advertising, i.e. the dissemination of information on companies, products, etc. in the mass media which is free of charge. Finally, the Code does not apply to advertisements that fall into the category of classified ads, obituaries, general notices, etc.4

**Content of the Code**

In the introduction of the Code there are also definitions of the terms such as “advertisement”, “advertising medium”, “consumer”, “advertiser”, “advertising agency”, and “media”.

“A message in advertising (an advertisement) is any notice on the existence, features, purpose, advantages and types of a product embraced in any means of advertising and published or broadcast in any media, whereby the notice is commissioned and paid for. The medium by which an advertisement is communicated is any form through which the advertisement is materialized, both visual (printed advertisements, brochures, posters, leaflets, viewing cards, catalogues, annual reports, billboards, transparencies, circulars, lights, calendars, stickers, packaging when some other product is advertised on it, etc.) as well as those which are audio and audio-visual in character (loudspeaker announcements, radio recordings, record or tape recordings, video-cassette commercials, video disks, commercials broadcast on TV or in the cinema, cinema slides, advertisement stills, teletext, interactive electronic media, etc.). A consumer in the sense of the Code is anyone likely to be reached by advertising within the competence of the Code. An advertiser is any company, organization or individual that produces or carries out services through its own work and means, the product of which is the subject of various forms of communication regardless of whether they themselves have ordered that an advertisement

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4 There is a chapter “The Code’s limitations” saying: “a) The Code does not apply to advertisements aimed at foreign audiences, regardless of where they are broadcast or published. b) The Code does not apply to promotional advertising, i.e. the dissemination of information on companies, products, etc. in the mass media which is free of charge. The possible and existing anomalies in this field must be resolved by the media organizations in their internal acts, and primarily by adhering in full to the code of the Journalists’ Association. c) The Code does not apply to advertisements that fall into the category of classified ads, obituaries, general notices, etc.”
be published or broadcast in a media, or if this was done by an agency specialized in communicating advertising services.

An advertising agency is a company which through market communication and within this through advertising as its registered activity engages in the provision of services for clients in all or any parts of the advertising process (research, draft designs, creative work, project management, implementation and production, planning, purchase of space and time in the media etc.) and which in this way obtains revenue.

A media as understood in the Code is any organization whose basic or parallel activity is also the dissemination of advertisements."⁵

The Code includes general principles which include articles on constitutional provisions, lawfulness, decency, honesty, truthful presentation, form of presentation, recognisability, responsibility to society and consumers, privacy, religious sentiments, safety, children and other minors, denigration, protection of trademarks, imitation, referring to third parties, referring to recognitions, advertisements quoting prices, guarantees, and environmental claims. The chapter of the Code called “Special provisions” includes articles on alcoholic drinks and tobacco products, medicines and medical preparations, “health” foods and general consumer products, special products, thermal spas and health resorts, schools and professional courses, holidays and travel, purchases in installments and credit sales, mail order, lotteries, employment and political advertising.

The Article 12 on children and other minors is very detailed.

Article 12

Special attention should be devoted to creating and communicating advertisements aimed at young people or those in which young people appear as actors or models. Advertisements should not exploit the inherent credulity of children or their lack of experience in life.

Direct appeals to buy should not be made to children in advertisements unless the product to be advertised is likely to be one of interest to them and one which they could reasonably be expected to afford. No advertisement should directly influence children to persuade their parents or guardians to buy a product. No advertisement should create images leading children to believe that they will be inferior to other children if they do not buy a particular product or have it bought for them by their parents or guardians.

⁵ Extract from the Code of Advertising Practice of the Slovenian Advertising Chamber.
Advertisements should not show children unattended in street scenes unless it is obvious that they are old enough to care for their own safety; children should not be shown playing in the street unless it is evident that it is a closed-off street or a designated play area; they should not be shown crossing the street without paying attention to traffic; if they are shown crossing the street they must be doing so on a pedestrian crossing -- all this is intended to ensure that they are not being encouraged in a wrong attitude to traffic safety.

Children should not be shown leaning dangerously out of a window or over bridges or climbing dangerous slopes on their own. Also, small children should not be shown climbing onto kitchen cabinets, for example, with the purpose of reaching something above their heads. Advertisements should not depict children using matches, lighters or electric appliances which could lead to serious burns, electric shock or other injuries. Children should not be shown driving vehicles (tractors, motorcycles, etc.) in advertisements unless it is obvious that they are of an age when they can be expected to be capable of this or to possess a driving licence. Presentations of the situations cited in paragraphs 3, 4, 5 and 6 of this article can only serve the purpose of depicting behaviour which children and young people should avoid and can be shown only in an educational context of this kind.

The Advertising Arbitration Court

The Advertising Arbitration Court interprets the Code, decides on complaints regarding advertising practices and on requests for opinions whether certain advertising is improper or misleading e.g. whether it is in accordance with the principles and provisions of the Code. The opinion can be requested by the advertiser before the advertisement is published, but such opinion is not available to public and should be paid for. The opinion requested by state bodies or consumer associations based on the Act on Protection of Consumers is free of charge and is not available to the public until the proceeding initiated by a state body or consumer association is over.

The Court consists of seven members appointed by the Advertising Chamber for three years (until recently the mandate was four years). They are nominated from experts in the advertising business by three member associations of the Advertising Chamber – association of advertisers, association of advertising agencies and association of the media. Each association nominates three candidates, and the assembly of all members of the Advertising Chamber from nine candidates elects seven members. Present composition of the Court does
not include consumer or general public representatives. The Advertising Arbitration Court work is based on the rules of conduct. The rules proscribe that the decisions on complaints and opinions are made with consensus, exceptionally by voting. The meetings are not open for public while the decisions are public and have to be distributed to all parties involved, to the President of the Board of the Advertising Chamber, and to the media. The Court can send decisions on complaints and request for opinions also to consumer organisations, relevant state bodies and other interested parties.

**Complaint Procedure**

The Advertising Arbitration Court decides within 30 days after the submission of the complaint, and within 10 days after the request for opinion whether an advertisement is in accordance with the principles and provisions of the Code. When the Court decides that complaint on certain advertisement is justified it can request one of the following actions: correction of the advertisement if it is already published, public call for withdrawal of the advertisement, public call to stop the advertising action, initiative to the Market Inspectorate or other state bodies to take measures, initiative for penal proceedings. The parties involved can complain to the decision of the Court within 7 days. If there are new relevant facts the Court can re-consider the decision.

For the members of the Advertising Chamber the last sanction if the decision of the Arbitration Court is not observed is exclusion from membership. But it is very rare in practice. The system relies on voluntary commitment of the advertising industry to respect the code. In the case of non observance of a decision of the Arbitration Court by an advertiser or an advertising agency the Advertising Chamber may call the media, members of the Chamber, not to publish the respective advertisement.

*f) Supervision of the system*

According to the Consumer Protection Act the Advertising Chamber at the request of a state body, a consumer organisation, a consumer or on its own initiative, shall provide an opinion

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6 According to Ana Predovic, acting director of the Advertising Chamber, there has been resistance within the Chamber to involve consumer representatives in the Advertising Arbitration Court. Still, the revision of the rules of conduct are envisaged before end of 2005 where composition of the Court is to be changed in a way to include two representatives from the public, but expertise in the field of advertising will be requested.
as to whether a certain advertisement is indecent or misleading. It serves as a supplement system mostly used by the Market Inspectorate, a national inspection agency responsible for supervising the application of laws and other regulation in the areas of consumer protection, trade, the catering industry, small business and crafts, prices, and the safety of non-consumable products on the market.

When the Market Inspectorate decides whether certain advertising is indecent or misleading it requests an opinion from the Advertising Chamber. The opinion is provided on regular basis by the Advertising Arbitration Court within the Advertising Chamber free of charge. There is no legal obligation for the Market Inspectorate to respect the opinion of the Advertising Chamber, but there were cases when the Market Inspectorate respected negative opinion of the Advertising Arbitration Court and acted against the advertiser. There has been a case where as a result of the Inspectorate action the advertiser sued the Advertising Chamber for the harm made by its negative opinion. To avoid such situations advertisers sometimes request from the Advertising Arbitration Court an opinion before publishing the advertisement.

The Advertising Chamber doesn’t receive financial support from the state for carrying out the duties determined in the Consumers Protection Act. The work of the Advertising Arbitration Court of the Chamber is also in that part financed from the Advertising Chamber’s own sources – membership fee and its activities such as organisation of advertising festivals etc.

The Advertising Arbitration Court’s opinion requested by state bodies such as the Market Inspectorate is free of charge, but the one requested by the advertisers or advertising agencies prior to the publishing of the advertisement is payable.

**g) Impact assessment**

There is a proportionally small number of complaints to the Advertising Arbitration Court on annual basis. According to the statistics, since 1994 there have been altogether complaints on 114 advertisements on one side and 164 requests for opinion about the advertisements on the other side (out of them, 39 opinions have been requested on the basis of the Act on Protection of Consumers by state bodies or consumer associations). There is an average of 13 complaints per year in past 5 years. Since the establishment of the Court, there have been 5 complaints

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7 According to Ana Predovic, that was the case with the advertisement for Kumho tires which the Advertising Arbitration Court found indecent.
which refer to Art. 12 on children and other minors. Most complaints refer to the articles on decency, honesty and truthful presentation.

2. Part II: Leading Cases

In 2004, there were two decisions by the Advertising Arbitration Court with regard to the Article 12 of the Code of Advertising Practice (children and other minors).

The first complaint is referring to the use of 4-year old boy, wearing his panties, who is watching in the billboard advertisement for the (rather tabloid) weekly magazine Več accompanied with the text “Radovedni hočejo več” (The curious wants more). The complainant stated that the use of the kid in the advertisement is unacceptable since the weekly is meant for adults and has no connection with the (almost naked) kid. The publisher of the weekly and the advertising agency that produced the advertisement replied that they presented the kid as a metaphor for curiosity since the weekly is positioning itself as “a weekly for curious people”. The Court found the complaint for grounded and issued a public call to the publisher of the weekly magazine Več to withdraw the advertisement.

Another complaint in 2004 referred to the advertising campaign (billboard advertisement, advertisement in the print media and the internet banner) for mobile phone operator Si.mobil and their special offer of cheaper calls and SMS. Two type of pictures appeared in the advertisements – one with a woman with male hands on her breasts, and other with a man with female hands on his bottom. The complainant indicated that the advertising campaign is not proper for minors although they are one of the target consumer groups of the advertised services.

The Advertising Arbitration Court decided that the complaint is grounded in the part where it referred to the image of woman with male hand on her breasts, and requested from the advertiser and the media to withdraw the advertisements with the controversial image. The case became controversial because of the media reports criticizing the different decisions of the Court regarding the images of woman and man. Also the advertiser didn’t withdraw the whole advertisement but put the label “Censored” on the billboard advertisement over the controversial image with male hand on woman breasts.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Advertising sector

<table>
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<tr>
<th>Criteria</th>
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<th>Explanation</th>
<th>Additional remarks</th>
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<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
</tr>
<tr>
<td>The Slovenian Code of Advertising Practice is a set of rules and principles adopted by the Slovenian Advertising Chamber whose members are advertisers, advertising agencies and the media. The Code is implemented by the Advertising Arbitration Court.</td>
<td>The Code is formal set of rules which has formal body which adopted it and formal body which implement it. It has clear formal procedure and sanctions.</td>
<td>This non-state regulatory system has formal setting within the Slovenian Advertising Chamber and is proved as sustainable on the basis of the adoption and implementation procedure, and on the basis of financial support from the founder (the Chamber).</td>
<td></td>
</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be</td>
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<td>The system – the Slovenian Code of Advertising Practice – is created to influence decisions of the advertising and the media organisations/industry represented in the Advertising Arbitration Court whether certain advertising is improper or misleading e.g. whether it is in accordance with the principles and provisions of the Code. It also serves as a set of rules and principles which influence decisions of advertisers and advertising agencies prior to publishing of their advertisements.</td>
<td>The system includes strict and formally adopted rules, decisions and sanctions, and is not based on pure consultation.</td>
<td>There is set of regulation in the Consumer Protection Act which gives certain power to the non-state regulatory system such as Code of Advertising Practice/Advertising Arbitration Court within the Slovenian Advertising Chamber. The power includes providing opinion (on request) to the state regulators such as Market Inspectorate whether certain advertising is improper or misleading e.g. whether it is in accordance with the principles and provisions of the Code.</td>
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<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
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</table>
The system is performed by the Slovenian Advertising Chamber whose members are advertisers, advertising agencies and the media, all of them being addressees of the consumer protection regulation and the media regulation.

The system is created within the advertising and media industry.

Subject of the non state action in the case of the Slovenian Code of Advertising Practice is every advertisement appearing in Slovenian mass media and aimed at Slovene audiences.

**Link between the non-state-regulatory system and state regulation:** No data provided by correspondent
Conclusion: The Code of Advertising Practice and the Advertising Arbitration Court within the Slovenian Advertising Chamber can be understood as non-state regulatory system which has its own formal set of rules, procedures and bodies created within the advertising and media industry. Parts of its actions are based on the Consumer Protection Act (opinions given on request to the Market Inspectorate for instance) and it makes the system able to explicitly influence actions taken by the regulators.
3.18. Spain

Introduction

As it was advanced in the first Spanish report, and it will be seen in this second text, the co-operative regulatory Spanish system relies mainly on the force of the law, and with the exception of the field of advertising and the telecommunications sector, the non-state regulatory system is exercised under some general codes of ethics, but without strict measures of enforcement, due, among other reasons, to the lack of obligated affiliation to professional bodies, the recent constitution of some of the resolution bodies and the non imposition of sanctions; in the field of telecommunications, the role of the Telecommunications Market Commission is mainly focused on the licensing and prices control, as well as in the users claims, but not in the field of contents.

However, before examining the development and actions of the co-operative regulatory system for each specific sector, it must be taken into account that, in respect of the legal system, most of the laws on content diffusion and broadcasting do not refer to an unique medium, but to all existing ones, and due to this characteristic, it could be necessary to make a general introduction over these laws, in order not to repeat them for each media sector, and also as to have a general idea of the state legal frame; on the other hand it should not be forgotten that the general mass media concentration law – included in the first national report - should be also applied.

Beginning with this general overview, it must be cleared that:

- Every law relating to mass media activities is born from article 20 of the Spanish Constitution 1978, as the fundamental law on rights and duties of the Spanish democracy; as stated in the first report, article 20 recognizes and considers freedom of information and freedom of expression, as well as its main general limits: protection of children and youth, privacy, defamation and personal image or right of publicity.

- The non-state regulatory branch has a mass media specific sector or professional scope – as in the case of advertising, videogames or the ethical codes of press associations and journalistic professional corporations.
And, finally this same specific scope of application rules also for independent authorities entitled by the national or regional governments, as in the case of the audiovisual and telecommunications sectors.

So on, it should be understood that the main laws on contents have a general media scope, specially in radio, television or press informative contents; but this does not mean that there are not any other laws on the content issue, as they do exist; but, besides the licensing acts for each media sector explained in the first report, these above mentioned rules constitute quite an exhaustive topic frame for the development of media activities. But, in fact, it should be also taken into account that some market sectors have specific regional laws, whenever the regional governments and parliaments have the legal power to enhance acts in the issue; as an example, there should be mentioned: the Act 8/1996, 5th July, regulating cable audiovisual broadcasting and programming in Catalunya; the Act 6/1999, 1st September, on Galicia audiovisual landscape; the Act 18/2001, 5th July, regulating audiovisual activities in Navarra and creating the Audiovisual Council of Navarra; or the Act 2/2001, 18th April, on audiovisual content and additional services in Madrid; etc. Also, as mentioned in the first report, some regional laws on secondary issues contain certain provisions in respect of secondary aspects of advertising.

Besides, it is also important to give some short clues about the organization and function of the Spanish administrative, political and judicial systems, especially in those aspects referred to the enforcement and breach of the law:

- As part of the Council of Europe and signatory since 1979 of the European Convention on Human Rights, any case taken to the Constitutional Court and related with a right included in the Convention, can be taken up to the Strasbourg Court if there is no agreement with the Constitutional Court judgment.

- Some of the laws, especially those concerned with licensing and the implementation of the Directive TV without Frontiers, are under the supervision of the Government and its respective Ministries; however this does not mean that the judiciary system has nothing to do with it, as in the case of television licensing a company which considers non legal any of the regulatory provisions, or breaching of the constitutional foundations can take the case to the courts; in respect of the TV without Frontiers Directive, the Government – through Ministries and the Council of Ministers - has the power to impose monetary sanctions in case of breach.
The judicial Spanish system is structured in several branches depending on the issue: civil actions, administrative actions, penal actions, etc; so, it will depend on the topic which judicial line must be followed – jurisdictional order; the courts system is organized under a geographical criteria which, in fact, is a scale structure: 1st instance courts; provincial high courts; superior justice courts – regional scope; Supreme Court and National High Court; and Constitutional Court.

Except in the cases where a judge gives a definitive sentence, without appeal possibility, and whenever there is a disagreement with the sentence, it exists the possibility of getting to an upper court level under the form of an appeal. After arriving to the Constitutional Court, the only possibility is to take the case to the Strasbourg Court on Human Rights.

For those cases related with competition rules, there is a first instance service belonging to the Ministry of Economy, called the Competition Defence Service; for those cases taken by the judicial line, there is a special court called Competition Defence Court.

Besides, it must be noticed that there exist an administrative procedure for those cases of breach of the law carrying on a monetary sanction imposed by the Government through the correspondent ministries; however the administrative law on the mass media mainly affect to advertising cases –in a regional scope-, and to some laws related with the configuration of the broadcasting market.

On this side, the non fulfilment of the TV without Frontiers Directive is one of the main issues of application of administrative measures; however, information on specific sanctions is not usually made available to the public.

On the other hand, and in respect of the non-state regulation over the content of the media, it must be noticed, in a first overview, as indicated in the first report, the following ethical codes, self-regulation organisms, professional bodies on the one hand, and the so-called in Spain “independent authorities” entitled by the national or regional governments, but with an autonomous functioning on the other. The latter, of course, pertain to the state sector but are involved in media cases on a level inferior to the government.
<table>
<thead>
<tr>
<th>Ethical codes</th>
<th>Press</th>
<th>Radio</th>
<th>TV</th>
<th>Telecommunications</th>
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<tbody>
<tr>
<td>Federation of the Spanish Press Associations;</td>
<td>Catalunya and Galicia Journalists</td>
<td>Catalunya and Galicia Journalists</td>
<td>Catalunya and Galicia Journalists Professional Colleges codes; Self-regulation Code on Television Contents and Children</td>
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<td>Professional bodies</td>
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<tr>
<td>Independent authorities</td>
<td>Audiovisual Councils of Catalunya,</td>
<td>Audiovisual Councils of Catalunya,</td>
<td>Telecommunications Market Commission</td>
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<td>Navarra and Madrid</td>
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<tr>
<td>Others</td>
<td>Individual ethical codes of press companies</td>
<td>Individual ethical codes of radio companies</td>
<td>Individual ethical codes of TV companies</td>
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<tr>
<td>Ethical codes</td>
<td>Ethical Code of Asimelec (associations of ISP companies)</td>
<td>Ethical Code on E-Commerce and Interactive Advertising</td>
<td>Ethical code of Catalunya Advertisers Professional College; Ethical code of advertising practices of Autocontrol</td>
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<tr>
<td>Ethical Code on E-Commerce and Interactive Advertising</td>
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<td>Ethical Code on E-Commerce and Interactive Advertising</td>
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</table>
As a general statement, it can be said that, as a whole, both laws and non-state regulation pursue quite the same objectives, although usually laws are much more specific, instead of the case of advertising, whereas many coincidences between law and non-state regulatory system happen.

The main objectives of the Spanish co-operative regulatory system are:

- Guarantee of freedom of expression and information.
- Limitation of contents in press and broadcasting under exceptional circumstances for the country.
- Harmonizing of the right to privacy, the right to honour, and the right to personal image with the right to freedom of information.
- Protection of children and youth in respect of contents of magazines, television broadcasting, cinema and video films, videogames, advertising, and television advertising.
- Exercise of the right of rectification in favour of people damned by mass media contents.
• Promotion of the Spanish cinema.
• Classification of films, videos, DVDs and videogames under an age scale.
• Prohibition of misleading, negative comparative, subliminal, surreptitious and anticompetitive advertising.
• Limitation of television advertising, sponsorship and teleshopping, under time and contents criteria.
• Protection of personal data and privacy in respect of new technologies and computers.

In respect of sanctions, it must be outlined, as general rules, that the ethical codes do not contain specific provisions on the quality of sanctions, which will be decided by the company’s or association’s deontological councils; and as it will be seen after, there are not explicit sanctions usually imposed, but only “moral calls of attention”; for the so-called “independent authorities”, administrative sanctions will be mainly imposed under the form of monetary sanctions or fines, without prejudice to the appropriate and necessary judiciary actions.

Besides, it must also be mentioned the role of three private associations on the control of mass media and telecommunications contents, which usually publish reports on the breaches of the laws and ethical principles and codes: the Spanish Internet Observatory, the Internet Users Association, and the Communication Users Association.

Finally, as the last general overview of the Spanish co-operative system, it must be mentioned that, with very few exceptions that will be dealt with later on in detail, there are no agreements between state regulatory authorities and non-state regulatory institutions in order to promote such co-operative systems, mostly because of the short term of our recent democracy, after a censorship dictatorship, that has led legal authorities to a situation of non interference over mass media activities, with the exception of the state regulatory obligations. Nevertheless, it must be mentioned the governmental entitle of some national and regional independent authorities. In general, however, it seems this situations is starting to change as a consequence, especially in the field of television, of the bad-taste contents offered by operators. A good example of this new co-operative approach was the signing in December 2004 of the self-regulation Code on Television Contents and Children, promoted by the national televisions, but also counting with the encourage of the Government.

Besides, we must mention the co-operative approach that is, inside the television advertising field, the agreement reached in 2003 between Autocontrol and the Ministry of Industry,
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

Commerce and Tourism – SETSI, Technical Secretary for the Information Society – in respect of the application in television advertising of the Autocontrol Advertising Ethical Code.

In the field of Internet and Videogames, we must refer to the new agreements between Autocontrol and the Spanish E-Commerce Association, as well as to the agreement between Autocontrol and the Spanish Association of Entertainment Software.

I. Co-operative Regulatory Systems in the broadcasting sector

1. Part I: The co-operative regulatory system

The lack of special radio provisions, whether in the state or non-state regulatory level, as well as the limited number of initiatives in the field of television allow us to deal with these two sectors jointly; also, as it was before mentioned, because the most important content law are applicable to all media and, in the case of press associations and professional bodies, they are not restricted to press journalists, so that they also include those people working for the broadcasting sector whenever they develop their work as journalists.

a) Development of the regulatory system

For the field of television, we must have a look to the Act 25/1994, 12 July 1994 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, amended by the Act 22/1999, 7 June 1999, both implementing the Television without Frontiers Directive; also, the Royal Decree 1462/1999, 17 September 1999, on the approval of the Regulation concerning the right to information of media users about the broadcasting of the programmes (establishing 11 days as the compulsory term to advertise the television schedule); and the Royal Decree 410/2002, 3 May 2002, on the development of section 3 of article 17 of the Act 25/1994, 12 July, amended by the Act 22/1999, 7 June, establishing uniform criteria about the classification and signalizing of television programmes. Also, the existing independent authorities in the field, that is to say, the Audiovisual Councils of Catalunya, Navarra and Madrid shall be looked at.
The Catalunya Audiovisual Council was the first independent authority entitled by a government in Spain in the media market. It was created by the Act 2/2000, 4th May, of the Catalunya Parliament, on the creation of the Catalunya Audiovisual Council, as the regulating authority of the audiovisual market for those issues under the jurisdiction of the Government of Catalunya, but also for those issues under national jurisdiction when applicable to Catalunya cases; besides, it is a member of the European Platform of Regulatory Authorities.

Its main activities, until the date, and apart from the publishing of several reports concerning the different audiovisual sectors, are related with:

- The presence of Catalunya own language and culture in the audiovisual media.
- The classification of television programmes for the protection of youth and children.
- The recognition of the citizens’ right to information on the television schedules.
- Establish sanctions in case of non fulfilment of the laws.

Finally, the Council has an Office for the Defence of the Audience, where anyone can present a claim or make any consult.

The Navarra Audiovisual Council was created by the Law 18/2001, 5th July, of the Parliament of Navarra, on the creation of the Navarra Audiovisual Council. As in the precedent case, this Council is conceived as an independent organism, in charge of the supervision and regulation of the regional landscape; it also belongs to the European Platform of Regulatory Authorities. Its main activities until the date have focused on television and radio regional licensing, as well as in some recommendations on the programming for deaf people, the protection of youth and children, and the conditions of financial aid to audiovisual companies. It also has an Office for the Defence of the Audience.

The Madrid Audiovisual Council was created by the Act 2/2001, 8th April, of the Madrid Parliament on audiovisual contents and additional services; this Council has not developed almost activities in the field of contents until the date, and has not a public web page available providing information about its activities.

In the field of non-state regulation, we must dedicate some lines to comment on: the application to radio and television journalists of the ethical and deontological codes of the
Spanish Federation of Press Associations and the Catalunya and Galicia Journalistic Professional Colleges; secondly, we must get deeper into the Self-regulation Code on Television Contents and Children, signed in December 2004 by the national television companies. Thirdly, we must not forget that some individual media have their own ethical codes and ombudsmen offices, especially the regional public corporations of radio and television, as mentioned in the first Spanish report.

The Self-Regulation Code on Television Contents and Children has arrived after several initiatives that did not succeed much on this same field, like the Agreement on TV Self-Regulation on the protection of youth and children, signed by the Ministry of Science and Education, the Education Counsellors of the regional governments and television broadcasters, in 1993; Agreement on the establishment of an uniform signalizing system for the qualification of television programmes for people under age, in 1999. In contrast, the Agreement between Antena 3 TV, RTVE, Tele 5, Sogecable, FORTA, Autocontrol and the Spanish Association of Advertisers, in 2002. This Agreement, in order to achieve a better self-regulation on advertising by television operators, was also signed, as a measure of its promotion, by the Ministry of Science and Technology in December 2003.

However, with the exception of the advertising agreements controlled by Autocontrol, the other initiatives did not succeed especially in the commercial channels Antena 3 and Tele 5, which for the last years have offered adult contents on children television time.

The new Code has been signed in December 2004, as a consequence of the central Government threat to enforce a “hard law regulation” on the issue, in case that television companies were not in favour of changing their scheduling habits. So on, the Code has been signed by the Vice-President of the Government, the Ministry of Industry, Tourism and Commerce, and the presidents of the companies TVE, Antena 3 TV, Tele 5 and Sogecable.

b) Subject matter of the regulatory system

The laws implementing the TV without Frontiers Directive focus, as it is well known within the European Union, on the television advertising and teleshopping times, as well as on the prohibition of certain types of television advertising and sponsorship. In fact, some of these precepts, related with the forbidden types of television commercials, are also contained within the General Act 34/1988, 11th November on Advertising.

This Law defines as non-licit and forbidden advertising:
- The one that goes against people's dignity, which breaches constitutional values, especially those referred to children, youth and women.
- Misleading advertising.
- Anticompetitive advertising.
- Subliminal advertising.
- Any other advertising which breaches the laws regulating advertising on certain products, services, goods and activities.

In respect of comparative advertising, it is considered as anticompetitive advertising and is not admitted by this Act when it is not founded on essential, neighbouring and objective characteristics of products or services, or whenever the compared products or services are not similar or known, or have a limited presence at the market.

Concerning the laws implementing the Directives, its general content repeats the original Directives one, so it has no sense repeating it here, as it is the same for every EU Member State; but part of this Directive's content, especially the one related with protection of youth and children against harmful television contents, has been implemented through the Royal Decree 410/2002, 3 May 2002, on the development of section 3 of article 17 of the Act 25/1994, 12 July, amended by the Act 22/1999, 7 June, establishing uniform criteria about the classification and signalizing of television programmes, following the criteria of the same TV without Frontiers Directive: so on, any television programme will have to be classified according to the following categories:

- Especially recommended for children (optional)
- Suitable for everyone.
- Not recommended to people under 7.
- Not recommended to people under 13.
- Not recommended to people under 18.
- X programme.

Further, it establishes an optical code according to this same classification:

- Green symbol (especially recommended for children).
- Non symbol (suitable for everyone).
- Yellow symbol with a “7” inside (not recommended to people under 7).
- Yellow symbol with a “13” inside (not recommended to people under 13).
- Red symbol with a “18” inside (not recommended to people under 18).
- Red symbol with an “X” inside (X programme).

Also, there is an obligation of broadcasting a one second acoustic signal at the beginning of every part of programme, except in the case it is allowed to people under 18.

On the other hand, the content of the Self-Regulation Code on Television Contents and Children basically re-enforces some of the issues contained in the TV without Frontiers Directive, but extending some of its precepts to a wider range. Therefore, the Code aims to control the broadcasted television contents followed by broadcasters' representatives, journalistic professionals, representatives of parents, children and consumers.

The Code settles a special protected time for youth and children, which will comprise from 6.00 AM to 22.00 PM; and within this time, it will be necessary to distinguish between youth and children; so on, there will be some especially re-enforced protected schedules for children, as it is considered that possibly there are no adults supervising the children television consumption:

- Monday to Friday: 8.00-9.00 and 17.00-20.00
- Saturday and Sunday: 9.00-12.00 PM
- The Saturday and Sunday schedule will also be applicable on the following dates: January the 1\textsuperscript{st} and the 6\textsuperscript{th}; Friday of Eastern Holidays; May the 1\textsuperscript{st}; October the 12\textsuperscript{th}; November, the 1\textsuperscript{st}; and December, the 6\textsuperscript{th}, 8\textsuperscript{th} and 25\textsuperscript{th}.

Apart from the classification rules mentioned in the Royal Decree 410/2002, 3 May 2002, on the development of section 3 of article 17 of the Act 25/1994, 12 July, amended by the Act 22/1999, 7 June, establishing uniform criteria about the qualification and signalizing of television programmes, the main principles of the Code are:

- Promotion of parental control of children television time of consumption.
- Promotion of adequate alphabetization of children, avoiding non decent or insulting language, including SMS broadcasting.
- Avoid children imitation of certain non safe attitudes, including the consumption of drugs or the imitation of extremely thin bodies.
- Avoid explicit violence and sex.
- Avoid the show conversion of personal and familiar conflicts.
- Avoid the images and identification of people under age in any news or content related with crimes or non licit activities.
- Avoid the use of disabled people under age with a propagandistic aim.
- Non broadcasting of identified youth or children consumption of alcohol, tobacco or drugs.
- Non use of people under age imitating adult behaviours which can be offensive to their dignity.
- Avoid the broadcasting of violence, cruel or sexual images in news, except when required by the news, and previously warned by the journalist.

In respect of the so-called independent authorities, the Audiovisual Councils of Catalunya, Navarra and Madrid, agree in the basic scope of their objectives:

- Guarantee freedom of information and expression.
- Protection of youth and children.
- Supervision of the respect of the laws for the audiovisual market.

c) – d) Basis of the co-operation and institutions involved in the system

For the case of the broadcasting market, there are three independent authorities, regulated by law, and with part of their members elected and named by regional parliaments and governments.

The Catalunya Audiovisual Council: 9 out of its 10 members are elected by the Catalunya Parliament, proposed by, at least, three political groups and with a majority of 2/3 of the votes; the tenth member will be elected by the regional Government after listening to the other 9 members.

The Navarra Audiovisual Council: it is composed by 7 members, 5 of which are directly named by the Parliament, and the other 2 are name by the regional government.

The Madrid Audiovisual Council: it is formed by 11 people, three of them name by the Madrid Parliament, four belonging to the regional administration, and two more representing the Youth and Children regional Defender and the organizations of consumers; there will be
also a president, who will be the correspondent Counsellor, and a secretary, who will be a civil servant of the regional administration.

Besides, the state part of the regulatory system is also formed by National and regional parliaments and governments, as well as the Courts.

Non-state parts of the regulatory system are:
In respect of the presence of the Government as signer of the Self-regulation Code on Television Content and Children, it must be mentioned that its role is only as encourager and provider of logistic infrastructure for its development; as a self-regulation tool, the Government and the state regulation have no power to enforce its fulfilment; however, this symbolic role could be considered as a “call of attention” to the broadcasters.

e) Functioning of the system

Opposite to the press sector situation, the co-operative system works effective in the field of the audiovisual market, as the three regional audiovisual councils were established by law; besides, the Self-Regulation Code on TV content and Children was strongly encouraged by the national Government.

The Code does not forbid individuals to claim in the case of non-fulfilment by the broadcasters. However, the Control Commission acts as a filter for claims that will finally arrive at the self-regulation committee. In case of positive progress of a claim, presented by an individual or any association or institution, a letter will be sent to the broadcaster, asking to change the issues which have been object of the complaint. But, as in the case of other self-regulation tools, there are no explicit sanctions in this non-state regulatory system. However, the Control Commission, as well as the self-regulation committee, could bring a case before the Ministry of Industry, Commerce and Tourism, in case the breach of the Code is also an infringement of the Directive TV without Frontiers. If so, administrative sanctions are possible.

f) Supervision of the system
The supervision of the fulfilment of the precepts of the laws implementing the TV without
Frontiers Directives belongs to the Government, as well as to the existing regional audiovisual
councils.

In respect of the Self-Regulation Code on Television Content and Children, a Control
Commission will be created with a range of 8 eight members, four of the representing the
broadcasters, and the other four, representing the above mentioned. However, the
Government will be present as Secretary of this Commission, without right to vote, but with
right to speak.

Also a Self-Regulation Committee will carry on the final responsibility of taking the decisions
over the possible breach of the Code content. It is formed by representatives of the
broadcasters, independent producers and journalistic professionals, whose functions will be:
to solve the doubts of broadcasters in respect of their contents; and to solve the complaints
presented by any association with national scope. The Committee's statements will only have
the following possible results: no inconvenience found; inconveniences found which must be
solved in the following direction (...); the broadcasting cannot be shown within the protected
time for youth and children; the broadcasting can only be shown in non protected time.

g) Impact assessment

The Catalunya Audiovisual Councils and the Navarra Audiovisual Councils publish yearly a
report of their activities.

2. Part II: Leading Cases

It is not possible to outline major cases related with radio and television content, which have
been taken to the courts, as they are related with several aspects of freedom of information.
However, in respect of the application of the contents of the TV without Frontiers Directive,
in a national scope, it is the Ministry of Industry, Tourism and Commerce, the one institution
under which the sanctioning for non-fulfilment is considered; previously, other ministries,
since 1994 took this function, but on every occasion the ministries did not publicly display
any information about specific cases when required. So the only possibility to have an idea
about the fulfilment of the laws by the broadcasters is attending to the EU reports on the issue
—which are too general, or going over newspapers and claims from consumers associations: so
on, the private and independent Communication Users Association has claimed in several
occasions the non fulfilment of the provisions of the Directive by the broadcasters. The Association has presented, in the last 4 years, more than 20 claims before the administration on the issue, as well as for the non fulfilment of the General Act on Advertising. But it seems there were no official answers, according to the public information displayed by the Association.

In respect of the fulfilment of the Self-regulation Code on TV Content and Children, it is still too early to obtain conclusions about its application, due to it has just entered into force in February 2005. However, the same above mentioned Association, as well as the Youth and Children regional Defender of Madrid, have claimed that the Code is not yet being applied by the broadcasters. In fact, all extra-official sources consulted by this author refer to the first complaints introduced in March, April and May, as very particular and specific, and many of them were finally dismissed. It seems as the biggest step given until now has been the avoiding of swear words in the children specially protection schedule.

In respect of the leading cases related with the audiovisual councils, only one of them seems to have developed until the date some sanctioning activities or, at least recommendation activities:

The Catalunya Audiovisual Council has published several recommendations on the following issues: programmes classifying and signalizing; treatment of genre violence in news and entertainment programmes; treatment of religious ideas in entertainment programmes; treatment of immigration in news programmes; treatment of personal tragedies in news coverage; treatment of judiciary processes in news coverage. Besides, since 2000 it has taken decisions over almost 300 complaints; however it does not make public the information about the sanctions imposed.

On the other hand, the Navarra Audiovisual Council declares that it does not have imposed any sanctions until the date; and there are no data about the sanctioning function of the Madrid Audiovisual Council.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Broadcasting sector

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
<td></td>
</tr>
<tr>
<td>Self-Regulation Committee established by the Self-Regulation Code on TV content and children, 2004.</td>
<td>Court cases. Cases related with the breach of TV without Frontiers Directive rules will be sanctioned by the Government or audiovisual councils. The cases are not made publicly available.</td>
<td></td>
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<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td><em>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge.</em></td>
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Co-Regulation Measures in the Media Sector: Annex 5: Coutnry reports on possible co-regulatory systems

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<td>All national television channels signed the Self-Regulation Code on TV Content and Children.</td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
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</thead>
<tbody>
<tr>
<td>Criteria</td>
<td>Cases excluded by this criterion</td>
</tr>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
</tr>
</tbody>
</table>
### Protection of Minors

The Self-Regulation Code on TV content and children was promoted by the Government to deeply implement through self-regulation the TV without Frontiers Directive provisions.

There is a legal basis for the non-state regulatory system

Informal agreements without any legal criteria to judge the functioning of non-state regulation

If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.

### Code on TV content and children

The state/EU leaves discretionary power to a non-state regulatory system

Traditional regulation

Innovative forms can only be found if there is real “division of labour” between non-state and state
<table>
<thead>
<tr>
<th>No mentions to the non-state regulatory system in the General Law.</th>
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<tbody>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
</tr>
</tbody>
</table>
**Conclusion:** It could be said that the co-operative regulatory system is starting to function in the audiovisual market in Spain: the recent approval of the Self-Regulation Code on TV Content and Children, promoted by the national TV channels, and encouraged by the Government, has given hope to the self-regulatory branch of the system, despite of the critics of its non-fulfilment during its first months of life.

**II. Co-operative Regulatory Systems in the press sector**

1. **Part I: The co-operative regulatory system**

   It is not possible to talk about a specific press sector state regulation, as the general rules (see introduction) are applicable to whatever mass media, but as stated in the first Spanish report, the licensing system works on different parameters than the broadcasting one, as the establishment of press companies is not subject to previous concessions by the different governments or authorities.

   **a) Development of the regulatory system**

   Some general laws are applicable to the press sector:
   - Article 20 of the Spanish Constitution.
   - Act 9/1968, 5th April, on official secrets.
   - Organic Act 4/1981, 18th June, on state situations of alarm, exception and besiege.
   - Organic Act 1/1982, 5th May, on the right to honour, personal and family privacy and self-image.
   - Royal Decree 1189/1982, 4th June, on the regulation of dangerous or non convenient activates for youth and children.
   - Organic Act 2/1984, 26th March, on the right of rectification.
   - Act 16/1985, 25th June, on Spanish historic patrimony.
   - Organic Act 15/1999, 13th December, on personal data protection.
   - The Penal Code, where applicable.
But during the first 27 years of our democracy there has been some academic and professional debate in respect of the application of the Act on Press and Printing of 1966, approved by the dictator General Franco. As the 1978 Constitution established in its article 20, any censorship system disappears with the beginning of the democracy; but this article did not mention specifically the precepts of the 1966 Act, which refer to a co-responsible civil system in press faults, which will be claimed to authors, directors, editors, printers or distributors of foreign press.

Apart from this, the Royal Decree 1189/1982, 4th June 1982, on the regulation of certain non convenient or dangerous for youth and children activities, forbids: the general public selling of pornographic magazines, except in specific sex-shops; and the public exhibition of these magazines in any shop window.

On the other hand, and in respect of the non-state regulatory system, there are three main characteristics: the non existence of a national professional body which comprises all journalists working in the press or broadcasting sector – there are only two regional professional bodies: Catalunya and Galicia; the only existence, as national self-regulation, of a Federation of Spanish Press Associations, which does not have compulsory affiliation.

Under this situation we must refer then to the development and role of these three institutions:

The Federation of Spanish Press Associations was created in 1922, in the time of King Alfonso XIII as an initiative of Santander Press Association. However, the 1936 Civil War and the dictatorship of General Franco brought a pause for its development, taking the character of a semi-official association. It was in 1984 when it recovered its life, taking the role of keeping and updating the Spanish official register of journalists – however, not obligatory under any regulation. Nowadays it considers itself as the journalistic most representative Spanish institution, and it comprises 41 local associations.

The Journalistic Professional College of Catalunya was created by a Catalunya Parliament Act on November, the 8th, 1985. Its birth emerges from the local press associations of the region, which have been functioning since 1910. And its first aim was to transform these existing associations into a real professional body, able to fight for the rights of journalists, so in 1984 it allows the affiliation of those professionals, who had been working for the media for a long time, but without an academic degree in
Journalism. However, it did not have an easy way to develop itself, as in 1985 the Barcelona Press Associations states that it is not compulsory to belong to the new Council in order to exercise the profession.

The College's original Statute presents as main objectives (art. 1): the improvement of workable conditions for journalists; the exercise of a professional defence of its members in case of dispute; to guarantee independence and freedom of information; to avoid the deformation of facts, produced by the Information Society; and to guarantee the journalistic professional secret and the right to conscience objection.

The Journalistic College of Galicia was created by the Galician Parliament Act 2/1999, 24th February, three years after the beginning of some conversations held between members of the 8 professional bodies existing then the region. After the approval of its constitution law at the regional parliament, over 1.000 professionals were admitted;

b) Subject-matter of the regulatory system

In respect of the main objectives settled by the laws:

- Guarantee of freedom of expression and information.
- Limitation of contents in press under exceptional circumstances for the country.
- Harmonizing of the right to privacy, the right to honour, and the right to personal image with the right to freedom of information.
- Protection of children and youth in respect of contents of magazines covers.
- Exercise of the right of rectification in favour of people damned by mass media contents.
- Protection of personal data and privacy in respect of new technologies and computers.

In respect of the non-state regulatory system, the general aims are very similar to the legal ones; however it seems they get into some other aspects of the journalistic profession much more related with the fulfilment of ethical standards in its exercise:

The current Statute of the Federation of Spanish Press Associations was approved in 2001, and recognizes as one of its duties the development of the news and journalistic deontology (art. 2); also, the supervision of the fulfilment of deontological principles (art. 5).
The Deontological Code was approved within an extraordinary assembly in 1993, and its contents are:

- Respect for the truth.
- Respect for privacy and personal image of citizens and news characters, specially in cases related with personal pain, youth and children, or medical issues, with the exception of those cases whereas it exists a public interest justification.
- Respect for the principle of innocence in judiciary cases, with special regards on behalf of the identity of youth and children.
- Special respect for those under a weak or discrimination situation.
- Non diffusion or broadcasting of facts which are not based on truthful documentation or information, with source contrasting.
- Using of licit methods for the obtainment of news.
- Respect for the “off the record” method.
- Distinction between facts and comments/opinions.
- Non acceptance of gifts, presents or any kind of retribution because of an article orientation.
- Non personal use of the information obtained under his/her professional role.

In October 1992, the Deontological Code of the Journalistic College of Catalunya was approved, and two years after, the College started working in the constitution of an organ with the duty of controlling the fulfilment of the Code, which will finally arrive in 1996 under the name of Information Council, with 19 members whose professions are: academics, journalists, judges, and other representatives of different sectors as medicine or economy.

The deontological criteria of the Code are structured under four main fields: general ones, criteria on image manipulation, criteria on news pictures and criteria on the Internet:

- Distinction between news and comments/opinions.
- Source contrasting of news.
- Use of licit methods for the attainment of information and images.
- Respect to the “off the record”.

624
Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

- Recognition of the right of people to keep in silence and to give no interviews.
- Non acceptances of gifts, presents or any kind of retribution because of an article's orientation.
- Non personal use of the information obtained under his/her professional role.
- Respect for the people's right to privacy and self-image.
- Respect to the principle of innocence in judiciary cases.
- Special care in news related with youth and children.
- Special care in news related with any kind of discrimination.
- Non modification of any news picture or image which gives as result a different picture to the one taken by the camera.
- Accuracy rectification when necessary.

In the case of the Journalistic College of Galicia, either its Statute as its Deontological Code is a simple copy of the Journalistic College of Catalunya, although its Government Board only has 12 members and it does not have a Deontological Council at the moment.

c) Basis of the co-operation

There is no formal or official legal co-operation between the regulatory and non-regulatory systems in the sector of the press.

d) Institutions involved in the system

In respect of the state regulatory system the Parliament of Spain, the Government and the Courts in the solution of judicial cases are involved.

In respect of the non-state regulatory system there is the Federation of Spanish Press Associations, which has got four main governing organs: the General Assembly, the Federal Council, the Executive Council and the President; however, for this study it is much more important to remark the role of the Deontological Council, whose mission is the resolution of conflicts in respect of the fulfilment of the principles of the Federation's Deontological Code, which is applicable not only to the press sector, but to
any associated journalist despite of his/her medium. The current Deontological Council is formed by 12 people, whose professional backgrounds are: journalists, judges, academics, non-profit organizations members. Their first meeting took place on November the 4th 2004.

Furthermore there is the Journalistic College of Catalunya, which has as its main organ the Governing Board, comprising 25 people from the professional sector. The Journalistic College of Galicia only has 12 members in its Governing Board and it does not have a Deontological Council at the moment, is also part of the non-state system.

\textit{e) Functioning of the system}

The system functions in its two branches, as there is no legal or formal relation between them. The funding of the professional colleges and press associations comes basically from the members’ fees.

\textit{f) Supervision of the system}

Within the state regulatory system the Government and the Courts are the supervisory instances.

In regard to the non-state part the Deontological Council of the Spanish Federation of Press Associations and of the Journalistic College of Catalunya are competent for the breach of deontological criteria by their members. As it will be explained after, the sanctions of the deontological bodies of both institutions only have a “moral call of attention” character, and the resolutions are sent to both parts, made briefly publicly available through the intern publications of the institutions, and do not prevent from any judicial action.

\textit{g) Impact assessment}

The Deontological Council of the Spanish Federation of Press Associations has recently started meeting, and therefore there are not special interest reports yet; however the Federation develops some work in the publishing of press statements on some press issues; the Journalistic College of Catalunya publishes several reports in scientific and
professional issues of the journalistic sector, as well as some information on the cases solved by the College, but mainly focused on the general remarks of the cases.

2. Part II: Leading Cases

In respect of the questioned application of the 1996 Act on Press and Printing, the Constitutional Court has explicitly recognized in 1990 and 1992 the in-force position of the law, as it has not been explicitly abolished – among others, judgments 171/1990, 172/1990, 240/1992 of the Constitutional Court; and also judgment of the Supreme Court of 24th February 2000. On the other hand, it is difficult to outline press cases solved under the co-operative regulatory system, due to the following facts:

There are thousands of court judgments in respect of press contents, especially in those issues related with protection of honour, privacy and self-image; even it is difficult to outline some sentences coming from the Constitutional Court as they are so many, and at the same time, often they are contradictory, as there is no obligation for a Court to follow others’ statements. However it is possible to refer to this issue, as it has been the most frequent to dispute at the courts, not only in respect of press, but also in respect of television.

So on, we can take some conclusions from specific and remarkable judgments at the Constitutional Court level:

- The right to privacy was defined, among others, by the judgment 115/2000, May 5th: “It is a repeated statement of this Court that the right to privacy recognized by article 18.1 of the Spanish Constitution has as an object to guarantee to the people a preserved space in their lives, linked with the respect to their dignity as persons, against the actions and knowledge of others, whether public authorities or simple citizens. So on, the right to privacy guarantees the power to preserve that private space, whether personal or familiar, against not wanted public diffusion. (...) It is then a matter of each person to preserve this space, making it as wide as each one wants, against peoples' curiosity, and no matter what there is inside that personal space”.

- The right to self-image has an outstanding case in the judgement 231/1988, December 2nd, related with the death of a bull-fighter called “Paquirri”: this right
does not exist as a personal right after the death of the subject; however, its economic effects do continue to exist; also, in respect of this same right and its economic dimension –right of publicity, the judgment 117/1994, stated that self-image business does not mean the extinguishment of this right as a personal right, as its owner can exercise it despite of any contract.

In the non-state regulatory branch of the system, the Deontological Council of the Federation of Spanish Press Associations has just started its activity in November 2004, and it has published three resolutions until the date; however these sanctions only fall into the moral scope, without any monetary or sanctioning consequence. Their publicity falls within the intern publications of the Federation. For the case of the two existing Professional Colleges, the Catalunya one does make publicly available yearly a brief of its decisions, although the sanctions also remain just as moral “calls of attention” to the journalists and media implicated; the Galicia one does not have a deontological council yet. In both cases, the claiming part can make publicly available the resolution.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Press sector

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
</tr>
<tr>
<td>Spanish Federation of Press Associations, 1922.</td>
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<tr>
<td>Journalistic College of Cataluny, 1985.</td>
<td>Court cases.</td>
<td>It is a decision of the damaged part to take the case to the Courts –if the Law considers it as a breach-, with independence of the self-regulation branch.</td>
</tr>
<tr>
<td>Journalistic College of Galicia, 1999.</td>
<td></td>
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<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
</tr>
</tbody>
</table>
The Codes of Ethics of the three institutions are applicable to their members.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation

Measures by third parties (e.g. NGOs)

The range of possible subjects of non-state action has to be limited to make the definition workable.

Yes, but most parts of professionals of the press sector do not belong to these institutions, except in the case of Catalunya, where the Journalistic College is widely accepted.

### Link between the non-state-regulatory system and state regulation

<table>
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<tr>
<th>Criteria</th>
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<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
<td></td>
</tr>
<tr>
<td>Journalistic ethic standards</td>
<td>There is a legal basis for the non-state regulatory system</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
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<tr>
<td></td>
<td>Any professional college must be created by Law in Spain; however the law does not interfere in its internal organizations or functioning.</td>
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<tr>
<td></td>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
</tr>
<tr>
<td></td>
<td>No mentions to the non-state regulatory system in the Law.</td>
<td></td>
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<tr>
<td></td>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
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Co-Regulation Measures in the Media Sector: Annex 5: Country reports on possible co-regulatory systems

<table>
<thead>
<tr>
<th>No.</th>
<th></th>
<th>promise innovation.</th>
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<tr>
<td></td>
<td></td>
<td>In fact, the press codes of ethics usually speak in very general words</td>
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</tbody>
</table>
Conclusion: It is not possible to talk of a real and effective co-operative system, as the principle regulatory frame for the press belongs to the state system; the lack of compulsory affiliation to the Spanish Federation of Press Associations, as well as the recent creation of its Deontological Council, determines the inexistence of an efficient self-regulatory framework, especially due to the fact that the sanctions only possess a moral character, but do not have any other consequence.

III. Co-operative Regulatory Systems in the advertising sector

1. Part I: The co-operative regulatory system

As mentioned before in the case of television advertising state regulation, one of the characteristics of the advertising content regulation system in Spain is the existence of a General Act on Advertising which is not restricted to an unique medium; further, this law gives a national regulation for the field, despite of the existence of some regional laws on the issue, due to the legal powers of regional governments and parliaments, although over secondary aspects of the activity.

a) Development of the regulatory system

The General Act 34/1988, 11 November 1998, on Advertising was the first constitutional law on advertising after 40 years of dictatorship under General Franco, whereas the Advertising Statute –1964- was its main regulatory frame. It has been slightly modified by Act 39/2002, 28 October 2002, on the implementation of several community directives on the protection of the interests of consumers and users, and by the Organic Act 1/2004, 28 December 2004, on protection measures against violence against women.

It is also necessary to mention the Act 26/1984, 19 July 1984, on the Defence of Consumers and Users, the Act 17/2001, 7 December 2001, on Trademarks, as well as some specific provisions of the Act 24/2002, 11 July 2002, on Information Society services and electronic commerce, concerned with electronic commercial communications.

In the field of non-state regulatory system, we must refer to the role of Autocontrol, the Association for Self-Regulation in Commercial Communications, founded in June 1995,
and before called Association for Self-Regulation in Advertising; it is a self-regulation organ, which receives acceptance by the advertising market players, as for the number of controversies solved by this method. Its members are advertisers, advertising agencies, mass media, managers associations, as well as other companies involved in commercial communications services; all together they represent 80% of the revenues of the advertising market.

b) Subject-matter of the regulatory system.

The 1988 General Act on Advertising states the non-licit and forbidden advertising:

- “advertising which goes against people's dignity, which breaches constitutional values, especially those referred to children, youth and women”.
- “misleading advertising”, defined as advertising in any form which take or can take addressees to mistake, affecting to the economical behaviour, or damning or being able to damn a competitor; also, any advertising that silences fundamental data of the goods, services and activities when this silence could take addressees to mistakes.
- “anticompetitive advertising”, defined as any measure that because of its content, presentations or diffusion makes direct or indirect discredit, denigration or despise over a person, a company, their products, services, activities, circumstances, trademarks, commercial names or any other distinctive symbol; also, any advertising that takes to a confusion with competitors, or uses under no justification any of their distinctive signs; besides, any advertising which goes against good faith, correction rules and market good uses.
- “subliminal”, any advertising using any techniques to produce under senses stimulus, without conscient perception of the audience.
- “advertising which breaches the laws regulating advertising on certain products, services, goods and activities”.

And as mentioned, comparative advertising is considered as non-loyal advertising and is not admitted by this Act when “it is not founded on essential, neighbouring and objective characteristics of products or services, or whenever the compared products or services are not similar or known, or have a limited presence on the market”, with no restriction to any media.
As it can be seen this Act includes in its definition of non-licit advertising the main provisions of the EC Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, as well as the Directive 97/55/EC of the European Parliament and the Council of 6 October 1997 amending the before one, so as to include comparative advertising.

On the other hand it is also necessary to mention the Act 26/1984, the Act 39/2002, the Act 17/2001 and the provisions of Act 24/2002 (see above under a)). Although these four acts do not refer specifically to advertising activities, they should be taken into account under some of their precepts:

- the right to information of consumers and users on products and services labelling and their characteristics information.
- the modification of the procedure of the exercise of the actions of rectification and cease of advertising campaigns.
- the anticompetitive use of trademarks.
- and the rules concerning electronic commercial communications.

On the scope of the non-state regulation provisions, Autocontrol has as its first aim to solve advertising controversies, creating a frame of responsible truthful commercial communications, avoiding courts in the resolution of advertising conflicts, in order to save money and time. As a self-regulation association it has, since 1996, a Code of Advertising Conduct, modified in 2002, with quite a similar content to the 1988 General Act on Advertising, plus some other principles. It is based on the main contents of the ICC International Code of Advertising Practice; further, Autocontrol also belongs to the European Advertising Standards Alliance, EASA. We will avoid here to repeat the general rules defining the non-licit and forbidden advertising, referring to subliminal, misleading, anticompetitive, comparative or surreptitious advertising, as they were briefly explained before; however, we will have a look to some other principles of the Code:

- Advertising must be worthy to the service it provides in the market.
- Respect for the condition of good faith in advertising in respect of consumers.
• Non use of fear, distress or superstition to promote consumers’ acquisitions of products and services.
• Non violence promotion or incitement in the ads.
• Non illegal behaviours promotion.
• Respect for good taste.
• Non dangerous practices promotion.
• Non discriminatory advertising, whether based on sex, religion, race or nationality.
• Easy identification of the ads as commercial communications.
• Respect for truth advertising.
• Respect for the rights of honour, privacy and personal image.
• Non promotion of damage to the environment.
• Obligation of exhaustive and understandable truth information on behalf of goods and services characteristics or prices; also truthfulness in respect of testimonials, whether they are paid for or not.
• Non exploitation of the immaturity of children or adolescents, nor must advertisement take advantage of their sense of loyalty.
• Non misleading of children in respect of size, value, nature, durability or performance of the product.
• Promotion of healthy habits between children.

But Autocontrol has also published an Ethical Code on Electronic Commerce and Interactive Advertising (1999), reviewed in 2005, and another one on Cinema Advertising (2000). The first one, under the subtitle of “Confianza On-Line” (On-Line Trustmark), refers to the general advertising ethical code applied to the Internet, in electronic advertising as well as electronic commerce; as well as to the General Act on Advertising, as basic references.

Further, it settles:
• The need for identification of the advertiser and the advertising character of the message.
• Prohibition of unsolicited email advertising.
• Prohibition of advertising in newsgroups, chats, etc. except when counting on the consent of the webmaster or responsible of the web page.
• Requirement of exhaustive information for the cases of electronic commerce.
• Special protection of privacy and personal data in electronic commerce transactions.
• Special protection of people under age: identification of exclusive adult content.

It also establishes a double system for the resolution of disputes under this Code: the Jury of Autocontrol itself and the National Arbitration Council on Consumer Affairs for those issues related with Internet advertising and e-commerce, respectively.

The second one, on Cinema Advertising Ethics, goes again over to the main Autocontrol ethical code as the fundament of the principles of this other one; it does not support many new ideas, except in the case of those related with films promotion – trailers-, which should be adequate to the age classification of the film given by the Institute of Cinematographic and Audiovisual Arts.

Finally, on the other hand, the Catalunya Advertising and Public Relations Professional College, although with a regional scope, was the first Spanish professional body constituted for the advertising sector; it was created by the Act 12/1998, 5th November, of the Catalunya Parliament, with the same objectives and aims as the Journalistic one, but applied to the advertising and public relations sector. Its Governing Board is formed by 13 people, elected by the members, and has a specific commission on ethical issues. Besides, from 2001, it also exists a Valencia Advertising and Public Relations Professional College created by the Act 5/2001, 20th June, of the Valencia Parliament. Its Government Board is formed by 10 people, elected by the members, but there is not a specific ethical commission or code yet.

c) Basis of the co-operation

As mentioned before, in 2003, the Ministry of Industry, Commerce and Tourism, through the Technical Secretary for the Information Society, signed an agreement with AUTOCONTROL in order to promote an Agreement signed in 2002 between the main national television broadcasters, the Spanish Association of Advertising Agencies and Autocontrol, to pursue the application of self-regulation rules in television advertising; apart from this, the Catalunya and Valencia Advertising and Public Relations Professional Colleges were created by law.
The Catalunya Advertising and Public Relations one was created by the Act 12/1998, 5\textsuperscript{th} November, of the Catalunya Parliament, with the aim to control the access and development of the advertising and public relations fields, as well as the defence of the interests of the professionals. The control of the fulfilment of advertising ethical standards is also part of its functions. The General Board of the College has the mission to set up the ethical code, which was approved in 2005, after seven years of existence of the professional body. However the text has not been made publicly available yet. The affiliation to the College is not compulsory for the development of the advertising or public relations profession.

Opposite to this, the Valencia Advertising and Public Relations College introduced compulsory affiliation at the time of its creation by the Act 5/2001, 20\textsuperscript{th} June, of the Valencia Parliament. Its functions are similar to those of the Catalunya one. The Governing Board plays the main role in its management. It is the duty of the associated professional to fulfil the ethical standards of the profession. However, an ethical code has not been approved yet, and neither an ethical commission nor a committee exists.

d) Institutions involved in the system

The state regulatory system includes national and regional governments and parliaments, as well as the courts. Also, the Ministry of Industry, Commerce and Tourism, through its Technical Secretary for the Information Society.

The non state regulatory system includes Autocontrol (see below under e)), as well as the Catalunya Advertising and Public Relations Professional College and the Valencia Advertising and Public Relations Professional College (see above under c)).

e) Functioning of the system

The most important board of Autocontrol is the Jury, with the mission of solving the mentioned controversies presented either by a third member, a private association or even a sole consumer or citizen; the only requirement is to present reasonable clues of a breach of advertising ethical rules. The Jury itself is composed by experts in the field of Law, Economics, commercial communications, and 25\% of them elected by the National Institute of Consume. In fact, this controversies solution system has been
qualified by the European Commission as an extra-judiciary organ, fulfilling all the legal requirements. Among the Jury functions we must also outline the presentation of Ethical Codes drafts.

But apart from the role of the Jury on the controversies solution, Autocontrol has enhanced since January 2001 a previous consulting method, called “Copy Advice”, as a way of avoiding the deeper consequences in the creation, diffusion and broadcasting of ads; this system works through a technical board in charge of making a statement on a certain campaign, when required by a member, before its definitive creation or broadcasting. This statement has a confidential character and its fulfilment is non-compulsory, and the usual term taken to give an opinion is three days.

In respect of the claims which arrive to the Jury, the process is a bit longer, but however still shorter than the judiciary line: once a claim arrives to Autocontrol, a statement is sent to the advertiser which will be able to present its allegations; if the advertiser accepts the arguments of the claim, the case will be immediately closed; if not, then the case will arrive to the Jury which will also make a statement; it will be possible to present an appeal against it; in that case, it will be the whole of the Jury, instead of one of its sections, to give a definitive solution. The usual terms to solve these controversies through the Jury do not take much longer than one month, even in case of appeal. Opposite to other self-regulation and independent authorities reviewed in this report, the resolutions of the Jury are made publicly available in their whole through the web page of Autocontrol, and also through the Autocontrol monthly bulletin.

It must be mentioned that the existence of Autocontrol Jury does not prevent any judicial action of individuals, associations, institutions or companies. As a self-regulation tool, it is totally compatible with the legal system. However, Autocontrol provides a faster and cheaper way of solving controversies, especially in regard to complaints concerning the rectification or the cancellation of a campaign. On the other hand, there is no obligation for the courts to follow Autocontrol Jury criteria.

In respect of the agreement of 2003 between Autocontrol and the Ministry of Industry, Commerce and Tourism, it refers to Autocontrol to keep control over the advertising activity of the broadcasters.
f) Supervision of the system

The National Government could impose administrative sanctions in case of infringement of the TV without Frontiers Directive. Autocontrol Jury is competent as the relevant self-regulation system on the advertising industry. And Autocontrol itself can give notice to the Ministry of Science in case of breaches of the ethical codes of advertising by national television broadcasters, due to the 2003 mentioned agreement. Professional Colleges of Catalunya and Valencia will be competent in respect of future complaints in regard to ethical standards, according to the behaviour of their members.

g) Impact assessment

The Jury of Autocontrol has developed itself as the most preferred medium for the solving of controversies in the advertising sector, due to its big affiliation, affecting to 80% of the companies involved on the advertising market.

2. Part II: Leading Cases

Apart from the above mentioned issues on the application of the TV without Frontiers Directive, there are plenty of court cases in respect of advertising; but most of them only get to the first steps of the judiciary system, that is to say the 1st Instance Courts and the Provincial Courts, which makes it almost impossible to outstand some specific cases; however, we must bring here one of the most important Constitutional Court cases, related with the issue, as it is the Pablo Casado Coca case, which also was taken to the European Court of Human Rights: the case concerned Pablo Casado Coca, a lawyer, who inserted an informative ad within a local short circulation newspaper, breaching the intern rules of the Catalunya Lawyers Professional College, which forbid advertising to its members; Pablo Casado Coca brought actions to the courts, defending that his ad was just another form of exercising the right of information of citizens; the case arrived to the Supreme Court –resolution of September, the 23rd, 1988-, which stated that “advertising (...) does not mean the exercise of an activity included in article 20 of the Spanish Constitution, (...) as it is related with the existence of a professional activity in order to obtain a monetary benefit”. The appeal was dismissed by the Constitutional
Court on April, the 17th, 1989; and Pablo Casado Coca took the case to the Strasbourg Court which considered that the data contained in an ad do contribute to the granting of the rights to give and receive information.

But it is much more interesting to make a reference to the self-regulation branch in respect of the cases, as the Autocontrol Jury has received from 1995 until nowadays, around 1,300 claims; and the Copy Advice system has received over 7,000 consults. There are specific data in respect of last year, which talk about 180 claims before the Jury and almost 2,700 previous consults:

The Copy Advice system devoted half of its last year's activity on the field of the protection of youth and children against television advertising; 53% received a positive answer, 24% were said to be modified, and the other 23% was said not to be broadcasted; the main reasons to discard or modify the ads were related with misleading advertising and non fulfilment of specific laws in respect of exhaustive data information about products for children and youth.

The Jury system received 180 claims against 176 ads, being the preferred way of solving advertising controversies; 73% were presented by individual consumers or consumers associations; just in 6 occasions the claims were not attended or were sent to the judiciary system or administrative authorities; the main issues dealt with were untruthful advertising and breach of the good faith principle. One of the most famous cases solved by the Jury was the one related with the first comparative advertising practices in Spain, carried out by DON SIMON, an orange juice trademark, which in the mid-nineties started using this advertising technique to compare the amount of natural juice of its product with RADICAL, another trademark carried by PEPSI; in 1998, the comparative fight was against MINUTE MAID, belonging to DANONE and COCA COLA, using as argument that the second one was a drink obtained from concentrated orange juice, while DON SIMON was direct orange juice; the Autocontrol Jury gave a positive answer to DON SIMON, as the compared characteristics were similar, essential, could be proved and gave real information to consumers about both products.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Advertising sector

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
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<td>The creation of organisations, rules or processes</td>
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<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
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**AUTOCONTROL, 1995**


To influence decisions by persons or, in the case of organisations, decisions by or within such entities | Pure consultation | AUTOCONTROL Jury starts functioning whenever there is a formal claim against the commercials of any company. | The non-state component should at least in a nutshell... |
organisations, decisions by or within such entities | be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.

Yes.


As long as this is performed by or within the organisations or parts of society that are addressees of the regulation | Measures by third parties (e.g. NGOs)

The range of possible subjects of non-state action has to be limited to make the definition workable.

80% of the companies involved in the advertising sector belong to Autocontrol.
Any professional who is member of the Advertising Professional Colleges of Catalunya or Valencia is under their jurisdiction.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
<th>Cases excluded by this criterion</th>
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Advertising, and also, due to the Agreement signed with the Ministry of Science in 2003, it can give notice to it of any breach of the Code of Advertising Conduct by national main television broadcasters.

In respect of the Confianza On-Line system, the two branches of resolution are the Autocontrol Jury as well as the National Arbitration Council on Consumer Affairs.
**Conclusion:** The advertising market is the leading sector in the co-operative system in Spain, thanks to the deep impact of the non-state regulatory system, through Autocontrol and its Advertising Code of Conduct, which is respected and applied by approximately 80% of the companies involved in the market. Although mainly based on the 1988 General Act on Advertising, the Jury of Autocontrol has become a leading method for the solution of controversies.

**IV. Co-operative Regulatory Systems in the internet sector**

1. **Part I: The co-operative regulatory system**

Very few provisions can be remarked for the internet sector, either from the state regulation or non state regulation point of view, as the main legal provisions in the field are focused on the licensing of access or content providers; and the content regulation is controlled under the laws cited for other fields like press, television, radio or advertising.

*a) Development of the regulatory system*

In respect of the internet content distribution, the state regulation does not get into specific measures regarding the issue, but refers to aspects related with electronic commercial communications, electronic commerce, protection of personal data during electronic transactions, and regulation of the Internet domain name “.es”. The state laws on the field are: Act 32/2003, 3rd November 2003, on Telecommunications, Act 34/2002, 11th July 2002, on Information Society services and electronic commerce; Order 662/2003, 18th March 2003, on the National plan on internet domain names under the Spanish code “.es”; Act 59/2003, 19th December 2003, on the electronic signature; and the Royal Decree 292/2004, 20th February 2004, on the creation of a public trust mark for Information Society services and electronic commerce.

In respect of the state regulatory branch, we must name here the existence of one independent authority publicly entitled, as it is the Telecommunications Market Commission, as well as the existence of a kind of public company called Red.es, entitled by the Ministry of Science and Technology to manage the Internet Spanish domain “.es”.

647
The Telecommunications Market Commission was created by the Royal Decree 6/1996, 7th June 1996, on the Liberalization of telecommunications, with no powers on the content regulation; its three main functions are, then, the encouragement of competence within the market, the supervision of general duties of the operators, as well as the development of an arbitrage role in case of conflict. It has a General Council formed by 9 people, a president, a vice-president, a general manager and a secretary. The Council members are named by the Government for a six year term.

The Red.es public company belongs to the Ministry of Industry, Tourism and Commerce; and it was created in 2002. One of its main goals is the Information Society and Telecommunications Observatory, which develops research and studies on statistics and qualitative data. On the other hand, and focusing on self-regulation, we must mention the Electronic Commerce and Direct Marketing Federation and Asimelec, as the most remarkable associations with ethical standards, although they are not engaged deeply into content matters. The Electronic Commerce and Direct Marketing Federation was funded in 1977 as a private association of companies working in the field. Asimelec considers itself as a multi-sector association of electronic and communications enterprises, existing since 1984; the affiliated companies represent 80% of the Internet services and traffic providers.

b) Subject-matter of the regulatory system

It can be of interest to have a short overview over the main provisions of the Act 34/2002, 11th July 2002, on Information Society services and electronic commerce, as it implements the corresponding EU directives on the issue, and makes some interesting statements on the responsibility for Internet content broadcasting:

- No need for previous authorisation to establish a company on the Internet.
- Obligation of communication of an email address or domain name to the Commerce Register.
- Obligation of identification on the net for services providers.
- Non obligation for intermediary services providers of supervising or controlling the contents; however, they must collaborate with access blocking when required by the authorities. Responsibility in respect of contents will only appear
in case they collaborate in the making of the contents, or when it is known that they are illegal, if they provide them.

- Compulsory identification of electronic advertising.
- Need of compulsory and explicit consent for email advertising.
- Promotion of ethical codes on the Internet.

For the non-state regulatory system:
In the case of the Electronic Commerce and Direct Marketing Federation, it has a very short ethical code on the protection of personal data, which just contains the provisions of the laws on the issue; also, it runs the Robinson Lists in Spain for those who do not wish to receive unsolicited advertising. In the case of Asimelec, it published a deontological code in November 2004 declaring the respect for the human rights values, freedom of information, human dignity, and especially, protection of children and youth. Also, the code pursues the clear identification of the commercial activities of Asimelec members, as well as the commercial nature of the services and products offered. The main aim of the Asimelec code is to offer to consumers a trust guarantee. Also, we must go again back to Autocontrol Ethical Code on E-Commerce and Advertising, as well to the system Confianza On-Line, created in 2003, to give consumers security on their transactions through the Net, and e-advertising.

c) Basis of the co-operation

The Telecommunications Market Commission was created by the Royal Decree 6/1996, 7th June 1996, on the Liberalization of telecommunications; the public company Red. Es belongs to the Ministry of Industry, Commerce and Tourism.

d) Institutions involved in the system

National Government and Parliament; Courts.
Telecommunications Market Commission.
Electronic Commerce and Direct Marketing Federation (ECDMF)
Asimelec
Autocontrol
e) – f) Functioning and Supervision of the system

In respect of Asimelec and the Electronic Commerce and Direct Marketing Federation the organisations themselves supervise the fulfilment of their deontological codes. Their respective members can introduce a complaint in case of any non-fulfilment. However the consequences of these infringements of the ethical codes are, once again, mainly “moral calls of attention”.

In the case of the Confianza On-Line system, the breach of its ethical rules on e-advertising and e-commerce will start a mechanism where a consumer will be able to make a complaint before the Autocontrol Jury or the National Institute on Consumer Affairs.


g) Impact assessment

The Telecommunications Market Commission publishes a yearly report on the sector, but not referred to contents.

2. Part II: Leading Cases

Not made publicly available.
### 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

#### Table: Criteria / Internet sector

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<td>Asimelec, 1984</td>
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<td>Confianza On-Line, 2003</td>
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<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be</td>
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<td>Ethical Code of the Electronic Commerce and Direct Marketing Federation.</td>
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<td>practically impossible to single out pure knowledge exchange.</td>
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<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
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<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of</td>
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<td>Country report on possible co-regulatory systems</td>
<td>Implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
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<tr>
<td>There is not a proper co-operative system on behalf of contents.</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation.</td>
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<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
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<td>The state uses regulatory resources to influence the non-state regulatory system</td>
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Conclusion: The internet content distribution sector constitutes a co-operative system in respect of the services provided, but not of the harmful or illegal contents; the creation by Law of the Telecommunications Market Commission as an independent authority must be understood within the so mentioned technical and financial context. Besides, the ethical codes of the Electronic Commerce and Direct Marketing Federation and Asimelec only have medium relevance.

V. Co-operative Regulatory Systems in the video-games sector

1. Part I: The co-operative regulatory system

a) Development of the regulatory system

As it was stated in the first Spanish report, the unique state provision in respect of the videogames sector is the Decree 37/2002, 12 July, 2002, on the administrative authorization procedure for the exploitation of videogames and software in personal computers; however, it does not contain any provisions in respect of harmful content or age classification.

So the sole regulatory system comes through the branch of self-regulation within the classification code of the Spanish Associations of Entertainment Software Editors and Distributors, ADESE. It was created in 1997 to promote the development of the specific market, but counting on its duties with the promotion of exhaustive information on the contents of the products to parents, consumers, educators and, in general, the society.

Since 2003 the Pan European Game Information self-regulation code has been used by several Spanish companies to age-classify its products and content, thanks to the signing of the code by the Spanish government; this code substitutes and extends the 2001 code of ADESE.

Besides, ADESE has also published a Code on Videogames Advertising, and any breach of it can be taken, since 2005, to the Autocontrol Jury.

b) Subject-matter of the regulatory system

This Pan European Game Information system establishes five age categories:

- Over 3 years old.
• Over 7 years old.
• Over 12 years old.
• Over 16 years old.
• Over 18 years old.

And it may also include content quality categories related with discrimination, drugs, fear, bad language, sex and violence.

c) Basis of the co-operation

Signing of the PEGI agreement by the Government of Spain.

d) Institutions involved in the system

National Government and Parliament and ADESE

2. Part II: Leading Cases

None.
### 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

#### Table: Criteria / Video games sector

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<td>PEGI system</td>
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<td>ADESE and Autocontrol</td>
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<tr>
<td>There is a legal basis for the non-state regulatory system</td>
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<td>Signment of the PEGI agreement by the government</td>
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**Conclusion:** The co-operative system exists as long as the Government has signed the PEGI agreement in 2003, in order to implement the European videogames age classification.

**General conclusion**

It is very difficult to refer to the Spanish case as an authentic co-operative regulatory system, as the practice development shows that we are still in low levels of application in the branches of the non-state regulatory system.

The main supervision of contents in our co-operative system has been made, until the date, by the state regulation, which is generally not applicable only to a medium, but all mass media contents; also, it is necessary to mention that the role of the European Union, especially with the TV without Frontiers Directive, and the directives on the electronic commerce and Information Society services, have encouraged the implementation of law rules on these issues.

However, we must outstand that in the field of advertising it is possible to talk about a co-regulatory system, looking at the role of Autocontrol, and its self-regulation Jury. The approval of the self-regulation Code on TV Content and Children, signed by the Government and the main national television operators last December 2004, could be a first starting point for a wider effectiveness of the co-operative system, but this will depend on the real desire of broadcasters to fulfil it, and a comprehensive supervision by the authorities.
3.19. Sweden

I. Co-operative Regulatory Systems in the press sector

1. Part I: The co-operative regulatory system – Press Ombudsman and Press Council

   a) Development of the regulatory system

   The Swedish Press Council (PON) was established in 1916 and is the oldest tribunal of its kind in the world. The Press Ombudsman (PO) was established in 1969. The PO and the PON were set up with the purpose of giving the general public a forum to complain on items in the press. Before the establishment of the office of the PO, complaints regarding violations of good journalistic practice were filed with the PON. Currently, incoming complaints are first handled by the PO, who also may look into matters ex officio. The principals of the PO and the PON are the foundation of the Press Ombudsman (Sw. Stiftelsen Allmänhetens Ombudsman), which was founded by the Publicist’s Club (Sw. Publicistsklubben). The current PO is Olle Stenholm who was appointed in 2000 and is a former journalist.

   b) Subject-matter of the regulatory system

   “The Press Ombudsman (PO) shall provide advice and assistance to individuals who feel offended by something that has been published in a newspaper, other periodical or Internet publication, investigate deviations from good journalistic practice, either on his own initiative or following an application, whenever appropriate refer such cases for decision by the Press Council and, by participating in public debate further the cause good journalistic practice.”

   The PO and the PON supervises that the Code of Ethics for the Press, Radio and TV are followed in periodicals. The Code of Ethics establishes in principal that the press shall provide accurate news, treat rebuttals generously, respect individual privacy, exercise care in the use of pictures, listen to each side and be cautious in publishing names. The PO shall also,

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1 Section 1 of the Instructions for the Office of the Press Ombudsman.
2 For an English version, please see http://www.po.se/Article.jsp?article=1905&avd=english.
as far as possible, provide information and advice on good journalistic practices etc. to the
general public.³

c) Basis of the co-operation

The work and procedures carried out by the PO is governed by the Instruction for the Office
of the Press Ombudsman.⁴ The work and procedures carried out by the PON is governed by
the Charter of the Press Council.⁵ The material regulations that the PO and the PON base their
supervision on follow from the Code of Ethics for the Press, Radio and TV. Pressens
Samarbetsnämnd is a joint committee founded by the leading media organisations in Sweden:
The Newspapers Publishers Association, The Magazine Publishers Association, The Union of
Journalists and The National Press Club. These four organisations are responsible for the
Charter of the Press Council and the Standing Instructions for the Press Ombudsman. They all
contribute to the financing of the Press Council and the Office of the Press Ombudsman. The
concept of self-regulation means that the parties define the ethical and professional guidelines
and see to it that these guidelines are respected.
Below follows full text version of the Code of Ethics for the Press, Radio and TV and relevant
parts of the Charter of the Press Council and the Instruction for the Office of the Press
Ombudsman.

CODE OF ETHICS FOR PRESS, RADIO AND TELEVISION
The press, radio and television shall have the greatest possible degree of freedom, within the
framework of the Freedom of the Press Act and the constitutional right of freedom of speech,
in order to be able to serve as disseminators of news and as scrutinizers of public affairs. In
this connection, however, it is important that the individual is protected from unwarranted
suffering as a result of publicity.

Ethics does not consist primarily of the application of a formal set of rules but in the
maintenance of a responsible attitude in the exercise of journalistic duties. The code of ethics
for press, radio and television is intended to provide support for this attitude.

I. RULES ON PUBLICITY

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³ Section 9 of the Instruction for the Office of the Press Ombudsman.

⁴ For an English version of the Instruction, please see http://www.po.se/Article.jsp?article=2291&avd=English.

⁵ For an English version of the Charter, please see http://www.po.se/Article.jsp?article=2290&avd=english.
Provide accurate news

1. The role played by the mass media in society and the confidence of the general public in these media call for accurate and objective news reports.

2. Be critical of news sources. Check facts as carefully as possible in the light of the circumstances even if they have been published earlier. Allow the reader/listener/viewer the possibility of distinguishing between statements of fact and comments.

3. News bills, headlines and introductory sections must be supported by the text.

4. Check the authenticity of pictures. See to it that pictures and graphical illustrations are correct and are not used in a misleading way.

Treat rebuttals generously

5. Factual errors should be corrected when called for. Anyone wishing to rebut a statement shall, if this is legitimate, be given the opportunity to do so. Corrections and rebuttals shall be published promptly in appropriate form, in such a way that they will come to the attention of those who received the original information. It should be noted that a rebuttal does not always call for an editorial comment.

6. Publish without delay critical rulings issued by the Swedish Press Council in cases concerning your own newspaper.

Respect individual privacy

7. Consider carefully any publicity which could violate the privacy of individuals. Refrain from such publicity unless the public interest obviously demands public scrutiny.

8. Exercise great caution in publishing information about suicide and attempted suicide, particularly with regard to the feelings of relatives and in view of what has been said above concerning the privacy of individuals.

9. Always show the greatest possible consideration for victims of crime and accidents. Consider carefully the question whether to publish names and pictures with regard to the victims and their relatives.

10. Do not emphasize ethnic origin, sex, nationality, occupation, political affiliation, religious persuasion or sexual disposition in the case of the persons concerned if such particulars are not important in the specific context and demeaning.

Exercise care in the use of pictures

11. Whenever appropriate, these rules also apply to pictures.

12. Montage, electronic retouch and captions should be handled in such a way as not to mislead or deceive the reader. Whenever a picture has been altered through montage or
retoch this should be stated. This also applies to such material when it is filed in picture libraries.

Listen to each side

13. Offer persons, who are criticized in a factual report, the opportunity to reply instantly to the criticism. Aim at presenting the views of all parties involved. Bear in mind that the sole objective of filing complaints of various kinds with various bodies may be to cause harm to an individual.

14. Remember that, in the eyes of the law, a person suspected of an offence is always presumed innocent until proven guilty. The final outcome of a legal case should be published if it has been previously reported on.

Be cautious in publishing names

15. Give careful consideration to the harmful consequences that might ensue for persons if their names are published. Refrain from publishing names if it might cause harm unless it is obviously in the public interest.

16. In case a person's name is not published, also refrain from publishing a picture of that person or particulars of occupation, title, age, nationality, sex, etc, which would enable identification.

17. Bear in mind that the entire responsibility for publishing names and pictures rests with the publisher.

COMMENTS ON PART I

The Swedish Press Council is primarily responsible for interpreting the concept "good journalistic practice" as far as the press is concerned; in matters not referred to the Press Council, the Press Ombudsman has this responsibility. It should be noted that the Press Council and the Press Ombudsman do not deal with possible deviations from the rules in radio or television programmes. The Swedish Broadcasting Commission, appointed by the government, is responsible for monitoring such programmes.

The criticized newspaper will publish the Press Council's ruling. In addition brief reports will also be published in Pressens Tidning (The Press Journal) and in Journalisten (The Journalist). Subscriptions to the Press Council's decisions are handled by the Swedish Newspaper Publishers Association (Tidningsutgivarna).

Rulings by the Broadcasting Commission may be ordered from the Commission Secretariat.
Instruction for the Office of the Press Ombudsman

§ 1

The Press Ombudsman (PO) shall provide advice and assistance to individuals who feel offended by something that has been published in a newspaper, other periodical or Internet publication, investigate deviations from good journalistic practice, either on his own initiative or following an application, whenever appropriate refer such cases for decision by the Press Council and, by participating in public debate further the cause good journalistic practice.

With regard to Internet PO’s mandate has the following limitations:

a) The review applies to Internet publications by companies represented in the Joint Committee of Press Associations.

b) The review applies to such Internet publications that constitute supplements to periodicals as defined in the Freedom of the Press Act 1:7 or which are referred to in the Freedom of Speech Act 1:9 and produced by the editorial staff of a printed periodical or by a company belonging to a corporation that also publishes periodicals.

§ 2

An application to PO should be made in written form. If it concerns an Internet publication a printout of the published material should be enclosed.

§ 5

In deciding whether a case should be referred to the Press Council, PO shall primarily consider whether the following requirements have been met:

a) There must me reasonable ground for the application.

b) Review of a case by the Council must be of significance in view both of ethical principles and the damage which the article might have caused.

c) The application must refer to a relatively recent article.

Should PO find that the application does not meet the above requirements, the case shall be dismissed. In that context it should be considered whether a correction or reply to the allegations has been published.

Unless otherwise justified, applications to PO may be taken up for review only if they refer to articles or Internet publications published within three months prior to the date that the application was received.

§ 6
PO shall obtain the written consent of the injured party before he - on application from a person other than the injured party or on his own initiative - refers the matter to the Press Council.
§ 9
In addition to the duties of the Office of the Press Ombudsman described in Sections 1-6 herein, the Ombudsman shall, as far as possible, provide the general public with information and advice concerning the professional ethics of the press. Information and advice of this nature shall be free of charge. PO shall as far as possible contribute to the general knowledge of matters concerning the professional ethics of journalists. This should include talks and lectures, the writing of articles, etc., for publication in journals of both a specialized and a general kind, and, if desired, also lecture at educational institutions for journalists.

§ 10
The person appointed Press Ombudsman should have a thorough knowledge of press ethics and related issues. Journalistic experience should also be taken into account. PO shall be appointed by a committee made up of the Chief Parliamentary Ombudsman, the chairman of the Swedish Bar Association and the chairman of the Joint Committee of Press Associations. He shall be employed by the Press Ombudsman Foundation administered and financed by the National Press Club, the Swedish Union of Journalists, the Swedish Newspaper Publishers Association and the Magazine Publishers Association. Conditions of employment and salary shall be established in a separate agreement between PO and the Foundation. The term of office shall be three years. Unless notice is given by the Foundation no later than one year before the expiration of the term of office, or by the PO no later than six months before the expiration of the term of office, it shall be automatically renewed for a further three-year period. The same period of notice as applied to the first term of office shall apply to each new term of office. The Assistant Press Ombudsman shall be appointed by the board of the Press Ombudsman Foundation in consultation with PO. Conditions of employment and salary shall be established in a separate agreement drawn up between the Assistant Press Ombudsman and the Foundation.

The charter of the Press Council:

§ 2
The Council may take up cases for review on application by the Press Ombudsman or when an application is submitted to the latter and referred by him for consideration by the Council. Applications submitted to the Press Ombudsman but dismissed by him may instead be
referred to the Council by the applicant on condition that the matter concerns the applicant personally.

Applications may be submitted by individuals. Applications from companies, organizations or public authorities should as a rule be considered only regarding correction of facts or reply to an allegation.

§ 4
The Council shall report its opinion on the cases reviewed. These reports shall be made public.

§ 5
The Council shall consist of a chairman, a first, second and third vice-chairman, and fourteen ordinary members.

The Council shall be divided into two groups, each group consisting of a chairman or vice-chairman and seven ordinary members. With due observance of the provisions of the first paragraph of section 8 herein, the placing of the members in the two groups shall be decided for six months at a time by the drawing of lots. The groups are equally qualified to consider the cases handled by the Council.

Fourteen deputy members shall be appointed to replace any ordinary member appointed similarly to the deputy in the event that the ordinary member is unable to attend.

§ 6
The National Press Club, the Swedish Union of Journalists, the Newspaper Publishers Association and the Magazine Publishers Association shall each appoint two members of the Council and two deputy members.

The Chief Parliamentary Ombudsman and the chairman of the Swedish Bar Association shall jointly appoint six members and six deputy members, who shall be respected citizens with wide experience of national affairs. They must not be dependent on any newspaper company or press organization.

The term of office, which is two years, shall commence on July 1. Appointment of members of the Council should be performed at least two months before the beginning of the term of office. Nobody may be elected member or deputy member of the Council for a total term of office of more than six years.

The chairman and vice-chairmen should be jurists with experience of service as regular court judges. They are appointed by the Joint Committee of Press Associations for a term of office of two years. The chairman and vice-chairmen of the Council should be consulted when new
appointments to the chair are made. Nobody may be appointed chairman or vice-chairman of the Council for a total term of office for more than eight years.

Each of the four organizations appointing members of the Council may if necessary appoint temporary replacements. The acting chairman has the same authority regarding the other members.

§ 11
A newspaper censured by the Council shall pay a fee which as of 2002 amounts to the following sum:

Circulation, weekdays Kronor
Up to 10 000 copies 10 000:-
Over 10 000 copies 25 000:-

When an Internet publication is censured the fee charged shall be based on the circulation of the printed publication published by the company in question. The fee shall be adjusted annually in accordance with the consumer price index (CPI) where October 2001 = 100.

§ 12
The fee, which shall contribute to covering the costs of the Press Council and the Press Ombudsman, shall be paid to TU Service AB (The Swedish Newspaper Publishers Association).

§ 13
A printed or online publication criticized by the Council shall without delay publish the entire, unabridged text of the Council's statement in a prominent place in the publication and without special reminder report to the Council that it has done so.

§ 14
The Council shall submit an annual report of its activities to the press organizations specified in Section 6, to the Chief Parliamentary Ombudsman and to the chairman of the Swedish Bar Association.

The chairman of the Council shall inform the Press Ombudsman of the work of the Council on a regular basis.

d) Institutions involved in the system
The PO and the PON are funded by The Newspapers Publishers Association, The Magazine Publishers Association, The Union of Journalists and The National Press Club.\(^6\)

The PO is appointed by a special committee including the Chief Parliamentary Ombudsman ("the JO"), the chairman of the Swedish Bar Association and the chairman of the National Press Club. There is also an Assistant Press Ombudsman, who is appointed by the board of the Press Ombudsman Foundation in consultation with the PO.\(^7\)

"The person appointed Press Ombudsman should have a thorough knowledge of press ethics and related issues. Journalistic experience should also be taken into account."\(^8\)

The PON is composed of (i) a judge, acting as chairman, (ii) one representative from each of the above-mentioned press organisations and (iii) three representatives of the general public. The latter must not have any connections to the newspaper business or to the press organisations.

The chairman and vice chairman” are appointed by the Joint Committee of Press Associations for a term of office of two years. The chairman and vice-chairmen of the Council should be consulted when new appointments to the chair are made. Nobody may be appointed chairman or vice-chairman of the Council for a total term of office for more than eight years.\(^9\)

e) Functioning of the system

Anyone may lodge a complaint with the PO against newspaper items that they regard violates good journalistic practice. Nonetheless, the person to whom the article relates must give his written consent if the complaint is to result in formal criticism of the newspaper.

When a complaint is filed, the PO's task is initially to determine whether it can be corrected by a factual correction or a reply from the affected person published in the newspaper concerned. The PO may contact the newspaper for this purpose. If the matter cannot be settled in this way, the PO may inquire if he suspects that the rules of good journalistic practice have been violated. The PO will then ask the newspaper's editor-in-chief to answer to the allegations of the complainant. After that the complainant will be offered the opportunity to comment on the newspaper's reply. Complaints must be filed within three months of the original publication.

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\(^6\) http://www.po.se/Article.jsp?article=1905&avd=english.

\(^7\) Section 6 of the Charter of the Press Council.

\(^8\) Section 10 of the Instruction for the Office of the Press Ombudsman.

\(^9\) Section 6 of the Charter of the Press Council.
After having carried out the inquiry the PO has two alternatives: either (1) the matter is not considered to warrant formal criticism of the newspaper, or (2) the evidence obtained is weighty enough to warrant decision by the Press Council.\(^\text{10}\)

If the PO decides to dismiss a complaint, the complainant may appeal that decision directly to the Press Council. It must be noticed that the PO never finally decides on a matter, but he merely decides whether a complaint has enough substance to warrant a decision by the PON. To file a complaint with the PO is not connected with any costs for the complainant. Newspapers that violate good journalistic practice are expected to publish the written decision of the Press Council. It may also be ordered to pay an administrative fine.\(^\text{11}\) This fine is used to fund the work of the PO and the PON.

It must be emphasized that if a party wants to receive damages from a newspaper he must bring proceeding before the general courts. A person may refer to the general court even after a matter has been scrutinized by the PO and the PON.

In addition to his scrutinizing powers the PO shall also answer queries from the general public on matters of press ethics.

\[f) \text{ Supervision of the system}\]

The decisions of the PO may be appealed to the PON.

\[g) \text{ Impact assessment}\]

The following material is available:

The Annual Report of the PO and the PON for 2004 and the four preceding years.\(^\text{12}\)

Additionally, it should be possible to request a copy of the Auditors Report or similar for the PO or the PON. These are generally available to the general public.

According to the Annual Report of 2004 the PO received 389 cases during 2004, of these 377 were dismissed, and 40 referred to the PON.\(^\text{13}\)

\(^\text{10}\) [http://www.po.se/Article.jsp?article=1906&avd=english.](http://www.po.se/Article.jsp?article=1906&avd=english.)

\(^\text{11}\) This follows from Section 11 of the Charter of the Press Council.

\(^\text{12}\) [http://www.po.se/arsberattelser.jsp.](http://www.po.se/arsberattelser.jsp)

\(^\text{13}\) See p. 14.
2. Part II: Leading Cases

There is hard to refer to any “landmark” cases but here follows a few recent ones that illustrate the core of the work of the PO and the PON.

**Publishing regarding the Anna Lindh assassination (Exp nr 17/2004)**

In relation to the coverage of the assassination of foreign Minister Anna Lindh, a daily newspaper had published numerous pictures of a wounded Anna Lindh. The PO decided to ex officio look into the matter. The PO concluded that, although the assassination was a matter of major historical impact, newspapers must nonetheless consider the effect a publication may have on relatives etc. Seeing that the published pictures showed, as it would turn out, a dying Anna Lindh, the daily newspaper should have spared Anna Lindh’s family a direct or indirect exposure of the pictures. In conclusion the concern for the relatives should have outweighed the public interest of publishing the pictures.

In its defence the daily newspaper *inter alia* argued that at the time of printing the issue at dispute, Anna Lindh’s injuries were not deemed life threatening. Consequently, in the light of those circumstances the decision by the magazine to publish the pictures followed good journalistic practices.

The matter was referred to the PON which agreed with the PO, stating that, albeit that the public interest was huge, the very obvious extent and obtrusiveness of the pictures the publishing could not be in accordance with good journalistic practice.

**Untrue statements regarding TV celebrity (Exp nr 20/2004)**

A Swedish tabloid had published an article saying that a Swedish female TV celebrity had separated from her boyfriend. The tabloid had gained this information from an article in a rival magazine, but had not been able to get in contact with the TV celebrity in order to confirm the information. The information that the TV celebrity had left her boyfriend was incorrect, and due the publishing her children and friends became surprised and affected in other negative ways.

The PO was quite forthright in his judgment and considered that the tabloid had not followed good journalistic practice, since the magazine had not bothered to verify the facts. The PO emphasized that the tabloid had several times before treated the TV celebrity in the same bad manner. The PO stated that even if a person is a celebrity, it cannot be in accordance with good journalistic practice to publish any facts whatsoever. A fundamental requirement as regards private information is that the information is correct. In this context the TV celebrity
put forward that the article of the rival tabloid, from which the tabloid had received the false information, did not mention any separation between the TV celebrity and her boyfriend. Since the PO considered the matter to be significant enough to warrant a decision of the PON the matter was delivered to the PON for judgment.
The tabloid argued that it had not published false facts, but only known facts, given that the reporter had checked with public records which showed that the TV celebrity lived alone. Additionally, the TV celebrity had not responded to messages left by the reporter.
In spite of the arguments put forward by the tabloid, the PON agreed with the PO and ruled that the tabloid had not followed good journalistic practice.
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
<td></td>
</tr>
<tr>
<td>The principals of the PO and the PON are the foundation of the Press Ombudsman (Sw. Stiftelsen Allmänhetens Ombudsman), which was founded by the Publicist’s Club (Sw. Publicistsklubben).</td>
<td></td>
<td>The judging based on the Code of Ethics that the PO/PON is obviously carried out on a case-by-case basis. Due to this fact there is a growing case law providing guidance.</td>
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<tr>
<td>The PO/PON carry out their work in a court like manner. The PO, either ex officio or on initiatives from the general public initially evaluates the grounds for complaints on items in the press. The PON then finally decides on the matter. In sum, the PO/PON is of a formal and permanent nature.</td>
<td></td>
<td>The non-state component should at least in a nutshell</td>
<td></td>
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<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td></td>
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Co-Regulation Measures in the Media Sector: Annex 5: Coutnry reports on possible co-regulatory systems

<p>| The scrutiny of the PO/PON is directed towards the press (periodicals). In the event of breaches of the Code of Ethics for Press, Radio and Television, the PO/PON can order the criticised newspaper to publish the ruling of the PO/PON. The newspaper can also be ordered to pay an administrative fee, which will contribute to covering the costs of the PO/PON. Consequently, the PO/PON has the power to influence, and to some extent enforce, behaviour on the scrutinized subjects. As long as this is performed by or within the organisations or parts of society that are addressees of the regulation The principals of the PO/PON are in practice the scrutinized newspapers themselves. | be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange. The PO shall, as far as possible, provide information and advice on good journalistic practises etc. to the general public. Measures by third parties (e.g. NGOs) The range of possible subjects of non-state action has to be limited to make the definition workable. | Link between the non-state-regulatory system and state regulation |</p>
<table>
<thead>
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</tr>
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<tbody>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
<td></td>
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<tr>
<td>The system is established <em>inter alia</em> in order to guarantee accurate and objective news as well the respect of individual privacy, which are public policy goals.</td>
<td></td>
<td>To some extent it could be said that the PO/PON serves the individual interest of their principals, as in absence the area would most likely be subject to legislation of a more mandatory nature.</td>
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<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td><em>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</em></td>
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<tr>
<td>Pressens Samarbetsnämnd, who is a Joint Committee founded by the leading media organisations in Sweden (The</td>
<td></td>
<td>There is no legislation adopted by the Government.</td>
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founded by the leading media organisations in Sweden (The Newspapers Publishers Association, The Magazine Publishers Association, The Union of Journalists and The National Press Club), issues the regulations governing the work and scrutiny of the PO/PON. These regulations are:

- The Code of Ethics for Press, Radio and Television;
- Instruction for the Office of the Press Ombudsman; and,
- The Charter of the Press Council.

Consequently, there is a basis of legal nature for the PO/PON.

<table>
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<tr>
<th>The state/EU leaves discretionary power to a non-state regulatory system</th>
<th>Traditional regulation</th>
<th>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</th>
</tr>
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<tbody>
<tr>
<td>There is no traditional regulation similar to the rules The Code of Ethics for Press, Radio and Television. This indicates that the Government has left discretionary power to the PO/PON.</td>
<td>---</td>
<td>It should be noted that certain criminal offences may be prosecuted under the Freedom of the Press</td>
</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Act. However, this concerns severe breaches in newspapers such as defamation or insulting language or behaviour.</td>
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<tr>
<td>The Government is partly involved in appointing the PO and the members of the PON as the Chief Parliamentary Ombudsman which is the ombudsman of the Parliament, is part of the committee that appoints them. This is one way for the Government to influence the work of the PO/PON.</td>
<td></td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
</tr>
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</table>
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

The PO and the PON are bodies organised independently from the State. Their work is governed by instructions issued by press organisations. Furthermore, the PO and the PON carry out their supervision based on guidelines issued by the same organisations. Additionally, the PO and the PON are appointed by the same organisations.

b) The link between the non-state part and state regulation

The scrutiny of the Swedish Press sector is basically left to the PO and the PON. Save for the Freedom of the Press Act there is no law targeting journalistic content in newspapers. Moreover, the State is partly involved in appointing the PO and the members of the PON as the JO, which is the ombudsman of the Parliament, is part of the committee that appoints them.

Conclusion: Based on the criteria and definitions given to us, our view is that the PO/PON does constitute a co-regulatory system. This conclusion is drawn mainly based on the following circumstances:

- The PO/PON is set up in order to achieve public policy goals.
- The JO is involved when the PO and the members of the PON are appointed.
- There are no other systems addressing these kinds of issues, but only criminal offences found in the Act on the Freedom of the Press.

II. Co-operative Regulatory Systems in the media sector

1. Part I: The co-operative regulatory system - the Media Council
a) Development of the regulatory system

The Media Council, formerly the Council on Media Violence, was established in 1990. It is a Committee of Inquiry in the Government Offices.¹ The objective of the Media Council is to reduce the risks for harmful effects of the media on children and young people. The Media Council has to give particular attention to portrayals of violence and pornography and to apply a clear gender perspective in its work. One reason why the Media Council was established was the reluctance of the Parliament and Government to adopt a procedure of preliminary examination.²

b) Subject-matter of the regulatory system

The Media Council has the following objectives³:

- Act as an expert on developments in the media and the effects of the media on children and young people
- Follow research on the effects of the media and to spread factual information and provide guidance
- Press for self-regulation in the media industry
- Work for increased media knowledge in schools
- Protect and strengthen children and young people in the new media landscape through cooperation with other actors
- Follow international developments and take part in international cooperation in its field

The Media Council’s aim is thus to achieve changes and a better media environment, especially for children and youths without the means of legislation.

c) Basis of the co-operation

The Media Council was originally a committee (U 1990:03) under the Ministry of Education (now the Ministry of Education, Research and Culture). The Media Council is governed by three directives⁴, one origin and two amending, issued by the Government:

² Dir. 1990:40.
⁴ For a Swedish version of the directives please see http://www.mediaradet.se/templates/Page____181.aspx#.
d) Institutions involved in the system

The Media Council includes six members and a chairman. The Media Council also has four advisers and three experts at its disposal. The Media Council Chair is Inger Segelström, a Social Democratic politician and a Member of the European Parliament. The current members include *inter alia* an actor, the managing director of the Advertising Association of Sweden, a teacher, a psychologist and the secretary general of Goodgame a non-profitable consumer organisation focusing on computer and video games. The head of the Ministry of Education, Research and Culture appoints the members of the Media Council. There are no specific professional requirements for a person to become a member of the committee, the head of the ministry chooses fit persons. The Media Council is a very special construction in the Swedish governmental system. The Media Council is funded by the Ministry of Education, Research and Culture.

e) Functioning of the system

The Media Council shall encourage self-regulation. Furthermore, the Media Council produces scientific material within the field of its objectives. Given that the main purpose of the Media Council is to reduce the risk of harmful media effects on children and youths, children and young people shall be involved actively in the Council's activities.

f) Supervision of the system

Sorting under the Ministry of Education, Research and Culture, and steered by directives issued by it, the Media Council is primarily subject to the control of that Department. The Media Council shall each year provide a report of its work as well as strategies for its continuous work.

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5 For a full list please see http://www.medieradet.se/templates/Page____190.aspx.
g) Impact assessment

N/A.

2. Part II: Leading Cases

The Media Council is a not judging body. Therefore, there are no judicial cases to report. In the event of offences against the freedom of the press or media, the Chancellor of Justice (“the JK”) will act as a prosecutor. The JK is an independent civil servant appointed by the Government, his capacities will not be further dealt with here. The JK has no connection with the Media Council.

Regardless of what has just been stated it should, as was mentioned above, be emphasized in this context that the Media Council shall encourage self regulation and have a close connection with the business. Within this scope the Media Council is part of various organisations, e.g. the EU project Safetey, Awareness, Facts and Tools (SAFT), constitutes an information central, and participates in research projects. An example was during the nineties when the Media Council was part of committee that evaluated, inter alia the work the Media Council, but also the borders of censorship of films. The results were presented in SOU 1993:39. One of the suggestions of the committee was that an age limit of 18 should be adopted as regards the cinema. This suggestion was not passed as law.

7 [hyperlink to website]
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Media Council

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
<th>Additional remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
<td></td>
</tr>
<tr>
<td>The Media Council, formerly the Council on Media Violence, was established in 1990. It is a Committee of Inquiry in the Government Offices. The Media Council Chair is Inger Segelström, a Social Democratic politician and a Member of the European Parliament. The current members include <em>inter alia</em> an actor, the managing director of the Advertising Association of Sweden, a teacher, a psychologist and the secretary general of Goodgame a non-profitable consumer organisation focusing on computer and video games. The setting up of the Media Council is of a permanent and formal nature.</td>
<td>Pure consultation</td>
<td><em>The non-state component should at least in a nutshell be regulation in itself;</em></td>
<td></td>
</tr>
<tr>
<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td>The range of possible subjects of non-state action has to be limited to make the definition workable.</td>
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<tr>
<td>The Media Council serves as a body of expertise, destined to influence everyone from the Government, the Media until parents and schools. It does not carry out any scrutiny itself within the meaning of this study.</td>
<td>The Media Council shall encourage self-regulation and is the Swedish party of the EU project Safety, Awareness, Facts and Tools (SAFT). However, the Media Council does not have any means to enforce this.</td>
<td>As mentioned above the Media Council is destined to influence all relevant subjects, i.e. both the media that is the provider of the material containing portrayals of e.g. violence and sex of and the consumers of such material. Therefore, it is hard to single out any particular subjects of the work of the Media Council.</td>
<td></td>
</tr>
<tr>
<td>Criteria</td>
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</tr>
<tr>
<td>------------------------------------------------------------------------</td>
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<td>----------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are</td>
<td>restricted to public policy goals (protection of minors or similar), so research</td>
</tr>
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<td></td>
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<td>can also focus on those forms of regulation.</td>
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<tr>
<td>The Media Council has the following objectives which are public</td>
<td></td>
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<tr>
<td>policy goals:</td>
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<tr>
<td>Act as an expert on developments in the media and the effects of the</td>
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<tr>
<td>media on children and young people</td>
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<tr>
<td>• Follow research on the effects of the media and to spread factual</td>
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<td>information and provide guidance</td>
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<tr>
<td>• Press for self-regulation in the media industry</td>
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<tr>
<td>• Work for increased media knowledge in schools</td>
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</tr>
</tbody>
</table>
- Protect and strengthen children and young people in the new media landscape through cooperation with other actors
- Follow international developments and take part in international cooperation in its field

<table>
<thead>
<tr>
<th>There is a legal basis for the non-state regulatory system</th>
<th>Informal agreements without any legal criteria to judge the functioning of non-state regulation</th>
<th>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</th>
</tr>
</thead>
<tbody>
<tr>
<td>There are several directives issued by the Ministry of Education, Research and Culture governing the work of the Media Council.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</td>
</tr>
<tr>
<td>The Media Council was set up in order to abstain from legislation on portrayals of violence and sex in the media.</td>
<td></td>
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</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-</td>
<td>Innovative forms can only be found if there is real</td>
</tr>
<tr>
<td>state regulatory system</td>
<td>state-regulatory system</td>
<td>“division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
</tr>
<tr>
<td>-------------------------</td>
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</tr>
<tr>
<td>The head of the Ministry of Education, Research and Culture appoints the members of the Media Council. The Ministry supervises the work of the Media Council and funds its work. The Media Council shall each year provide a report of its work as well as strategies for its continuous work.</td>
<td></td>
<td></td>
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3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

The Media Council shall independently carry out research within the areas of its objectives. As mentioned above, it shall also encourage and scrutinize examples of self-regulation in the field. One example of self-regulation in the field is the "Sveriges Branchförening för Multimedia Dator - & TV-Spel (MDTS)" which powers are based on the Pan European Game Information (PEGI) system. It establishes that games containing elements of violence or sex should be adequately marked. MDTS was established by the business. The Media Council includes members from different parts of the society, e.g. from advertising, actors and various consumer organisations.

b) The link between the non-state part and state regulation

The Media Council reports to the Ministry of Research Education and Culture. It shall follow the development in the Media and function as a body expertise on portrayals of violence and pornography in media, especially as regards its effect on children and youths. Furthermore, the Media Council is established to achieve a better media environment as regards portrayals of violence and pornography. As mentioned above special attention should be paid to the harmful effects that such content may have on children and youths. In this context it should also be emphasized that the Media Council was set out with the very objective to abstain from legislative measures such as preliminary reviews etc.

Conclusion: Based on the criteria and definitions given to us, our view is that the Media Council does constitute a co-regulatory system.

This conclusion is drawn mainly based on the following circumstances:

- The Media Council is set up to achieve public policy goals.
- The Media Council was established by the Ministry of Education.

1 www.mdts.se
• The Media Council aims to provide the media with top-notch research within its field of objectives and to encourage self-regulation.
3.20. United Kingdom

I. Co-operative Regulatory Systems in the television sector – broadcast advertising

1. Part I: The Co-operative Regulatory System

a) Development of the system

The specific co-operative regulatory system regarding television advertising is of very recent date: November 2004. Section 3(4) Communications Act 2003, in subsection c), requires Ofcom to have regard to the ‘desirability of promoting and facilitating the development and use of effective forms of self-regulation’. Responsibility for advertising content regulation (but not frequency or sponsorship) has been devolved to the Advertising Standards Authority Broadcast (ASA(B)) and Broadcast Committee of Advertising Practice (BCAP), although ultimate responsibility remains with Ofcom. The Advertising Standards Authority (ASA), is, as noted in the part 1 report, a pre-existing body which has dealt with other forms of advertising (see further below). Previously, under the Broadcasting Act 1990, broadcast advertising was dealt with by the Independent Television Commission (ITC).

b) Subject-matter of the regulatory system

Section 211 Communications Act imposes on Ofcom the responsibilities contained in the Broadcasting Act concerning, among other issues, broadcast advertising. The legislative scheme envisages that detailed content concerns are to be dealt with by codes of conduct. These functions Ofcom carries out by the drafting of codes of practice with which broadcasters must comply; Ofcom has recently revised the content codes. In the context of drafting codes relating to advertising, note now the role of the ASA. The standards objectives contained in the relevant legislation, insofar as they relate to advertising, include:

"(a) that persons under the age of 18 are protected;
(b) that material likely to encourage or incite the commission of crime or lead to disorder is not included in television and radio services;
(e) that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes;
(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from inclusion in such services of offensive and harmful material;
(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;
(i) that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with [in particular those obligations set out in Articles 10, 12-16 and 19-22a of Directive 39/552 EEC as amended by Directive 97/36/EC (the Television without Frontiers Directive)];
(l) that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred."

Section 319(2) provides that in setting or revising any standards, Ofcom must have regard, in so far as relevant, to the following:
"(a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description;
(b) the likely size and composition of a potential audience for programmes included in television and radio services generally, or in television and radio services of a particular description;
(c) the likely expectation of the audience as to the nature of a programme's content and the extent to which the nature of the programme's content can be brought to the attention of potential members of the audience;
(d) the likelihood of persons who are unaware of the nature of the programme's content being unintentionally exposed, by their own actions, to that content;
(e) the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and, in particular, a change that is relevant to the application of the standards set under this section…"."
Section 319(6) deals with religious programmes, specifying that standards set to secure the standards objectives specified in para 3(e) above must, in particular, contain provision designed to secure that religious programmes do not involve:

"(a) any improper exploitation of any susceptibilities of the audience for such a programme; or
(b) any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination."

There are 5 codes relating to advertising, plus guidance notes. The codes are Radio Advertising Standards Code; Television Advertising Standards Code; Rules on the Scheduling of Advertising (dealing with specific products and the programmes against which they should not be juxtaposed); Code for Text Services; and Guidance on Interactive Television. The current television advertising code is an updated version of the ITC 2002 code; its aim is to ensure that advertisements are ‘legal, decent, honest and truthful’ and do not mislead or cause harm or serious or widespread offence. The Code’s introduction notes that the protection of young viewers is a priority, a point which is reflected in the fact that there are several dedicated sections dealing with minors. The other codes express the selfsame aims. Certain goods and services (such as gambling and tobacco products) are singled out for special controls under legislation and in the codes; the ASA Annual Report suggests that advertising of alcohol is currently seen as a particular problem; a review of both broadcast and non-broadcast codes resulted in the tightening up of the codes in this respect and the changes came into force 1st October 2005.

c) Basis of the co-operation

Ofcom proposed that the regulation of advertising should be contracted out, under s.1(7) CA, which applies part 2 of the Deregulation and Contracting Out Act 1994 to Ofcom, and ss. 66 and 77(1) Deregulation and Contracting Out Act 1994 (DOCA). An order under DOCA was required to allow Ofcom to delegate the specified functions: The Contracting Out (Functions relating to Broadcast Advertising) and Specifications of Relevant Functions Order 2004. Following this, Ofcom identified the party (ASA) to whom it was delegating functions together with those functions in an authorisation. Although Ofcom and ASA entered into a memorandum of understanding (MoU) to elaborate the division of responsibilities, it is in the DOCA
order and the authorisation that the legal responsibilities of Ofcom and ASA are found. Although Ofcom remains ultimately responsible for its regulation, the ASA now has day-to-day responsibility for the regulation of broadcast advertising; Ofcom has undertaken not to interfere save in exceptional circumstances.

d) Institutions involved in the system

OFCOM was established by the Office of Communications Act 2002, but its powers were conferred by the Communications Act. Ofcom is a statutory corporation. The main decision making body of Ofcom is its Board. This Board is a unitary board with a mix of executive and part-time members. It employs a full-time staff and is also supported by advisory committees, notably the 13 member Ofcom Content Board, set up under s. 12(1) Communications Act.

The primary regulator for all forms of advertising now in the UK is ASA. It states that its mission is to uphold standards on behalf of ‘consumers, business and society’. As noted in the part 1 report, ASA(B) has responsibility for adjudication on complaints, BCAP for reviewing codes of conduct. Any changes in the codes require the consent of Ofcom. BCAP is assisted in its role by an advisory committee, the AAC, based on the committee that advised the ITC. The AAC was established in January 2005 and represents the views of citizens and consumers and have independent expert or lay members. Advice, training and support for advertisers and media is available from a new Code Policy and Monitoring team, which has been established as part of the CAP Executive to set and monitor compliance with the advertising codes.

The Broadcast Advertising Standards Board of Finance (Basbof) was created to fund these new bodies within ASA via a levy on broadcast advertising expenditure (a similar but separate structure operates in respect of non-broadcast advertising).

Note also the non-statutory role of the Broadcasting Advertising Clearance Centre (BACC) and the Radio Advertising Clearance Centre (RACC), both of which are funded by member broadcasters. BACC has two principal functions: the examination of pre-production scripts and the pre-transmission clearance of finished television

1 ASA Annual Report 2004, Introduction
2 BCAP’s responsibilities are set out at paragraph 30 MoU
advertisements. BACC is under the control of its funding broadcasters via the Copy Committee, which consists of 6 senior representatives from television companies and which meets once a month. This Committee directs policy and offers guidance on contentious projects. RACC is likewise funded by the commercial radio broadcasters and has similar functions in relation to radio advertising.

e) Functioning of the system

The terms of the code are imposed on broadcasters via licence conditions. Compliance is mandatory. Note some of the terms of the code will reflect specific statutory provisions.

The ASA Council is ultimately responsible for deciding if advertisements meet the advertising code’s requirements. The majority of Council members are not from the advertising industry, instead reflecting a range of backgrounds. The majority are appointed following public advertisement. Industry members on the Council do not act as representatives of their company whilst on the Council, but are instead independent agents who have been appointed because of their expertise in the advertising field. Although ASA is funded by industry statistics in its 2004 Annual Report stated that 59% of complainants felt that ASA was independent of industry and that the vast majority of advertisers agreed with that perception.

The Ofcom Content Board must comply with a specific code of conduct for its members. Ofcom is an independent public body; it is required to report annually to Parliament.

From the point at which a complaint is accepted by ASA, a named executive is assigned to the case and acts as a continuing point of contact with the complainant. Depending on the seriousness of the complaint, the ASA might resolve the matter informally, or refer it to the Council, in which case a formal investigation is involved and the Council’s decision is published as adjudication. Should the complainant not

3 Code of Conduct available on OFCOM website at http://www.ofcom.org.uk/about_ofcom/boards_panels/brds_adv_bodies/ofcom_content_board/code_of_conduct/?a=87101
be satisfied with the result, a review of the decision can be requested. The review is undertaken by the Independent Reviewer of ASA Adjudications.

Neither Ofcom nor the ASA has the right to review advertising in advance of the broadcast. Any complaints and control procedures operate *ex post facto*. Having said that, there is a system in place whereby adverts may be cleared prior to broadcast, which grew up in response to the previous system run by the ITC and Radio Authority. Consequently almost all TV advertisements are vetted before broadcast by the Broadcast Advertising Clearance Centre (BACC). Similarly, all national and certain special categories of local and regional radio advertisements are vetted before broadcast by the Radio Advertising Clearance Centre (RACC). Clearance is not required by any legal provision; this is industry best practice. BACC and RACC give guidance to broadcasters; this is available in general terms on their web-sites and subscribers to the systems may get individual advice in respect of particular cases. The way in which the system works in practice – and difficulties arising out of it – is illustrated in the cases below. ASA has also guidance notes as to the interpretation of the relevant codes (both broadcast and non-broadcast) which are available on its website. The ASA and RACC/BACC meet regularly to exchange information and to try to minimise differences in approach between the clearance centres and the ASA.

*f) Supervision of the system*

ASA has limited powers in relation to broadcasters: ASA(B) may impose certain requirements on broadcasters/advertisers in relation to upheld adjudications. Ofcom when it contracted out the responsibility for monitoring compliance in this field, similarly contracted-out its enforcement powers under the *Communications Act 2003* to ASA(B). ASA(B) may therefore:

(a) require a licence holder to exclude from its programme service a particular advertisement or to exclude it in particular circumstances (Section 325(5)(a));

(b) require a licence holder to exclude from its service certain descriptions of advertisements and methods of advertising (whether generally or in particular circumstances) (Section 325(5)(b)), such power to be exercised by ASA(B) only for misleading advertisements or impermissible comparative advertisements or impermissible medical advertisements; and
(c) require, from any person who to ASA(B) seems to be responsible for an advertisement, provision of evidence relating to the factual accuracy of any claim and to deem a factual claim inaccurate if such evidence is not so provided.

ASA cannot fine licensees although it may refer a broadcaster to Ofcom, which has broader powers. Ofcom can direct the broadcast of a correction or statement of findings; impose a financial penalty or shorten a licence period; and revoke a licence. Adjudications of both bodies are published on their respective websites.

The MoU between ASA and Ofcom also states that regular contact between ASA(B), BCAP and Ofcom should be maintained, initially through formal and regular contact between Ofcom and ASA(B)/BCAP. Ofcom will in any event continue to review the system to ensure that appropriate standards are maintained. Specific standards on monitoring performance of the new system are set down in the MoU, which relate to qualitative and quantitative criteria. BCAP, like the ASA, is accountable to Ofcom for the effectiveness of broadcast self-regulation and is required to report to Ofcom quarterly on compliance, policy initiatives and proposed code changes and rule reviews.

A new development in the ASA system is the introduction of the possibility of appeal from the decision of ASA(B) in an individual case to an Independent Reviewer. Ofcom also envisages the possibility of an internal review procedure in the case of complaints about decisions it makes in this context. Although no specific separate body has been established, review is to be carried out by someone more senior than the original decision maker and someone not involved in the original decision-making process. It is also possible to ask for the review to be re-considered by the Ofcom board. It is possible for complaints about Ofcom to be referred to the Parliamentary Commissioner for Administration (the Ombudsman), but such a complaint may only be made by an MP.

Decisions of public bodies are subject to judicial review: the High Court has supervisory jurisdiction over any body performing public law duties, supported by public law sanctions, and under a duty to act judicially, whose power is not simply by

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4 See paragraphs 55 et seq, MoU
5 See paragraph 19 MoU
consent of those over whom it is exercised.\textsuperscript{6} Decisions of both ASA(B) and BCAP are therefore open to judicial review,\textsuperscript{7} as would those of Ofcom be. It would seem that they are also subject to the terms of the Human Rights Act in regard to their public functions.\textsuperscript{8} It is not clear whether BACC and RACC would fall within this system: a decision of BACC was the subject of a judicial review action, though the matter was not determined, the court stating that it was at least arguable that BACC was subject to review.\textsuperscript{9} The matter was not determined finally, as the court refused leave for judicial review on other grounds.

\textit{g) Impact assessment}

ASA publishes annual reports, as well as the quarterly performance reports to Ofcom. Furthermore, adjudications are available on the ASA website.\textsuperscript{10} According to the 2004 Annual Report, although broadcast advertising came under Ofcom’s remit for most of 2004, the ASA received 1,797 complaints about TV and radio advertising from 1 November until the end of the year. In 2004, Ofcom and the ASA received a total of 9,860 broadcast complaints about 2,532 commercials where the product was identified. This compares with 9,082 complaints about 1,642 ads in 2003 as reported by Ofcom. The Annual Report commented that the most common ground of complaint was that an advertisement was misleading. This resulted in approximately double the number of complaints found in the next category, offensiveness. The third most common complaint was that an advertisement might result in harm. The annual

\begin{itemize}
\item \textsuperscript{7} Even before its broadcasting-related powers, ASA decisions were amenable to review: \textit{R v. ASA ex parte Insurance Services plc} [1990] COD 42
\item \textsuperscript{9} \textit{R v. BACC, ex parte Swiftcall} (QBD), unreported, 16 November 1995
\item \textsuperscript{10} See: \url{http://www.asa.org.uk/asa/adjudications/broadcast/}. Adjudications are available for 5 years, remaining accessible thereafter via a paper archive.
\end{itemize}
report notes that the activities of the compliance team, which takes action against recalcitrant advertisers and members of the media, assist in ensuring a level playing field between companies in different sectors. The issues in this year’s report regarding the compliance team related to non-broadcast advertising. It should be noted, however, that Ofcom has taken action against teleshopping channels for misleading price indications. One channel was fined £450,000, another lost its licence.

2. Part II: Leading Cases

At the moment it is too soon to comment on the ASA; although there are a series of decisions relating to individual complaints this is a very young body of decisions. None of its decisions in the broadcasting sector have yet been challenged before the courts, although they could be challenged via judicial review. Ofcom similarly has had little opportunity to build up a body of case law, as it only recently took over responsibility for broadcasting regulation from the ITC and RA. In general terms the courts have been prepared to allow regulators a fair amount of flexibility in the interpretation of their own codes (see further below). It should be noted that the previous regulators have taken societal concerns into account when determining the acceptability of broadcast content. For example complaint A016/52 before the Radio Authority concerned an advertisement for crunchy nut cornflakes, in which a little girl was portrayed as making a pact with her father not to tell her mother, actually about an extra portion of breakfast cereal, but in the words that mummy ‘wouldn’t understand’. The advertisement had been cleared by RACC (although with a boy in the script rather than a girl), as they perceived the script to be a ‘light-hearted family scene’. Although the RA broadly agreed with RACC, it noted ‘in the context of current sensitivities about child abuse, we were concerned about the wisdom of using this sort of scenario at all in advertisements.’ The advert was withdrawn – the views of the RA being passed to the advertiser via RACC.

The ITC also noted the assessment of the body giving pre-clearance advice, in respect of television the BACC. For example in an advertisement for Action Energy commissioned by the Carbon Trust, which featured scenes of an office with blood like

12 Radio Authority’s Quarterly Bulletin for October, November 2003
fluid dripping out of electrical fittings, the ITC noted that BACC had cleared the advertisement on an ‘ex-kids’ basis. This meant that the advertisement would not be scheduled next to programmes aimed at young children and which they might be likely to view alone. The ITC noted that although the advertisement could have been broadcast adjacent to the Rugby World Cup and therefore might be seen by children, ‘the overall reaction from viewers, including children, does not suggest that the specific content of the advertising was unacceptable for broadcast. The ‘blood’ emerged from inert electrical objects and the text provided a clear energy-related context for what was shown. There was no reason to believe that the imagery, while initially strange, was likely to cause harm to the average viewer. The incidence of adverse reaction from children, while regrettable, was very low.’

The effectiveness of an ‘ex-kids’ scheduling – and the BACC’s view that this is sufficient does re-occur. Ofcom dealt with an advert which featured a gremlin taunted a woman about her lack of reading skills. The view of the BACC was that the gremlin was established in a number of similar adverts and that it had a cartoon like feel that was ‘almost light-hearted in its effect’. Ofcom, however, disagreed and instructed BACC to impose a post-7:30 pm restriction.

The ASA have recently had to deal with ex-kids scheduling in relation to advertising for further training. The advertisement in question concerned a couple in bed listening to banging and groaning coming from their son’s bedroom. He was shown with the imprints of two hands wriggling under his skin. When his mother called his name, a face also appeared under his skin and responded to her call. The voiceover states ‘you know the real you is in there somewhere and a City and Guilds qualification can help you find the right job to bring it out.’ This advert attracted complaints in three categories: that it was visually shocking, akin to the imagery found in a horror film; that it frightened young children; and that it alluded to a sexual act unsuitable for viewing before the watershed. None of the complaints were upheld, in general because of the ex-kids scheduling.

In another case involving an advertisement for the metropolitan police highlighting domestic violence, which was cleared by RACC provided it was broadcast out of drive-time (i.e. so children would not hear the advertisement on the way to school).

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13 ITC Advertising Complaints Bulletin No. 30, 22 December 2003
The advertiser, on being informed of this restriction asked its agency to ensure the broadcasting restrictions were respected; this did not occur, 8% of the broadcasting slots falling within drive-time. The radio station stated that had it known of the restrictions, it would have ensured that none of the slots fell within drive-time. The ASA concluded that the RACC assessment of the advertisement was appropriate; respecting broadcasting restrictions remains the responsibility of the broadcaster even when they have not been informed of the restriction.
III. Assessment according to the criteria for determining which types of regulation are covered by the study

**Table: Criteria / ASA (B)**

<table>
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<th>Non-state regulatory system</th>
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<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</td>
</tr>
<tr>
<td>There is a legislative framework which provides for the codes and with which broadcasters must comply. Supervision and review of codes devolved to industry body.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</td>
</tr>
<tr>
<td>The codes are binding on broadcasters via broadcasting licence compliance with ASA codes by advertisers in...</td>
<td></td>
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</tr>
</tbody>
</table>
licences; compliance with ASA codes by advertisers is indirect.

As long as this is performed by or within the organisations or parts of society that are addressees of the regulation

| Measures by third parties (e.g. NGOs) | The range of possible subjects of non-state action has to be limited to make the definition workable. |

Codes are addressed to broadcasters; advertisers are compelled to comply by need access media and other ASA sanctions.

| Note role of clearance associations – informal |

**Link between the non-state-regulatory system and state regulation**

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<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
</tr>
<tr>
<td>Policy goals are set out in Communications Act and include protection of minors, consumer protection, protection of religious views and implementation of TWFD.</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</td>
</tr>
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<td></td>
<td></td>
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<tr>
<td>See DOCA, s.1(7) Communications Act and statutory instruments</td>
<td></td>
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<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
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</tr>
<tr>
<td>ASA adjudicates on individual cases, subject to overall review by Ofcom (but not on an individual case by case basis).</td>
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| state regulatory system | influencing the regulatory process within the non-state-regulatory system | be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.

Revision of codes subject to Ofcom consent. |
Conclusions: This system would seem to satisfy the requirements for a co-regulatory system in that it involves both state and non-state actors. An existing organisation funded by industry has been adapted by the creation of specific sub-committees and financing structures to deal with issues delegated to it, under statute and via statutory instrument, by an independent public body. The issues that it deals with, broadcast advertising, specifically affect those who pay for it: advertisers. Broadcasters are also affected as the ultimate responsibility for compliance with the codes rests with them under their broadcasting licences, issued by Ofcom. Further, in cases of complaints about broadcast advertising, it is the broadcaster and not the advertiser that the ASA contacts, reflecting the nature of those under obligations in the broadcasting code. This system can therefore be contrasted with the non-broadcast system, where the responsibility remains with the advertiser, rather than the owner of the media (press, billboards etc) in question. The aim of the system is the maintenance of certain minimum standards in broadcasting, that is it is aimed at public interest goals and ASA(B) has discretion in the decisions it comes to within the framework provided by statute and overseen by Ofcom.

II. Co-operative Regulatory Systems in the internet sector

1. Part I: The co-operative regulatory system

a) Development of the regulatory system

The Internet generally is not subject to content regulation, although general laws do apply. Certain aspects of Internet content fall within other regulatory schemes, notably that relating to advertising generally and note the role of ICMB regarding Internet content provided by mobile operators (see below). Otherwise, since ISP providers were found to be liable for content on the web\(^1\), the industry founded the Internet Watch Foundation (IWF) to provide an online reporting mechanism of alleged illegal content.\(^2\)

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2 See now s. 17(1) E-Commerce Regulations
Advertising standards are regulated by ASA, which is an industry funded body, via a code of conduct drafted by the Committee of Advertising Practice (CAP), a self-regulatory body. Note that although in principle advertising in new media, such as banner advertising, fall within the ASA framework, the ASA states that advertising claims companies make, for example, on their own websites do not fall within the scope of the Code. This is because the ASA will only rule on the editorial content of publications where space has been paid for to promote a product, service or cause; its jurisdiction is limited to advertising. ³ Further, given the inherently international nature of the Internet, it is possible that individuals may see advertising originating from countries other than the UK: these also fall outside ASA’s remit. The ASA will pass complaints about advertising originating in countries which are part of the European Advertising Standards Alliance (EASA) to the relevant authorities in the country, using the cross-border complaints system operated by EASA. ASA has also tried, where relevant, to contact regulatory authorities for countries outside the EASA system, with limited success.

Although initially constituting industry self-regulation, the ASA found its powers subsequently given statutory authority (see below). Although under the self-regulatory system, recalcitrant advertisers could be denied access to advertising media, these regulations allow ASA to refer cases to the Office of Fair Trading on matters falling within the scope of the regulations. This system is separate from that relating to the broadcast advertising delegated by Ofcom.

Access to internet sites could be covered by ICSTIS should premium rate services be involved (in this sense there is a similarity between the regulation of access to Internet and other interactive services – control depends on the phone service used); the ICSTIS report notes that a particular problem it has recently encountered is internet access being diverted via a premium rate number without the caller necessarily being aware of this fact. Although there is a body set up to deal with mobile content and interactive services (see below), it does not deal with Internet services accessed by mobile phone, if the operator is only being used as a transmission mechanism.

b) Subject-matter of the regulatory system

In terms of content, the main regulatory system concerns advertising. The main aims concern misleading and offensive advertising though there are special rules in the code of conduct relating to advertisements aimed at children as well as those for alcohol, health products, beauty products, financial services, employment and business opportunities, and gambling.

Other content is subject only to the general law, for example, provisions such as incitement to racial hatred, offensiveness etc.4

The IWF operates a notice and take down system. It aims:

‘To minimise the availability of potentially illegal internet content specifically:

- images of child abuse hosted anywhere in the world.
- criminally obscene content hosted in the UK.
- criminally racist content hosted in the UK.’

As noted in the earlier report, the IWF originally had the remit to develop a labelling and rating system. This is now the responsibility of the Internet Content Rating Association (ICRA).

ICSTIS regulates content and promotion of premium rate services. It is concerned with ensuring that the users of premium rate services are aware that they are using premium rate services and of the costs involved. Its role is to prevent consumer harm, by requiring clear and accurate pricing information, honest advertising, and appropriate and targeted promotions. ICSTIS in its mission statement explains that it is particularly concerned with protecting the vulnerable, especially children.

c) Basis of the co-operation

The ASA shows the development from self regulation to co-regulation. It was the product of industry self-regulation originally, but then received the support of the state system, currently under the Control of Misleading Advertisements Regulations.5

The ASA can refer advertisers who refuse to co-operate with the self-regulatory

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4 Note the Racial and Religious Hatred Bill 2005; for a comment in the context of broadcasting see Myers, A., ‘A Crime to Tell the Truth’ (2005) NLJ 155 (7182) 957

system to the Office of Fair Trading (OFT) for legal action. Complaints under the regulations may be made directly to the OFT, although under the terms of the regulations, the Director General of Fair Trading (DGFT) must have regard to the desirability of encouraging self-regulation. DGFT may therefore, before considering a complaint, require a complainant to show that:

- All appropriate alternative avenues for pursuing the complaints have been tried;
- The alternative body has been given a reasonable chance of dealing with the matter; and
- The alternative body has not been successful.

According to the ASA code of conduct, paragraph 61.12:

‘The OFT and other “qualified entities”, such as Trading Standards Authorities, can use the Stop Now Orders (EC Directive) Regulations 2001 to enforce several existing consumer laws, including the Control of Misleading Advertisements Regulations 1988 (as amended). The ASA has agreed Case Handling Principles with the OFT to ensure that the Stop Now Orders bring about consumer protection without undermining the "established means".’

Although ICSTIS is established by members of the mobile phone industry and might therefore be thought to be a case of industry self-regulation, it has long worked in tandem with the telecommunications regulatory, first OfTEL and now Ofcom. Ofcom has described ICSTIS as ‘not the extension of an industry association or self-regulatory arrangement but recognises the critical importance of stakeholder support for its work as non statutory regulator of all PRS activity in the UK’. ICSTIS is thus another industry body whose activities have state support, although seemingly based on a contractual relationship between the network operator and the service provider.

Under s. 6 Communications Act, Ofcom is required to review its own activities to ensure that it does not impose unnecessary regulatory burdens on telecommunications operators and to consider whether self-regulation or co-regulation is appropriate. The Communications Act 2003 gives Ofcom the power to regulate telecommunications operators in line with the EC communications package. As a result, telecommunications operators are under a number of conditions, both general and

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6 See paragraph 61.10 of the CAP Code of Conduct
7 Memorandum of Understanding between Ofcom and ICSTIS, August 2005, para 10
specific. As regards premium rate services, the Act envisages that there be an approved code of conduct and that there be an ‘enforcement authority’, being a body which under the code has the responsibility for enforcing it. The presumption in the Act is that Ofcom will recognise the existing system if there is one and it meets criteria in the act. Consequently, Ofcom has approved the ICSTIS code, as did Oftel under the previous licensing regime. Compliance with the ICSTIS code is a specific condition imposed by Ofcom on premium rate operators. Although not specifically stated in the condition, Oftel viewed this condition as being the legal basis for ICSTIS’ involvement in regulation.

Ofcom and ICSTIS have recently agreed a memorandum of Understanding (MoU) which reflects the criteria Ofcom has adopted in relation to co-regulation, and which sets out the scope, nature and operation of the relationship between Ofcom and ICSTIS (see further below). As with the MoU entered into between Ofcom and the ASA, this MoU is not a legally binding document. It does not therefore remove responsibility from Ofcom for the performance of its statutory duties. In practice, though, it is envisaged that Ofcom will not involve itself in operational matters unless there is a problem with the performance of ICSTIS.

Although ICSTIS has the power to fine operators, Ofcom retains this power also, and may also withdraw a service provider’s licence. Ofcom has, as required by s. 392 Communications Act, drawn up guidelines on penalties. In it, the guidelines state that Ofcom should bear in mind, when imposing any penalties, a number of factors

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8 For the power to make conditions see s. 45 et seq. Communications Act 2003.
9 s. 120 Communications Act 2003, especially s.120(3) and s.120(15)
10 The terms for approving the code of conduct are set out in s. 121 Communications Act 2003
11 Lloyd and Mellor Telecommunications Law (Butterworths, 2003), p. 76
13 See Ofcom ‘Criteria for Promoting Effective Co- and Self-Regulation’
14 MoU, para 7
15 Available on Ofcom’s website at:- http://www.ofcom.org.uk/about/accoun/pg/
including the fact that the company in question has already been subject to sanction in relation to the same conduct by another regulatory body.\textsuperscript{16}

The IWF was founded by industry to work in partnership with the police and relevant government departments to tackle illegal content on the Internet. It has no express statutory basis, although it is included in a number of government committees and task forces in this area. Following the \textit{Sex Offences Act} 2003, which amends the protection awarded to children under the \textit{Protection of Children Act} 1978,\textsuperscript{17} the Chief Constables’ Association and the Crown Prosecution Service entered into a memorandum of understanding about the reporting of such offences which, inter alia, recognises the role of the IWF and states that reports made to the IWF in line with its procedures will be accepted as a report to the relevant authority for the purposes of the \textit{Sex Offences Act} 2003. The basis on which IWF has handed over responsibility for content rating to ICRA is not clear.

d) \textit{Institutions involved in the system}

ASA: see above

ICSTIS is a non-profit making organisation. It is funded by a levy on service providers and collected by network operators. Its budget is subject to the approval of Ofcom. The ICSTIS Network Operators Committee (INOC), which was set up in 1996 to improve ICSTIS’ transparency and accountability, represents those network operators who carry premium rate services. Under current arrangements, one quarter of the members are actively involved in delivering PRS. According to the MoU, this is to be kept under review. Its main functions are to scrutinize ICSTIS' annual budget, to monitor income and expenditure against this budget, and to consider any issues

\textsuperscript{16} Guidelines, paragraph 5

\textsuperscript{17} Section 45 amends the \textit{Protection of Children Act} 1978 so that the offences under that \textit{Act} of taking, making, permitting to take, distributing, showing, possessing with intent to distribute, and advertising indecent photographs or pseudo-photographs of children will now also be applicable where the photographs concerned are of children of 16 or 17 years of age. The same change applies to the offence of possessing an indecent photograph or pseudo-photograph of a child at section 160 of the \textit{Criminal Justice Act} 1988 (section 160(4) applies the 1978 Act definition of “child”). Section 46 provides a defence in that an individual will not have committed the offence where it was necessary for him to make the photograph or pseudo-photograph for the purposes of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings, in any part of the world.
relating to the development or regulation of the premium rate industry; it has thus also considered some policy issues. Insofar as ICSTIS is acting as a public body, the Nolan Committee Seven principles of Public Life apply.\(^{18}\) In this, there are parallels with the standards applied to the ASA. Outside its public function, ICSTIS should attempt to adopt a similar approach.

Within ICSTIS there are a number of committees/groups. The ICSTIS Committee consists of nine remunerated part-time members who have no current connection with the premium rate industry. The Committee discusses policy relating to premium rate services. Sub-groups of the Committee, made up of three members, meet once a fortnight to adjudicate on complaints. It is supported by a full time secretariat. ICSTIS set up a compensation scheme in respect of unauthorised calls to certain Live Services; claims on compensation are determined by an independent adjudicator. There is also an Independent Appeals Body. It consists of a chairman, a judge, and four lay members. All five are completely independent of ICSTIS.

IWF is a limited company, but not run for profit. It is currently seeking charitable status. IWF is controlled by a Board of ten members, comprising six non-industry members, three industry members, and an independent Chair. IWF funding is by voluntary industry sponsorship. Those funding the IWF are invited to join a Funding Council, which determines its own constitution, terms of membership, and methods for selecting its representatives on the Board. Additionally, IWF receives EU funding. Special projects are also funded by government departments. Industry members have also sponsored individual events, as shown in the IWF’s annual reports.

As noted in the part 1 report, ICRA is an independent, non-profit organization whose mission is to develop, implement and manage a voluntary self-rating system which provides internet users world wide with the choice to limit access to content they consider harmful, especially to children. It is not a purely UK organisation, being founded by international companies.

\(^{18}\) These principles can be found summarised at: http://www.public-standards.gov.uk/about_us/seven_principles.htm
e) Functioning of the system

See above re ASA and part 1 report. The CAP provides a free copy advice service to advertisers, broadly equivalent to the service provided by the BACC and RACC in respect of the broadcast system.

Note that although compliance with ASA rulings themselves is not compulsory as a matter of law (though strongly encouraged within the industry), it has sanctions at its disposal to encourage compliance, even outside the areas directly dealing with statutory requirements. In its code, ASA notes that bad publicity is one of the strongest sanctions. It also relies on the power of CAP, which may issue Ad Alerts to its members, including the media, advising them to withhold their services from non-compliant marketers or deny the latter access to advertising space. Trading privileges may likewise be suspended. Further, ASA and CAP may require that persistent offenders have their advertising vetted before it is accepted for publication. Note also that some aspects of ASA’s responsibilities, such as the Misleading Advertising Regulations, do result in the possibility of sanctions imposed by the courts. ICSTIS regulates the content and promotion of services through its Code of Practice. Although the review of the code is the responsibility of ICSTIS, Ofcom is responsible for approving the code for its compliance with the requirements in the Communications Act. Enforcement of the code is primarily a matter for ICSTIS, although Ofcom will provide ‘backstop powers’ for enforcement via the PRS condition. Participation in the ICSTIS system as far as premium rate service operators are concerned is mandatory because of the conditions imposed on them by Ofcom under the Communications Act 2003. The Code of Conduct, available on the ICSTIS website, also contains general guidance about interpretation of the code. ICSTIS investigates complaints and has the power to fine companies and bar access to services. In addition, it offers free copy advice and guidance to both existing and new service providers. It has the responsibility to investigate complaints about any

19 The Code of Practice is periodically revised: the current edition (10th) came into effect 1 January 2004. It was amended by emergency procedure August 2005, and the amendment has been approved by Ofcom.

20 MoU, paras 9 and 14

promotion or service that is charged at a premium rate and monitors services and their advertising to make sure they follow the Code of Practice. This includes any premium rate call to access Interactive TV and online internet services. Some types of service may not be provided without the prior permission of ICSTIS (e.g. live chat lines and remote gambling). Within this framework, ICSTIS has discretion to make decisions in individual cases, subject to appeal to the Independent Appeals Body. ICSTIS may be subject to judicial review. ICSTIS is independent of the industry. Adjudications are published on the ICSTIS site. ICSTIS also produces annual reports.

The responsibilities and conduct of all IWF Board members are governed by the provisions of the Board Members’ Handbook, available on the IWF website. The Board’s function is to monitor and review IWF’s remit, strategy, policy and budget in the light of the IWF’s objectives: it does not make content decisions. IWF has a Chief Executive to manage day-to-day operations, subject to policy directives from the Board. Decisions on content are made by the hotline team, who are salaried individuals, and who act in accordance with the policies determined by the Board, although in many instances the role of the IWF is that of passing information on to law enforcement agencies. IWF provides a certain amount of guidance on its website, together with information as to the relevant law in this area. It operates advice in the form of ‘if in doubt, report the material’ policy. Cooperation and compliance with IWF is mandatory for members of Internet Service Providers Association (ISPA) by virtue of its code of practice. Membership of ISPA is not mandatory, though in practice most UK ISPs are ISPA members. Note that the rating system managed by ICRA is also voluntary.

f) Supervision of the system

The ASA has an independent internal review procedure and is also subject to judicial review, although as noted below the standard for such a challenge is high. As regards ICSTIS decisions are subject to review by the Independent Appeals Body. It hears appeals by service providers in the following circumstances:

- Against adjudications made by ICSTIS, following an oral hearing

22 See e.g. R v. ICSTIS, ex parte Telephone Entertainment Service (QBD), 6 February 1992, CO/2439/91
• Against refusals by ICSTIS to grant applications for permission to provide services in cases where permission from ICSTIS is required
• Against the imposition of conditions as part of the permission granted to a service provider to operate a service.
ICSTIS is also subject to judicial review. Under the MoU, ICSTIS and Ofcom have agreed key performance indicators (KPIs) on which ICSTIS must report, as well as on its performance in the light of Ofcom’s Co-Regulation Criteria. There seems to be little in the way of systems in place to challenge IWF take down notices; it is not entirely clear whether the IWF would constitute a public body (see above). In the Jockey Club case, Hoffman LJ noted that the mere fact of power is not sufficient to constitute a public body as power may be public or private. What may be significant in this context is the recognition of the IWF by government departments and the police and Crown Prosecution Service as other bodies which have to be seen to be part of a regulatory system and therefore, have been deemed to be public bodies. Criminal prosecutions can of course be challenged within the criminal justice system. ICRA would seem not to be amenable to judicial review.

g) Impact assessment
ICSTIS has published annual reports since its inception (activity reports); it also publishes monthly reports, as well as updates, press releases and leaflets. In its report in respect of 2003, ICSTIS stated that it resolved 18,303 complaints; it received 27,501 complaints an increase of over 200% on the previous year. Of those cases resolved those requiring investigation (approximately half), just under half resulted in a finding of a violation of the code. A significant number of cases were dealt with under the emergency procedures and resulted in significant fines (up to £450,000 in respect of 6 interlinked companies) and the barring of services in some cases. Most

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23 R. v. ICSTIS, ex parte Firstcode Ltd (CA), 24 February 1993
24 R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan [1993] 1 WLR 909, see also R v. Football Association Ltd, ex parte Football League Ltd [1993] 2 All ER 833
25 R v. ASA, supra
26 For sentencing guidelines see: http://www.iwf.org.uk/documents/20041019_sentencing_advisory_panel_child_abuse_images_on_the_internet.pdf
complaints concerned competitions, though online adult entertainment came a very close second. The complaints often concerned pricing or a failure to respect a cut-off amount. Another significant group of complaints related to online services not sticking to walled garden environments. Note that the consumer association, Which, has recently reported that ICSTIS is sometimes slow to respond to complaints; this is because one particular service can trigger significant numbers of complaints very quickly, thus overwhelming the system.

As regards the IWF, despite some initial concerns, it seems accepted that it has been effective in the sense that it has been used. Gringras noted that between January and June 2002, the IWF’s hotline received 8,414 reports of which 25% were judged to be potentially illegal. The number of reports cited constituted an increase of almost 65% on the previous year’s figures.\(^\text{27}\) According to IWF, 2003 showed a 9% increase in number of reports on 2002, 33% of which were assessed as potentially illegal. On its website, the IWF comments that the percentage of potentially illegal content assessed by itself and hosted in the UK has been reduced from 18% in 1997 to around 1% in 2004. What impact this has on the provision of such content globally is debatable. The 2003 figures show that child abuse content traced to the US rose by 55% on the previous year and that in relation to Russia, by 5%. It also states that 95 potentially illegal newsgroups from UK ISPs have been suppressed during 2005 so far. The website further lists six cases in which the police have acted on information supplied by IWF and successfully prosecuted the offenders, though IWF notes that it is not always notified of the outcome in particular cases.\(^\text{28}\)

2. Part II: Leading cases

Although not concerning the Internet, the operation of the misleading standards regulations can be seen in Director General of Fair Trading v. Planet Telecom plc and others.\(^\text{29}\) In this case, the company was found to have sent misleading faxes, requesting recipients to fax back over a premium rate phone line. Additionally, it erroneously appeared that the sender of the faxes was connected to a public

\(^{27}\) Gringras, C., The Laws of the Internet (Butterworths, 2003), p. 328

\(^{28}\) Details can be found at: http://www.iwf.org.uk/police/tools.5.20.htm

\(^{29}\) Director General of Fair Trading v. Planet Telecom plc and others [2002] EWHC 376 (Ch), 6th March 2002
telecommunications operator (BT). That the cost of faxing the company back would be £5 per sheet was unclear. After complaints about this practice to ASA, ASA upheld the complaint on 6th December 2000. When the company refused to discontinue its practice, ASA referred the matter to the Director General for Fair Trading who then wrote to the defendants, requesting an undertaking from them to the effect that they would stop sending the faxes. After some correspondence between the parties about the practice of sending faxes, proceedings were commenced against the defendants, the Director General requesting an interim injunction to restrain the use of faxes in the form about which he had complained. This case is interesting as the defendants sought to divert the complaints about the misleading advertising by pointing out to the high court the existence of regulatory bodies with potential jurisdiction over the company’s actions, namely the Information Commissioner (who deals with the Data Protection Act and the Freedom of Information Act) and ICSTIS. These arguments were not accepted by the court as being a basis for it not to consider the issue of misleading advertising. Given the nature of the application sought, an interim injunction, the court was not concerned with a final determination but with the question of whether there is a serious question to be tried; they granted an injunction on the advertisements and those in substantially the same form.

As noted, ASA is subject to judicial review, although successful cases have been rare. The test is high: irrationality, illegality or procedural impropriety. The courts have also noted the importance of recognising the specialist skills of the regulatory body, especially where that expertise away from the courts’ ordinary expertise. In one case concerning a campaign by an animal rights group against the killing of seal pups in the interests of salmon fishermen, focussed on the sale of tinned Salmon by Tesco, the court cited the words of Bingham:

‘The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test is sufficiently flexible to cover all situations.’

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Further, the courts have ruled that inconsistency does not necessarily render an ASA judgment flawed.31 Prior to the HRA, the courts also held that ASA has no need to consider the ECHR32; the position now is less clear. In *SmithKline Beecham plc v. Advertising Standards Authority*,33 the ASA determined an advert about Ribena being good for teeth to be misleading, despite the fact that the specific claims in the advert had been approved by the British Dental Association (BDA). SmithKline Beecham complained that the expert consulted by the ASA was not impartial, having publicly allied himself with complaints about the advertisement. As part of its reasoning, the administrative court hearing the case considered the need for impartiality as guaranteed by Article 6(1) ECHR, citing the test for an impartial tribunal set down in the ECHR jurisprudence,34 as well as English jurisprudence on the matter. Freedom of commercial expression is protected by Article 10 ECHR, and the scope of protection was considered in this case too. SmithKline Beecham argued that the ASA interpreted the scope of ‘reasonable claims’ too stringently, constituting an unjustified intrusion into free speech. This the court rejected, stating that English law matched Article 10 ECHR in this regard.35 The advertisement made an absolute claim, which required greater substantiation under the ASA code. The ASA’s response was, according to the court, therefore justifiable in principle and proportionate.

Much of the case law before the criminal courts concerns computer pornography and the nature of a photograph in respect of the *Protection of Children Act*36 a matter which has to some extent been clarified by legislation. The IWF does not itself bring prosecutions that is a matter for the police and the Crown prosecution service,37 nor have any of its decisions been challenged in court. Some concerns have been expressed about the impact of take down notices on freedom of expression and the lack of adequate remedies in this regard.

31 *R v. ASA, ex p DSG Retail*, CL, April 1997, 461
34 *Ferrantelli and Santangelo v. Italy* 23 EHRR 288 and *Haushildt v. Denmark* (1990) 12 EHRR 266
35 On the position prior to the HRA, compare *IFW, supra.*
36 See notably *R v. Fellows* (1997) 1 Cr App R 244
37 Gringras gives the example of Leslie Bollingbroke, p. 328, not reported
Although ICSTIS regularly takes action against those operators which do not comply with the code (see above), it seems that few of these cases have been challenged judicially. In *Telephone Entertainment Services*, the court was concerned with ICSTIS’s approach to the interpretation of its code regarding advertisements of a sexually suggestive nature. The court noted that as regards a body’s approach to interpretation of its own rules, it is much more difficult to argue misinterpretation.\footnote{Telephone Entertainment Services, supra, citing R v. Panel on Takeovers and Mergers, ex parte Guinness [1990] 1 QB 146, at 159}
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Internet

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criteria</strong></td>
<td><strong>Cases excluded by this criterion</strong></td>
<td><strong>Explanation</strong></td>
</tr>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
</tr>
<tr>
<td>All three bodies have codes, compliance systems and give advice.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td><em>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</em></td>
</tr>
<tr>
<td>Codes are supported by statute, even if indirectly.</td>
<td></td>
<td><em>Note position of IWF; its role seems to be only indirectly recognised in law.</em></td>
</tr>
</tbody>
</table>
As long as this is performed by or within the organisations or parts of society that are addressees of the regulation

<table>
<thead>
<tr>
<th>Measures by third parties (e.g. NGOs)</th>
<th>The range of possible subjects of non-state action has to be limited to make the definition workable.</th>
</tr>
</thead>
</table>

All are funded by relevant industries who participate in system.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
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<td>The system is established to achieve public policy goals</td>
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<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
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Communications Act and Misleading Advertising Regs specifically set out policy goals; note also purpose of Sexual Offences Act is protection of minors.
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<th>Informal agreements without any legal criteria to judge the functioning of non-state regulation</th>
<th><em>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</em></th>
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<tr>
<td>Statutory framework exists regarding misleading advertising (ASA), see generally position of ICSTIS recognised under Communications Act. Position of IWF less clear: no formal statutory basis.</td>
<td>Traditional regulation</td>
<td><em>Note IWF has a formal role within a public law enforcement system.</em></td>
</tr>
<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>All three have decision making powers.</td>
<td><em>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure execution of state/EU-set rules does not promise innovation.</em></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Note distinction between take-down notices operated by IWF and criminal prosecution in which it has a role, but in which it does not make the final decision as to the content’s legality</td>
</tr>
<tr>
<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td><em>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</em></td>
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</tr>
<tr>
<td>Some goals are set by statute/SI in regards to ICSTIS/ASA though both bodies formulate their own codes. IWF closely linked with government initiatives, but formal influence less clearly seen.</td>
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</tbody>
</table>
Conclusions: This system overall seems to be co-regulatory based on the use of industry-based bodies but with links to the state sponsored system and overall policy goals, certainly as regards advertising content and access on certain types of phone line. As noted, ASA would seem to fall within the criteria for a co-regulatory body, to a certain extent more clearly than in relation to broadcast advertising as the code of conduct regarding non-broadcast advertising is not so influenced by statute. ICSTIS would also seem to constitute a co-regulatory body. It was set up by the industry members themselves and provides a code with which they comply. It is supported by the state, via the conditions imposed on the industry members by Ofcom, a public body established by statute. IWF although not vested with formal statutory powers, forms part of the overarching scheme for protection of society and does receive some public funding as well as industry funding. One difficulty here is that the system itself is not coherent: not all content is covered and regulation of access depends on the type of link used to gain access to the Internet.

III. Co-operative Regimes in the mobile sector

1. Part I: The co-operative regulatory system

a) Development of the regulatory system

ICSTIS, the industry body regulating premium rate telephony content in the UK, has established a subsidiary to deal with content accessed via mobile phones, the Independent Mobile Classification Body (IMCB). This development was at the request of the six mobile telephony operators in the UK, which together established a code of conduct relating to 3G content in January 2004.

b) Subject-matter of the regulatory system

Mobile content is a sub-set of the telephony regime; it is different from traditional telephony in the same way as premium rate services: as well as pricing and access issues (which might fall within the ICSTIS regime), these services also raise content-based issues. Advertising carried on all these services, whether premium rate or otherwise, falls within the remit of the ASA.
The IMCB has responsibility for still pictures; video and audiovisual material; and mobile games, including java-based games. It excludes text, audio and voice-only services, including where delivered as a premium rate service and consequently regulated by ICSTIS;\(^1\) gambling services (covered by other UK legislation); moderated and unmoderated chat rooms; location-based services (subject to a separate mobile operator code of practice); content generated by subscribers, including web logs; and content accessed via the internet or WAP where the mobile operator is providing connectivity only. In the introduction to its Classification Framework, the IMCB emphasised that the rationale for the system was to protect children from unsuitable content (whilst facilitating the use of new mobile services).

\textbf{c) Basis of the co-operation}

In respect of those services provided on premium rate services, see ICSTIS, details above. In respect of all relevant content services, whether provided by premium rate service or not, IMCB operates under a contract between itself and the mobile operators. It has no powers conferred on it by general law.

\textbf{d) Institutions involved in the system}

ICSTIS: see above. Although a subsidiary of ICSTIS, IMCB is funded and run separately. It is funded by the mobile operators on terms that are designed to ensure its independence. IMCB is a not-for-profit company and its board members are drawn from the ICSTIS Committee.

\textbf{e) Functioning of the system}

For ICSTIS procedures see above. The main function of the IMCB is to set a classification framework according to which content providers may self-classify their content. Where content within the framework is provided by premium rate service, the operator must comply with the ICSTIS code also. IMCB does have the function of investigating complaints about misclassification, but it seems that this is to constitute

\(^1\) PRS is defined in s. 120 \textit{Communications Act} 2003
a fall back position; complaints in the first instance should be made to the mobile operator; indeed contacting the mobile operator is a pre-requisite of making a complaint under the Classification Framework unless the complaint is made by another mobile operator. On receiving a complaint the matter is considered by an IMCB board member. The board member will ask for information from all relevant parties and any other information needed to determine the case and state the time in which this should be received, which will not be longer than 28 days; a panel of the IMCB board will consider the matter and make its decision ensuring that everybody involved has had an opportunity to respond to all the points raised. Any party can request an oral hearing, but does not have the right to such a hearing. That decision is made by the panel. As it is still new, there is little available about IMCB’s decision-making in practice; it will, however, publish its adjudications on its web page.2

(f) Supervision of the system

The IMCB Framework also introduces the Classification Framework Appeals Body ("CFAB"), which is a body of persons independent of IMCB appointed to hear appeals against decisions made by IMCB under the IMCB Complaints and Dispute Procedures. An appeal may be made, within 28 days, on the following grounds:

- the disputed decision was based on an error of fact;
- the disputed decision was wrong in law or;
- IMBC exercised its discretion incorrectly in reaching its decision.

Again the parties have the right to request an oral hearing, but not the right to have such a hearing. Similar questions regarding the amenability to judicial review of IMCB decisions, and that of the appeal board, occur as do in relation to the IWF, given the contractual nature of the IMBC and the fact it is mainly funded by industry. IMCB is less obviously part of a government scheme for regulation, however, than the IWF.

2 http://www.imcb.org.uk/latestulings/
g) Impact assessment

Given the recent nature of the IMCB, it is too early to assess its impact. IMCB will be publishing a report in 2005 in respect of its first period of operation. At the moment IMCB has determined just one case and that, as it occurred prior to the establishment of the framework was deemed to be not binding, but for guidance only.\(^3\)

For ICSTIS see above.

2. Part II: Leading cases

There are no cases relating to the operation of IMCB; for assessment as to whether it is a ‘public authority’ and therefore amenable to judicial review see cases cited above.

\(^3\) http://www.imcb.org.uk/latestrulings/
3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

Table: Criteria / Mobile sector

<table>
<thead>
<tr>
<th>Non-state regulatory system</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>The creation of organisations, rules or processes</td>
<td>Informal agreements, case-by-case decisions</td>
<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
</tr>
<tr>
<td>Body has been established to operate classification system.</td>
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<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td><em>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</em></td>
</tr>
<tr>
<td>System requires content classification; it therefore affects content providers, whether network operators or not.</td>
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</tbody>
</table>
As long as this is performed by or within the organisations or parts of society that are addressees of the regulation, Measures by third parties (e.g. NGOs)

Network operators, which required establishment of system, are caught where they provide content; other content providers also caught.

<table>
<thead>
<tr>
<th>Link between the non-state-regulatory system and state regulation</th>
<th>Cases excluded by this criterion</th>
<th>Explanation</th>
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<tr>
<td>The system is established to achieve public policy goals</td>
<td>Measures to meet individual interests</td>
<td>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</td>
</tr>
<tr>
<td>System seemingly established to protect minors.</td>
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<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td>Informal agreements without any legal criteria to judge the functioning of non-state regulation</td>
<td>If there were no limits on the link to non-state</td>
</tr>
<tr>
<td>No public law basis exists; relationship between IMCB and network operators is contract.</td>
<td>judge the functioning of non-state regulation</td>
<td>regulation all forms of interaction would come to the fore.</td>
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<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
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<tr>
<td>ICMB has discretion to review classification decisions.</td>
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<td>The state uses regulatory resources to influence the non-state regulatory system</td>
<td>Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system</td>
<td>Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.</td>
</tr>
<tr>
<td>System seems to be set up at request of industry with minimal, if any, state involvement.</td>
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</table>
**Conclusions:** It does not seem that the IMCB on its own can be seen as a co-regulatory structure. Although the structure itself is set up to influence decisions of mobile content providers, but also content providers who are not network providers, and is aimed at achieving some social policy goals, there does not seem to be the necessary connection with the state apparatus. Compliance with IMCB classification is not backed up by any state sanction (although compliance with the requirements of ICSTIS, IMCB’s mother company, is), nor is the IMCB supported financially by other means by the state. Having said that, it is clear that the establishment of IMCB was designed to respond to general concerns about the provision of mobile content services and thereby forestall regulatory intervention.
Annex:

I. ATVOD

1. Part I: The Co-operative Regulatory System

a) Development of Structure

ATVOD currently has seven members (Video Networks, the On-Demand Group, NTL, Telewest Broadband, Kingston Interactive Television, Blockbuster and BT), all of which are communications companies that provide a range of content-on-demand services. ATVOD was formed (by five of these companies) in response to concerns that traditional mechanisms for protecting children in particular were ineffective given the development of digital technology. It seems that at least some of the members viewed the development of the code of practice as other means of continuing to fall outside a state regulatory system. Equally, this approach can be seen as reflecting a governmental preference towards industry self-regulation. ATVOD is a private company limited by guarantee which was established in 2003, though as yet contact with ATVOD is only by post. There is currently no helpline number; the website is not yet available.

b) Subject Matter of Regulatory System

ATVOD concerns ‘on-demand services’ as defined in the ATVOD code as ‘a service where video and audio programming, commercial transactions, information and other consumer benefits are provided over a telecommunications network (of any nature whether by cable, wireless or otherwise) for reception at different times to the premises of individual subscribers in response to requests made by individual customers’.

The main function of ATVOD is to operate, via its board, a code of conduct. The code is based on two core principles:

1 See Video Networks Ltd presentation “Regulation in a Converged World”, June 2005
“members recognise their responsibility to assist subscribers in their efforts to take children and young people from unsuitable material; members recognise their responsibility to provide accurate, timely and reasonably prominent guidance in relation to their offerings of (a) content reasonably expected to cause significant offence or upset to some customers and (b) commercial services”.

ATVOD has also developed a ‘trustmark’; this its members are under no obligation to use. It is however viewed as significant for inspiring public confidence in on-demand services.²

Additionally ATVOD was invited to participate in the Audio Visual Content Information Working Group established by OFCOM as part of its media literacy responsibilities.³ The working group is to investigate how viewers prefer to receive information about challenging content, particularly in homes with digital television and broadband connections to the Internet. OFCOM intends to develop as a result of this research a common labelling system to enable greater consistency in presenting information about content which could cause harm or offence, as well as information to protect young and vulnerable people from inappropriate material. Although OFCOM may make recommendations in this regard, enforcement of any such recommendations would be difficult.

c) Basis of Co-operation

OFCOM is obliged under its general duties in the Communications Act to ensure that adequate protection is provided against the inclusion in broadcast services of offensive and harmful material. Note however that these general provisions also

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² As noted by OFCOM ‘Perhaps we might move to a sort of “opt in” regulation, where some content providers agree to meet certain standards, in return for a publicly recognised kite mark or mark of approval. This does not necessarily need to involve the regulator. We have already seen good progress in self regulation, encouraged by bodies such as ISPA and ATVOD.’ Foster, R., Competition and the Public Interest: A More Transparent Approach - A Paper for the OECD/Ofcom Roundtable on Communications Convergence, 2 June 2005

³ Section 11 Communications Act 2003 puts OFCOM under certain duties to promote media literacy. In particular it is required to “bring about a better public understanding of the nature and characteristics of material published by means of electronic media”.

733
contain an in-built preference towards a lighter regulatory approach, favouring self-regulation over action by the regulator where possible. Section 319 also obliges OFCOM in setting its standards code for radio and television services to ensure that persons under the age of 18 are protected. In setting standards, OFCOM must have regard to the degree of harm or offence likely to be caused by particular sort of material. In respect of licensed services, OFCOM may enforce such standards via licence conditions. On demand services would currently seem to fall outside OFCOM’s responsibilities in this regard: ss 232 and 233 define the respective scope of OFCOM’s regulatory remit by reference to the transmission of television programmes, but exclude ‘two-way services’. Given a potential lack of certainty in this regard, ATVOD suggested when OFCOM consulted on its programme code that the OFCOM Content Code should explicitly make the point that on-demand services are not regulated by OFCOM.

d) Institutions, funding and management

Membership of ATVOD is open to those undertakings which operate on-demand services which are available for reception within the UK; associate membership is also possible for operators of telecommunications networks over which on-demand services are distributed as well as for suppliers of programming for on-demand services. As yet, there are no associate members. Membership, whether full or associate, is voluntary. According to the ATVOD Code, ATVOD is to notify the DCMS from time to time of the identity of its members.

The ATVOD Board administers the ATVOD Code of Conduct. According to the code, it shall be “entitled to establish an administrative capability”: the Secretariat. The Secretariat is independent and run by a company, Millwood Hargrave Limited. The costs of the ATVOD board and Secretariat to be met by the Members, the precise division of responsibility to be determined by the ATVOD board acting unanimously. Note that the Secretariat may apply a discretionary non-refundable charge of £250 towards the handling of the complaint procedure which is levied upon the relevant member.
The composition of the ATVOD board is a mixture of independent members and those representing the members. There is to be a minimum of two independent members of the ATVOD board, together with an independent chairman. The code envisages a maximum of 11 members in total, but currently provides also for each member to have a representative on the board plus, for every four full members, one representative collectively appointed by any associate members. Although these rules currently mean that the representatives of the members could outweigh independent members, the rules also specify that, no later than the fifth anniversary of the coming into force of the code, the majority of ATVOD board members are to be independent of the members. It also provides that the independent members are not only to be unconnected with the provision of on-demand services that are selected to correspond, as far as possible, so as to reflect a diversity of background and experience. Members of the ATVOD board are to work part time and be appointed for an agreed, though unspecified, period. Currently, an independent chairman has been appointed but all board members are representatives of members. Neither the requirement for a representative from associate members nor the requirement for two lay members has been satisfied, though the non-appointment of a representative of associate members may arise from the fact that there are currently no associate members.

Additionally there is an independent appeals body: the ATVOD Independent Appeals Commission. It comprises a chairman and four lay members: it does not include any member or affiliate of a member. A separate appointing body is to be appointed by ATVOD to recruit the members for the Independent Appeals Commission. Again, this body is not to include any member or affiliate of a member although it is to consult the ATVOD board during the appointment process. The appointing body will also set the remuneration rates for the members of the Independent Appeals Commission. A separate fund is to be established to pay for this. The money for the fund will be provided by the members in accordance with the funding formula to be determined by the ATVOD board, again acting unanimously.

e) Functioning of System

The ATVOD Board has the responsibility to set and maintain standards, and to keep those standards under review. Although the ATVOD Code requires the Board to
consult members and other stakeholders, including the DCMS, before changing those standards, it does not seem as though ATVOD Board will be bound by those views. The ATVOD Board may additionally adopt policy statements which will be incorporated into the Code and therefore bind members, although such practice statements cannot amend the constitution of ATVOD, the Core Principles of the Complaints Procedure. In principle, ATVOD 'shall ensure that the provision by its Members of on-demand services within the United Kingdom shall be provided in accordance with the Broadcasting Regulatory Codes prevailing from time to time.'

This requirement is subject to an important proviso:

‘For the avoidance of doubt, in the event of a conflict between a ATVOD Practice Statement and the Broadcasting Regulatory Codes, the ATVOD Practice Statement shall take precedence.’

This would seem to allow for differences between the broadcasting and on-demand systems to arise with the potential for on-demand services to be subject to either higher or, crucially, lower standards. The Code gives further guidance on the review of standards, notably, ‘the relevance and application of the prevailing Broadcasting Regulatory Codes to on-demand services and customer expectations.’

The code identifies some systems which will enable members to fulfil its ‘core principles’, although each member is responsible for determining the most appropriate means by which it will satisfy these requirements. There are two main groups of material which require special care: that which might be unsuitable for children or young people; and that which might be likely to cause significant offence to some customers. As regards the protection of children and young people, members are under an obligation to ‘make available a reasonable, robust and effective access control system’. In identifying the material which should be subject to access control, members should have regard not only to ATVOD practice statements but also to the prevailing broadcasting codes. Similarly the identification of offensive material,

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4 ATVOD Code, para 2.10
5 Ibid.
6 ATVOD Code, para 2.11
7 ATVOD Code, para 4.1
which is to be identified as such, is to be done by reference to ATVOD practice statements and broadcasting codes.

In principle it seems as though the first port of call for any complaints is effectively the relevant service provider. The code of conduct specifies that where the complaint is notified to ATVOD, the Secretariat will direct the complainant to contact the relevant service provider. Members are under an obligation to use “reasonable endeavours to resolve the complaint within 20 working days of receipt”. If the member does not comply with this time frame, or does not resolve the matter to the satisfaction of the complainants, after providing ATVOD with enough detail, the ATVOD Secretariat will then contact the relevant member within two working days of receipt of the details. The member is then under an obligation to respond to the complainant directly within 10 working days and must copy the Secretariat into its response. If either the complainant or the ATVOD board is unsatisfied with the response, the ATVOD board may initiate a complaints procedure. A complainant cannot require that the ATVOD would do this; the ATVOD board has absolute discretion in this regard.

This procedure requires the Secretariat to compile a report which includes details of the original complaint, the manner in which the Secretariat investigated the complaints, specifying any investigation carried out by the Secretariat together with any results of its inquiries, or material available to the Secretariat and the Secretariat’s conclusions. This report will then be presented to the ATVOD board which will then decide whether in its opinion there has been a breach of the code.

The code provides that the responsibility for determining complaints under the formal complaints procedure falls to the ATVOD board, although the ATVOD board may delegate its powers to a subcommittee which comprises not less than three members of the ATVOD board, one of whom must at all times be independent of the members. There are further rules to ensure impartiality: where a member of the ATVOD board either represents the member who is the subject of the complaint or the complainant, that member is to be replaced on any such sub-committee by an alternate member of the ATVOD board whilst the complaint in which s/he has an interest is considered.
The ATVOD board may refuse to adjudicate on a complaint where the subject-matter of the complaint is the subject of legal proceedings, where the complaint concerned the legality of material carried on a service under general law or where the complaint is deemed to be frivolous, vexatious or persistently made without reasonable grounds. Should the ATVOD board refuse to adjudicate, it is to give reasons for doing so. If the complaint falls within the jurisdiction of another regulatory body, such as OFCOM or ICSTIS, the ATVOD board may refer the complaint to that body. It may nonetheless also proceed to adjudicate upon the complaint: there seems to be no provision dealing with double penalties being imposed upon a service provider in such an instance, though the OFCOM Guidelines on Penalties (discussed in relation to ICSTIS) do provide that OFCOM should bear in mind penalties imposed by other regulatory bodies.

Additionally, the code contains rules providing for an emergency procedure to deal with circumstances where there has been a serious breach of the code, or there is likely to have been such a breach of the code, which requires urgent remedy. This procedure is initiated by the Secretariat at the request of the ATVOD board and requires the Secretariat to investigate the complaint immediately. Members notified by the Secretariat of a decision that there has been such a finding of an apparent serious breach will be required to correct such a breach immediately. Thereafter, the member has an opportunity to put its side of the case.

The sanctions range from requiring a member to remedy any breach promptly, requiring assurances relating to future behaviour, requiring the member to reimburse service charges to publicity regarding the final decision and possible suspension of the member from ATVOD. In addition to these sanctions, we also find the possibility of ATVOD requiring the member to reimburse to ATVOD “any unreasonable amount in respect of administration charges incurred by ATVOD in determining the complaint”; it is not clear what relationship this sanction bears to the provision which allows the Secretariat to make the nominal charge of £250.
f) Supervision of System

Failure to comply with any sanction will itself constitute a breach of the code. Additionally, there is an appeals procedure to the ATVOD Independent Appeals Commission. Appeals may be made on two grounds only:
the ATVOD adjudication was based on an error of fact; or
the ATVOD adjudication was based on an incorrect exercise of the ATVOD board’s discretion.
Any appeal the set out the reasons why the appellant is dissatisfied with the response received from ATVOD.

It is debatable whether the decisions of the ATVOD Independent Appeals Commission themselves would be subject to review through the courts system: to a certain extent, this would depend on whether the system was viewed as a public body or not. The problems relating to the determination of whether a body should be viewed as a public body or not have been outlined in the section relating to the ASA.

Article 2(g) of the ATVOD Code provides that it will publish annual reports, such reports to include, *inter alia*, summaries of complaints received by members and by ATVOD. No such annual report has yet been published, though it seems that one is in preparation.

g) Impact Assessment

No information is as yet publicly available via ATVOD. Although some of the members of ATVOD do make reference to the role of ATVOD, they do not provide any further information. It seems that ATVOD have not yet had any complaints/appeals.

2. Part II: Leading Cases

It does not appear that there are any decisions available for comment.
### 3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

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<td><em>This study focuses on potentially innovative forms of regulation; therefore, there should be a sustainable and formal setting.</em></td>
</tr>
<tr>
<td>ATVOD has drafted a code of conduct, which as well as dealing with content standards, contains procedures by which decisions are made. Note interrelationship with broadcasting codes.</td>
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</tr>
<tr>
<td>To influence decisions by persons or, in the case of organisations, decisions by or within such entities</td>
<td>Pure consultation</td>
<td><em>The non-state component should at least in a nutshell be regulation in itself; otherwise it would be practically impossible to single out pure knowledge exchange.</em></td>
</tr>
<tr>
<td>There are possibilities of sanction to help encourage compliance; note that membership of ATVOD is not compulsory.</td>
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<tr>
<td>As long as this is performed by or within the organisations or parts of society that are addressees of the regulation</td>
<td>Measures by third parties (e.g. NGOs)</td>
<td><em>The range of possible subjects of non-state action has to be limited.</em></td>
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<tr>
<td>ATVOD members are members of the ‘regulated’ industry.</td>
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limited to make the definition workable.
### Link between the non-state-regulatory system and state regulation

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<td><em>The fields for potential implementation of co-regulation in the media are restricted to public policy goals (protection of minors or similar), so research can also focus on those forms of regulation.</em></td>
</tr>
<tr>
<td>Main concern seems to be protection of minors generally.</td>
<td>Query whether system has been established to try</td>
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<td>to avoid regulation by the state.</td>
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<tr>
<td>There is a legal basis for the non-state regulatory system</td>
<td>Informal agreements without any legal criteria to</td>
<td><em>If there were no limits on the link to non-state regulation all forms of interaction would come to the fore.</em></td>
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<td>judge the functioning of non-state regulation</td>
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</tr>
<tr>
<td>Any basis would seem to be contractual between members and ATVOD, rather than based on specific statutory powers.</td>
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<tr>
<td>The state/EU leaves discretionary power to a non-state regulatory system</td>
<td>Traditional regulation</td>
<td>*Innovative forms can only be found if there is real “division of labour” between non-state and state actors;</td>
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The Communications Act seems to exclude two-way services from OFCOM’s responsibilities for content regulation. In this sense ATVOD would seem to have complete freedom to make decisions, constrained by the general law.

The state uses regulatory resources to influence the non-state regulatory system

<table>
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<th>pure execution of state/EU-set rules does not promise innovation.</th>
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Incorporation of codes set by the industry without influencing the regulatory process within the non-state-regulatory system

Innovative forms can only be found if there is real “division of labour” between non-state and state actors; pure incorporation of non-state rules does not promise innovation.

ATVOD refers to the OFCOM broadcasting code, but makes clear that in the event of a discrepancy between that Code and its guidance, ATVOD guidance prevails.
II. Conclusion

Although OFCOM has included ATVOD in its media literacy working group, ATVOD has not been delegated any formal powers by OFCOM, nor does OFCOM back-up the sanctions applied by ATVOD. Indeed, the sanctions in general seem relatively weak, essentially consisting of the publicity factor. On this basis, ATVOD would seem to constitute a self-regulatory system rather than co-regulation or regulation. One interesting point to note is that ATVOD seems to be making efforts to parallel the standards imposed on broadcasters through its references to the OFCOM code; ultimately, however, ATVOD has reserved to itself the right to diverge from these standards.
4. COUNTRY REPORTS NON-EU-COUNTRIES

4.1. Australia

I. Co-operative Regulatory Systems in the broadcasting sector

1. Part I: The co-operative regulatory system

   a) Development of the regulatory system

Co-operative regulatory systems in the broadcasting sector were first introduced in 1992 through the *Broadcasting Services Act 1992* ("the Act"). The Act signified a fundamental change to the way broadcasting services were to be regulated in Australia. Until that time, the regulator, the Australian Broadcasting Tribunal was required to intervene in most matters concerning broadcasting and in the area of content regulation it set standards and license conditions which were binding on the licensees.

The planning process for the new Act dated back to a commitment made by Government in its federal election campaign in 1987 where it said it would reform the Broadcasting Act because it had become too complex and the Government’s agenda was to remove unnecessary regulation and “to meet the changing nature of broadcasting that is occurring worldwide. The trend is to an increasingly diverse range of services that address many community needs and are delivered by an expanding range of technological means.”¹

The new Act created a new regulatory authority called the Australian Broadcasting Authority ("ABA") which was said to be “an oversighting body rather than an interventionist one”. The ABA is constituted by a chairperson, a deputy chairperson and not more than 5 other members all appointed by Government. It has approximately 130 staff.

It was intended that the new ABA monitor the broadcasting industry’s performance against clear established rules, intervene only when it has real cause for concern and has effective

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¹ Explanatory Memorandum to the Broadcasting Services Bill 1992 –Outline, p.1
redressive powers to act to correct breaches. This was said to be introduction of “light-touch”
regulation for the broadcasting sector.

The level of regulation to be applied to any particular type of broadcasting service is to be
determined according to the degree of influence that the type of service is able to exert in
shaping community views in Australia. Commercial television was considered to be the most
influential and a new category of broadcasting service called a narrowcasting service was
expected to be the least influential. Parliament declared that the regulation of broadcasting
services should be flexible and aim for an appropriate balance between catering for public
interest considerations, and imposing financial and administrative burdens on licensees. In
return for this new liberating regime, broadcasters were told that they would have to accept
responsibility for developing co-regulatory codes of practice\(^2\) which prior to 1992 did not
exist in the broadcasting regulatory framework.

\(\text{\textit{b) Subject matter of the regulatory system}}\)

The relevant objectives of the regulation so far as they concern content regulation are set out
at the start of the Act as follows:

- to promote the role of broadcasting services in developing and reflecting a sense of
Australian identity, character and cultural diversity;
- to promote the provision of high quality and innovative programming by providers of
broadcasting services;
- to encourage providers of broadcasting services to respect community standards in the
provision of program material;
- to encourage the provision of means for addressing complaints about broadcasting
services; and
- to ensure that providers of broadcasting services place a high priority on the protection
of children from exposure to program material which may be harmful to them.

A key aspect of content regulation is the development of industry codes of practice approved
by the ABA and then administration of a system of complaints from members of the public.

\(^2\) Ibid. Clause 4(2)
c) Basis of the co-operation

The entire legal basis for this cooperative regime is legislative. Part 9 of the Act – Program Standards sets out the legal basis for the cooperative regime as far as development of the codes is concerned. Part 11 of the Act – Complaints to the ABA sets out the legal basis for the cooperative regime as far as handling of complaints about breaches of the codes is concerned. A key section is section 123 of the Act which provides that:

It is the intention of the Parliament that radio and television industry groups representing:

- commercial broadcasting licensees; and
- community broadcasting licensees other than providers of services targeted, to a significant extent, to one or more remote Indigenous communities; and
- community broadcasting licensees whose services are targeted, to a significant extent, to one or more remote Indigenous communities; and
- providers of subscription broadcasting services; and
- providers of subscription narrowcasting services; and
- providers of open narrowcasting services;

develop, in consultation with the ABA and taking account of any relevant research conducted by the ABA, codes of practice that are to be applicable to the broadcasting operations of each of those sections of the industry.

The issues for which codes of practice may be developed are spelt out legislatively and cover most aspects of program content including “such other matters relating to program content that are of concern to the community”. Certain matters are still left regulated by stricter regulation, by way of standards made by the ABA itself and directly enforceable as licence conditions. The amount of Australian content and content suitable for children on television is regulated by standards rather than left to the codes regime.

d) Institutions involved in the system

Each sector of the broadcasting industry has developed a representative group as follows:
Free TV Australia ("FTA")
FTA represents the interests of the free-to-air commercial television industry licensees. It has developed one code of practice that applies to all commercial television broadcasting licensees. When it was first introduced it was required to be reviewed within 3 years. Time control of advertising is dealt with in this code through a concept called ‘non-program matter’ which is narrowly defined by the code. It is only the amount of non-program matter that is regulated by the code, not the total amount of advertising. See 2 below for more detail.

Youth protection is dealt with through various measures the main one being a program classification system and the related broadcast time restrictions for certain classified material.

Commercial Radio Australia ("CRA")
CRA represents the interests of the free-to-air commercial radio industry licensees. It has developed one code of practice that applies to all commercial television radio licensees.

Australian subscription television and radio association ("ASTRA")
ASTRA is the peak industry body for subscription television but has a broad range of members that include providers of satellite services, narrowcast television services, program channel providers, subscription television operators and communications companies. It has developed five (5) codes of practice as follows:

- Subscription broadcast television code
- Open narrowcast television code
- Subscription narrowcast television code
- Open narrowcast radio code
- Subscription narrowcast radio code

Community Broadcasting Association of Australia ("CBAA")
CBAA is the representative body for all holders of community broadcasting licences. It has developed one code of practice that applies to all community broadcasters both radio and television.
Each of the above four bodies are funded by membership fees paid by industry members.
National broadcasters (the Australian Broadcasting Corporation and the Special Broadcasting Service set up under separate acts of parliament) have developed codes of practice but are...
simply required to lodge a copy with the ABA unlike the other broadcasters who are required to submit their codes for registration (see below.)

\textit{e) Functioning of the system}

Once an industry group has developed a code of practice, the ABA must include that code in its Register of Codes (and it comes into force) if the ABA is satisfied that:

- the code of practice provides appropriate community safeguards for the matters covered by the code; and
- the code is endorsed by a majority of the providers of broadcasting services in that section of the industry; and
- members of the public have been given an adequate opportunity to comment on the code.$^3$

Industry groups would generally seek to satisfy the ABA as to there being an adequate opportunity for the public to comment by placing advertisements in national newspapers inviting comment on the draft code. Whether a code of practice provides appropriate community safeguards is a matter of judgement for the regulator, the ABA. They will be guided by their experience and the experience of the regulator in working with a previous version of the code if it is being reviewed. Once a code is included in the Register of Codes it applies to ALL licensees in that section of the industry regardless of whether they have had a part in its development or not thus making participation in the code system mandatory.

Once a code is registered, a member of the public may complain about a breach of the code. The Act requires that the complaint must be made in the first instance to the relevant broadcaster. Only if the complainant has not received a response within 60 days after making the complaint, or receives a response that the person considers to be inadequate, may the person make a complaint to the ABA.$^4$

The ABA is required to investigate a complaint made to it (unless the complaint is frivolous vexatious or not made in good faith) and provide a report of its investigation to the complainant. In the complaint investigation process, the broadcaster must be given an opportunity to comment. Each code of practice is a publicly available document and includes

$^3$ S.125(4) of the Act

$^4$ S.148 of the Act
provisions relating to complaint handling. A common breach of the codes is a breach of the complaint handling provisions.

The Free TV Australia code (for commercial television) requires Free TV Australia to publish each year a report on code administration by licensees. The report available to the public contains the number and substance of code complaints details of each complaint upheld and action taken by the licensee in each case. The ABA also publishes a report of complaints that it has investigated.

Information about how to make a complaint is set out on the ABA’s website at www.aba.gov.au.

\[f) \text{ Supervision of the system}\]

Responsibility for the overall supervision of the system lies with the ABA although the Act contains a provision\(^5\) that has never been used which permits Parliament to amend codes and standards. If the ABA finds that a code of practice has been breached, it has no direct remedy available to it although the ABA may make compliance with a code a condition of a broadcaster's licence where it considers this appropriate. If that licence condition is subsequently breached then the ABA can issue a notice to remedy that breach within a period up to a month. If that notice is not complied with then an offence under the Act has been committed for which a significant fine may be imposed by a court of law. This graduated approach to enforcement is a feature of the “light touch” regulatory ethos of the Act. The ABA usual response to a breach of a code is to work with the broadcaster to ensure that the broadcaster concerned rectifies problems with its performance against the code. There have been no court decisions pertaining to this system. Parts of the codes that deal with classification of programs according to the film classification system (administered by a separate body, the Office of Film and Literature Classification Board) and the times when certain programs can be shown must be periodically reviewed by the ABA to see whether those provisions are in accordance with prevailing community standards\(^6\).

\(^5\) S. 128 of the Act.

\(^6\) S. 123A of the Act.
g) Impact assessment

The ABA reports in each year’s annual report as to the total number of all investigations started and completed. It details investigations resulting in breach findings and identifies how many relate to breaches of codes of practice. Individual investigation reports on breach findings are published on the ABA website. Findings of breach of codes are broken down by category of broadcasting service.

Most industry groups publish an annual report or specific code complaints report each year. For example the Free TV Australia Code Complaints Report details the number of complaints, breaks them down by program, program category and type of complaint and compares the numbers of complaints to those received by the ABA.

Official comments about the code system are limited.

The author is not aware of any scientific evaluation or assessment of the system.

2. Part II: Leading Cases

No cases in relation to this system have been dealt with by a court of law. The only ‘cases’ that illustrate how the system operates are ABA decisions and findings on investigations of breaches of codes. These tend to be subject specific. An example follows:

On 27 February 2005, the ABA determined that BTQ 7 breached clause 5.6.1 of the Commercial Television Industry code of practice by broadcasting more than the permissible 13 minutes of non-program matter in an hour.

The complaint was initiated in writing by an individual. The ABA sought comment from the licensee and a copy of the program schedule. It was evident from the program schedule that the broadcaster had scheduled 13 minutes and 18 seconds of non-program matter in each hour between 6pm and midnight and thus a breach was found.

In its report, the ABA noted that the licensee had taken the following steps since the breach was identified;
• The non program matter for the station break had been allocated to the 5.30pm -6 pm slot rather than between 6.00pm -6.30 pm.
• The scheduler responsible for this had been spoken to
• The schedules are continuously checked and double checked
• The appropriate verification and checking procedures have been reiterated to all schedulers.

The ABA stated that it considered that these actions addressed the compliance issues raised by this investigation and noted that it will continue to monitor the licensee’s performance in this regard.

Prior to 1992, control of advertising time was dealt with by an ABA imposed standard called the ‘advertising time standard’ which did regulate the actual amount of advertising (broadly defined) permitted in any one hour. If there had been a breach of this standard prior to 1992, it would likely to have been a matter taken into account in the inquiry as to whether a licensee would have its broadcasting license renewed (license renewal is now presumed unless there are exceptional circumstances).

Prior to 1992 licenses argued for removing all rules about advertising time on philosophical grounds and because of the greater flexibility they said this would allow them to place advertisements sympathetically within programs. This argument was accepted in part by the then regulator, the Australian Broadcasting Tribunal, and the outcome was the removal of the rules for two years in order to see what results appeared on the television screen. At the end of the trial period in 1989 it appeared that there had been no dramatic change in advertising patterns except there was a larger amount of short advertisements in advertising breaks. The ABT re-introduced advertising time standards although these disappeared shortly thereafter as the new Act (1992) permitted the industry to develop a code which revolved around the concept of “non-program matter” rather than advertising.

3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study
a) **The non-state regulatory part of the system**

Each section of the broadcasting industry has set up a specific organisation to develop and then administer the codes of practice. Some of the smaller sections of the industry have combined with others to form one body. (see ASTRA in section 1(d)). This has been done in order to influence the regulator, the ABA, to accept a particular form of regulation for that section of the industry and later to influence the ABA in what findings it makes in its investigations of complaints about program content and other matters under the codes. Each of these non-state bodies are constituted by members all of whom who are addressees of the regulation.

b) **The link between the non-state part and state regulation**

The system was established by legislation in order to provide broadcasters with greater control over regulation of program content and greater flexibility in developing their own rules. This was all done within the public policy goals set out in the objects of the Act including the encouragement of providers of broadcasting services to respect community standards in the provision of program material; in the provision of means for addressing complaints about broadcasting services; and to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them.

The legal basis for the non-state regulatory bodies and processes is specifically spelt out in the legislation although the non-state regulatory bodies are not named. The non state regulatory system has considerable discretion in how it develops the codes and in the administration of its complaints system. The State provides resources to the regulator, the ABA to carry out its statutory functions in relation to the system which include considering codes for registration, ensuring they are regularly reviewed and administering an ‘appeals-type’ complaints system after the broadcaster’s complaints system has dealt with a complaint.

**Conclusion:** In my opinion, the Australian broadcasting codes of practice regulatory system is a co-regulatory system within the meaning of the study.

II. **Co-operative Regulatory Systems in the internet sector**
1. Part I: The co-operative regulatory system

a) Development of the regulatory system

Between 1994 and 1998 there were a number of inquiries in Australia that explored the debate over the merits of legislative intervention as opposed to industry self-regulation for the issue of offensive Internet content. A report published by the Australian Broadcasting Authority (“ABA”) in mid 1996 recommended that online service providers develop a code of practice to be registered with the ABA containing a proposed model for complaint handling. Over the same period Australian industry-based groups began discussing and drafting their own voluntary codes of conduct.

In July 1997 the Federal Government announced proposed legislative principles for amendments to the Broadcasting Services Act (“the Act”). The government opted for co-regulation involving self-regulation within a legislated framework. These principles became the basis for the Broadcasting Services Amendment (Online Services) Bill 1999 which provoked a substantial amount of opposition both in the Internet industry and in the media. The debate was centred on two issues; whether it was technically possible to regulate the Internet and whether it was desirable for the Federal Government to make laws about Internet content which restricted freedom of speech. The amending Act commenced in July 1999 introducing a new Schedule 5 to the Act. The legislation required the ABA to introduce binding standards on industry participants unless the industry developed, and had registered by the ABA, codes of practice which dealt with the relevant issues by 1 January 2000. This deadline was met by the industry and no standards have been introduced by the ABA.

a) Subject matter of the regulatory system

Schedule 5 regulates the activities of Internet Service Providers (“ISPs”) and persons who host Internet Content (“ICs”). It is part of a broader regulatory approach by Government to the issue of Internet content. It is a co-regulatory scheme as between the federal regulator, the ABA, and the Internet industry but also between the State and federal governments as obligations on the producers of Internet content and those who upload it are contained in complementary State based legislation.
Relevant objectives of the regulation so far as they concern Internet content regulation are set out at the start of the Act as follows:

- to provide a means for addressing complaints about certain Internet content; and
- to restrict access to certain Internet content that is likely to cause offence to a reasonable adult; and
- to protect children from exposure to Internet content that is unsuitable for children.

The main process that is regulated is the development of industry codes of practice and then administering a system of complaints from members of the public.

c) Basis of the co-operation

The entire legal basis for this cooperative regime is legislative. Schedule 5 to the Act – Internet Content sets out the legal basis for the cooperative regime.

There are four elements to the scheme:

- An Internet content complaints scheme administered by the ABA.
- A classification scheme for Internet content based on the system for films and computer games under the Classification (Publications, Films and Computer Games) Act 1995 (Cth).
- Enforcement powers given to the ABA against persons who host content on the Internet in Australia.
- The Internet Industry codes of practice, containing obligations for Internet Service Providers (“ISPs”) and Internet Content Hosts (“ICHs”) and mechanisms and procedures to assist users to filter unsuitable material hosted overseas.

d) Institutions involved in the system

The industry body responsible for developing the codes is the Internet Industry Association (“IIA”). The IIA is Australia’s national Internet industry organisation. Members include telecommunications carriers; content creators and publishers; web developers; e-commerce traders and solutions providers; hardware vendors; systems integrators; banks, insurance underwriters; Internet law firms, ISPs; educational and training institutions; Internet research analysts; and a range of other businesses providing professional and technical support services. On behalf of its members, the IIA provides policy input to government and advocacy on a range of business and regulatory issues, to promote laws and initiatives which enhance
access, equity, reliability and growth of the medium within Australia. Funding for the IIA comes from membership fees (77%), sponsorship monies (12%) and other income (11%)\(^7\).

The state body is the ABA. For detail on how this body operates generally see the section of this report on the broadcasting codes of practice. Its main role under the scheme is to register the codes of practice, administer the complaints system, make classification decisions on the content complained of (in conjunction with another federal regulator, the Classification Board at the Office of Film and Literature Classification), decide whether the content complained of is ‘prohibited content’ and to notify ICHs, ISPs and makers of approved Internet Content filtering systems as to their obligations under the codes in relation to any identified prohibited content.

\(e\) Functioning of the system

Under the scheme members of the public can complain to the ABA about Internet content. The ABA has power to investigate complaints which is or may be prohibited by law. Internet content does not include email or other content that can be accessed in real time.

The Act states that prohibited content falls into two categories. The first is content either hosted in Australia or overseas that has been refused classification (RC) or classified X by the Classification Board at the OFLC. The second category is content hosted in Australia that has been classified R by the Classification Board that is hosted in Australia and not subject to a restricted access system.

If the ABA identifies prohibited content, it must issue a take down notice to the ICH if it is based in Australia. For prohibited content hosted outside Australia, the ABA notifies all suppliers of approved Internet content filters of the URL of the prohibited content and they configure their filters so that the prohibited content is filtered out a person using their filter. If the prohibited content is sufficiently serious, the ABA refers the matter to the relevant police force either in Australia or overseas.

\(^7\) Year ended 30 June 2002 Annual Financial Performance
ISPs and ICHs have a series of other obligations under the scheme that are contained in the three Internet Content Codes of Practice developed by the IIA and first registered by the ABA in December 1999. These include taking reasonable steps to ensure internet access accounts are not provided to persons under the age of 18 years, encouraging content providers to label content that is unsuitable for children and taking reasonable steps to inform users how to supervise and control access by children to internet content.

Similar to the registration process for codes developed for sectors of the broadcasting industry, once an industry group has developed a code of practice, the ABA must include that code in its Register of codes (and it comes into force) if the ABA is satisfied that:

- the code of practice provides appropriate community safeguards for the matters covered by the code; and the providers of internet services in that section of the industry;
- members of the public and participants in that section of the industry have been given an adequate opportunity to comment on the code;
- The codes must also be consistent with various statutory provisions.

Once a code is included in the Register of codes it applies to ALL ISPs and ICHs in the internet industry in Australia regardless of whether they have had a part in its development or not thus making participation in the code system mandatory. On 27 May 2005, the ABA registered 3 new codes under the scheme. These are for child protection in online and mobile access, particularly internet access through mobile phones. These codes are binding on ISPs, ICHs and mobile telecommunications carriers. The Director of the IIA said about these new codes:

Fortunately, the 'co-regulatory' system we have in Australia allows us to refine industry Codes as the technology develops - and in a much more responsive way than legislation can. The co-regulatory approach has the benefits of adaptability, but at the same time has the power of law backing it, meaning that the ABA has the power to enforce compliance across industry." Each code of practice is a publicly available document and includes provisions relating to complaint handling. Complaints may be made online on the ABA’s website.

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8 Clause 62 of Sched 5 to the Act
9 S.125(4) of the Act
f) Supervision of the system

Responsibility for the operational aspects of the system is shared between the ABA and the internet industry. There has also been regular parliamentary scrutiny of the system including formal reviews (see below).

The key responsibility for the overall supervision of the system lies with the ABA. The ABA registers the codes, has power to impose standards, administers the complaints system and has various enforcement powers. It also has other functions under the Act such as advising and assisting parents and responsible adults in relation to the supervision of and control of children’s access to Internet content, conducting or commissioning research into issues relating to Internet content and liaising with regulatory and other relevant bodies overseas about cooperative arrangements for the regulation of the Internet industry including collaborative arrangements to develop multilateral codes of practice and Internet content labelling technologies.

The IIA is responsible to monitor the operation of its own codes and make sure they are working so as to avoid the ABA reaching the conclusion that it needs to impose standards. The codes have been refined since first being introduced and new codes addressing issues relating to internet content on mobile devices have recently been developed by the IIA and registered by the IIA (See above).

Failure to comply with a take down notice issued by the ABA is an offence under the Act. The ABA may direct a particular participant in the industry to comply with an industry code. Failure to comply with such a direction is also an offence under the Act. The ABA may also issue formal warnings to a participant in a particular section of the internet industry if the person contravenes an industry code.

The ABA reserves a power to make industry standards at any time if a request for an industry code is not complied with. This power may be exercised even if there is partial failure of an industry code.

g) Impact assessment

On 30 September 1999, the Australian Senate passed a motion calling on the Government to table a report on the effectiveness and consequences of the amendments to the Act in the Senate at six-month intervals from the date of implementation. Nine (9) such reports have
now been tabled in the Senate the last one being for the period January to June 2004. These reports contain detailed analysis of the number of cases/complaints under the scheme and include information about community education and international liaison activity.

The ABA also maintains statistics about the numbers of complaints on its website.

The original legislation included a requirement that there be a review by the Minister of the operation of the legislation before 1 January 2003 and stated matters that the review must consider such as the general development of Internet content filtering technologies.

This review was conducted and on 13 May 2004, the Minister for Communications, Information Technology and the Arts tabled in Parliament the report of the review of the operation of Schedule 5 of the Act. There were a number of recommendations made in this report including that internet industry codes should be reviewed every three years.

2. Part II: Leading Cases

There has been some controversy around access to the details of ABA and OFLC decisions that identify prohibited content. Applications for this material made by Electronic Frontiers Australia under Australia’s Freedom of Information Act were released but with the URL and names of web pages blacked out. EFA took this matter to the Administrative Appeals Tribunal who handed down a decision in June 2002 which supported the ABA’s approach to the release of information. However the federal government introduced into parliament an amendment to the Freedom of Information Act to specifically exempt all this information from public access. This was passed in September 2003, with the support of independent Senators but without the support of the opposition party.

Sample investigation reports are now published by the ABA but no details of particular cases are published.

3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study
a) The non-state regulatory part of the system

The internet industry in Australia has set up a specific organisation to develop, submit for registration and then administer codes of practice. This has been done in order to influence the regulator, the ABA, to accept a particular form of regulation for the internet industry. This non-state body is constituted by members most of whom who are addressees of the regulation.

b) The link between the non-state part and state regulation

The system was established by legislation in order to address wider community concerns in relation to material that is illegal or highly offensive material online or may be harmful to children. The scheme strikes a balance between these public policy goals and the needs of industry particularly the costs that might be imposed on industry by way of regulation.

The public policy goals are set out in the objects of the Act and include providing a means for addressing complaints about certain Internet content, restricting access to certain Internet content that is likely to cause offence to a reasonable adult; and protecting children from exposure to Internet content that is unsuitable for children.

The legal basis for the non-state regulatory body and processes is specifically spelt out in the legislation. The non state regulatory system has considerable discretion in how it develops the codes of practice. The State provides resources to the regulator, the ABA to carry out its statutory functions in relation to the system which include considering codes for registration, administering the complaints system, ensuring they are regularly reviewed and carrying out various other complementary functions. The ABA and the Minister (through her Department) influence the non-state regulatory system through advocacy and publishing discussion papers and calling for submissions. A good recent example of this is the development of the newly registered industry codes for child protection in online and mobile access referred to in 1(e) above.

**Conclusion:** In my opinion, the Australian internet content regulatory system is a co-regulatory system within the meaning of the study.
4.2. Malaysia

Development of the regulatory regime of Malaysia’s convergence media

1908 - Fusion of the Post and Telecommunication Departments

1946 - Foundation of the Department of Telecommunications Malaysia (JTM).

1946 - Establishment of the Radio Broadcast's Department in Singapore

1948 - Radio broadcast services were expanded during the outbreak of the communist period

1950s - Expansion of radio broadcast transmission throughout Malaysia

1960 - Start of advertising via radio broadcasting

1963 - Promulgation of the Constitution of the Ministry of Transport and Communications

1963 - Start of television broadcasting

1968 - Incorporation of the Departments of Post and Telecommunication of Sabah and Sarawak into the Department of Telecommunications (JTM)

1969 - Promulgation of the Constitution of the Ministry of Public Works, Post and Telecommunications

1969 - Transmission of television moves to its new premises at the Angkasapuri Complex

1969 - Department of Broadcasting under the Ministry of Information becomes responsible for broadcasting of radio and television

1976 - Promulgation of the Constitutions of the Ministry of Energy, Telecommunications and Posts

1984 - Start of transmission of the first private free-to-air television channel

1 Malaysia was selected after completion of the first country reports. Therefore, this reports includes descriptions of the media systems as well.
<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987</td>
<td>Beginning of deregulation of the communication-industry by the corporatisation of Telekom Malaysia. The Department of Telecommunications (JTM) as a regulatory agency is reorganised.</td>
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<tr>
<td>1989</td>
<td>Liberalisation of customer equipment and value-added services</td>
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<tr>
<td>1990</td>
<td>Liberalisation of the market aligning with an increase in the number of market players</td>
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<tr>
<td>1994</td>
<td>Integration of a new industry development policy in the National Telecommunications Policy</td>
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<td>1995</td>
<td>Enforcement of competition by introducing interconnection agreements</td>
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<tr>
<td>1996</td>
<td>Launch of the first phase of tariff-realignment, incl. new tariffs and rates</td>
</tr>
<tr>
<td>1997</td>
<td>Rationalisation of the industry by introducing a policy of encouraging consolidation among market players</td>
</tr>
<tr>
<td>1998</td>
<td>Formulation of the Communications and Multimedia (Convergence) Policy under the New Development Policy. Promulgation of the Constitution of the Ministry of Energy, Communications and Multimedia. The Communications and Multimedia Commission was established as the regulatory agency for the industry.</td>
</tr>
<tr>
<td>1999</td>
<td>Enhancement of the competition policy through the introduction of &quot;Equal Access&quot; (Call by Call) and creation of an interim Model for Universal Service Obligation</td>
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**Legislative changes in the convergence media sector**

<table>
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<tr>
<th>Year</th>
<th>Event</th>
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<tr>
<td>1950</td>
<td>The Telecommunications Act 1950 (revised 1970) governing the telecommunications industry is introduced. The Act is then repealed by the Communications and Multimedia Act 1998</td>
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<tr>
<td>1985</td>
<td>The Telecommunications Services (successor company) Act 1985 comes into force to enable the corporatisation of the telecommunications services, previously an agency under the Ministry of Energy Telecommunications and Post</td>
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<tr>
<td>1986</td>
<td>The Telecommunications (Automatic Telephone Using Radio Services) Regulations 1986 P.U. (A) 17/86 (‘ATUR Regulations 1986’) is passed</td>
</tr>
</tbody>
</table>
1988  –  The Broadcasting Act 1988 is overruled. The broadcasting legislation is repealed by the Communications and Multimedia Act 1988

1996  -  The Telephone Regulations P.U. (A) 256/96 are passed by the minister.

1997  –  The Cyberlaws, i.e. the Digital Signature Act 1997, the Computer Crime Act 1997 and the Copyright (Amendment) Act 1997 come into force


2000 -  The ATUR Regulation 1986 is revoked by P.U. (A) 282/2000, the Telecommunications (Automatic Telephone Using Radio Services) (Revocation) Regulations 2000

2002 -  The Telephone Regulations 1996 is revoked by P.U. (A) 79/2002, the Communications and Multimedia (Rates) Rules 2002

**Historical background**

To understand the media regulatory system in Malaysia an overall knowledge is required of its background as a fast developing country with a pluralistic society. Malaysia has a total population of 26.13 million\(^2\). Malaysia has a pluralistic society, mainly consisting of three races: Malays, Chinese and Indians and other minority groups which include native inhabitants of eastern Malaysia\(^3\). Situated at the southern tip of East Asia with Singapore as her southern neighbour, she is close to the international regional economy-, finance- and media-centres. Her multi-racial society-sensitivities and development-policies have shaped the regulatory environment of the media. Malaysia’s history of race-relations at

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\(^3\) Based on the 2000 Census the Department of Statistics, Malaysia reported that out of the total population 94.1% were Malaysian citizens. Of the total Malaysian citizens, Bumiputera comprised 65.1%, Chinese 26.0% and Indians 7.7%. In Sarawak, the predominant ethnic group was the Ibans 30.1%, followed by the Chinese 26.7% and the Malays 23.0%. While in Sabah the predominant ethnic group was the Kadazan Dusun with 18.4% which were followed by Bajau (17.3%) and the Malays (15.3%).
various periods before and after independence tempered the fears of the government of the possible repercussions of media activities.\(^4\)

Malaysia gained independence in 1957\(^5\) and inherited the British legal and administrative systems. During the colonial period the British introduced laws regulating the media to protect their vested interests and in response to the demographic, social and political changes that occurred at the time. The population of Malaysia changed with the arrival of immigrant Chinese and Indian labour added to the indigenous Malay people and native inhabitants. Besides licensing, controls over the press as counter insurgency measures, the Sedition Ordinance 1948 and Printing Presses Ordinance 1948 were enacted during the communist period which ran from 1948-1960. Radio broadcast of anti-communist messages were made to the general populace.\(^6\) These laws remained after the British left and in fact further gained strength as time went on, restricting media independence of news reporting and analysis of issues.

**The Constitution**

The Malaysian Constitution guarantees the exercise of the freedom of speech in Article 10(1a). Parliament is however authorized to impose restrictions on freedom of speech on the basis of Articles 10(2a), 10(4), 149 and 150, if it considers it necessary or expedient. The Parliament’s satisfaction of the necessity or expediency of restriction is not open for question.\(^7\) The restrictions are based on the following 14 grounds:\(^8\):

\(^4\) During the Japanese occupation the Chinese community was oppressed by the Japanese occupiers while the Malay community was co-opted to inform on the activities of the former. After the end of occupation, many Chinese joined the underground communist party and committed sabotage on the returning British administration and economic interests to enforce the issue of independence that led to the Emergency. The communists terrorised the population of all ethnicity, though the Chinese community was suspected of sympathising with their plight. The industriousness of the Chinese brought economic strength to many in their community and raised the envy of the other groups especially the indigenous Malays. The 1969 race riot was a result of this, as well as the fears of the Malay community of the growing Chinese political force in the opposition.

\(^5\) Malaysia or parts of, at various times, was a former colony of Portugal, the Netherlands and Britain.


\(^7\) Article 4(1b) Federal Constitution of Malaysia.
In the aftermath of the bloody 1969 race riots, the Malaysian government instituted a series of amendments to the Federal Constitution which widened the narrow window of discourse allowed to the media. A broad definition of "seditious tendency" was inserted in the Sedition Act which does not require actual harm to be caused by the acts or speeches in question. These included a tendency to bring into hate or contempt or to excite disaffection against any ruler, the government or the administration of justice. There is also a tendency to raise discontent or disaffection amongst the citizens of Malaysia. The privilege to debate in the Dewan Rakyat afforded by members of the parliament is also curbed by the new clause 63(2) in the Federal Constitution. It has been

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8 Shad, Saleem and Sankaran (1998) 14-16.
declared that in Malaysia speech is free as long as it does not offend the law. In *Public Prosecutor v Ooi Kee Saik*, Raja Azlan Shah J (as he was called back then) said: "The right to freedom of speech is simply the right which everyone has, to say, write or publish what he wants as long as he does not breach the law. The effect of the speech-guarantee along with the laws protecting the various overriding interests is that there is freedom of speech but there is no freedom after speech."

**The mass media in Malaysia**

After independence the mass media in Malaysia were perceived by the government as ‘vital agents of social change’. The mass media were an important instrument to motivate people to change their attitudes and traditions that have hindered their own socio-economic progress. In the 1970s the structures and functions have been altered to support national development and integration complying with the objectives stated in the Second and Third Malaysia Plans and the *Rukunegara* national ideology. The *Radio Televisyen Malaysia*, the state television and radio broadcaster is the main government mouthpiece. Its task is the ‘promoting of national unity, developing of civic consciousness and providing of information and entertainment’. Other government departments and agencies such as the Department of Information, *Filem Negara Malaysia* (National Film Malaysia) and *BERNAMA* (Malaysian National News Agency)

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within the Information Ministry also play a major role in transmitting government policies and current information and emphasizing development-oriented programs.

The Ministry of Information regulated the broadcast media before the enactment of the Communications and Multimedia Act 1998 (‘CMA’). The Ministry now maintains its regulation of government information over the broadcast media. There are five departments and agencies under its auspices. These are the Broadcasting Department of Malaysia (‘Radio Televisyen Malaysia’), Department of Information Malaysia (‘Jabatan Penerangan Malaysia’), the National Film Malaysia (‘Filem Negara Malaysia’), Malaysian News Agency (‘Bernama’) and the Special Affairs Department (‘Jabatan Hal Ehwal Khas’). The jurisdiction over the broadcast, satellite, online services and telephony is under the new Ministry of Energy, Water and Communications.\(^\text{14}\) An agency called the National Film Development Corporation Malaysia (‘Finas’) is under the auspices of the Ministry of Culture, Arts and Heritage.

The press in Malaysia includes the New Straits Times Press (‘NSTP’) group that publishes the English dailies *New Straits Times, Malay Mail, Business Times*, the national language dailies such as the *Berita Harian* and *Harian Metro*, and the Chinese language daily, *Shin Min Daily News*. They also publish the weekend editions of *New Sunday Times, Sunday Mail* and *Berita Minggu*. Another press organisation is the Utusan Melayu (Bhd) group. It publishes in the national language the *Utusan Malaysia* and *Utusan Melayu* dailies and their weekend editions, the *Mingguan Malaysia* and *Utusan Zaman*. These two major press groups are owned by UMNO, the main component party in the ruling Barisan Nasional party.

Beginning in the 1980s the privatization policy of the Mahathir administration deregulated the media industry. Private television networks and radio stations and later on satellite subscription services began to operate independently from the television and radio stations owned and run by the government. TV3, a company owned by entities

\(^{14}\) Previously it was under the Ministry of Communications and Multimedia.
linked to the parties of the ruling government was the first recipient of a free-to-air private television license. Later, other private stations followed suit with varying success such as Metrovision (free-to-air in 1995), Mega TV (cable subscription in 1995), ASTRO (satellite subscription in 1996) and NTV7 (free-to-air in 1998). Hoping to be a step ahead with advances in communication, information and entertainment (CIE) media and services, together with the rise of the internet, Malaysia enacted the Communications and Multimedia Act (CMA), the first converged legislation covering all the media, except print. The Broadcasting Act 1988 and the Telecommunications Act were repealed by the CMA and a period of transition started for all the existing licensees to migrate to the new regime.

A series of discussions with key industry players in the media industry, namely in the broadcast, telephony and online sector have been undertaken before and throughout the phasing in of the CMA. It was a big transition as the separate media were now identified by the type of license they held and not by the medium or platform they were operating. The government introduced the Communications and Multimedia Commission (‘CMC’) to regulate the converging multimedia industry. The introduction of the current media regime is part of the country’s development project, the Multimedia Super Corridor (‘MSC’) conceptualised by the Mahathir administration in 1996, aimed at propelling the country forward to a developed nation status until 2020. The project started with a physical corridor of 750 square kilometers spreading from the Kuala Lumpur city centre to Sepang in the south, close to the Kuala Lumpur International Airport. An overall strategy to digitalise the country by the development of the information communication technology (‘ICT’) was pursued by the Mahathir administration by its "Vision 2020" plan. Former Prime Minister Mahathir stated that one of the challenges of "Vision 2020" is to establish a scientific and progressive society, being innovative and looking forward.16

15 The MSC constituted a part of the Malaysian government’s key initiative to expand the country’s information infrastructure network and services under its Seventh Malaysia Plan (1996-2000).
I. Co-operative Regulatory Systems in the television and internet sector

1. Part I: The co-operative regulatory system

a) Development of the regulatory system

Since 1999 the regulation of broadcasting, telecommunication and online media has been gradually combined\textsuperscript{17} under the framework of the Communications and Multimedia Act 1998 (‘CMA’).\textsuperscript{18} A regulatory body named the Malaysian Communications and Multimedia Commission (‘MCMC’) was also created under the Communications and Multimedia Commission Act 1998 (‘CMCA’). The government initiated the legal convergence of the media sectors, appreciating the technological advances made in the evolving industry. The enabling legislation has a clear set of policy objectives of:

- Promoting the national policy objectives for the communications and multimedia industry;
- Establishing a licensing and regulatory framework to support the national policy objectives for the industry;
- Establishing the powers and functions for the Malaysian Communications and Multimedia Commission (CMC);
- Establishing the powers and procedures for the administration of the CMA.\textsuperscript{19}

The government intended the legislation to be long term-oriented and visionary, setting a clear direction for the industry and providing a basis for the achievement of economic, social and industry objectives.

\textsuperscript{17} The Broadcasting Act 1988 and the Telecommunications Act 1950 were repealed.


\textsuperscript{19} Section 3(1) CMA.
The development of the regulatory regime of a converged communications and multimedia industry in Malaysia is essentially a top-down mission without opening widespread public inquiries or inviting debate on the proposals. The "Multimedia Super-corridor Project" and the cyberlaws were enacted to create the adequate environment for the development of the communications and multimedia industry. It was also intended to position Malaysia as an important centre for the communications and multimedia information and content services.

b) Subject-matter of the regulatory system

The legislation introduced the regulation for the new online media and also dealt with other forms of media, i.e. of the broadcasting and the communications sector. Four areas are targeted at in the new regulatory environment: economic regulation, technical regulation, consumer protection and "social regulation". The CMA states the national policy objectives for the multimedia and communication industry which are:

- to establish Malaysia as a major global centre for communications and multimedia information and content services;
- to promote a civil society where information-based services will provide the basis for continuous enhancements to quality of work and life;
- to grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity;
- to regulate the long-term benefit of the end user;

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20 The changes were made to assist the Malaysian government’s plans to propel the country into developed nation status by 2020 through the embrace of knowledge-based economy. A briefing of the CMA was given to members of the industry by the Commission in 1999.

21 Closed door consultations for feedback from the industry were made with the main operators from the broadcast and telephony groups (Interview with officer of policy planning division in Ministry of Information).

• to promote a high level of consumer confidence in services provided by the industry;
• to ensure an equitable provision of affordable services over ubiquitous national infrastructure;
• to create a robust applications environment for end users;
• to facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;
• to promote the development of capabilities and skills within Malaysia's convergence industries; and
• to ensure information security and network reliability and integrity.23

The processes and decisions regulated in the CMA cover:

• Licensing of various activities, including to draw up rules and guidelines on anti-competitive conduct24;
• Provision of access to infrastructure and services25;
• Determination of technical standards;
• Promotion of universal service provision;
• Guidelines for content of services;
• Resolution of consumer disputes26

Part V of the CMA27, dealing with the powers and procedures of the MCMC, lists the tasks of the regulator. They are:

23 Section 3(2).
24 Sections 133 to 144 of the CMA.
25 Sections 145 to 156 of the CMA.
26 Part VIII of the CMA.
27 Sections 51 to 125 of the CMA.
• to issue written directives regarding compliance or non-compliance of license conditions, including the remedy of breaches of license condition, and provisions of the CMA or its subsidiary legislation;28
• to determine any matter specified in the Act as being subject to the Commission’s determination;29
• to hold public inquiries of any matter of general nature related to the administration of the CMA, or its subsidiary legislation;30
• to investigate any matter of a civil or criminal nature, if directed by the Minister or if there is a probable cause for an offence against the Act or its subsidiary legislation;31
• to gather information;32
• to maintain a physical and electronic register of all matters, which have to be registered under the Act or its subsidiary legislation;33
• to resolve disputes;34
• to register agreements;35
• to designate industry forums and supervise the compliance of the voluntary industry codes with the laws in force;36
• to determine mandatory standards for the industry;37
• to manage registered undertakings;38

28 Section 51 to Section 54 of the CMA.
29 Section 55 to Section 57 of the CMA.
30 Section 58 to Section 67 of the CMA. The inquiry is conducted in response to a Ministerial directive or in response to a written request from a person or on the Commission’s own initiative if it is convinced that the matter is of significant public interest or relevant to current or prospective licensees. Section 58(2).
31 Section 68 – Section 72 of the CMA.
32 Section 73 to Section 80 of the CMA.
33 Section 81 of the CMA.
34 Section 83 to Section 89 of the CMA.
35 Section 90 to Section 93 of the CMA.
36 Section 94 to Section 103 of the CMA.
37 Section 104 to Section 109 of the CMA.
38 Section 110 to 116 of the CMA.
• to forbear from applying any provision of the Act or its subsidiary legislation upon the Minister’s directive to a licensee or a class of licensees;\(^{39}\)
• to review all rules and regulations made under the Act;\(^{40}\)
• to monitor all significant matters relating to the performance of network facilities providers, network service providers, applications service providers and content applications service providers and to report to the Minister at the end of each financial year.\(^{41}\)

The CMA establishes a formal structural framework of co-regulation of the industry by providing forums for industry members to create and manage codes of conduct for the industry.\(^{42}\) In the explanatory statement of the CMA it is said that the provisions are set out to allow the intervention of the state in case of failure of the industry self-discipline. The new regime introduced provisions for safeguarding against anti-competitive conduct and to promote fair and sustainable competition in the industry and specific transitional safeguards.\(^{43}\) In the operation of the CMA regime, section 3 provides that nothing in the Act shall be construed as permitting the censorship of the internet. However other laws relating to public order such as the Internal Security Act 1960, Sedition Act 1948, Official Secrets Act 1972, Police Act 1967 and even the CMA itself may impose restrictions on online content post-publication. Repercussions may occur as a result of the publication of material or discussions which are deemed as injurious to the national

\(^{39}\) Section 117 and Section 118 of the CMA.

\(^{40}\) Section 122 of the CMA.

\(^{41}\) Section 123 to Section 125 of the CMA. The report made by the Commission shall be published as soon as practicable after conveying the report to the Minister.

\(^{42}\) See Part V of the CMA.

\(^{43}\) See Sections 133 to 144 and 276 to 282 of the CMA.
interests.44 The CMA is not intended to encroach on existing legislation which governs traditional media and content services. According to the explanatory statement it does however overrule some specific provisions relevant to traditional media which would otherwise have a limiting or counterproductive impact on the development of the communications and multimedia industry.45 There are four categories of licensable activities which may fall either under an individual or a class type license, depending on the degree of regulatory control for the different activities.46 The categories are:

- Network facilities provider (NFP);
- Network service provider;
- Applications service provider;
- Content applications service provider (CASP).

Network Facilities Providers (NFP) are owners of facilities such as earth stations/base stations, broadband fibre optic cables, telecommunications lines and exchanges, radiocommunication - transmission equipment, mobile communication- base stations and broadcasting transmission towers and equipment. Network Service Providers (NSP) are the providers of basic connectivity and bandwidth to support a variety of applications. Network services enable connectivity or transmission between different networks. A network service provider usually also owns the network facilities. But it is also possible to operate a connectivity service by using the infrastructure of another provider.

44 The alternative online newspaper *Malaysiakini* and the online organ of an opposition party *Harakahdaily* was warned by the government to be responsible for its content and not to abuse the freedom stipulated under the Multimedia Super Corridor Bill of Guarantee. This is reported by Beh Lih Yi, ‘Be careful, we are watching’, Malaysiakini warned’, in *Malaysiakini*, Oct 16, 2003 accessed on July 13 2005 at [http://www.malaysiakini.com/news/17473](http://www.malaysiakini.com/news/17473), in her coverage of the parliamentary answer by the Energy Communications and Multimedia Parliamentary Secretary. Publishers were warned that their operations as a company may be affected, although they are not scrutinised under the CMA as licensees.


46 Malaysian Communications and Multimedia Commission.
Applications Service Provider (ASP) provide particular functions such as voice services, data services, content-based services, electronic commerce and other transmission services. Applications services deliver the function capabilities to end users. Content Applications Service Provider (CASP) cover traditional broadcasting services and online services that provide content such as online publications and information services. The CASPs include broadcasters, online service providers that provide content on the Internet, closed circuit broadcasting services and also local and wide area networks.\textsuperscript{47} The Communications and Multimedia (Licensing) Regulations 2000\textsuperscript{48} provides the standard conditions for all licenses, and special license conditions for each category of individual licenses.

There are a total of 398 licensees (190 individual licensees and 208 class licensees). The total revenue contribution of the communications and multimedia industry totals RM24 billion.

The MCMC is obliged to investigate any matter in regard to the administration of the CMA or subsidiary legislation. Either it is instructed to do so by the relevant Minister or the CMC believe that an offence against the CMA has or will be committed or upon a complaint by any person.\textsuperscript{49} The CMA requires MCMC to provide guidelines for the procedure, i.e. the receipt, handling and resolution of complaints.\textsuperscript{50} The guidelines for complaints handling came into force in September 2004. They include the complaints procedure, as well as provisions relating to communication and confidentiality.\textsuperscript{51} An appeal of MCMC’s decision can be brought before an Appeal Tribunal.\textsuperscript{52} The CMA provides that the Minister may draw up regulations regarding the operating procedures of

\textsuperscript{47} Section 205(1) states that no one shall provide a content applications service without a valid license.

\textsuperscript{48} P.U.(A) 129.

\textsuperscript{49} Sections 68 and 69.

\textsuperscript{50} Section 196.


\textsuperscript{52} See paragraph (f) Supervision of the System.
the Tribunal, although no such regulations have been prepared yet. The High Court is the last instance.

c) **Basis of the co-operation**

The previous co-regulatory arrangement of the industry operated through industry-based advisory committees and consultative processes. The new communications and media legislation established the industry self-regulation regime and supported it by having fallback provisions administered by the MCMC. The CMA strongly promoted the new co-regulatory system through its regulator. The pull factor to form themselves into industry bodies is to formulate their own rules and guidelines rather than to be imposed and forced upon them. However it is still a new concept for the industry players hence the MCMC plays a big role to encourage participation by all parties involved. A self-regulatory body – an industry body – which is called a ‘forum’ is constituted when it is designated or appointed. This will be the case if the MCMC is certain that the following criteria have been fulfilled:

- The membership of the body is open to all relevant parties;
- The body is capable of performing as required under the CMA; and
- The body has a written constitution.

In addition, the MCMC will only register the body as an industry forum if the body agrees in writing to be such an industry forum. The designated forum may then prepare

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53 Section 24.
55 See Part V Chapter 9 of the CMA and also sections 94, 152 on Access Forum, 184 on Technical Forum, 189 on Consumer Forum, and section 211 on Content Forum.
56 Section 94(1).
57 Section 94(2)).
a voluntary industry code either on its own initiative or upon request by the Commission.58

*d) Institutions involved in the system*

aa) The state regulator for the communications multimedia industry is the **Malaysian Communications and Multimedia Commission** (‘MCMC’). Its functions are:

- to advise the Minister on all matters concerning the national policy objectives for communications and multimedia activities;
- to implement and enforce the provisions of the communications and multimedia laws;
- to regulate all matters relating to communications and multimedia activities not provided for in the communications and multimedia laws;
- to consider and recommend reforms to the communications and multimedia laws;
- to supervise and monitor communications and multimedia activities;
- to encourage and promote the development of the communications and multimedia industry including the area of research and training;
- to encourage and promote self-regulation in the communications and multimedia industry;
- to promote and maintain the integrity of all persons licensed or otherwise authorized under the communications and multimedia laws;
- to render assistance in any form to, and to promote cooperation and coordination amongst, persons engaged in communications and multimedia activities; and
- to carry out any function under any written law as may be prescribed by the Minister by notification published in the *Gazette*.

bb) **The existing industry forums** in the co-regulatory system are the **Access Forum**, the **Technical Standards Forum**, the **Consumer**, and the **Content Forum**. The primary

58 Section 95(1).
function of a designated industry forum is to formulate and to implement voluntary
industry codes which should serve as a guide for the industry to operate. The membership
of the forums has to represent fairly and adequately the supply and the demand side of the
relevant communications sectors. This is ensured by the MCMC prior to their designation
by scrutinizing their memorandum of association and articles of association. The
Communications and Multimedia Content Forum has categories of membership. One
representative of each category participates in the Council of the forum and also in the
Complaints Committee. The Commission allocates an annual grant in form of gratis
payment to the forums to cover their operational costs as submitted by the forums. This is
reviewed regularly and based on priority.

59 The categories of membership in the CMCF are as follows:

- Advertiser: means any person, partnership, company, corporation or society carrying on or directly
  involved in advertising as part or the whole of its business or activity and shall include an advertising
  agency.
- Audiotext Service Provider: a person who provides an application service which enables a caller by
dialling a "600" short code or such other codes as may be decided by the Commission from time to
time, to receive a recorded message or interact with a programme for the purposes of receiving
information.
- Broadcaster: means a person who causes to be transmitted any sign or signal through a broadcasting
station whether for audio or visual reception or both, and includes any music, theatrical or other
entertainment, concert, lecture, speech, address, news and information of any kind so transmitted for
reception by the general public.
- Civic group: means any organisation whose objects are exclusively to promote the interests of
community issues which shall include but not limited to consumer interests, women's issues, children's
issues, youth issues and religious harmony issues and which is registered as a society under the
Societies Act 1966 or as a company limited by guarantee under the Companies Act 1965.
- Content Creator / Distributor: means those who are involved in any one of the following activities:
  (a) the creation of content including but not limited to online content creators, aggregators,
      scriptwriters, production houses, post-production agencies but excluding advertisers; or
  (b) the distribution of content (excluding those who make available and/or distribute such content
directly to consumers of content via the medium of broadcasting, internet services, audiotext).
- Internet Access Service Provider means those who are involved in providing access to internet services
  and applications in conjunction with either a dial-up or direct connection.
The industry codes may be developed on the forum’s own initiative or upon request by the MCMC.\textsuperscript{60} The Code will come into force after its registration.\textsuperscript{61} The MCMC is empowered to refuse registration if there is no opportunity for public consultation during the development of the Code.\textsuperscript{62} In this context, the MCMC is obligated to register the code if it is consistent with the objects of, relevant instruments under, and provisions of the CMA.\textsuperscript{63} Compliance with the voluntary industry code is not mandatory but may be used as a defence against prosecution in relation to a matter dealt in the Code.\textsuperscript{64} Because the compliance with a (voluntary) code is not mandatory, it will be the task of the courts to interpret the Codes when judging about a complaint.

Another form of cooperation is knowledge-sharing between the regulator and industry experts in the form of \textit{technical working groups}. Important technical matters such as the regulation of spectrum, standards and numbering and electronic addressing technology are addressed by technical working groups comprising experts from the industry. Reports from these working groups are compiled and presented in the national committees before bringing them to the international level.\textsuperscript{65} There is also the \textbf{Information Sharing Forum (ISF)} formed in June 2004, comprising various internet service providers (ISP) and other agencies in order to address the information and network security issues in Malaysia. Besides obtaining cooperation among the industry players, the forum enables sharing of experience and expertise. The MCMC is the Chairman of the ISF. The setting up of the ISF supports the national objective of ensuring information security and network reliability and integrity.

\textsuperscript{60} Section 95(1)).
\textsuperscript{61} Section 95(2)).
\textsuperscript{62} Section 95(3)).
\textsuperscript{63} Section 95(4).
\textsuperscript{64} Section 98.
\textsuperscript{65} See MCMC website at \url{http://www.cmc.gov.my/what_we_do/work_group/index.asp}.  

781
(1) The Communications and Multimedia Content Forum of Malaysia (‘CMCF’)

The CMCF\(^{66}\) was established in February 2001 and designated\(^{67}\) by the MCMC in April 2001. The forum is administered by a constitution. The management of the CMCF rests with a chairman and 18 council members, elected from 6 “ordinary” member categories for a term of two years. The 6 ordinary member categories are - advertisers, audiotext service-providers, broadcasters, content creators/distributors, internet access service providers and civic groups.

Among the CMCF’s objectives are the following: to establish Malaysia as a major global centre for communications and multimedia information and content services, to promote national policy as in the CMA, to prepare a Code on content\(^{68}\), and to provide a complaints procedure.

The CMCF’s website describes the body as a “society” (see http://www.cmcf.org.my\(^{66}\)), i.e. presumably a society registered under the Societies Act 1966. Under this act a society is not obliged to publicly disclose its annual return or balance sheet. The MCMC gives a grant to the CMCF for its funding, to cover the operational costs. The rationale for the grant is the "relationship" between the MCMC and the CMCF, latter being a "product" of the former. The Commission ought to ensure the basic function of the forum, therefore the grant does not cover extravagance.\(^{69}\) Also subscription fees are a source of fund for the CMCF. The fees breakdown is as follows:

<table>
<thead>
<tr>
<th>Ordinary Member</th>
<th>Associate Member</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other than civic group</td>
<td>Other than civic group</td>
</tr>
<tr>
<td>Entrance fee: RM1,000.00</td>
<td>Entrance fee: RM1,000.00</td>
</tr>
</tbody>
</table>

\(^{66}\) Their website address is http://www.cmcf.org.my. The site was last updated on March 7, 2005.

\(^{67}\) Section 212 of the CMA provides that the MCMC designates an industry body to be a content forum.

\(^{68}\) Section 213 states that a content code prepared by the content code or by the Commission shall include model procedures for dealing with offensive or indecent content.

\(^{69}\) Interview with a senior MCMC executive.
The Content Code covers all content provided over the electronic networks including radio, television and online services.\textsuperscript{70} During the development of the Content Code the

\textsuperscript{70} There are other relevant legislations besides the CMA and the Content Code that licensees need to be aware of in preparing their content. These are:
- Accountants Act 1967 (revised 1972)
- Children & Young Persons (Employment) Act 1966 (Revised 1988)
- Consumer Protection Act 1999
- Copyright Act 1969
- Defamation Act 1957
- Dental Act 1971
- Film (Censorship) Act 2002
- Geneva Conventions Act 1962
- Indecent Advertisements Act 1953
- Internal Security Act 1960
- Medicine (Advertisement and Sale) Act 1956
- National Anthem Act 1968
- Penal Code
- Pesticides Act 1974
- Poisons Ordinance 1952
- Poisons (Sodium Arsenite) Ordinance 1949
- Printing Presses and Publications Act 1984
- Private Higher Educational Institutions Act 1996
- Private Hospitals Act 1971
- Sale of Drugs Act 1952 (Revised 1989)
- Sale of Food Act 1983
- Food Regulations 1985
- Securities Industry Act 1983
- Sedition Act 1948
- Trade Description Act 1972
- Trade Marks Act 1976
Broadcasting Guidelines and the Advertising Code, developed by the Ministry of Information, were still in force. The Ministry of Energy Water and Communications is also formulating a National Content Policy to develop and control local content. Under the Eighth Malaysia Plan the Malaysian Government allocated RM10million at the Ministry of Energy Water and Communications to develop the local content industry.\footnote{The fund is called the Local Content Development Fund.} After the registration the Content Code came into force in September 2004. As the Content Code includes also provisions in regard to advertisement, broadcasting, online and other content, the former guidelines and codes are overruled now.

The MCMF began its task on the premise that there was a need to protect the interests of the consumers by maintaining accepted community standards in content. The need to balance the freedom of speech and the need of protection in regard to potentially offensive and harmful material, and the need to ensure appropriate protection of fairness and privacy, have also been taken into account.\footnote{Speech by Chairman of the Communications and Multimedia Content Forum at the launch of the Content Code and CMCF website on October 21, 2004, accessed on July 14, 2005 at http://www.cmcf.org.my/HTML/cmcf_events1.asp.} The central basis for the Code is as envisaged by section 211(1) of the CMA that states:

No content applications service provider or other person using a content application service shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person.

The matters addressed by the Code include:

- Restrictions on the provisions of unsuitable content;
- Methods of classifying content;
- Procedures for handling public complaints and for reporting information about complaints to the Commission;
- Representation of Malaysian culture and national identity;

\footnote{Women and Girls Protection Act 1973}
• Public information and education regarding content regulation and technologies for the end user control of content and;
• Other matters of concern to the community.\textsuperscript{73}

Besides a Complaints Bureau the CMCF is setting up a Content Advisory Centre (‘CAC’). Its objectives will be to:
• provide a resource whereby clarification can be obtained in regard to the interpretation of the Communications and Multimedia Content Code prior to production and/or dissemination;
• provide a trustworthy and respected, fair and balanced interpretation of the Communications and Multimedia Content Code;
• provide a broad advisory service for networked content;
• provide a reasonable level of assurance that materials will not require expensive withdrawal or correction;
• execute all of the forgoing in a timely and efficient manner.

The CAC would be a service, being aware of the business needs of the content industry. The advisory process will endeavour to provide advice as helpfully, constructively and swiftly as possible.\textsuperscript{74}

\textsuperscript{73} Section 213(2) of the CMA.
\textsuperscript{74} Information on CMCF website last updated October 20, 2005.
(2) The Communications and Multimedia Consumer Forum of Malaysia (‘CfM’)

The Communications and Multimedia Consumer Forum was designated by the MCMC in March 2001. It is made up of 48 members from various segments of the communications and multimedia industry. It has an elected council of 13 members, the majority of whom are representatives from industries such as service providers, telecommunication companies and broadcasting stations (described as the supply side). The other representatives are from non-governmental organisations and public interest groups (the demand side). The CfM’s objectives and purposes are to:

- promote national policy objectives as stated in the CMA;
- draft, develop and prepare codes that protect consumers’ right pursuant to the provisions of the CMA;
- amend, develop, modify, review and update the codes;
- undertake research on matters within the jurisdiction of the forum and collect, prepare and distribute statistics beneficial for the forum’s objectives;
- provide access to complaint procedures, disputes and grievances;
- recommend inexpensive and practical alternative dispute resolution procedures;
- recommend procedures for compensation and/or any other mode of action to the consumer for breaches of the code;
- invite, collect and collate public opinion and views on consumer matters and to promote and create public and industry awareness of the codes and their compliances;
- provide the possibility to disseminate information to the public and in regard to education about consumer rights, regulations and technologies for the consumer;
- administer sanctions on breaches of the codes by members;
- monitor service delivery of the communications and multimedia industry concerning consumer interests in order to ensure compliance with the codes;

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75 Pursuant to Section 189 of the CMA.
• promote and encourage high standards of service, conduct and performance throughout the communications and multimedia industry and to develop consumer confidence;
• update the Commission regularly on the progress of the forum.

The CFM has four working committees assisting it in meeting its objectives. These Working Committees are:

• The Code Drafting Committee that drafts, develops, prepares, amends, modifies, reviews and updates the Codes.
• The Education and Promotions Committee whose tasks are to promote and publish the activities and objectives of the forum and to provide avenues for dissemination of public information and education in regard to consumer rights.
• The Complaints Handling Committee that operates as a channel for complaints relating to consumer matters and to provide procedures for such complaints and grievances.
• The Membership Committee enlists and updates the membership list of CFM.

The legal status of the CFM is not clear; on its website (http://www.CFM.org.my) it is described as a national organisation. The CFM receives a grant from the MCMC to cover its operational costs. It also receives subscription fees from its members. The fee breakdown is given below.

<table>
<thead>
<tr>
<th>ORDINARY MEMBER</th>
<th></th>
<th>ASSOCIATE MEMBER</th>
</tr>
</thead>
</table>
| Fee type                 | commercial organisation | public interest group/non-
<pre><code>                      | governmental | governmental      |
</code></pre>
<p>|                          |            | organisation/ institutions of |
|                          |            | higher learning           |
| Entrance                 | RM1,000.00 | RM10.00                  |
| Annual Subscription      | RM3,000.00 | RM30.00                  |</p>
<table>
<thead>
<tr>
<th>Fee type</th>
<th>non MCMC-licensed commercial organisation</th>
<th>individuals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Entrance</td>
<td>RM100.00</td>
<td>RM10.00</td>
</tr>
<tr>
<td>Annual subscription</td>
<td>RM200.00</td>
<td>RM20.00</td>
</tr>
</tbody>
</table>

The General Consumer Code of Practice (‘GCC’) of the CfM has been registered on 17 October 2003. The GCC is seen as a kind of commitment that has to be provided by the service providers. There will be a ‘one-stop’ shop for consumers to file complaints. The objectives of the GCC are to provide model procedures for:

- Reasonably meeting consumer requirements;
- The handling of customer complaints and disputes;
- The creation of an inexpensive mediation or process other than the court and procedures for compensation of the customers in case of a breach of the consumer code;
- The protection of consumer information;
- To support the achievement of the relevant national policy objectives of the CMA;
- To provide benchmarks for the communications and multimedia service providers for the benefit of consumers;
- To promote a high level of consumer confidence in service delivery from the industry;
- To provide guidelines for self-regulation among the industry.

The GCC binds all licensed service providers in regard to their licensed activities and all non-licensed service providers who are members of the Consumer Forum. The Code becomes part of the license conditions. The CfM administers all codes and sub-codes developed by them.
In June 2005 the CfM released the Internet Access Service Provider (‘IASP’) Sub-Code\textsuperscript{76} identified as an important sub-code for the Consumer Forum.\textsuperscript{77} The IASP Sub-Code is applicable\textsuperscript{78} to IASPs, persons or class of persons directed by the MCMC and members of the Consumer Forum. The IASP Code has to be read in addition to the GCC. The GCC governs all sub-codes. The general rules for Service Providers and code of practice covered in the IASP Code are:

- The IASP Code Guiding Principles
- Protection of personal information
- Provision of information
- Provisioning of services
- Anti-spam measures
- Policy on information network security
- Content
- Billing
- Protection of minors
- Handling of customer complaints and disputes

The IASP Sub-Code states that service providers should address concerns about spam and consider methods of managing such issues in order to ensure the protection of consumers’ interests. The sub-code includes the following general principles which have to be implemented as contractual conditions in agreements between the service providers and their customers: -

- The customer shall not engage in sending spam messages;

\textsuperscript{76} The IASP Code is developed pursuant to Clause 6.2, Part 1 of the GCC to address the specific needs of the Internet services industry.

\textsuperscript{77} Its objectives were to:
- Promote the free-flow of information and communications over the Internet;
- Set out a code of practice for Internet Access Service Providers;
- Improve the standard of conduct within the industry.

\textsuperscript{78} Sub-code means codes that are developed to address specific industry needs. The IASP Code comes into effect upon its registration by the MCMC. The Code may be downloaded at the CfM website at \url{http://www.cfm.org.my/indexenglish.jsp?page=welcome2.htm}. 

789
• Any infringement shall result in the suspension and/or termination of the customer account. The customer may appeal for reactivation of the said account in accordance with the service provider’s prevailing policies and procedures;

• Service providers should provide specific guidance (in the form of an Acceptable Use Policy (AUP)) about the sanction or suspension and termination of an account. The Acceptable Use Policy should impose an obligation on the customer to ensure that all commercial emails sent out by the customer are accompanied by or include the following information:
  - Header information that is not false, deceptive or misleading
  - A valid return e-mail address
  - Functional unsubscribe facility (i.e. “opt out” facility)
  - Identity of sender
  - Message has to be clearly labelled as commercial communication (eg [ADVERTISEMENT] for advertisements, [COMMERCIALS] for commercials etc.)

For the purpose of this provision, “commercial electronic message” shall mean any electronic message that is send in order to advertise, to highlight, to promote, to sell and/or to offer goods, property, service and/or business or investment opportunity. The Service Providers should also provide their policies and procedures in reactivating the services due to violation of the AUP.

The sub-code required service providers to implement technical measures to curb spam and present a written procedure for handling incidents of spam. It must be publicly available either in print or on a website. The service provider is also required to make available on its website information on anti-spamming measures regarding its customers. The sub-code requires service providers to ensure that post-paid internet

79 Such information may include IP addresses, suspended and/or blocked by the Service Provider and/or any anti-spamming monitoring bodies such as Spamhaus and Soamcip. The said information shall be updated on a weekly basis.
access accounts are not provided to children without the consent of a guardian.\textsuperscript{80} It also states that service providers should take reasonable steps to provide customers with:

- Information on supervising and controlling a child’s access to internet content;
- Procedures with which guardians can control a child’s access to internet content, including the availability, use and appropriate application of internet content filtering software.
- Notifying the customers: “if you are below 18 years of age – prior consent of a guardian is required before you are allowed to subscribe to a post-paid Internet access account” prior to the sale of the service.\textsuperscript{81}

Concerning the handling of customer complaints, disputes and compensation the sub-code states that reference should be made to the relevant provisions in the GCC. The CfM is also working on the Content Hosting Service Providers Sub-Code, Mobile Service Provider and Fixed Line Service Provider Codes.\textsuperscript{82}

\textbf{(3) The Malaysian Access Forum Berhad (545160-D) (‘MAFB’)}

The Malaysian Access Forum Berhad (545160-D) (“MAFB”) is a company limited by guarantee and was incorporated on 17 April 2001.\textsuperscript{83} The first meeting of the board of directors was held on 16 June 2001. The main objective of the MAFB is to formulate codes based on the officiated Access List for proposal to the MCMC.\textsuperscript{84} The members are representatives of the telephony providers. It has been formally designated as the Access

\textsuperscript{80} This obligation is not applicable to pre-paid Internet access services. See paragraph 9.1 of the IASP sub-code.

\textsuperscript{81} Paragraph 9.2 of the IASP sub-code.

\textsuperscript{82} Information obtained from the MCMC website at http://www.mcmc.gov.my/mcmc/consumer/consumer.asp

\textsuperscript{83} Accessed on 15 July 2005 at http://www.mafb.com.my/. The website indicated that it was a temporary website until the MAFB is officially designated by the MCMC. It was updated on May 22, 2003.

\textsuperscript{84} Section 153 of the CMA.
Forum by the MCMC in March 2003. The major activities of the MAFB to date include industry business dialogues, different workshops, industry gatherings, and the draw up of a voluntary access codes in June 2005.85

Added to the role of the Access Form, the MCMC also released a determination on the access list in 2001 - the Commission's Determination on Access List 1/2001. The MCMC also released several public inquiry and consultation reports concerning access. These are:

- A report on a public inquiry under Section 55 of the Communications and Multimedia Act 1998 on Access List Determination 12 March 2001 (PIR/AL/1/01)
- A consultation paper on local access funding 13 May 2002
- A consultation paper on access funding 13 May 2002 MCMC/IDD/IRA/LAF/No. 4 of 2002
- A consultation paper on access pricing 13 May 2002 MCMC/IDD/IRA/AP/No.3 of 2002
- A report on a public inquiry under Section 65 of the Communications and Multimedia Act 1998 on Access Pricing 31 July 2002 (PIR/AP/2/02)
- A report on a public enquiry under Section 65 of the Communications and Multimedia Act 1998 on Local Access Funding 31 July 2002 (PIR/LAF/4/02)
- Public inquiry paper on draft mandatory standard on access 30 April 2003 (MCMC/IDD/PRID/MS(ACCESS)/No.1 of 2003)
- A report on a public inquiry under Section 65 of the Communications and Multimedia Act 1998 on Mandatory Standard on Access 30 July 2003 (PIR/MSA/1/03)
- A report on public consultation on effective competition in the Access Network 18 November 2003 (MCMC/IDD/PRR/ANE/PCR/No.1 of 2003


In the absence of a voluntary industry code or mandatory standards on access, the industry is currently guided by the:

- The General Framework for Interconnection and Access, May 1996;
- The Statement on the Implemental Plan of Equal Access and Cost-Based Interconnection Pricing in Malaysia, issued by the Minister of Energy Telecommunications and Post on 10 April 1998;
- Telecommunications Regulatory Determination – Customer Access Arrangements 24 May 1998 (TRD 001/98);
- Determination of Cost Based Interconnect Prices and the Cost of Universal Service Obligation, 15 July 1998 (TRD 006/98);
- Ministerial Direction on Equal Access 23 March 2001;
- Commission Determination on Access List, 24 March 2001;

The industry players also have their own access agreements which are required to be registered by the MCMC. The Commission also made two other determinations on access. These are:


(4) Malaysian Technical Standards Forum Berhad (‘MTSFB’)

The Malaysian Technical Standards Forum Berhad is a company limited by guarantee, which is responsible for the establishment and maintenance of the standards, technical

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codes, interoperability of networks and operation issues. The MTSFB is also responsible for the development, recommendation, modification, update and such of the registration of technical codes from the MCMC. The MTSFB was officially designated on 27 October 2004. The management of the MTSFB rests with the board of directors headed by a chairman and 13 directors. The board members comprises of:

- 8 members who are licensees;
  - 2 from NFP category (1st by highest Annual Revenue & 2nd by ballot)
  - 2 from NSP category (1st by highest Annual Revenue & 2nd by ballot)
  - 2 from ASP category (1st by highest Annual Revenue & 2nd by ballot)
  - 2 from CASP category (1st by highest Annual Revenue & 2nd by ballot)
  - 2 members who are Profit Organisations (1st by highest Annual Revenue and 2nd by ballot)
- 2 members who are Non-Profit Organisations (both by ballot);
- 1 member from the National Standards Agency category (by ballot).

The objectives of the MTSFB as a company limited by guarantee are:

- To actively promote a co-operative environment to address in a timely manner national or international issues involving technical standards, technical codes and development of operational guidelines for the Malaysian communications and multimedia industry;
- To take all measures that may appear to be incidental or conducive to the development of the object thereto;
- To establish and maintain technical standards, technical codes, network interoperability and operational issues affecting the Malaysian communications and multimedia industry;
- To develop, recommend, modify, update and seek the registration of technical codes from time to time for the communications and multimedia industry;

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87 There is no further information regarding the technical codes developed by the MTSFB or their activities and schedule on its website.
• To promote the dissemination of relevant information on the technical codes and standards to the public and the education thereof;
• To monitor technical code compliance and administer sanctions for breaches of the technical codes;
• To engage in activities that would facilitate industry regulation;
• To generally do all such things as may appear to be incidental or conducive to the development of the object thereto including operating as a recognized standard writing organisation for the development of Malaysian standards in accordance with the Standards of Malaysia Act 1996 where the Board deems appropriate;
• To be an information resource to its members and participants and other interested parties;
• To work closely with government and non-governmental bodies, voluntary associations or individual persons in order to facilitate the development and growth of the communications and multimedia industry;
• To promote the development of standards and the safety of network facilities.

There are several working groups (‘WG’) within the MTSFB:

• WG on IMG-2000 Systems and Beyond Mobility
• WG on Networks
• WG on Broadband Multimedia
• WG on Interoperability Requirements for CPE
• WG on Public Mobile Radio (PMR)
• WG on Wireless Access/Local Loops

According to the MTSFB the key benefits for joining the MTSFB are that:  
• it is a forum where relevant parties such as telecommunication operators, vendors, academic, government and non-government agencies, local authorities, voluntary association or individuals come together. Therein they could formulate and

88  See the MTSFB website at http://www.mtsfb.org.my/.
present ideas on the technical standards, technical codes, network interoperability and operational issues in order to ease interoperability;

- it provides a platform to discuss and get feedback on Research and Development findings;
- it has the ability to propose to MCMC on test parameters, type of equipment, and benchmark standards for all technical tests;
- is a possibility to share and discuss information with the participants and other interested parties for the enhancements of the current standards.

For a fee breakdown of the MTSFB, Schedule 1 of the M & A is referred below.

<table>
<thead>
<tr>
<th>Membership</th>
<th>Annual Revenue(RM)</th>
<th>Initial Fee (RM)</th>
<th>Fee</th>
<th>Annual Fee (RM)</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. Ordinary Members</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Licensees</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Above 100million and above</td>
<td>3,000</td>
<td>50,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Above 50million to 100million</td>
<td>3,000</td>
<td>30,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Above 10million to 50million</td>
<td>1,000</td>
<td>15,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Above 5million to 10million</td>
<td>1,000</td>
<td>10,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5million or less</td>
<td>1,000</td>
<td>3,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Profit organisation</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Above 100million and above</td>
<td>3,000</td>
<td>30,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than 100million</td>
<td>1,000</td>
<td>3,000</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Members of the MTSFB are e.g. Maxis Communications Bhd (MAXIS), MEASAT Broadcast Network System Sdn Bhd (MBNS), Telekom Malaysia Berhad (TELEKOM), Digi Telecommunications Sdn Bhd (DIGI), SIRIM Berhad and TIME DotCom Berhad.  

*e) Functioning of the system*

The licensees under the CMA are obliged to comply with the provisions of the Act and their licenses. The *individual license* under the CMA could be suspended or cancelled if the licensee:

- fail to pay any amount required under the act of the individual license;
- fail to comply with the CMA or the terms and conditions of the individual license;
- contravene the provisions of any written law relevant to the communications and multimedia industry;
- fail to comply with any instrument issued, made or given by the Minister or the Commission; or
- if the suspension or cancellation is in the public interest.  

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89 An assembly of MTSFB members were held on November 25, 2004.  
90 Section 37 of the CMA.
Class licensees may be de-registered upon recommendation of the Commission to the Minister if the licensee:

- fails to pay any amount required by the act or the license;
- fails to comply with the provisions of this act or the terms and conditions of the license;
- contravenes the provisions of any written law relevant to the communications and multimedia industry;
- fails to comply with any instrument issued made or given by the Minister or the Commission; or
- the de-registration is in the public interest.91

The term ‘public interest’ has not been defined in the CMA. Regarding content, CASPs are required to provide content which is not indecent, obscene, false, menacing, or offensive in character with the intent to annoy abuse, threaten or harass any person.92 Otherwise they commit an offence with a penalty of RM50, 000 maximum or jail of one year maximum with a further fine of RM1,000 for every day the offence is continued after conviction.93 The Content Code’s provisions on classification are based on the permissible content provision in section 211. The classification of content is categorised into:

U: Universal viewing [can be shown at any time of the day]
PG – 14-: Parental Guidance for Under 14 [can be shown at any time of the day]
PG – 18-: Parental Guidance for Under 18 [can be shown any time after 7.30pm]
18 & Above: Adult viewing [can only be shown after 10.00pm]

There are two general guidelines on permissible content to be broadcasted. Under Part 4: Specific Broadcasting in the Content Code paragraphs 3.5 and 3.6 states:

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91 Section 47 of the CMA.
92 See Appendix 2 on Classification of Content.
93 Section 211 of the CMA.
3.5 Broadcasters must endeavour to provide content that, as far as possible, caters to the various tastes and expectations of Malaysian viewers and listeners. This is in view of the varied of tastes of the Malaysian public.

3.6 Broadcasters must ensure, to the best of their ability, that their content contains no abusive or discriminatory material or comment on matters of, but not limited to, race, religion, culture ethnicity, national origin, gender, age, marital status, socio-economic status, political persuasion, educational background, geographic location, sexual orientation or physical or mental ability.

Before the forum codes became effective the MCMC used the Ministry of Information’s Advertising Code and Broadcasting Guidelines to regulate the advertising and broadcasting sectors. As mentioned before these guidelines are overruled now.

The Content Code and General Consumer Code of Practice are voluntary industry codes and are only effective if they are registered by the Commission. It is not mandatory to comply with the code requirements although it constitutes a defense against any prosecution, action or proceeding whether in court or otherwise if a person complies with the code. However it must be explained that not complying with the industry forum codes may be considered as a failure to comply with the CMA or the terms of the individual license. Thus although it is not mandatory to comply with the codes however the conditions of the license and primary legislation obligates the licensees such as online content providers and broadcasters to comply with it. The

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94 The advertising industry also has its Malaysian Code of Advertising Practice.
95 Part 4 of the Contents Code.
97 Section 6 and 213 of the CMA.
98 Section 95(2) of the CMA. See the Complaints Code paragraph 6.1.
99 Section 98(1) of the CMA.
100 Section 98(2) of the CMA.
MCMC is obliged to undertake enforcement action under the law.\footnote{101} The Commission may direct individuals or class of persons to comply with a registered voluntary industry code.\footnote{102} Non-compliance with the Commission’s direction to comply with the code will be followed by a maximum fine of RM200,000 to the Commission.

It must also be remembered that all television broadcasters as well as public screenings of films are governed by the Film Censorship Act.\footnote{103} If a programme does not have a censorship certificate issued by the Censorship Board, it is also a breach of the license condition under the CMA.\footnote{104} The special license conditions for the CASPs individual license include special requirements and privileged terms. These are:

- The requirement to provide a certain percentage of local content (including special content categories such as: particular language content requirements, particular categories of local production such as film, advertising, etc.)
- Specific undertakings with respect to the levels of investment, specific activities and operations;
- Specific rights and privileges agreed between the licensee and the Government which are conditional upon the undertakings entered into by the licensee;
- Other special conditions and matters as declared by the Minister or provided in any subsidiary legislation under this act.

\footnote{101} For example when renewing license under section 34(3) the MCMC could recommend to the Minister not to renew the license; MCMC may recommend to the Minister to suspend or cancel an individual license under section 37. The MCMC may also recommend to deregister a class licensee under section 47.

\footnote{102} See Section 99 and 51. One direction has been issued for non-compliance with a license condition. See register at \url{http://www.mcmc.gov.my/mcmc/registers/cma/comdirect/pdf/NTV7.pdf}.

\footnote{103} Refer to the study on the regulation of films in Malaysia.

\footnote{104} The Schedule of the CMA provides the standard license conditions for the Content Applications Service Provider individual license states:

- The licensee shall comply with the provisions of any subsidiary legislation made, or other instruments, guidelines or regulatory policies issued, under this Act;
- The licensee shall comply with any consumer codes registered under this Act which are relevant to the activities of the licensee;
- The licensee shall indemnify the Minister and the Commission against any claims or proceedings arising from any breaches or failings on the part of the licensee.
Complaints

There are layers of redress for the consumer under the co-regulatory system and for different types of complaints. The **Guidelines for Dispute Resolution** were issued in July 2003 as required under Section 85 of the CMA. It contains principles and procedures for the resolution of disputes or a class of disputes by MCMC in relation to any matter under the CMA or its subsidiary legislations. There is also the Guidelines for Complaints Handling (‘Complaints Guidelines’)\(^{105}\) issued by the MCMC as required under the CMA.\(^{106}\) The guidelines are limited to licensees under the CMA and the Commission may only act against licensees.\(^{107}\) The guidelines are in addition to and not in derogation of the Commission’s existing powers and functions under the act. Any person may still refer complaints relating to civil or criminal offences committed by non-compliance with the provisions of the act or its subsidiary legislation to the Commission. Paragraph 8 of the guideline says the Commission may deal with those other complaints according to a separate guideline or as the Commission deems fit.\(^{108}\) This guideline is construed to allow bringing further appeals from decisions on adjudications of the industry forums.

An appeal tribunal may review any matter on appeal, from a decision or direction of the Commission but not from a determination by the Commission. Its decisions are final and binding on the parties to the appeal and are not subject to further appeal.\(^{109}\) It could be argued that the finality of the tribunal’s decision can still be challenged by invoking the High Court’s inherent power to exercise a judicial review. But there have been only a few occasions in which a court has exercised its powers of judicial review. More importantly,

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\(^{105}\) Issued on July 1, 2003. See section 196 of the CMA.

\(^{106}\) The Commission may use its powers to resolve consumers’ complaints relating to customer service and consumer protection including but not limited to, the failure of a licensee under the Act to comply with a consumer code prepared under Chapter 1 Part VIII of the Act. See section 195 of the CMA.

\(^{107}\) Paragraph 6 of the Complaints Guidelines.

\(^{108}\) Paragraph 8 of the Complaints Guidelines.

\(^{109}\) Section 18.
the courts have tended to defer to the Executive in giving effect to administrative decisions.\textsuperscript{110}

The CMCF (Communications and Multimedia Content Forum Malaysia) has established a \textbf{Complaints Bureau} which determines complaints on prohibited content. This bureau consists of a chairman and 6 members. The procedure on complaints is described in detail in the Content Code. The Content Code is based on the prohibition of offensive content in the CMA, i.e. content which is “indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person”.\textsuperscript{111} The Complaints Bureau for content matters deals with all complaints of general or specific nature. The complaint has to be lodged in writing within two months after its occurring, and it is deemed as admissible when there is a reasonable basis and the complaint is not frivolous.\textsuperscript{112} Complaints that are subject of legal proceedings do not fall under the jurisdiction of the Complaint Bureau.\textsuperscript{113} There have been two complaints regarding obscene content in 2005 and is being looked into by the Complaints Bureau which has started operation.\textsuperscript{114} Additional powers need to be given to the forums before they can impose sanctions on their decisions.\textsuperscript{115} The Complaint Bureau may issue a written reprimand, impose fines up to RM50,000 require removal of the offensive content and order a cessation of the offending act but this is only as provided in the Content Code. Pending the issuance of bye-laws their sanctions do not have the force of law. The Content Advisory Centre is also now working although both these bodies have not released any publicity regarding their advice and adjudication.


\textsuperscript{111} Section 211(1) provides the penalty of a fine of RM50,000 or a maximum imprisonment of one year and liable for RM1,000 for every day offence is committed.

\textsuperscript{112} Paragraph 3.3 of the Contents Code.

\textsuperscript{113} See appendix 1 for complaints procedure.

\textsuperscript{114} Personal interview with senior MCMC executive.
The Content Code provides that the Complaints Bureau of the CMCF may refer the complainant to the Commission if further appropriate action is required.\textsuperscript{116} The CfM’s General Code of Consumer Practice (‘GCC’) requires the service providers to implement complaint procedures for consumers in the communications sector. This does not constraint any rights or remedies for consumer, i.e. to take legal actions before the courts or benefit from other forums to resolve disputes.\textsuperscript{117} The GCC provides that the customer should be informed by the service provider about the right to refer a complaint to the Commission.\textsuperscript{118}

There is no information on the decision-making processes of the industry forums available so far. However the CfM and CMCF provide complaint forms on their websites for the submission. The MCMC, CfM and CMCF have provided actively guidelines to industry members regarding the regulation of content and consumer issues under the new regulatory regime. They have also promoted the public awareness in regard to the existence of the codes. The CMCF organised road shows during 2005 to educate and inform the public.\textsuperscript{119} The lack of information on and from these industry forums may be attributed to a lack of commitment by the industry to the new system. Under the former system the industry has been guided only by legislation, prevalent religious values and social mores of the society. The industry has still to get used to the formalised

\begin{itemize}
\item \textsuperscript{115} An outstanding matter for the MCMC and the Ministry of Energy Water and Communications is to draft and gazette the bye-laws pertaining to the powers of these industry forums. Information obtained from personal interview with a senior MCMC executive.
\item \textsuperscript{116} Paragraph 8.2 of Part 8: Code Administration in the CMCF Content Code.
\item \textsuperscript{118} Paragraph 6.2 of Part 3: Complaints Handling of the General Consumer Code of Practice.
\end{itemize}
organisation guided by the CMA and the MCMC, which requires planning, expenditures as well as time and effort.\textsuperscript{120}

\textit{f) Supervision of the system}

The key responsibility for the overall supervision rests upon the MCMC. It designates industry forums, determines the draw up of voluntary codes and the administration by such forums, sets standards to be complied with, and has the powers to withdraw designation of industry forums and revoke a code.\textsuperscript{121} It also has various enforcement powers. However the industry forums are gradually receiving more responsibilities to carry out their tasks within the regulatory system.

The CMA provides for the establishment of an Appeal Tribunal, directed by the relevant minister. Such tribunal may be established “as the Minister considers necessary or expedient for good cause and in the interest of justice, or to assist in the performance of the Commission's functions, or in the public interest”.\textsuperscript{122} The decision of the tribunal may be enforced in the same manner as a judgment or order of the High Court.\textsuperscript{123}

The MCMC will monitor the full implementation of the Code of Content and will take strict actions against any breaches of the code. The minister stated that in case of multiple infringements, licensees risk their license.\textsuperscript{124}

There is a regular interaction between the MCMC and the industry to attend current matters of concern to the industry.\textsuperscript{125} A briefing on regulatory matters was held on 8

\textsuperscript{120} Some of the forums have yet to recruit full time permanent staff delaying further the operations of these forums. The regulator assists them by providing financial support and including them in activities of the commission to raise their public profile. Personal interview with a senior MCMC executive.

\textsuperscript{121} Sections 94, 101, 211-213.

\textsuperscript{122} Section 17.

\textsuperscript{123} Section 23A.

March 2004. In January 2005 a dialogue was held with the CEOs of the industry. The objective of the 2005 dialogue between the MCMC with the industry CEOs is:

- to listen to the presentations of the industry – to provide value added information on the industry for effective planning;
- to inform members of the industry of the initiatives and plans for 2005 and to update the activities of 2004;
- to have a dialogue which enables industry to raise questions and to explain issues regarding the concerns of the market and matters relating to the Commission; and
- to foster greater networking spirit.

**g) Impact assessment**

Currently the industry forums and codes are still young, as they have been designated and registered within the past two years. There are no annual reports of their activities released yet and the information on the forums’ websites is limited. There is no opportunity to assess their impact yet because of the lack of information on their operations. However, due to the annual dialogue with the MCMC, certain information on the performance of the CfM is available. Complaints received by the CfM were mainly received online (46.7%); the main topic of complaints was the inadequate internet connection (32.9%) and billing disputes (29.6%).

The MCMC publishes statistics on content complaints in their annual report although they receive various kinds of complaints, handled by different departments. The 2004 annual report has not been released yet. In 2004 the MCMC did an impact survey of holders of individual and/or class licenses issued under the CMA. The main objective of the exercise was to assess the impact of licensable activities under the CMA in regard to

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126 Ibid.

127 The date of the report was 6 January 2005.
the communications and multimedia industry in Malaysia. The Commission also regularly conducts a consumer satisfaction survey. The last one was in 2004.

2. Part II: Leading Cases

No cases have been reported yet which were handled under the co-regulatory system by the various institutions. However, it is noted that online content is monitored by the authorities other than the MCMC.

In January 2003 the premises of the alternative newspaper published online *Malaysiakini* have been searched and their PCs and servers were confiscated, following a police report in regard to a controversial letter sent by a reader. The police have investigated because of a news report posted by the paper, which claimed that the report was meant as an April fool joke. A linked story in the paper had stated that the report about top politicians, which should be charged with corruption, was an April fool prank. In July 2005 the police confiscated the computers belonging to the editor of another online publication and interrogated the editor over alleged seditious reports on a Malaysian royal family.

From time to time during the question time in the Parliament, the issues of media content, which bear indecent and offensive depictions, offending religious and racial sensitivities, or may harm the development of minors are raised. Different ministers from various

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130 The letter entitled ‘Similarities between ‘new Americans’ and bumiputera’ was investigated under the Sedition Act 1948. The police officially closed its investigation on the case which went on for two years and returned the computers. See ‘Petrof case closed, no action against Malaysiakini’ in *Malaysiakini*, July 12, 2005.
ministries such as the Information Ministry, Culture Arts Heritage and Tourism\textsuperscript{133}, or the Minister in charge of Islamic matters in the Prime Minister’s Department indicated their concerns and proposed recommendations publicly to repress such content in the media. The Ministry of Information is in charge of the regulation of public broadcasting. The Culture and Heritage Ministry oversees and is the custodian of the arts and heritage. There is a platform to express their concerns over these overlapping issues at a committee called the "Coordination and Monitoring of Broadcasts by Public and Private Stations Broadcasts Committee" or in Malay is titled \textit{Jawatankuasa Penyelarasan Pemantauan Siaran Stesen TV Awam dan Swasta} (‘JKPPSTRAS’).\textsuperscript{134}

3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

\textit{a) The non-state regulatory part of the system}

The communications and multimedia industry has set up designated industry forums which are deemed to represent the industry and to develop codes of conduct on specific areas. These codes are registered to take effect over the licensees under the CMA and the members of the industry forums. However, the Commission may refuse to register the code if there wasn't sufficient public consultation during the development of the voluntary industry code.

\textit{b) The link between the non-state part and state regulation}

The forums of the communications and multimedia industry which carry out self-regulation were set up with clear objectives of upholding the national policy objectives of the CMA. These objectives of the CMA are reflected in the substance and procedures of

\textsuperscript{133} Kuek Ser Kuang Keng, ‘Govt to rein in Astro’, in \textit{Malaysiakini}, July 5, 2005 accessed on July 15, 2005 at \texttt{http://www.malaysiakini.com/news/37643}. The Minister described some of Astro’s programs as repulsive and announced the satellite television service provider will be brought under the control of domestic laws.

\textsuperscript{134} Personal interview with senior MCMC executive.
the codes. The system created under the CMA, i.e. the co-operative rulemaking functions, aim at achieving public policy goals and social processes. The non-regulatory system is influenced by the state regulator that uses the resources of providing funds, "carrot and stick measures" provided by the CMA, as well as the publication of consultation papers, making inquiries etc. The system as such leaves room for discretionary power for the non-state part component. But on the other hand there is a strong influence in areas such as content from other state branches and other laws. This situation might be confusing.

**Conclusion:** In our opinion, the Malaysian communications and multimedia regulatory system is a co-regulatory system within the meaning of the study.
Appendix 1: Extract from Content Code Part 8 Code Administration paragraphs 4.0 – 11.7

[Unofficial translation with editorial changes made for clarity by the compiler of the study. The original texts could be downloaded on the website of MCMC http://www.mcmc.gov.my]

4.0 Procedure for General Public Complaints

4.1 Any complaint received from the public must be made in writing, specifying, if possible, the part of the Content Code that has been breached together with supporting documents or details of the alleged misconduct.

4.2 The complaint will be referred to the Chairman for his consideration. If the chairman judges the complaint as frivolous or that it is prima facie lacking in merit or the issue falls outside the scope of the Code, he will notify the complainant that no further action is being taken and the reasons therefore.

4.3 If the Chairman is of the opinion that the complaint warrants further investigation to determine its validity, the complaint will be forwarded immediately to the defendant asking for a response within two working days.

4.4 After two working days, the Chairman will review the complaint and the response, if any. If the Chairman feels there are insufficient grounds for upholding the complaint, the chairman will circulate to Bureau members his views together with the complaint and the response, if any, within 4 working days of the receipt of the complaint.

4.5 Within three working days, if the majority of the members agree with the view of the Chairman, the Bureau will write to the complainant stating that there are insufficient grounds to uphold the complaint.

4.6 If the Chairman is of the view that the complaint has merits, then copies of the complaint together with the response of the defendant will be circulated to members for their views within two working days and:
(a) If the views of the members are unanimous, the Bureau will inform the parties involved of the decision.
(b) If there is a difference of opinion, the Bureau will convene a meeting within three working days to deliberate the matter.

5.0 Procedure for Industry Complaints

5.1 Any complaint that a member or a person from the industry will lodge, should first be raised with the alleged offending party in writing, specifying the part of the code which is concerned, one copy should be send to the Complaints Bureau.
5.2 If within two working days, the complaint is not resolved, then either of the parties shall in writing inform the Complaints Bureau which will then circulate copies of the complaint to its members for their views within two working days and:
(a) If views are unanimous, the chairman will instruct the Secretaries about the action that should be taken.
(b) If there is a difference of opinion, the Bureau will convene a meeting within three working days to deliberate the matter.

6.0 Inquiry Proceedings

6.1 In adjudication of all cases, the Bureau may require the parties concerned to provide evidence in support of or against the complaint and for this purpose may request:
(a) A written submission with documents, recordings or transcripts of the relevant content from the complainant and respondent;
(b) The presence of the complainant and respondent and their respective witnesses at the inquiry;
(c) The presence of any party to provide clarification on a document submitted as evidence; and
(d) The presence of any outside independent party for further information or further evidence.

6.2 The Bureau will specify the time at which or within which the complainant, respondent, their witnesses and any other affected parties are required to be present at the inquiry.

6.3 The provision as to the time within which any party is required to act or respond shall be strictly observed. However, all time limits set out may, in the Bureau’s discretion, be extended if it is considered that its strict application may cause injustice.

7.0 Decisions of the Bureau

7.1 The ruling of the Complaints Bureau, on any matter and at any given time, shall be decided upon by a majority of votes of its members and rendered in writing.

7.2 The parties concerned will be notified in writing of the decision and of the subsequent action that is recommended or to be taken.

7.3 In the event that after the decision any of the parties concerned comes into possession of evidence not earlier available, it may request the Bureau for reconsideration of its earlier decision. Such a request will be accompanied by a fee to be determined by the Bureau and any decision upon such reconsideration will be final.
8.0 Sanctions

8.1 The Bureau, after the adjudication and upon finding that there has been a breach of the Code, may impose fines and other penalties permitted by virtue of this code. The Bureau may upon finding that there has been a breach of the Code:
(a) Issue a written reprimand;
(b) Impose a fine not exceeding fifty thousand (RM50,000.00); and/or
(c) Require removal of the content or cessation of the offending act.

8.2 The Bureau may also refer the offending party to the Communications and Multimedia Commission for further appropriate action, if required.

9.0 Publication of Decision

9.1 The Complaints Bureau will report to the Forum’s Council the outcome of its mediation efforts or the ruling made, and whether or not the defendant has complied with or the party in breach has agreed to comply with the ruling.

9.2 The Bureau shall publish its findings within 30 days of the conclusion of the inquiry. The report shall not include:
(a) Any material of a confidential nature; or
(b) any disclosure or personal information about any individual that is not relevant to the complaint.

10.0 Composition of the Complaints Bureau

10.1 The Complaints Bureau comprises an appointed chairman and six members of the Forum, each of them representing: advertisers, audiotext service providers, broadcasters, civic groups, content creators/distributors and internet access service providers.

10.2 The appointed chairman shall be a retired judge or judicial officer or anyone the Council deems fit. The chairman may be appointed for several times and for different time periods, which is in the power of the Council. The members of the Complaints Bureau shall be appointed for a two-year term at the annual general meeting of the Content Forum. A member is eligible for reappointment but only for two successive terms.

10.3 A Complaint Bureau's member is entitled to appoint another member of the forum from the same category he/she represents, as an alternate and shall notify the Forum Secretary in writing.

10.4 A formal inquiry convened by the Bureau shall be made up of the chairman and at least three members. If the chairman is not able to attend such a scheduled inquiry, it must nonetheless be convened by at least three Bureau members, one of who will be elected to be the chairman of the inquiry.
10.5 In ensuring a fair hearing of a complaint, a Complaint Bureau's member must disclose to the chairman, as soon as possible, any interest, direct or otherwise, in any particular matter related to the complaint. If the chairman deems it necessary, all parties involved in the inquiry must be informed of such disclosure to determine whether the member may continue to execute his duties as a member of the Complaints Bureau in relation to that matter. If none of the parties objects, the member may then continue. If there is an objection, the member cannot proceed in his capacity as a member of the Complaints Bureau in relation to that matter.

10.6 If any vacancy in the Complaints Bureau occurs before the annual general meeting of the Forum, the position may be filled by a member of the Council until the next annual general meeting. The exercise of powers or the performance of the functions of the Complaints Bureau shall not be affected by a possible vacancy.

10.7 The Chairman or any member of the Complaints Bureau may, at any time, resign his office by giving a written notice to The Board of Directors/Council.

10.8 The Council may, at its discretion, suspend any member of the Complaints Bureau on the ground of inappropriate behaviour or incapacity or any other reasons which make him unfit to be a member of the Complaints Bureau.

11.0 Development, Amendment and Review of Content Code

11.1 Any proposal for the development, the addition, the amendment, or the review of the Content Code required or necessary shall be referred to a working group comprising the six categories, namely advertisers, broadcasters, audiotext service providers, content creators/distributors, internet access service providers and civic groups.

11.2 Any proposal for the development, the addition to, the amendment of, or the review of the Content Code shall be considered and formulated by the members of the working group and shall, if approved by a resolution of a simple majority of the members of the working group (whereupon it shall be referred to as the Recommendation), be made available to members of the society for their input.

11.3 The Working Group shall consider and deliberate on the input received from members and decide the extent to which the recommendation is to be revised. If two thirds of the members agree on the Recommendation whether in its original form or as revised, the Recommendation shall be submitted to the Council.

11.4 As long as the Council by simple majority of its members presents and the voting approves the recommendation, the Council shall make available such recommendations for public comment (public consultation) for a reasonable period.

11.5 The Working Group shall consider the results of the public consultation and then forward the recommendation in its original or amended form by a simple majority to the Council.
11.6 After receiving such a recommendation in regard to the Content Code, the Council shall forward the same to the Malaysian Communications and Multimedia Commission for registration.

11.7 The Malaysian Communications and Multimedia Commission must be notified of any amendment or modification to the Content Code, like to any code. Only after this registration the amended code could come into force.

Appendix 2: Extract from Content Code Parts 4 – 7 [Classification of Content]

PART 4 SPECIFIC BROADCASTING

1.0 Scope and Coverage

1.1 This part serves as a guideline for content that is broadcasted through the following media:
   (i) Direct to Home (DTH) subscription broadcasting and/or video on demand services, whether via satellite or cable; and
   (ii) Terrestrial Free-to-Air TV and Radio; collectively known as “Broadcasters”.

1.2 This part excludes content available online [see part 5].

2.0 Objectives

2.1 The objective of these specific broadcast guidelines is to ensure continued reliable standards of content disseminated by broadcasters in accordance with expectations of audiences and internationally recognised good practice of electronic media and journalism.

2.2 This code is a manifestation of a paradigm change brought about by technological developments in the broadcasting industry. It is acknowledged that compliance with the Content Code enables to set standards for content.

2.3 Malaysian Broadcasters recognise that the "creative freedom" obliges to take the responsibility to ensure minor protection in particular, as well as the protection of viewers and listeners in general. Therefore they guarantee to respect ethical and professional standards in their conduct of business operations in order to fulfil this social responsibility.

3.0 Specific Guidelines

3.1 In extension to the general principles and the general guidelines laid out in Part 1 and Part 2 of this Code respectively, the following specific guidelines take also into account the particular conditions under content could be broadcasted. Such condition might be the special audience or -as for the free-to-air broadcast- the time of the day:
Classification

3.2 Viewers need to be informed in an adequate way, enabling them to choose the programming conform to their taste and standards. Therefore broadcasters (radio operators excluded) will provide different signs for the different kind of content, indicated by the following classification. The broadcasters should display the adequate sign in regular intervals of the programme:

U: The programme is intended for a broad general audience and is suitable for viewers of all ages. The programme contains little or no violence, no strong language and little or no sexual dialogue or situation.

PG-14: Parental guidance is needed in order to allow children under the age of 14 to view this programme. The programme may contain mild physical violence, comedic violence, comic horror, special effects, fantasy, supernatural elements or animated violence. It may also contain some suggestive dialogue and mild sexual situations and innuendo, but depictions will be infrequent, discreet and of low intensity.

PG-18: Parents/guardians are strongly cautioned to exercise discretion before allowing young persons under the age of 18 to view this programme without supervision. The programme may contain sophisticated themes, some sexual content, discreet sexual references, suggestive language and in some sections strong and coarse language and violence which are dominant elements of the storyline and justifiable within the context of theme and character development. The programme may also contain and deal with mature themes and societal issues in a realistic and candid manner.

18 & above: For those older than 18 years. The programme is intended for an adult audience and may contain one or more of the following issues which are considered integral to the development of the plot, character or themes: intense violence and depictions of violence, graphic horror images, graphic language, mature themes, intense sexual situations and suggestive dialogue.

Scheduling

3.3 The scheduling of programmes which were classified is applicable to free-to-air broadcasters (excluding radio operators) as follows:

- U and PG-14 – Can be shown at any time of day
- PG-18 – Can be shown any time after 7.30 p.m.
- 18 – Can only be shown after 10.00 p.m.

3.4 Promotion content, which contains scenes of excessive violence, or adult material intended for adult audiences must not be transmitted before 10.00 p.m. Broadcasters are require to have their own content control unit which is responsible for the classifications and scheduling.
General Content
3.5 Broadcasters have to provide content that, as far as possible, caters to the various tastes and expectations of Malaysian viewers and listeners. This is in view of the varied tastes of the Malaysian public.

Non-Discrimination
3.6 Broadcasters must ensure, to the best of their ability, that the content contains no abusive or discriminatory material or comment on matters of, but not limited to, race, religion, culture, ethnicity, national origin, gender, age, marital status, socio economic status, political persuasion, educational background, geographic location, sexual orientation or physical or mental ability.

News and Current Affairs
3.7 Broadcasters recognise the fundamental importance of news dissemination and current affairs content in a democracy. They inform the public about actual events and enables people to understand affairs that may affect them as members of the community so that they may form their own conclusions.

3.8 "Current affairs Content" means content focusing on social, economic or political issues of current relevance to the Malaysian community.

3.9 Broadcasters will ensure that content of news and current affairs programmes are presented:
(a) Accurately, fairly and objectively at any time. They should not be manipulated, i.e. there should not be a distortion between the presentation of the content and its original context. The circumstances of the presentation should be taken into account (e.g. live coverage).
(b) Having in mind the likely composition of the viewing audience at the time of broadcasting.
(c) With sensitivity in the case of material likely to cause some distress to a substantial number of viewers such as images or interviews with victims of traumatic incidents. Such material should only be used when deemed editorially essential, and if so, sparingly.
(d) With due respect to the cultural differences in the Malaysian community.
(e) With appropriate respect to the rights of any individual group of persons who should not be portrayed in a negative light by placing gratuitous emphasis on matters pertaining, but not limited to, race, religion, culture, ethnicity, national origin, gender, age, marital status, socio economic status, political persuasion, educational background, geographic location, sexual orientation or physical or mental disability.
Where in the opinion of a broadcaster it is in the public interest, it may report events and broadcast comments in which such matters are raised.
(f) With due respect to privacy of an individual. However, in the public interest, an intrusion into an individual’s privacy may be justified such as in detecting or exposing crime or a serious misdemeanour, protecting public health or safety and preventing the public from being misled by some statement or action of an individual or organisation.
(g) The presented content should be presented by taking into account that news materials and current affairs are always in line with government’s principles. This is to avoid
confusion and misunderstanding among the people and also other countries. Materials received from foreign countries must also be ensured that they don’t contradict with national foreign policies.

3.10 Reasonable efforts must be made to correct significant errors of fact at the earliest opportunity.

Violence and Bad Language
3.11 In strictly adhering to the general guidelines on violence and bad language set out in Part 2 of this code, all broadcasters will:
(a) Exercise appropriate editorial judgment in the reporting of audio and audiovisual presentation of violence, aggression or destruction within their content.
(b) Exercise caution and appropriate discretion in the selection of, and repetition of, content which depicts violence.
(c) Exercise appropriate discretion in the use of explicit or graphic language related to stories of destruction, accidents or sexual violence which could be disturbing for family viewing.
(d) Warning viewers in advance of scenes of extraordinary violence, or graphic reporting on delicate subject matters.

Religious Content
3.12 By dealing with religious content, broadcasters shall have regards to Islam as the official religion of the country and the constitutional rights to freedom of religion of all other communities.

3.13 Religious broadcasts are aimed at respecting and promoting spiritual harmony and to cater to the varied religious needs of the community. Broadcasters must ensure that its religious content is not used to convey attacks upon any race or religion or is likely to create any disharmony.

3.14 All religious programming on Islam must be approved by the relevant religious authorities prior to transmission. Advice from the appropriate religious authorities should be obtained in relation to content relating to other religion.

3.15 However, the propagation of any religion other than Islam whether directly or indirectly is not permitted.

3.16 Content that is wrongful, fanatical, critical and insulting against any religion shall not be permitted.

Exploitation
3.17 No audio and audiovisual content should condone the exploitation of women, men and children. Negative or degrading content on the role and nature of women, men or children in society must be avoided.
3.18 Television content that degrades either sex by negative portrayal such as implied lewd conduct through modes of dress or camera focus on areas of the body is not allowed. Similarly, the degradation of children through improper portrayal or behaviour is not acceptable.

4.0 Advertisements

4.1 Broadcasters are responsible for the acceptability of advertising material transmitted and must ensure that:
(a) All advertisements are in good taste and conform to applicable laws and regulations.
(b) There is no influence by advertisers, or the perception of such influence, on the reporting of news or public affairs which must be accurate, balanced and objective, with fairness and integrity being the paramount considerations governing such content.

5.0 Information, Advice and Warnings

5.1 Broadcasters must ensure that classification details and other information announcements have a helpful role in enabling viewers to make appropriate choices at all times.

5.2 Broadcasters should consider if any element or programming might disturb viewers, in particular younger children. Appropriate information, advice and or warnings should be provided at the beginning of any programme or news report which might disturb younger children.

5.3 Broadcasters have to ensure the employment of clear and specific warnings, especially after 10.00 p.m. There is a probability after 10 p.m. that some viewers may find the programme disturbing or offensive. This does not reduce the responsibility of broadcasters in regard to sensitive scheduling of programmes, in order to reduce the risk of offence to the minimum.

PART 5 SPECIFIC ONLINE GUIDELINES

1.0 Scope and Coverage

1.1 In adhering to this and the relevant parts of this code, no action by code subjects should, in any way, contravene Section 3(3) of the Act, which states that “Nothing in this Act shall be construed as permitting the censorship of the Internet”.

1.2 Code subjects in this Part are providers of online content or those who provide access to online content through present and future technology. These include, but are not limited to:
(a) internet access service providers;
(b) internet content hosts;
(c) online content developers;
(d) online content aggregators; and
(e) link providers.

1.3 “Online” is defined as a networked environment that is available via a connection to a network service whereby content is accessible to or by the public whether for a fee or otherwise and which originated from Malaysia. Content, for the purposes of this part, means content as defined in the Act but does not include:
(a) Ordinary private and/or personal electronic mail other than bulk or spammed electronic mail;
(b) Content transmitted solely by facsimile, voice telephony, VoIP and which is intended for private consumption; or
(c) Content that is not accessible for the public whether freely, by payment of a fee or by registration, including (but not limited to) content made available by way of a closed content application service or a limited content applications service as defined under Sections 207 and 209 of the Act respectively.

2.0 Concept of Innocent/unliable? Carrier

2.1 Code Subjects providing access to any content without having neither control over the composition of such content or any knowledge of such content, is deemed an innocent carrier for the purposes of this code. An innocent carrier is not responsible for the content provided. Nonetheless, this does not exempt such access providers from adhering to the general measures as outlined in Part 6.0 of this part where it expressly applies to them.

3.0 Objectives

3.1 The online environment vastly differs from other existing traditional mediums which are addressed to the public where the use and dissemination of content is concerned.

3.2 The online users are able to choose to access, read or digest various online materials at any time. They are also, by certain applications, able to contribute online content in their own personal capacity.

3.3 There is a great benefit due to this medium. But the possibility to use it is accompanied by the possibility of abuse.

3.4 Online content providers are committed to take a responsible approach in regard to the provision of content. This should be done by implementing reasonable, practicable and proportionate measures to avoid abuse to provide an adequate mechanism if prohibited material or illegal activity is identified. End users should retain responsibility for the content they place online, whether legal, or illegal.

3.5 The online environment is not a legal vacuum. In general, if something is illegal "off-line", it will also be illegal "on-line", i.e. the relevant laws apply also.
3.6 Responsible content providers must, therefore, be guided by the commitment to reassure consumers and businesses that online content to inform, educate, entertain and facilitate commerce is safe and secure. Hence, the purpose of this part is to:
(a) recommend guidelines and procedures relating to the provision of online content through self-regulation by the industry in a practical and commercially feasible manner and at the same time foster, promote and encourage the growth and development of the online services industry;
(b) promote the education of users in making an informed selection of the content they consume; and
(c) keep update with international as well as national standards, trends and cultural sensitivities of the general Malaysian public when applying and reviewing this Part.

4.0 Principles

4.1 The following principles shall guide the parties who review, administer, apply, are affected by and/or are subject to this part of the Code:
(a) There shall be no censorship of the internet as provided in section 3(3) of the Act.
(b) Responsibility for content provided online by Code Subjects primarily rests with the creator of the content.
(c) In acknowledging that in the fast-changing online environment, it is very often impractical, costly, difficult and ineffective to monitor content, Code subjects will nonetheless fulfil, to the best of their ability the requirements of the Code.
(d) Users are responsible for their choice and utilisation of online content.
(e) As users are able to exercise independently the choice on whether to access, read or digest and consume various online materials, the application of the Code, by Code Subjects under this Part shall take cognisance of this fact.
(f) Any measures relating to content which is recommended by this part from time to time shall be:
   • Technologically neutral;
   • Fair; and
   • Widely affordable and not adversely affect the economic viability of the communications and multimedia industry.
(g) Any guidelines that apply to the provision of online content should not unduly restrict the growth of the industry but serve to enhance a conductive environment to encourage and stimulate the Malaysian communications and multimedia industry.

5.0 Online Guidelines

5.1 Code Subjects shall apply the guidelines set out in Part 2 of this code in determining whether content is indecent, obscene, menacing or offensive save where expressly provided in this part.
Prohibition
No Code subject shall knowingly provide online prohibited content

False content
Content that is not truthful and likely to mislead is prohibited except in any of the following circumstances:

- Satire and parody;
- Where it is clear to an ordinary user that the content is fiction; and
- Where it is preceded by a statement that the content found on the website is not factual.

6.0 Measures – General and Specific

6.1 It is recognised that it is impractical, difficult and ineffective to monitor or control the user’s access to online content. Only the user decides about the nature of content he consumes and the tools to use in order to control the content.

6.2 The Content Forum will assist users by informing about the type of tools that are available for users to control access to online content. Such information can be provided on the Content Forum’s website which may be updated from time to time in order to reflect the evolving technology. The Content Forum’s website shall contain information on:

(a) The types of tools which are available to assist users in filtering or controlling online content;
(b) User ethics in accessing and providing content over the internet;
(c) Responsibilities of adult users over children under their care in relation to internet use;
(d) Measures which can be taken by parents, guardians and teachers to control children’s access to online content;
(e) Content provider ethics;
(f) This content code; and
(g) The appropriate channel to which a complaint regarding online content may be made, and the procedures by which such a complaint is to be made.

6.3 The information provided on the website is intended to assist online users and the Content Forum is not responsible for any tools recommended or advice rendered.

6.4 Apart from the foregoing general measures the following specific measures as set out in Parts 7.1 – 10.2 must be complied with depending on the degree of control that a Code Subject may have over the online content.

7.0 Internet Access Service Provider (IASP)

7.1 An IASP shall comply with and incorporate terms and conditions in the contracts and legal notices as to terms of use with subscribers of their services. This shall include the following terms:
(a) Subscribers will comply with the requirements of Malaysian law including, but not limited to, the Code and shall provide neither prohibited content nor any content in contravention of Malaysian law;
(b) The IASP will have the right to withdraw access where a subscriber contravenes the above; and
(c) The IASP shall have the right to block access to or remove such prohibited content provided such blocking or removal is carried out in accordance with the complaints procedure contained in the Code.

7.2 The existence of terms and conditions will be displayed on the IASP’s website in a manner and form easily accessible by its subscribers by way of a link or other similar methods.

7.3 Once an IASP is notified by the Complaints Bureau that its user or subscriber is providing prohibited content and the IASP is able to identify such subscriber the IASP will take the following steps:
(a) Within a period of 2 working days from the time of notification, inform its subscriber to take down the prohibited content.
(b) Prescribe a period within which its subscriber is to remove the prohibited content, ranging from 1 to 24 hours from the time of notification.
(c) If the subscriber does not remove such prohibited content within the prescribed period, the IASP shall be entitled to suspend or terminate the subscribers’ access account.

7.4 An IASP will place on its website a hyperlink to the Content Forum website to enable subscribers to obtain the information specified above. If an IASP does not have a website, it will provide its subscribers with the Content Forum website address.

8.0 Content Aggregator

8.1 A Content Aggregator being a person who aggregates and/or purchases content shall incorporate terms and conditions in the contracts and legal notices as to terms of use with users, subscribers and content providers of their services. This shall include the following terms:
(a) Users, subscribers and content providers will comply with the requirements of Malaysian law including, but not limited to, the Code and shall provide neither prohibited content nor any content in contravention of Malaysian law; and
(b) The Content Aggregator will have the right to remove such prohibited content where a user, subscriber or content provider contravenes the preceding (a) above provided the removal of such prohibited content is in accordance with the complaints procedure contained in the Code.

8.2 Upon a Content Aggregator being notified by the Complaints Bureau that its user, subscriber or content provider is providing prohibited content and the Content Aggregator is able to identify such subscriber, user or content provider, the Content Aggregator will take the following steps:
(a) Within a period of 2 working days from the time of notification, inform the user, subscriber or content provider to take down the prohibited content.
(b) Prescribe a period within which the user, subscriber or content provider is to remove the prohibited content, ranging from 1 to 24 hours from the time of notification.
(c) If the user, subscriber or content provider does not remove such prohibited content within the prescribed period, the Content Aggregator shall have the right to remove such content.

8.3 A Content Aggregator will place on its website a hyperlink to the Content Forum website to enable users and subscribers to obtain the information specified above.

8.4 Where a Content Aggregator has editorial rights over the substance of content, it shall comply with Part 2 (Guidelines on Content) of the Code.

9.0 Link Provider

9.1 A person who provides links to other sites containing prohibited content shall remove the link to such sites within 24 hours of being notified by the Complaints Bureau of the continuing existence of prohibited content on such site.

10.0 Internet Content Hosting Provider (ICH)

10.1 An ICH being a person in its capacity of merely providing access to content which is neither created nor aggregated by itself but which is hosted on its facilities shall incorporate terms and conditions in the contracts and legal notices as to terms of use with users and subscribers of their services. This shall include the following terms:
(a) Users and subscribers shall comply with the requirements of Malaysian law including (but not limited to) the Code and shall provide neither prohibited content nor any content in contravention of Malaysian law;
(b) The ICH shall have the right to withdraw its hosting services where a user or subscriber contravenes (a) above; and
(c) The ICH shall have the right to remove such prohibited content, provided such removal is in accordance with the complaints procedure contained in the Code.

10.2 Once an ICH is notified by the Complaints Bureau that its user or subscriber is providing prohibited Content and the ICH is able to identify such subscriber or user, the ICH will take the following steps:
(a) Within a period of 2 working days from the time of notification, inform the user or subscriber to take down the prohibited content.
(b) Prescribe a period within which the user or subscriber is to remove the prohibited content, ranging from 1 to 24 hours from the time of notification.
(c) If the user or subscriber does not remove such prohibited content within the prescribed period the ICH shall have the right to remove such content.

10.3 An ICH will place on its website a hyperlink to the Content Forum website to enable users and subscribers to obtain the information specified in Parts 7.1 – 10.2 above.
Examples in Applying Specific Measures

X, who is based in Kuala Lumpur, provides an online lifestyle magazine which can be accessed by anyone from any part of the world. X’s portal is hosted on Y’s servers. Y’s servers are located in Penang.

X provides his own content and third party content. In his arrangement with the third party content providers, he does not have the rights to edit the content. Most third party content is pushed onto his site automatically without X having the opportunity to view the content beforehand.

X is a subscriber of Z’s internet access services.
In this instance:
- X is both a content provider and content aggregator
- Y is an ICH
- Z is an IASP

The Complaints Bureau receives a complaint that one of the web pages of X’s online magazine contains content which is obscene as defined in the Guidelines on Content contained in Part 2 of the Code.

Scenario 1:
If X receives a notification from the Complaints Bureau it must:
(a) where X has provided the content, remove the prohibited content.
(b) where the content is provided by a third party W, inform W to remove the content within a period ranging from 1 to 24 hours. The period prescribed is at X’s discretion. If W fails to remove the prohibited content, it shall be removed by X.

Scenario 2:
If Y receives a notification from the Complaints Bureau, it must notify X to remove the content within a period ranging from 1 to 24 hours. The period prescribed at Y’s discretion. In this instance, Y gives X 4 hours. X may either remove the prohibited content itself or direct W to remove the content. If the prohibited content is not removed within 4 hours, it shall be removed by Y.

Scenario 3:
If Z receives a notification from the Complaints Bureau, it must notify X to remove the content within a period ranging from 1 to 24 hours. The period prescribed is at Z’s discretion. In this instance, Z gives X 12 hours to remove the content. X may either remove the prohibited content itself or direct W to remove the content. If the prohibited content is not removed within 12 hours, Z can suspend or terminate X’s access to the Internet.
If X is not Z’s subscriber, Z will not be required to take any measures.
11.0 Measures not required

11.1 IASPs, ICHs and Content Aggregators shall not be required to undertake any of the following:
(a) Provide rating systems for online content;
(b) Block access by their users or subscribers to any material unless directed to do so by the Complaints Bureau acting in accordance with the complaints procedure set out in the Code;
(c) Monitor the activities of users and subscribers; or
(d) Retain data for investigation unless such retention of data is rightfully requested by the relevant authorities in accordance with Malaysian law.

12.0 Definitions

12.1 For the purposes of interpretation, should there be any inconsistencies between the definitions in this Part and definitions elsewhere in this code, those in this part shall apply. In this part, unless the context otherwise requires —

**Access**
means its ordinary meaning i.e. a means of entering; a means or a right of using, reaching or entering. It is not the definition in section 6 of the Act;

**Content**
for the purposes of this Part, means content as defined by the Act transmitted through a variety of technology but does not include:
a) ordinary private and/or personal electronic mail other than bulk or spammed electronic mail;
b) Content transmitted solely by facsimile, voice telephony, VOIP and which is intended for private consumption; or
c) Content which is not accessible to the public whether freely, by payment of a fee or by registration, including (but not limited to) content made available by way of a closed content application service or a limited content applications service under Sections 207 and 209 of the Act respectively;

**Content Aggregator** means a person who aggregates and/or purchases content;

**Internet Access Service Provider** means a service provider who provides users with access to the internet including (but not limited to) the world wide web;

**Internet Content Hosting Provider** means a provider in its capacity of merely providing access to content which is neither created nor aggregated by itself but which is hosted on its facilities;

**Hosting Provider** means a provider in its capacity of merely providing access to content which is neither created nor aggregated by itself but which is hosted on its facilities;

**Link Provider** means a person who provides links to other sites;
Online means a networked environment which is available through a connection to a network service wherein content is accessible to and/or by the public whether for a fee or otherwise;

Online Content Developer means a code subject who develops files of content for the code subject or on behalf of others to be made accessible online;

Prohibited content means such content expressed to be prohibited under Part 2 of the Code and Part 5.1 of this part;

Provide in relation to content means for a Code Subject to make available online content where the Code Subject has:
a) full knowledge of the substance of the content; and
b) control over the substance of such content.
To the extent it does not conflict with the above definition, the following activities are excluded from the ambit of the above definition:

- the enabling of access including (but not limited to) by way of providing connectivity or links to such content;
- the aggregation of such content; and
- the hosting of content online;

User a person accessing online content; and web page/ web site/ site means files of content accessible on the world wide web by a requested URL.

PART 6 SPECIFIC AUDIOTEXT HOSTING SERVICES GUIDELINES

1.0 Scope and Coverage

1.1 An Audiotext Hosting Service is defined as a service provided pursuant to a license issued by the Commission, such service being accessed by utilising a telephone or any other future communication tool, and having access via numbers beginning with the prefix 600 or any other number/mode determined by the Commission.

Objectives

1.2 The major purpose of these specific guidelines is to allow Audiotext Hosting Service Providers to self-regulate themselves in the best interest of users generally and in accordance with internationally recognised practice and national policy.

Principles

1.3 The following principles shall guide Audiotext Hosting Service Content providers who are affected by and/or are subject to this part of the code:

(a) Audiotext Hosting Service Content providers shall apply the guidelines set out in Part 2 of this code in determining whether content is indecent, obscene, menacing or offensive unless otherwise defined in this part.
(b) No Audiotext Hosting Service provider shall knowingly provide prohibited content.
(c) Any content provided must not be misleading, likely to mislead or essentially out of date.
(d) Guidelines will be adhered to on a self-regulatory basis in a manner that would encourage the development of content and the positive growth of the industry.
(e) While recognising the importance of the positive growth and commercial viability of the industry, Audiotext Hosting Service providers shall at all times abide by all relevant laws and consider the views and interest of the general public.
(f) Where live Audiotext Hosting Services are offered, at least one adequately trained employee must be assigned and present at all times to moderate, facilitate and monitor the service to ensure that all activities within the service remain healthy. The service must provide facilities for the trained employee to immediately remove callers who misuse and abuse the service.

2.0 Specific Guidelines

Rating Classifications
2.1 All Audiotext Hosting Services must be classified according to the following rating classification below and displayed clearly in all advertising materials.
   (a) "U" - Information or entertainment services suitable for all ages. However, callers below 18 years of age must obtain permission from the person making payment for the use of the Audiotext Hosting Services.
   (b) "18+" - Services for the general public 18 years and above.

Specialist Information
2.2 "Specialist Information" is defined as information or advice provided by professionals, corporations, the government, government agencies or any other persons who is appropriately qualified or an expert or specialist in relation to the area of expertise.

2.3 Audiotext Hosting Service content containing professional advice or opinion (e.g. medical/dental/legal/financial services) must ensure that:
   (a) The person is appropriately qualified in his area of expertise;
   (b) The advice is prefaced with a disclaimer that such advice should not be acted upon without first consulting a suitably qualified practitioner and be conveyed in a manner that accurately reflects the seriousness of the subject matter; and
   (c) Any advice involving scientific, statistical or other research data must indicate clearly the source of such data.

2.4 An advertisement relating to an Audiotext Hosting Services containing specialist information or endorsement must clearly indicate:
   (a) The identity, current status and relevant professional qualification and experience of the person(s) involved; or
(b) The identity of the professional association, statutory authority or government department involved.

Content designed for children and young persons or dependent persons

2.5 Audiotext Hosting Services designed for, either wholly or mainly, and aimed at an audience of children, young persons or dependent persons must not
(a) Include references to sexual practices, language or materials that are offensive to the standards of decency prevailing among those likely to be exposed to them;
(b) Involve any information or noise or sound effect likely to alarm any child or young person, or of other dependent person, having regard to special protection for such dependent persons; and
(c) Force or unfairly cause any of the above persons, mentioned in this paragraph to dial additional telephone numbers.

2.6 Advertisement of services aimed at young persons/children, must carry the following warning messages: "This call costs RMX.XX per minute/per call. Callers under 18 must seek parents’ or guardians' approval before calling".

3.0 Copyright

3.1 Audiotext Hosting Services shall respect copyright ownership of recorded announcements or interactive content and shall not utilise part or all of the content from another medium without the permission of the copyright owner.

PART 7 SPECIFIC LIMITED CONTENT GUIDELINES

1.0 Scope and Coverage
Limited Content refers to programmes, advertisements and other related material conveyed through television, any networked medium or other means of transmission, which are displayed or communicated to a limited, specified or specific group of people or individuals. Providers of content for this part include:

(a) In-house TV and radio broadcasting;
(b) Electronic Boards (indoor/outdoor); and
(c) Any related networked medium.

1.2 Limited Content include, but are not be limited to, bus TV, rail TV, hotel TV and radio, airport TV, complex TV and radio broadcasting and Pay Per View TV.

1.3 Providers of all Limited Content Communications must abide by the provisions set out in this code especially those of Parts 2, 3 and 4 referring to the guidelines on content, advertisement and broadcasting respectively.
II. Co-operative Regulatory Systems in the press sector

1. Part I: The co-operative regulatory system

   a) Development of the regulatory system

   The press in Malaysia is regulated by several legislation restricting their operations and coverage of news. These laws date back to the British rule aimed at curbing press influence with the growth of the vernacular press, their influence over the population was seen by the colonialists as instigating dissent. During the Japanese occupation, the press was the main tool of the propaganda department of the Japanese Military. The Printing Presses Ordinance 1948 and the Sedition Ordinance 1948 imposing strict control over the press were enacted as one of the government’s counter insurgency measures during the Communist Period.¹ Post 1969 race riots also led to a strengthening of press control which saw amendments to the Federal Constitution and the Sedition Act limiting the scope of free expression. The Printing Presses and Publications Act 1984 ('PPPA')² which regulates the print organisations was amended in 1988 to preclude judicial review of the Home Minister’s decision to revoke or suspend a publication permit. The agency responsible for the regulation of the press is the Ministry of Internal Security.³

   There is no co-regulatory mechanism for the press although the idea of a media council had been mooted. Inisiatif Wartawan, a loose coalition of journalists had campaigned for self-regulation of the media in Malaysia. They proposed the introduction of a media council in the form of a self-regulated initiative with corresponding moves to repeal legislation that is inimical to the establishment of a council. In 1999 journalists had petitioned for a repeal of the Printing Presses and Publications Act especially the restrictive licensing provisions. This was however interpreted by the government as a call for more legislation and asked the group representing the editors, the Malaysian Press Institute (‘MPI’), to take action. The result was the 'Draft Media Council Act 2001' which was overwhelmingly opposed by journalist groups.⁴ The Malaysian Human Rights Commission SUHAKAM then held a consultation on the issue and later appointed a Media Complaints Working Group. There are no proposed

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¹ The state of Emergency due to the Communist insurgency was declared in Malaya in 1948 to 1960.
³ Its minister is the Prime Minister.
⁴ The Bar Council was asked by the MPI to approve the draft in 2003. They then met with journalists who pointed out problems with the proposed legislated Media Council.
amendments to the Printing Presses and Publications Act (PPPA). The Malaysian press is also controlled informally by the state through the ownership structure of the media linking the media with business interests closely aligned to the ruling political parties\(^5\), and its own practice of development journalism. Through the state investment arm Khazanah Nasional Berhad, the government also maintains a strong commercial interest in the media.\(^6\) There are no media cross-ownership rules\(^7\) in Malaysia except the provisions which prohibit anti-competitive conduct in the Communications and Multimedia Act 1998.\(^8\) After independence the media was co-opted by the State to assist in bringing development to the people by becoming the State’s mouthpiece.\(^9\) The media practiced development journalism, imparting information and disseminating government policies for the betterment of the population in general.

\textit{b) Subject matter of the regulatory system}

The PPPA regulates the use of printing presses, the printing, production, reproduction and distribution of publications, and importation of publications from abroad. It consolidates the Printing Presses Act 1948 and the Control of Imported Publications Act 1958 (which has


\(^6\) For example Khazanah Nasional Berhad holds 21.6% in ALL ASIA NETWORKS plc (ASTRO), the monopoly satellite pay tv provider. See ASTRO website accessed on July 17, 2005 at http://www.astro.com.my/v5/footer/about/default.asp.

\(^7\) See Media Prima website at http://www.mediatrima.com.my/AboutUs.asp.

\(^8\) See Part VI of the Act especially Sections 133-144.

since been repealed).\textsuperscript{10} Criminal sanctions are imposed on the media operators under the Act.\textsuperscript{11} The act does not state its objectives however ostensibly it is to control the operations of the press organisations requiring them to comply with the provisions within, or risk prosecution, or worse lose their printing license and publication permit.

c) Basis of the co-operation

The basis for co-operation between the state and media could be found in legislation policing. There is also administrative control over the media through regular meetings between senior editors and the Ministry of Internal Security.\textsuperscript{12} Editors are advised of the repercussions of their coverage of particular issues.

d) Institutions involved in the system

The Print and Quranic Text Control Division in the Ministry of Internal Security is responsible for regulating the press. There is the National Union of Journalists, an association for the members of the journalism profession. It has a code of ethics which declares the duty of the journalist to protect respect

\textsuperscript{10} See also the Printing Presses and Publication (Importation of Publications) (Deposit) Rules P.U.(A) 119/85 and Printing Presses and Publications (Licenses and Permits) Rules 1984 P.U.(A) 305/84.

\textsuperscript{11} In section 4(1), such as using printing press for unlawful purpose for instance printing obscene (or against public decency) publications or printing publications which contains an incitement to violence against persons or property, counsels disobedience to the law or to any lawful order or which is or is likely to lead to a breach of the peace or to promote feelings of ill-will, hostility, enmity hatred, disharmony or disunity. Liability is also imposed for maliciously publishing false news of which malice is presumed in default of evidence showing that prior to publication, the accused took reasonable measures to verify the truth of the news. s.8A. Possessing prohibited publications without lawful excuse is an offence under s.8. Prohibited publications are, publications prohibited by the Minister in his absolute discretion which contain any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is other wise prejudicial to or is likely to be prejudicial to public interest or national interest. These prohibited publications may be refused importation into Malaysia. s. 9.

\textsuperscript{12} V.Gayathry and Yeoh, Seng Guan (2004), ‘Media Values, Media Ownership and Democratic Governance’, in Communicating the Future, Proceedings from the National Conference on the Future of Media in a Knowledge Society: Rights, Responsibilities and Risks Kuala Lumpur 2003, Kuala Lumpur: Kinibooks, 82. From time to time the editors are also called for meetings with other government bodies for example at the height of the Asian economic crisis, editors were given “advisories and guidelines” by the National Economic Action Council (NEAC).
for the truth and freedom from interference by government and others. The union funds itself through membership fees and fundraising drives. However it was pointed out that the organisation lacks initiative in providing institutional support for press freedom and protection for journalists.13

e) Functioning of the system

Licenses14 and permits15 have to be obtained from the Home Affairs Minister16 for printing presses and for publishing newspapers17. These licenses and permits are required to be renewed annually. The issue of licenses and permits are at the absolute discretion of the minister who may at any time revoke or suspend such license or permit.18 The issuance of permits are not mere formalism but are mechanisms to suppress free press. A number of pro-opposition and independent publications have had their permits revoked (e.g. Esklusif, Detik, al-Wasilah) or altered (Harakah’s circulation was reduced from twice weekly to fortnightly).

The control over printing presses under the Printing Presses and Publications Act (PPPA) through licensing requirements, the occasional exercise of ministerial powers to discontinue, revoke or suspend licenses/permits, or the mere threat to do the same, results in self-censorship. Printers and publishers are also charged for breaching the PPPA and Sedition Act adding to the fear of breaching the license conditions. The online independent newspaper Malaysiakini which was ranked 6th in the country’s top website ranking19 was waiting for approval from the Internal Security Ministry for a permit to publish a print daily. The


14 Section 3 of the PPPA.

15 Section 5 and 6 of the PPPA.

16 Granted in his absolute discretion as stated in ss. 3(3) and 6(1). He also has absolute discretion to refuse an application for a license or permit. s. 12(2).

17 Newspapers defined widely as any publication containing news, intelligence, reports of occurrences or any remarks, observations or comments, in relation to such news, intelligence or occurrences, or to any other matter of public interest, or any magazine, comic or other forms of periodical printed in any language for sale or free distribution at regular or irregular intervals, but does not include any publication published by or for the Federal or any State Government or the Government of Singapore.

18 Sections 3 and 6 of the PPPA.
application was submitted in September 2002 and the Minister, who is also the Prime Minister, in his parliamentary written reply in June 2004 to an opposition MP questioning the status of the application said that:

Based on the application and (print) mock-up, as well as the track record of online daily, the ministry is of the opinion that Malaysiakini has a tendency of (highlighting) sensational and sensitive issues which could be prejudicial and jeopardize national security and public order. A print version that is provocative and exploitative would have negative implications when the newspaper is distributed and sold in the open market.20

The written reply by the Internal Security Minister did not confirm one way or the other whether the application for a print daily publishing permit has been rejected or not. The application for a print daily permit has to fulfil 3 criteria: submission of an application form, relevant documents about the applicant as a registered company and a mock-up of the proposed publication. The ministry will need to ensure that the publication of the newspaper will not have the potential to be harmful based on the criteria laid under s.7(1) of the PPPA. These criteria states content deemed to be undesirable are publications which is prejudicial or likely to be prejudicial to public order, morality, security or likely to alarm public opinion or likely to be contrary to any law or likely to be prejudicial to public interest or national interest. These criteria are quite vague and uncertain and results in the media being very cautious in what they publish. For instance in May 2002 a Malay tabloid’s permit was suspended for 3 months for publishing ‘sensational’ reports of the alleged sexual tendency of the head of Puteri UMNO, a women’s youth wing of the main component ruling party.21

At the Mass Media Conference 2005 held in July the Deputy Minister for Internal Security stated that the government will consider case by case applications for new publishing permits as the number of permits released in the country are already adequate. The ministry had given out 56 newspaper permits comprising 26 Chinese newspapers, 14 in Malay, 13 in English and

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The press regulatory system of policing license compliance is supported by administrative control through formal and informal communications and also restricting access to news through refusal of journalist accreditation to cover government functions. The Ministry of Information which controls outflow of government information via government press releases, press briefings or functions or broadcasts, issues accreditation tags through its information department to media organisations who cover their functions. It is a matter of too many gatekeepers to government information and anything deemed official. There are various departments and agencies administering different functions pertaining to the media and it is more complex for the controller when there is a converged media disseminating information to the public. Internet journalists are not issued accreditation because their operations fall outside the scope of traditional media and are not recognized by the Ministry of Information and Ministry of Internal Security which administers the PPPA. Therefore the independent online newspaper *Malaysiakini* is indirectly prevented from covering government events. Journalists from *Harakah* the publication of the Islamic opposition party PAS is allowed to cover the parliamentary debates since they are registered with the Internal Security Ministry. According to the Parliamentary Secretary to the Prime Minister’s Department parliamentary sittings are not open to journalists without the proper accreditation or press cards. However this is not rigidly imposed for every event turning away non-accredited reporters. It depends on the current atmosphere between the government and the independent media. This acts as a show of reminding the media who is in control of information and the extent the media is allowed to operate. In 2001 the Information Ministry Parliamentary Secretary refuted claims by certain quarters that there was no freedom for journalists in this country to do coverage on ministers. The Senator said that it was not proper to make such claims merely because

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journalists from the internet portal Malaysiakini.com were not allowed to attend any press
conferences involving Malaysian cabinet ministers.
"Malaysiakini (reporters) are barred from covering the press conferences not because they are
critical of the government but because their credibility is doubtful," he said.25

f) Supervision of the system

There is no supervision of the system for regulating the press as under the PPPA the Minister
has absolute discretion to revoke or suspend a license or permit. It is not permissible to
question in court the decision, order or direction of the Minister.26 No right to be heard is
afforded to a permit or license applicant or relating to the revocation or suspension of such
permit or license.27

The National Union of Journalists (‘NUJ’) which is an organisation of working journalists
representing their industrial, social and welfare interests.28 It was formed in 1962 and is the
sole authority to determine the proper rates of remuneration and other terms and conditions of
employment for journalists in the various publishing houses. Sadly it has limited capacity to
achieve their objectives because of the myriad of restrictive legislations, including PPPA, the
setback for the NUJ in defending the freedom of the press and dealing with the professional
conduct of its members maintaining high ethical standards of journalism, is that it represents
journalists a majority of them working for the mainstream media organisations which are
governed by those legislation and owned by companies linked to the ruling party.29 These
media companies are profit-driven and in their strategy to divert the audience’s attention
from sensitive and controversial issue their coverage has concentrated on popular light
lifestyle and entertainment which attracts circulation sales and therefore brings advertisement

25  See ‘Journalists free to do coverage on M'sian ministers’, Utusan Express, February 12, 2001 accessed on
e&pg=fp_06.htm&arc=hive.

26  Section 13A PPPA.

27  Section 13B PPPA.

of ethics is appended at the end of the section.

29  It is argued that the extent to which a particular medium is free more often depends on its owners. See
revenue. Courts have no authority to review the Minister’s discretionary use of his powers to grant licenses and permits which is unlikely to interfere with the exercise of executive powers and has tended to side with the authorities in many human rights cases. The National Commission on Human Rights (Suhakam) is a national body limited in their functions of overseeing the fundamental rights as guaranteed under the Federal Constitution and to receive complaints of human rights abuses. They can recommend to the government but cannot do more than highlight the irregularities. In their workshop on freedom of the media in August 2002 they recommended loosening up media laws and administrative procedures. Malaysia ratified the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child but has not ratified:

- The International Covenant on Economic, Social and Cultural Rights (ICESCR);
- The International Covenant on Civil and Political Rights (ICCPR);
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
- The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families;
- The United Nations Convention Relating to the Status of Refugees 1951;
- The International Convention on the Elimination of all Forms of Racial Discrimination;

30 See ‘Akademi Fantasia tops NEP debate in Malay dailies’, Malaysiakini, Aug 25, 2005 accessed at http://www.malaysiakini.com/news/39512. The editor-in-chief of a publishing house commented that Malay newspapers were more engrossed with making money and increasing their circulation when their coverage of the reality singing competition show was far above their reporting and analysis of the debate on the revival of the New Economic Policy, an economic restructuring policy which favoured the majority Malay ethnic group.

31 Many of these rights under Part II of the Federal Constitution as provided are limited by the provisions in the Constitution.

g) Impact assessment

There is no regular documentation of the workings of the Publication Control Division of the Ministry of Internal Security responsible for the regulation of the press such as an annual report accessible to the public. The other method of informing the cumulative operations of the department is via the Minister or his Deputy of the ministry responsible who reports to the parliament. This is usually during the question and answer session. There is no annual tabling of the report of the department concerned to the parliament. Occasionally, reports of the
banning or alteration of controversial publications are published in the media. A search of the websites of the respective ministries did not reveal extended information on the functioning of the regulatory system. Sometimes, the ministry website was totally inaccessible or possibly still under construction.32

2. Part II: Leading Cases

In April 2005 the Ministry of Internal Security banned eleven publications reminding the public of the consequences of printing, reproducing, publishing, selling, offering for sale, distributing of possessing those publications.33

Below, instances of interferences against the Malaysian media are listed. These excerpts are taken from the memorandum submitted to the Malaysian Human Rights Commission by Inisiatif Wartawan.34

- In December 2001, two journalists of The Sun were suspended by the board of directors – over the objection of two editors – for their part in exposing an assassination plot against the Prime Minister and his deputy. Several other journalists and editors were summoned to the police headquarters several times over a number of days to answer questions on editorial operations and the source of the news. The Prime Minister claimed the report would taint the country’s image abroad.

32 The website of the Ministry of Internal Security was not accessible on 11 July 2005.
33 Bernama, July 20. 2005. These publications are:
* Sheikh Nazim Al-Qubrusi, Mercy Oceans' Lovestream, Turkey: Girne/Mersin 10;
* Parshall, Phil Parshall, The Cross and the Crescent, Illinois: Tyndale House Publisher Inc.;
* Jeffrey, Grant R. Jeffrey, Messiah War in the Middle East & Road to Armageddon, Ontario: Frontier Research Publications;
* Williams, John Alden, The Word of Islam, London: Thames and Hudson Ltd;
* Fatima Mernissi, Women and Islam, Oxford, UK: Blackwell Publishers;

In January 2002, *Malaysiakini* reported that two journalists from an English language daily had been rapped for their aggressive style of questioning and fearless coverage of the by-election in Indera Kayangan. One journalist was said to have been sent back to the newspaper’s headquarters in Kuala Lumpur because his news coverage had irked a senior Barisan Nasional state election campaign director.

In March 2002, the *The New Straits Times* published a picture on its front page to illustrate sedimentation in piped water supply in parts of the Klang Valley despite being filtered. The Prime Minister condemned the newspaper for the report rather than order an investigation of the situation, alluding that such reports create a negative image of the country.

In March 2002, journalists from the online news *Malaysiakini* and web radio *RadiqRadio* were denied access to the press gallery in Parliament to cover proceedings on the basis that they had not been accredited by the Information Ministry.

Another example of media interference is discouraging reports on health statistics.³⁵

³⁵ See ‘HIV/AIDS account annoys Shahidan’ in *The Star Online*, February 19, 2005. It was reported that a statement of the rising number of pregnant women in the state with HIV/AIDS to the media by the state health director had irked the chief minister of the state. The chief minister claimed that his role as the State Health Committee Chairman was disregarded and the statement was made without his knowledge. It was argued that such statements could create a negative perception of the state.


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3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

There is no established or formal non-state regulatory part of the system of co-regulation of the press media in Malaysia. The professional bodies that govern the media professions mainly deal with journalism training and product development, and the welfare of members.³⁶

The non-state regulatory system for the press in Malaysia may be described as a practice of self-censorship by the media industry for fear of criminal and economic repercussions on the
part of the media organisations and its employees.\(^{37}\) While the media producers fear creative clampdown if the stated national ideology and wholesome values is not adhered to.

*b) The link between the non-state part and state regulation*

The link between the non-state part and state regulation is a rigid superior subordinate relationship.\(^{38}\) The press follows closely the national interest objective of maintaining peace and harmony and promoting state development policies, as well as the explicit and implicit rules of media reporting provided under the laws, regulations and directions from the various government authorities.\(^{39}\) There is also a fear of high defamation damages granted to high profile plaintiffs which creates a chilling effect on the media.\(^{40}\)

**Conclusion:** The regulatory system of the press in Malaysia is not a co-regulatory system within the definition of the study.

I. **Co-operative Regulatory Systems in the film sector**

1. **Part I: The co-regulatory system**

   *a) Development of the regulatory system*

   All films screened in Malaysia are regulated and classified for release under the provisions of the Film Censorship Act 2002 (‘The Censorship Act’).\(^{41}\) The Censorship Board is under the purview of the Ministry of Home Affairs.\(^{42}\) There are two other government agencies dealing

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\(^{37}\) See report titled ‘Media must report on sensitive issues’ in *The Star*, May 6, 2004. It says the media must not run away from reporting sensitive issues such as race or religion and sweep them under the carpet. The statement was made by Bar Council treasurer Ragunath Resavan at the National Union of Journalists Malaysia (NUJ) Press Freedom forum themed: “Testing the Limits”.


\(^{41}\) Act 620.

\(^{42}\) The ministry is headed by Minister Dato’ Azmi Khalid.
with films. Filem Negara Malaysia is under the jurisdiction of the Information Ministry and it produces short government information films and also provides facilities for film production. The National Film Development Corporation Malaysia (‘FINAS’) is under the purview of the Ministry of Culture, Arts and Heritage and is responsible for developing the local film and drama industry.

b) Subject matter of the regulatory system

The Perbadanan Kemajuan Filem Nasional Malaysia Act 1981 is an act (‘FINAS Act’) to promote, nurture and facilitate the development of the film industry of Malaysia. It also establishes the regulatory body for the film industry, the Perbadanan Kemajuan Filem Nasional Malaysia. The functions of FINAS are:

- to make recommendations to the Minister as to the policies, methods and measures to be adopted to promote, nurture and facilitate the development of the film industry;
- to develop, and stimulate the growth and maintain the standards of, the film industry by various means, including the provision of research and advisory services;
- to regulate and co-ordinate the activities of persons and bodies relating to matters pertaining to the film industry;
- generally to promote and assist, both inside and outside Malaysia, in the development of the film industry;
- to regulate and control the production, distribution and exhibition of films in Malaysia, and in relation thereto to provide for the issue of licenses; and
- to manage and control the maintenance and operation of places and equipment belonging to the Perbadanan for the purposes of subsection (2) (c).

The Censorship Act regulates the issuance of permits for imported films, and the censorship of films and publicity material. The unapproved possession, circulation, exhibition, distribution, display, manufacture, production, sale or hire of film or publicity material constitutes an offence under the Censorship Act. No film may be screened without a

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43 The owner of the film according to section 9(1) shall submit the film for censorship without any alteration or excision at his own risk and expense. Section 9(2) stipulated a penalty between RM5,000 and RM30,000 or imprisonment not exceeding three years or both if convicted of contravening section 9(1).

44 Section 6(2) provides the penalty between RM5,000 and RM30,000 for films and between RM1,000 to RM10,000 for film publicity material.
Censorship Board permit. Imported films and film-publicity material is detained by the customs officer until a permit or certificate of exemption is presented. The objectives of the Film Control Division are to:

- Ensure films in Malaysia are censored and approved by the Censorship Board before released for screening;
- Ensure all films distributed and screened have the ‘B’ Certificate;
- Extinguish the illegal distribution of pirated and banned films;
- Educate film activists on the rules of film regulation;
- Ensure that film content does not contain negative elements that contradict with the approved censorship guidelines;
- Encourage the Malaysian society to watch films of quality and make films as a source of knowledge;
- Protect the country from the spread of films that could jeopardise public order and sympathise with the ideologies that contradict with the principles of *Rukunegara* (national ideology);

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45 Section 7(1) and (2). Section 8(2) of the Censorship Act states a permit is issued by the Board subject to conditions, for the release of the imported film and is valid for the period specified in the permit. The time and place for submission for the film’s censorship is also stated on the permit. In section 8(3) a certificate of exemption is issued to applicants for films or film-publicity material imported into Malaysia:

(a) which the owner does not intend to exhibit in Malaysia, if the owner has notified in writing to the Board of his intent not to exhibit it in Malaysia and has supplied the Board with a full description of the film or film-publicity material;

(b) which the Board is satisfied is intended for private use; or

(c) where such film has been made or produced in Malaysia by a local or foreign corporation or company with a view for worldwide distribution, other than Malaysia.


47 The Censorship Board issues a certificate known as ‘Certificate B’ for every duplicate copy made in accordance with section 16. The section relates to duplication of film and a person who intends to duplicate films certified under section 14 shall submit a statutory declaration stating:

(a) his intention to make duplicate copies;

(b) number of duplicate copies he intends to make;

(c) that the duplicate copies are made from the original film approved and certified by the Board under sections 10 and 14.

48 The *Rukunegara* prescribes five beliefs (united nation, democratic society, just society, liberal society and progressive society) and five principles (belief in God, loyalty to king and country, upholding of the constitution, rule of law, and good behaviour and morality) which all Malaysians should embrace. The *Rukunegara* is sworn by school pupils during school assemblies.
• Preserve the Malaysian society’s good behaviour suited to the nation’s character standing on wholesome values;
• Dignify the Film Censorship Board as an institution of integrity and accepted as the film authority;
• Increase censorship skills and the management of the Division through the use of latest technology;
• Mould the staff of the Division to have high discipline, responsibility, commitment, professionalism in carrying out their duties friendly towards each other and to their clients.

c) Basis of the co-operation

The basis for co-operation with other non-governmental bodies is the legislation.

d) Institutions involved in the system

The Control of Films Division in the Ministry of Home Affairs provides the service of issuing permits for the theatrical release of imported and local films after going through classification by the Censorship Board. The members of the board are appointed by the Minister.\textsuperscript{49} The Minister is empowered to issue to the Board or Appeals Committee directions of a general character consistent with the Censorship Act and the Government’s policy on public exhibition of films and film-publicity material.\textsuperscript{50}

The National Film Development Corporation Malaysia (‘FINAS’) consists of twelve members headed by a chairman. They are appointed by the Minister for a three year term and their remuneration is also determined by the Minister.\textsuperscript{51} Four members of the corporation are individuals connected with the film industry not being public officers. Other members are senior officers from the Ministry of Culture, Arts and Heritage, Ministry of Information and Ministry of Finance. The funding for the corporation is derived from various sources. Accordingly, a fund is established, administered and controlled by the corporation, into:

(a) which shall be paid:

• such sums as may be provided from time to time by parliament;

\textsuperscript{49} Section 4 of the Censorship Act.
\textsuperscript{50} Section 25 of the Censorship Act.
\textsuperscript{51} Section 4 of the FINAS Act.
• such sums as may from time to time be borrowed by the Perbadanan for the purpose of meeting any of its obligations or discharging any of its functions and powers; (iii) all moneys earned by the Perbadanan;
• all moneys earned or arising from any property, investment, mortgage, charge or debenture acquired by or vested in the Perbadanan;
• any fees or other charges prescribed and collected by the Perbadanan; and
• all other sums or property which may in any manner become payable to or vested in the Perbadanan in respect of any matter incidental to its functions and powers;

(b) and out of which shall be defrayed –
• all expenditure, including capital expenditure, incurred by the Perbadanan in carrying out its functions and duties;
• moneys for the repayment of any loan made to the Perbadanan pursuant to its power to borrow; and
• any subsidy or credit facility granted by the Perbadanan pursuant to its powers under this Act.

e) Functioning of the system

The owner of the film submits his film or film-publicity material for censorship to the Censorship Board. The Board may approve the film for exhibition without alteration or approve the film for exhibition with some alterations. The film may also be refused approval. The owner has a right to appeal the decision of the Censorship Board to the Appeals Committee if he is aggrieved by the decision of the Board.\textsuperscript{52}

Film classification is as follows:

\textsuperscript{52} Section 21 of the Censorship Act.
Film making activities from production, distribution and exhibition are governed by the FINAS Act which requires them to be licensed. The corporation has various powers of enforcement as authorised by the Minister including making arrests, search, seizure and conducting prosecutions.

\[ f) \textbf{Supervision of the system} \]

The Censorship Board’s decision is notified to the owner in writing providing reasons for requiring the alteration of the film or for the refusal of classification. The Appeal Committee consists of civil servants and members appointed by the Minister. The decision of the

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\[ 53 \text{ See Section 21 of the FINAS Act, Part V of the FINAS ACT, the Perbadanan Kemajuan Filem Nasional Malaysia (Compounding of Offences) Regulations 1985 P.U.(A) 264/85, the Perbadanan Kemajuan Filem Nasional Malaysia (Film Charges) Regulations 1988 P.U.(A) 209/88, the Perbadanan Kemajuan Filem Nasional Malaysia ( Licensing) Regulations 1983 P.U.(A) 546/83 and the Perbadanan Kemajuan Filem Nasional Malaysia (Mandatory Screening Scheme) Regulation 2005 P.U.(A) 232/2005.} \]

\[ 54 \text{ Part VA of the FINAS Act.} \]

\[ 55 \text{ Section 22 of the Censorship Act. There are fifteen members appointed by the Minister including the Chairman and the Vice-Chairman. Member of the Appeals Committee from the civil servants are:} \]

- the Inspector General of Police, or his representative;
- the Secretary General of the Ministry responsible for matters pertaining to the censorship of films and film-publicity materials, or his representative;
- the Secretary General of the Ministry responsible for matters pertaining to the regulation of broadcasting, or his representative;
Minister, Board or Appeals Committee under the Censorship Act or regulations under it is not open to appeal or review by any court on any ground. The officers of the Censorship Board are immune from legal action in their personal capacity for any bona fide acts done under the Censorship Act.

There is no requirement to table the annual report on the activities of FINAS in parliament. Under Section 29 of the FINAS Act, no information of the organisation, business, finance, transactions and affairs of the Perbadanan or its committees is to be disclosed except in certain circumstances. Penalty for contravening the restriction is imprisonment up to two years maximum or fine of not more than RM5,000 or both.

g) Impact assessment

There is no regular documentation of the workings of the two divisions responsible for the regulation of the films such as an annual report accessible to the public. The other method of informing the cumulative operations of the departments is via the Minister or his Deputy of the ministry responsible who reports to Parliament. This is usually during the question and answer session. There is no requirement of annually tabling the report of the department concerned to Parliament. Information regarding films banned or restricted is obtained through the investigation of journalists or interested individuals. Occasionally, reports of the banning or alteration of controversial films are published in the media. A search of the websites of the respective ministries did not find extended information on the functioning of the regulatory system or that the ministry website was totally inaccessible perhaps still under construction.

- the Director General of Education, or his representative.

56 Section 48 of the Censorship Act.

57 Section 50 states: No legal proceeding, prosecution or other form of litigation may be instituted or maintained against –
(a) any member of the Board;
(b) any member of the Appeal Committee;
(c) the Secretary or any Assistant Secretary;
(d) any Enforcement Officer, or
(e) any person employed in the office of the Board or the office of Appeal Committee,
in his personal capacity in respect of any bona fide act, decision or statement done or made for the purpose of or incidental to the implementation or proposed implementation of the provisions of this Act or regulations made under this Act.

58 The website of the Ministry of Internal Security was not accessible on 11 July 2005. The FINAS website was inaccessible and visitor was directed to a temporary website that provided information regarding the 18th Malaysian Film Festival at http://www.mff.com.my/laman_utama.asp.
2. Part II: Leading Cases

The best film winner of the Malaysian film festival, Sepet (means squinted), a film about multiracial romance between a Malay girl and a Chinese boy was originally banned for screening in Malaysia. It was finally allowed screening after nine cuts were made. The movie was shown in Singapore earlier before it was released in Malaysia due to the sensitive issues that were raised by the Censorship Board.

3. Part III: Assessment according to the criteria for determining which types of regulation are covered by the study

a) The non-state regulatory part of the system

The film industry is subject to the content controls as administered by the state regulator in the form of the Censorship Board. Both the Censorship Board and the board on the FINAS Corporation are government appointees and they are funded by the state. The non-state regulatory system for the press and films in Malaysia may be described as a strictly circumscribed within the confines of the legislation and regulations. A setback in preparing this report and making an assessment is the lack of up-to-date information on the workings of the departments and organisations involved.

b) The link between the non-state part and state regulation

The link between the non-state part and state regulation is a rigid superior subordinate relationship. The censorship and classification control of films process do not engage with the film maker community and impose conservative viewpoints on permissible content for public viewing. Severe limitations on the creative product hinder the development of quality films for the film industry contradicting the objects of FINAS.

Conclusion: In my opinion the Malaysian film regulatory system is not a co-regulatory system within the meaning of the study.
4.3. South Africa

The Media System in South Africa

South Africa\(^2\) hosts what is probably the most advanced media sector on the African continent. With a media history that stretches back to the late 18th century it is, today, a sector driven by a highly skilled and professional work force, advanced technology, and a well-established regulatory system.

Constitutional Law

The Constitution of the Republic of South Africa (Act No. 108 of 1996) was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997. The Constitution is the supreme law of the country. No other law or government action can supersede the provisions of the Constitution. There is no specific reference to the media in the Constitution, except for Chapter 9\(^3\), which provides for an independent authority to regulate broadcasting. Chapter 2 of the Constitution consists of a Bill of Rights which provides protection of certain fundamental rights, some of which are relevant to the functioning of the media. These are outlined briefly.

Section 16 - Freedom of Expression

The Bill states that everyone has the right to freedom of expression, which includes -

- Freedom of the press and other media
- Freedom to receive or impart information or ideas
- Freedom of artistic creativity; and
- Academic freedom and freedom of scientific research

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1. South Africa was selected after completion of the first country reports. Therefore, this report includes descriptions of the media systems as well.

2. South Africa has a population of over 44.8 million people spread over a vast geographical area with a coastline stretching more than 2500 km and with the two main cities Cape Town and Johannesburg separated 1400 km from each other. (Cf. http://www.southafrica.info. Accessed: 2005-08-22.)

3. Chapter 9 of the Constitution relates to state institutions supporting constitutional democracy
The Bill further states that this right does not extend to propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. The concept of speech is taken to include all forms of non-verbal communication, while the concept of expression includes emotions and the use of various senses.

Section 32 - Access to Information

The right to access information is given independent status in the Constitution as a reaction to the secrecy of the Apartheid era. It also provides for greater transparency in government procedures. This section is applied horizontally, meaning it is not only applicable to the state but also to information held by individuals. However, a clause allows for the state to create legislation to regulate this right in terms of national security and the need to enforce the law.

Section 14 - Right to Privacy

This right is created to protect individuals from any intrusion into their personal lives. This gives a person the choice in disclosing personal information. However, there are still many aspects that are not covered, such the possession of pornography and the abuse of personal information. The scope of the right to privacy needs to be determined by the courts or by a regulator.

Section 36 - Limitations of Rights

Any infringement of any fundamental right is allowed when the following four requirements have been met:

- Rights can only be limited by law of general application and not to individual cases alone.
- The limitation must be reasonable according to accepted legal practice.
- The limitation must be justifiable in an open and democratic society based on human dignity, equality and freedom.
- The limitation is permissible to the extent that it is reasonable and justifiable.

Monitoring Institutions for all Media Sectors

The right to freedom of expression is closely monitored, by, inter alia, the Freedom of Expression Institute, The Media Institute of Southern Africa, and the Media Monitoring Project.
The Freedom of Expression Institute (FXI)\(^4\) was established in 1994 to protect and foster the rights to freedom of expression, access to information, and to oppose censorship. The Institute was formed from a merger of three organisations: The Campaign for Open Media, the Anti-Censorship Action Group and the Media Defence Trust, all of them active during the apartheid years. The FXI undertakes a wide range of activities in support of freedom of expression, including lobbying, education, monitoring, research, publicity and litigation and the funding of legal cases that advance the right to freedom of expression. In the process, it networks and collaborates with a wide range of organisations locally and internationally. The FXI is a voluntary, non-governmental organisation.

The Media Institute of Southern Africa (MISA)\(^5\) is a non governmental organisation with members in eleven of the Southern Africa Development Community (SADC) countries. Officially launched in September 1992, MISA focuses primarily on the need to promote free, independent and pluralistic media, as envisaged in the 1991 Windhoek Declaration\(^6\). MISA seeks ways in which to promote the free flow of information and cooperation between media workers as a principal means of nurturing democracy and human rights in Africa.

The Media Monitoring Project (MMP)\(^7\) is an independent non-governmental organisation that has been monitoring the South African media since 1993. The MMP aims to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of Africa. The core objectives of the organisation are to be the pre-eminent media watchdog in Africa, to inform and engage media professionals and other key stakeholders, to improve the quality and ethics of news reporting in Africa, and to influence the development of effective communication legislation and media codes of conduct in Africa.

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\(^6\) The Southern African Development Community (SADC) in its present form was formed in Windhoek, Namibia on 17 August 1992. SADC has fourteen member states: Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Malawi, Mauritius, Mocambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. In their Protocol on Culture, Information and Sport as well as in the Windhoek Declaration these countries have committed themselves, amongst others, to the creation of a political and economic environment conducive to the growth of pluralistic media, and the promotion, establishment and growth of independent media.

With regard to the level of press freedom in South Africa, the second Press Freedom Index (2003) by Reporters without Barriers ranked South Africa as 21st in the world, sharing this position with Hungary and Jamaica. Finland, Iceland, Norway and the Netherlands share the first position according to this report.8

I. The Press Sector

Introduction

During the years of apartheid (1948 - 1990) there was a strained relationship between government and the press. The former periodically threatened the press with increased censorship (the same applied to the film and book publishing industries, both in terms of production and distribution). Part of the government’s strategy was to create suspicion amongst the public about the responsibility and trustworthiness of the press. Numerous acts inhibited freedom of speech and the press9. With the exception of child pornography, bestiality and laws pertaining to defamation and hate speech, censorship was dramatically relaxed with the dawn of democracy in the early 1990s. Today the press operate in a far freer environment.

Market Overview

The country has four major press groups: Media24 Ltd, Independent Newspaper (Pty) Ltd, CTP/Caxton Publishers and Printers Ltd, and Johnic Publishing, Ltd., all of which have, since 1994 with the dawn of the new democratic South Africa, embarked on Black empowerment programmes to boost black media ownership and employment (cf. South African Yearbook, 2004/2005:125-182). Other important groups are Primedia, M&G Media, Associated Magazines, New Africa Investments Limited, Ramsay, Son & Parker and Kagiso Media. Together these groups publish 18 daily newspapers, eight Sunday newspapers, almost 120 regional or country newspapers in mainly two of the country’s eleven official languages,

8 (Cf. SA Yearbook 2004/2005: 13.)
namely Afrikaans and English. More than 170 neighbourhood papers ("freebies" or "knock and drops" - papers distributed free of charge and funded through advertisements) in mainly the urban areas are published with a weekly distribution of more than 4 million newspapers. The readership of daily newspapers is over 1,9 million with weekly newspapers reaching a readership of 1,2 million. The average magazine readership is over 12 million. More than 1 100 magazine titles are published, ranging from weekly to monthly magazines. As far as online publications are concerned there are more than 600 online publications with at least 16 specialising in daily news, including the main newspapers which are available online. The major news agency in South Africa, servicing both the print and broadcast media, is the South African Press Association (SAPA) which works in close association with Associated Press in London. Other major international agencies operating in South Africa are Agence France-Presse, Deutsche Presse Agentur, Reuters and United Press International10.

In terms of trends, it needs to be pointed out that the larger media groups tend towards integration and to increasingly focus on their core business. Furthermore, the newspaper business in South Africa not only has a low margin, it is also highly cyclical and needs to be supported by economies of size. Even so, South African newspapers are not particularly profitable. Despite the poor economic returns, new titles, especially in the field of magazine publication, continue to appear.

I.1. Regulation of the Press sector

I.1.1. State Regulation

The South African press is not formally regulated, although journalists and the print media are subject to general laws pertaining to, for example, obscenity, defamation, competition and media ownership regulations (such as in terms of the cross ownership of broadcasting).

The print media as with the advertising industry is mainly self-regulated. All publishers are expected to operate according to a set of codes of ethics and conduct. Given South Africa’s history of racial discrimination, the majority of these codes emphasise sensitivity in reporting issues related to race, gender, and sexual orientation.

The only legal requirement applicable to newspapers and other publications are those laid down in the Imprint Act 43 of 1993. This Act requires that all printed matter produced and distributed in South Africa must clearly indicate the full and correct name of the printer or a registered abbreviation thereof, as well as a business address. Although the Act defines printed matter\(^{11}\), it does not provide a definition of a newspaper. In this case the \textit{stare decisis} rule applies and reference is made to previous legal decisions in this regard.

The Legal Deposits Act 54 of 1997 makes provision for the preservation and cataloguing of documents emanating from, or adapted for South Africa in order to preserve the national documentary heritage. Publishers have to lodge copies of all documents with specific libraries for archival purposes\(^{12}\). Failure to do so is a punishable offence.

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\(^{11}\) Printed matter is defined by the Imprint Act as \textit{any picture or any mark conveying any meaning which has been affixed on any material or has been produced by impressing or transferring other material thereon}.

\(^{12}\) Legal deposit libraries include \textit{inter alia} the Library of Parliament, Cape Town; the National Library of South Africa, Pretoria
I.1.2. Non State Regulation

Some of the most prominent bodies for and in the print media are the following:

Print Media South Africa (PMSA)\(^{13}\) was formed in 1996 as an umbrella organization of the Newspaper Association of South Africa, the Magazine Publishers Association of South Africa and the Community Press Association of Southern Africa and represents 530 newspaper and magazine titles. The purpose of PMSA is to represent, promote, interact and intervene in all matters of common interest.

In 1996 PMSA, the South African National Editors’ Forum (SANEF), the Media Workers’ Association of South Africa, and the South African Union of Journalists (SAUJ) set up the Office of the Press Ombudsman\(^{14}\) and Appeal Panel as a readily accessible, impartial and independent complaints mechanism to mediate, settle and, if necessary, adjudicate complaints in accordance with a Code and Rules of Procedure.

The Press Ombudsman replaced the old Press Council as a more appropriate and independent body. It has two main aims: to strengthen and preserve press freedom and to ensure that the press is accountable. The Office provides a free and quick service to people and organisations who feel aggrieved by what has been published in newspapers and magazines. The Press Ombudsman is appointed according to criteria established by the Founding Bodies Committee.\(^{15}\)

The Press Ombudsman is funded by the newspaper and magazine industry, and its authority rests on the commitment of publishers and editors to respect its rulings and to adhere to the Press Code of Professional Practice which embodies the ethical standards by which newspapers and magazines are judged. The code is not intended to be comprehensive or to cover all eventualities. Rather the press is judged by the spirit of the code, which is accuracy,


\(^{15}\) The Founding Bodies Committee is made up of representatives from SANEF, Forum for Community Journalists, SA Union of Journalists, Media Workers Association of SA, Newspaper Association of SA and Magazine Publishers SA.
balance, fairness and decency\textsuperscript{16}. The Press Code is not without some criticism. For example, it does not consider the need for journalists to remain independent from undue influence\textsuperscript{17}. The power of the Press Ombudsman is limited to enforcing the publication of reprimands and corrections. The Press Ombudsman handled 139 cases during 2003\textsuperscript{18} and 147 in 2004\textsuperscript{19}. The cause of most complaints were about inaccurate reporting, the result of using inexperienced young journalists.

If a complainant is not satisfied, an appeal may be made to the Appeal Panel. A newspaper may also appeal a decision. The chairperson of the Appeals Panel may refuse leave to appeal. During an appeal, parties are not entitled to legal or other representation, but may make use of advisors. Proceeding takes the form of a round table rather than a trial. However, no new evidence may be introduced. The findings of the Appeal Panel are final\textsuperscript{20}. An individual or a company can also approach the Courts for an interdict to prevent the publication of a story based on the rights to privacy over the public’s right to be informed.

Besides PMSA and the Ombudsman, an important organisation in the print media is the South African National Editors’ Forum (Sanef)\textsuperscript{21}. The idea for setting up Sanef was conceived at a meeting of the Black Editors’ Forum, the Conference of Editors and senior journalism educators and trainers, held in Cape Town in October 1996. Delegates decided to unite in a new organisation that recognised past injustices in the media and committed itself to a programme of action to overcome them, as well as defending and promoting media freedom and independence. The vision of Sanef is to promote the quality and ethics of journalism, to reflect the diversity of South Africa, and to champion freedom of expression.

II. The Broadcasting Sector

The three tier broadcasting system

South Africa has a three tier broadcasting system brought about by the adoption of new broadcasting legislation since the early 1990s. Legislation clearly distinguishes between three types of broadcasting licences which are defined largely in economic terms rather than in terms of the services provided. The three types of licenses or tiers of broadcasting are public, commercial and community broadcasting.

Public service broadcasting

Public service broadcasting is defined as the services provided by the South African Broadcasting Corporation (SABC). The emphasis is on the broadcaster’s contribution to democracy, nation-building, provision of education, and “the strengthening of the moral fibre of society”\(^{22}\) - all the traditional principles of public service broadcasting. The SABC was established in 1936 in terms of the now defunct Broadcasting Act of 1936. With South Africa at that stage being a British colony of the United Kingdom of Britain, the SABC was based on the public service model of the British Broadcasting Corporation (BBC). It still aspires to follow the broadcasting trends and developments closely associated with the so-called liberalisation of the BBC.

Over time, and especially during the apartheid-era, the SABC acquired the character of a state broadcaster by fostering mainly apartheid ideology. Today the “new” SABC claims to be, and is in terms of legislation, independent of the government. Yet it is periodically criticised as being a mouthpiece of the ruling African Nationalist Congress (ANC). Thus, the SABC is closely monitored by especially non-government organisations (such as the Freedom of Expression Institute and the Media Institute of South Africa) in order to prevent it from reverting to state broadcaster status.

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An enormous logistical and financial burden is placed on the SABC to provide a public service for each of the eleven official languages\textsuperscript{23} of the country plus a service for the Khoisan people. The SABC is obliged to provide a terrestrial radio service to 80 percent of all listeners per language group. In 1992, when the process of political, cultural, economic and social transformation began, only two public radio stations, that is SAfm (catering for the English-speaking population) and Radiosondergrense (RSG) (catering for the Afrikaans speaking population) could truly claim such coverage. To meet this legal requirement has meant the costly installation of additional transmitters.

Today the SABC’s national radio network comprises 18 stations of which 15 are public broadcasting orientated and 3 which are commercial. Together these stations have a combined average daily adult audience of 19 million. The SABC’s national television network comprises three full-spectrum free-to-air channels and one satellite pay-TV channel. The satellite channel, *TV Africa*, is mainly aimed at audiences in the rest of Africa. The free-to-air channels are obliged to broadcast in 11 languages, yet, the SABC battles to meet this obligation. Together the free-to-air channels reach a daily adult audience of almost 18 million people\textsuperscript{24}.

In terms of trends, the SABC finds itself in an unenviable position. It is caught up in the same position as public service broadcasters in the rest of Africa, where a strong public service broadcaster who can contribute primarily to development and education is needed. At the same time it has to face increased competition brought about by globalisation, liberalisation, privatisation, internationalisation and the rapid development of information and communication technology, all of which leads to, inter alia, convergence and increasing commercialisation. The SABC thus finds itself caught between two opposing forces: on the one hand it is under the global economic and technological pressures of market forces experienced in the developed world, on the other hand it is operating in a developing country with the same economic, political, cultural and social problems and needs facing all developing countries.

\textsuperscript{23} South Africa has eleven official languages. According to the 2001 census isiZulu (23.8\%) has the most mother tongue speakers, followed by isiXhosa (17.6\%), Afrikaans (of Dutch origin) (13.3\%), Sepedi (9.4\%), Setswana (8.2\%), English (8.2\%), Sesotho (7.9\%), SiSwati, Tshivenda, Xitsonga, and IsiNdebele. (\textit{Cf.} http://www.southafrica.info. Accessed: 2005-08-22)

\textsuperscript{24} \textit{Cf.} SA Yearbook 2004/2005, Op cit.:137,139.
One of the measures the SABC adopted to cope with this situation was to corporatise into two divisions, a public service and a commercial service where the latter is expected to cross-subsidise the former despite the fact that the two divisions are administered separately. Two additional regional channels, known as SABC 4 and SABC 5, are expected to begin operating towards the end of 2005. The purpose of these two new channels is to provide services for marginalised language groups and which are required to have 55% local content. English will only be used in news or current affairs programmes where an interviewee can only speak English.

Channel Africa is an international radio service originally run on an agency basis by the SABC for the Department of Communication and funded by the government. The station has since been corporatised as a subsidiary company of the SABC with its own board of directors. Transmissions are via shortwave to Africa and also via the Internet. Programming is predominantly informational, emphasising African news, current affairs and sport. The programmes are broadcasted in four languages; English, French, Portuguese and Swahili, with separate transmissions for West, East and Southern Africa, totalling 10.5 hours a day, seven days a week, with an extended transmission of four hours over the weekend. Estimates put Channel Africa’s audience at 15 million listeners distributed over Africa.

**Commercial broadcasting**

Only thirteen commercial radio licences have been issued to stations, limiting services to the major urban centres. Of these, five stations were originally operated by the SABC, but were privatised in order to provide for ownership diversity. One station (Radio 702) was grandfathered. These figures exclude the three commercial stations operated by the SABC. Over the next two years ICASA (regulatory authority) is offering seven new commercial licences, three in the major urban areas and four in secondary markets. The rules for foreign and cross-media ownership of radio stations have recently been amended in order to boost

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25 In this portfolio are found eleven full-spectrum stations, plus three community stations. The portfolio also includes two television channels. SABC 1 is aimed at the youth market, broadcasting in English, isiZulu, isiXhosa and isiNdebele. It has the largest audience of all television stations and the terrestrial transmitter network covers 83 percent of the target audience (SABC 2002). SABC 2 is aimed at family viewing and broadcasts in English, Afrikaans, Sesotho, Setswana, Sepedi, Xitsingo and Tsivenda. The terrestrial transmitter network covers 85.6 percent of the target audience (SABC 2002).

26 In this portfolio are found four commercial radio stations.

black economic empowerment. Local ownership is restricted to 35% of the total number of licences in issue. Foreign ownership is restricted to a 20% stake in a station. Private owners are disadvantaged by the SABC’s ability to avail itself of networking facilities between the stations it operates which thereby helps to reduce costs.

The second broadcasting tier, namely commercial broadcasting, is broadly defined by law as a service operated for profit. Although small by western standards, the commercial television industry in South Africa is highly competitive. Currently there are three commercial channels: M-Net, which is available via over-the-air subscription (where a decoder is needed) and SABC 3 and e.tv which are available free-to-air. All three channels are available nationwide. In terms of revenue sources, the playing fields for these three channels are anything but even. M-Net receives income from subscriptions and advertising, SABC 3 is funded from three sources, licence fees, advertising and government funding while e.tv is solely dependent on advertising income.

M-Net was launched in 1986 by a consortium of newspapers groups as an attempt to counter lost advertising revenue to the SABC television channels. A licence was granted on the condition that programming was solely entertainment orientated. M-Net has a two-hour “open window” period between 17:00 and 19:00 when programmes are not coded. Originally this was used as a promotion devise, but it currently functions as a high viewership channel for advertisers as a result of airing a long running local soap opera *Egoli – Place of Gold* in this period. Within South Africa, M-Net operates a second niche channel, Community Services Network, which offers specialised programming for the local Indian, Portuguese, Italian, Jewish and Christian communities. In 1991 M-Net acquired a stake in FilmNet, while the following year a satellite service into Africa was launched. Currently M-Net provides, under the DStv banner, 59 video, six data and 40 audio satellite channels to South Africa and 50 other African countries. M-Net also provides a service to Greece, Cyprus, Thailand and China. The South African subscriber base is made up of 1,14-million subscribers, while the rest of Africa accounts for 337 000 subscribers. M-Net is now a subsidiary of the giant Naspers media conglomerate.

E.tv is South Africa’s first free-to-air national television channel and is seen as a major project towards empowering black media ownership. From its beginning in 1998 e.tv has been controversial with numerous licence infringements, financial woes and complaints about
programming, such as the screening of adult films during prime time. For the first five years e.tv made heavy financial loses which cast a shadow over the government’s black economic empowerment programme. Shares in Midi-TV, the holding company, are currently held by Hosken Consolidated Investments (66%) and VenFin (33%). E.tv has the second highest viewership of all television channels, ranking behind that of SABC 2.

Community broadcasting

In legal terms, the third tier community broadcasting, implies that a community station must be fully controlled by a non-profit entity and carried on for non-profit purposes, must serve a particular, clearly defined community, encourage members of the community to participate in the selection and provision of programmes, promote the interests of the community, and may be funded by donations, grants, sponsorships, advertising or membership fees or any combinations of these.

There are two broad types of community broadcasters.

- Stations serving a specific geographic community
- Stations serving a community of interests, where three sub-sections can be distinguished:
  - Institutional communities, such as universities and large organisations
  - Religious communities
  - Cultural communities such as for senior citizens, specific language groups such as Portuguese community, classical music, jazz, etc.

Originally, community radio services were initiated with one year licences, but these are being phased out in favour of a four-year licence. Short-term licences are also available for a maximum of thirty days in order to cover special events. Currently the regulatory authority ICASA has licensed 101 stations, although the actual number on air constantly varies. Although community broadcasters do not pay licence fees, they are faced with a number of other challenges. Advertisers, and thus income, is hard to come by as most community radio audiences do not have large disposable incomes, while the commercial stations draw away listeners. There is also a restriction on the amount of time that can be given to advertising and music. But the largest challenge is addressing the shortage of organisational, managerial and broadcasting skills. Trinity Television is the sole community television operator and is
restricted to the provision of religious broadcasts in the Eastern Cape. ICASA is still in the process of formulating policy relating to community television.

Insofar community radio and community media in general are concerned, it is important to take note of the **Media Development and Diversity Agency**\(^{28}\). This Agency was established in terms of the Media Development and Diversity Agency Act 2002 (No.14 of 2002).

The purpose of the Agency is to promote diversity and the development of the media in South Africa through financial and infrastructural support to small entrepreneurs wanting to enter the media industry. In this way government hopes to ensure that marginalised and disadvantaged groups have access to the media, not only as consumers but as owners and producers.

The aims of the agency include the following:

- encouragement of ownership, control of and access to media by marginalised and disadvantaged groups
- encouragement of skills-training and capacity building
- encouragement of channelling of resources into community media and small commercial media sectors
- raising of public awareness and promote research on media development and diversity
- supporting the promotion of literacy and a culture of reading

Funding of the agency is made up from contributions from the government, the main-stream media and donors.

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II.1. Regulation of the Broadcasting sector

II.1.1. State Regulation

Department of Communication

Broadcasting falls under the jurisdiction of the Department of Communications (DoC). This Department is the public service arm of the Ministry of Communications. It is a policy making body for the post, telecommunications and broadcasting services in South Africa. The functions of DoC includes the administration of legislation for portfolio organisations (telecommunications, broadcasting and postal services), the setting of broad government policy, attending to legislative responsibilities, the appointment of boards of directors and chairpersons, the approval of budgets, business plans, tariff and licence fees, recommending budgets to Parliament, approving joint ventures, mergers and partnerships, the monitoring of counter trade compliance, and to act as a lead for international liaison.

ICASA

The Independent Communications Authority of South Africa (ICASA) is the regulator of telecommunications and the broadcasting sectors. It was established in July 2000 in terms of the Independent Communications Authority of South Africa Act No.13 of 2000. It took over the functions of two previous regulators, the South African Telecommunications Regulatory Authority (SATRA) and the Independent Broadcasting Authority (IBA). The two bodies were merged into ICASA to facilitate effective and seamless regulation of telecommunications and broadcasting and to accommodate the convergence of technologies.

ICASA derives its mandate from four statutes. These are the ICASA Act of 2000, The Independent Broadcasting Act of 1993, the Broadcasting Act of 1999 and the Telecommunications Authority Act No. 103 of 1996.

IBA

As mentioned above prior to the establishment of the Independent Communications Authority of South Africa (ICASA) broadcasting in South Africa was regulated by the Independent Broadcasting Authority (IBA). The IBA was established in terms of the Independent Broadcasting Authority Act No 153 of 1993. The prime purpose of this Act was to provide a


The IBA Act, although not as important as it used to be, still make provision for two committees namely the Broadcasting Technical Committee and the Broadcasting Monitoring and Complaints Committee. The first is mainly concerned with the planning of broadcasting services frequency bands, technical matters regarding licence applications as well as the examination and management of the installations and transmitters to be used by a licensee or prospective licensee. The Broadcasting Monitoring and Complaints Committee (BMCC) monitors broadcasting licensees and broadcasting signal distribution licensees to determine their compliance with licence conditions, the Code of Conduct of the Broadcasting Monitoring and Complaints Commission and the Code of Advertising Practice. All the broadcasters who have not signed the Code of Conduct of the Broadcasting Complaints Commission of South Africa (BCCSA) fall under the jurisdiction of the BMCC.

**Legal Basis**

The Independent Communications Authority of South Africa (ICASA) Act No 13 of 2000 provides for the establishment and operational framework of a regulatory authority for both broadcasting and telecommunications through the amalgamation of the IBA with the South African Telecommunications Regulatory Authority (SATRA). Apart from the organisational structure of ICASA, the Act empowers the Authority to:

- licence broadcasters and telecommunications operators
- formulate rules, policies and regulations that govern the two sectors
- monitor the activities of the licensees and enforce compliance
- plan the broadcasting frequency spectrum

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• receive, hear and adjudicate complaints
• regulate the broadcasting and telecommunications industry as a whole

Through ICASA’s Unit for Policy Development and Unit for Policy Projects, the regulator has, since its establishment, developed, revised and is in the process of developing policies related to, inter alia: community television, regional television, internet broadcasting, licence fees, subscription television, commercial radio in secondary cities, digital broadcasting policy, convergence policy, local content policy\textsuperscript{32}, and ownership regulation\textsuperscript{33}.

The main purpose of the Broadcasting Act of 1999 is to

• describe and outline the duties of South Africa’s three tier broadcasting system
• establish the SABC as a public service broadcaster and outlines the mandate of the SABC
• establish a Frequency Spectrum Directorate, whose duty it is to manage the radio frequency spectrum for efficient usage
• establish a South African Broadcasting Production Advisory Board, which serves to advise the Minister of Communications on the development and production of radio and television programmes
• establish human resources capacity in broadcasting policy development

The Broadcasting Act has four main implications for the organisation and operation of the SABC, namely,

• to govern the SABC in terms of a broadcasting charter
• to structure the SABC into two distinct groups: a public broadcasting service and a public commercial broadcasting service (with a third group, namely state-owned broadcasting services).

\textsuperscript{32} As from August 2003 local public and community radio stations had to increase their local content quota to 40% and private and public commercial stations to 25%. Quotas for television where increased to 55% for public service television channels, 30% for commercial private and public free to-air channels and 8% for pay (subscription) stations.
• to have the public broadcasting services subsidised by the commercial services
• to turn the SABC into a limited liability *company* with the state as single shareholder

Collectively, the process of implementing these four implications is known as the corporatisation of the SABC. In this regard it is important to take note of how the SABC is financed. Whereas the norm is for public broadcasters to be funded from licence fees and government grants, the SABC relies on advertising for the greater part of its revenue. The SABC receives 62 percent of radio and television adspend which effectively reduces the competitive nature of the private broadcasting industry. The following figures\(^3^4\) serve as an example:

Operating revenue in 2002:

- Advertising and sponsorship — 76 percent
- Licence fees — 16 percent
- Other sources, such as hiring of facilities and interest — 8 percent

The operating revenue is primarily used to finance public broadcasting obligations. State funding is provided for specific projects such as educational programmes which amount to no more than 1 percent of the operating budget.

The Broadcasting Act has already been subject to its first amendment with the promulgation, during February 2003, of the Broadcasting Amendment Act, 2002 (Act 64 of 2002). The amendments included, *inter alia*, the provision for the introduction of two new regional television channels. In this regard the Amendment Act tries to address the discrepancy of the provision of broadcasting services in the eleven official languages of the country and growing public concerns about the present dominance of English. Finally, the Broadcasting Amendment Act brought into effect a new code of conduct for broadcasters and required the SABC to review its editorial, language and journalistic policies\(^3^5\).

\(^{3^3}\) After a lengthy consultation process with the industry ICASA released its recommendations on broadcast ownership in 2004. In short it stipulates that no person shall control more than one private television broadcasting service and for radio, 35% of all licences issued. Existing legislation limits foreign ownership to 20%. (Cf. Icasa. 2004. The review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences. Position paper 13 January 2004. Johannesburg: Icasa.)


A Broadcasting Monitoring Complaints Committee (BMCC) was established under sections 21 and 22 of the IBA Act of 1993. This body monitors broadcasting licensees for their compliance with, or adherence to, the terms, conditions and obligations of their broadcasting licences, the Code of Conduct for Broadcasting Services, and the Code of Advertising Practice.

II.1.2. Non State Regulation

BCCSA

The Broadcasting Complaints Commission of South Africa (the BCCSA) was established by the National Association of Broadcasters of Southern Africa (NAB) in 1993. The purpose of the BCCSA is to adjudicate and mediate complaints against a broadcaster who have signed BCCSA’s Code of Conduct. Commissioners are appointed by an independent panel and chaired by a retired Judge of the Appellate Division of the Supreme Court. The objectives of the BCCSA are to ensure the adherence to high standards in broadcasting.

NAB has a membership of over eighty broadcasting organisations and associated industries and sees itself as the voice of South Africa’s broadcasting industry. This non-profit organization is funded by its members and engages actively with policy makers (such as ICASA and the Department of Communications). The main aim of the organisation is to promote a broadcasting system that provides choice and diversity for audiences, a favourable climate for broadcasters to operate within and a broadcasting industry grounded in the principles of democracy, diversity and freedom of expression.

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III. The Advertising Sector

Market Overview

The South African advertising industry is dominated by large international groups such as FCB, Lobedu Leo Burnett, Grey Worldwide, Young & Rubicam and J Walter Thompson. Altogether there are 77 active agencies.

The top five spenders on advertising during 2004 were:

- Unilever (R418.2-million; 55-million)
- National government (R394.5-million; 51.9-million)
- Shoprite Checkers (a supermarket chain) (R327-million; 43-million)
- MTN (cell phone) (R294,1-million; 38.7-million)
- Pick ‘n Pay (supermarket chain) (R258,9-million; 34-million)

Above-the-line adspend in South African is now considered to be in the mature phase of the advertising industry life cycle. However, the 23,4 % increase in spending from R11,6-billion (1.53-billion) in 2003 to R14,3-billion (1.88-billion) in 2004 contradicts this argument. The growth in adspend reflects the economic development of South African over the past few years. A breakdown of adspend per medium during 2004 was as follows:

- Print: 40.0%
- TV: 38.7%
- Radio: 13.5%
- Outdoor: 4.3%
- Cinema: 1.8%
- Direct mail: 0.9%
- Internet: 0.8%

There is a strong relationship between broadcasting and the advertising industry, as indicated by the percentages in the list above. The gross advertising revenue for broadcasting in 1994 was estimated to be R2-billion (€256-million) rising to R5-billion (€640-million) in 2000. Television advertising shows the greatest rate of growth despite the fact that print-media...

continues to dominate the top position. Despite a growth of 137% during 2004, online advertising lags behind other electronic media. Outdoor advertising is expected to double in the next year with billboards beginning to crowd the country’s highways promoting everything from mobile phones to dog food. Radio is considered to be the weakest link in South African advertising.

The South African advertising industry is characterised by a lack of transformation. One of the biggest challenges facing the advertising industry is changing the racial composition whereby 30% of equity must be in black hands by 2006 rising to 45% by 2012. By 2004 equity had already been increased to 28.7% from 25.5% in 2003. A second challenge is the mentoring and training of black creative talent. The problem here is the margin squeeze on advertising agencies of between 4% and 5%, which means that agencies can ill afford to reinvest in skills training.

III.1. Regulation of the Advertising sector

III.1.1. State Regulation

The most important statutory bodies and legal provisions that play a role in terms of determining advertising policy are the following:

- The Independent Communications Authority of South Africa (ICASA) instituted in terms of the Independent Communications Authority Act 13 of 2000
- The Competition Commission established in terms of the Competition Act 89 of 1998;
- The Consumer Affairs Act 71 of 1988 - orientated towards protecting the consumer and makes provisions or control of certain business practices which are regarded as unfair because they prejudice consumers or deceive consumers. Since the concept “business practice” is defined widely in the Act to include, among others, “any advertising, type of advertising or any other manner of soliciting business”, the Act plays a role in regulating advertising. This Act provides specifically for the use of trade coupons as a means of advertising and for the establishment of a Consumer Affairs Committee.
- The Trade Practices Act 76 of 1976 - the purpose of this Act is to protect consumers against false or misleading advertisements.
- The Merchandise Marks Act 17 of 1941 - this Act contains various provisions against applying false trade descriptions, altering trade marks, selling or hiring out goods
which bear false trade descriptions or selling goods which have been imported without identifying the country in which they were produced. The prohibitions do not only apply to the goods, the labels and packaging, but also to the advertisements promoting these products.

- The Trade Marks Act 194 of 1993 - the aim of this Act is to regulate the use of trade marks which is the word or device which distinguishes the goods or services of one trader from those of another

Yet, despite these acts, the day-to-day business of the advertising industry is mainly self-regulated.

III.1.2. Non State Regulation

ASA

The Advertising Standards Authority of South Africa (ASA)\(^{39}\) is an independent body set up and paid for by the marketing communications industry to regulate advertising in the public interest through a system of self-regulation. ASA works closely with the government, statutory bodies, consumer organisations and the industry to ensure that the content of advertising meets the requirements of its Code of Advertising Practice. The three parts of the industry, viz the advertisers who pay for the advertising, the advertising agencies responsible for its form and content, and the media which carry it, work together to set advertising standards and to devise a system to ensure that advertisements which fail to meet those standards are corrected or removed. If an advertiser does not comply with ASA findings, then an Ad-Alert is issued to the media, who are then obliged not to accept any further placements by that advertiser until the findings are complied with.

Statistics provided by ASA\(^{40}\) show that it received 1951 complaints during 2004 against 983 in 1998. The average growth in consumer complaints is 31% a year. The increase in complaints is ascribed to the ASA’s media awareness campaign. Of all complaints received:

- 25% related to misleading advertisements


- 13% were for health and medicines advertisements
- 43% of all complaints related to television advertisements
- 91% of all complaints came from consumers and public bodies with the remaining 9% from advertisers’ competitors.

IV. The Telecommunications and the Online Sector

Introduction

In 2003 the South African ICT industry was the 20th largest in the world and the largest in Africa\(^41\). The overall aim of legislation in this sector is to increase access to ICT services. Processes and legislation to liberalise the telecommunications and ICT sector started immediately after the first democratically elected South African Government came into power in 1994. The major role player in the field, at this stage, is Telkom Pty Ltd\(^42\).

Market Overview

In May 1997, 30% of Telkom was sold to Thintana Communications, a consortium made up of US-based SBC Communications Inc and Telekom Malaysia. Three percent was set aside for economic empowerment and awarded to Ucingo Investments, which in turn represents 20 empowerment groups nation-wide. The remaining shares in Telkom were successfully listed on the Johannesburg Securities Exchange and New York Stock Exchange early in 2003. By the end of March 2002, Telkom has

- installed 2.8 million lines, bringing the total number of lines to 4.92 million
- installed 195 399 payphones, increasing the number by ten percent

and Integrated Services Digital network (ISDN) channels saw an increase of 25 percent form 374 062 in 2001 to 467 518 in 2002\(^43\).

Many of the challenges in the regulation of telecommunications were prompted by the Government’s decision to liberalise the telecommunications sector. To facilitate this, ICASA was required to create an environment in which competition could take place. This is currently taking the form of setting up (besides Telkom) a Second National Operator (SNO).

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The second nation operator (SNO) is expected to begin fixed-line services early in 2006 after more then three years of delays. The primary delay was caused by a battle over the controlling interest. The SNO shareholders are:

- Nexus Connection, the black empowerment partner: 19%
- Transtel, a division of Spoornet: 15%
- Eskom, the power utility: 15%
- Sepco, a consortium comprising VSNL, a Tata subsidiary (26%), Communi-Tel (37%) and Two Consortium (37%): 51%

ICASA is expected to issue the SNO with a public switch telecommunications service licence which means that the new entity can offer the same services as Telkom. The SNO is expected to target the business market first as Transtel and Eskom are already in that market. The residential market will follow later as the SNO lacks the necessary infrastructure to penetrate this particular market\textsuperscript{44}.

South Africa also has the largest Internet market in Africa with an estimated 2.4 million Internet users in 2002. The number of Internet service providers increased from seven in 1997 to 170 at the end of 2001. The internet service providers include Telkom, UUNet SA, Internet Solutions, AT&T Global Network, MTN Network Solutions and DataPro. GSM mobile services were launched in South Africa in 1994 with 12.1 million users as of September 30, 2002.

Currently, South Africa has three mobile communications network operators, namely Vodacom, MTN and Cell C.

Presently, Telkom and the government are under severe criticism from numerous roleplayers in the sector and the public for extremely high costs of telephony and internet access, including broadband access. It is feared that this situation will continue until Telkom’s monopoly comes to an end when a second national telecommunications operator starts to function, a process that is presently under way.

\textsuperscript{44} Cf. Mochiko, T. 2005. SNO aims to start in seven months. \textit{Star}, 17 August:5.
IV.1. Regulation of the Telecommunication and Online Sector

IV.1.1. State Regulation

As an indication of the government’s concern about information and communication technology and to make South Africa a full fledged member of the information society it has instituted a Presidential International Advisory Council on Information Society and Development, a Presidential National Commission on Information Society and Development, and an Institute for Satellite and Software Applications (ISSA) with the purpose of assisting the government in narrowing the digital divide between South Africa and the rest of the world and within South Africa itself. Another body focussing on the expansion of ICT (especially the internet) is the Business Unit in the Department of Communications.


The main purpose of the Telecommunications Act is to lay down provisions for the regulation of telecommunications activities other than broadcasting, to control the radio frequency spectrum and to establish an independent regulator, the South African Telecommunications Authority (SATRA - now ICASA). The goals of the Telecommunications Act inter alia are to: promote universal and affordable services, promote a wide range of services in the interest of economic growth and development, provide universal service, encourage investment in the industry and to ensure fair competition in the industry.

The Telecommunications Amendment Act, 2001 (Act 64 of 2001) concerns the management of the liberalisation of the South African telecommunications sector. It furthermore provides for the licensing of operators in under serviced areas in view of, apart from increasing access, ownership and the involvement of black people and women in die communications sector.

The purpose of the Electronic Communications and Transactions Act, 2002 (Act 25 of 2002) is to install a secure environment for e-commerce transactions. The DOT ZA Domain Name Authority was established and incorporated as a Section 21 company in accordance with this Act.
In order to promote the empowerment, growth and liberalisation of the communications industry the government has introduced a Convergence Bill\textsuperscript{45}. The aim of the Bill is to consolidate all the legislation relating to broadcasters and telecommunications service providers, by providing, \textit{inter alia}, for differing licence types. For example, the Bill empowers ICASA to make regulations with regard to any matter that may be prescribed. One aspect, since removed because of its restrictive nature, was an attempt to regulate website publishing by requiring all owners of websites to be licensed. Those operating a website without a license could be fined between R500 000 (€65 000) and R10 000 (€1 300) per day\textsuperscript{46}. This has been viewed as an unconstitutional attempt to control freedom of expression. Another contentious aspect is the need for licences to be approved by the Minister of Communications.

Although an admirable attempt by the government to keep up with technological developments, the Bill has been highly controversial and flawed. The Bill was tabled in parliament in January 2005, with a second draft being released on 16 February 2005. The last day for submissions was 8 April 2005. This was considered very short notice because of the Easter holidays together with a lack of notice about the release. Even so, there were more than 40 critiques to parliament and 30 direct representations to this, the second supposedly improved version. The second version has now had so many amendments that it has virtually become a third version. The major problem dogging this Bill is “that the whole experience (has) compelled legislators to formulate policy while trying to make law”\textsuperscript{47}. For instance, the Bill was not preceded by a Green and White Paper to outline the underlying policy assumptions. Thus, in the absence of prior policy formulation, the legislative process has ended up as serving the purpose of policy formulation, resulting in a complicated drawn out mix of roles in a process that is far from complete.

\textsuperscript{45} The full text of the Bill can be found at http://www.info.gov.za/gazette/bills/2005/b9-05.pdf
In order to implement the Convergence Bill, or as it now called, the Electronic Communications Bill, the ICASA Act needs to be substantially amended as the Electronic Communication Bill grants the regulator added responsibilities. This has resulted in the ICASA Amendment Bill which was published on 16 September 2005. This Amendment Bill is itself causing concern. For example, it imports competition law, lacks any allowance for appeals and provides no procedural recourse. It also appears that the Broadcasting Act will also need to be amended to become the SABC Bill.

State Regulatory Authorities

The main regulatory body in the field of telecommunication is ICASA. The responsibilities of ICASA as far as telecommunications is concerned are to promote:

- growth in telecommunications
- economic growth and development of society
- national and international investment
- universal service and access
- participation of previously disadvantaged groups
- level the playing fields by ensuring fair competition
- protecting public interest and consumer rights

IV.1.2. Other Regulatory Bodies

A Universal Service Agency was established in May 1997 in terms of the Telecommunications Act No 103 of 1996. Its objectives include advising the Minister of Communications about, inter alia, universal access by co-ordinating the activities of Telkom and the mobile operators and by working with community-based and non-government organisations. It is also responsible for managing the Universal Service Fund. This fund is

48 The full text of the ICASA Amendment Bill can be found at http://www.info.gov.za/gazette/bills/2005/b32-05.pdf


used to develop the infrastructure in under serviced communities, to establish telecentres and to provide equipment to schools for accessing the internet51.

The State Information Technology Agency52 is a private company with the State as sole shareholder. Its purpose is to provide IT-related services exclusively to the Public Service (government system)53.

The Internet Service Providers' Association (ISPA)54 is a non-profit South African internet industry body. ISPA currently has more than 80 members, comprised of large, medium and small internet service and access providers in South Africa. Formed in 1996, ISPA has historically served as an active industry body, facilitating exchange between the different independent internet service providers (ISPs), the Department of Communications, ICASA, and other IT service providers in South Africa.

There is no general obligation on ISPs who are members of the industry representative body to monitor the data it transmits or stores or to actively seek facts or circumstances indicating an unlawful activity. However the liability of internet service providers (ISPs) for illegal or defamatory content on their servers is regulated in terms of various statutes, for instance, the Electronic Communications and Transactions Act. This Act stipulates that ISPs can enter so-called 'safe harbours' and limit their liability if certain requirements are complied with (S 71-72 of the Act). This is only applicable to ISPs that are members of the industry representative body which adheres to a code of conduct.

**Child pornography**

One of the code's requirements is to designate an agent to receive notifications of infringement and to provide on its websites, on locations easily accessible to the public, the name, address, phone number and e-mail address of such an agent. It is furthermore required from ISPs that they act expeditiously to remove or block access to illegal content such as child pornographic data once noticed of its existence in terms of a take down notification. In

terms of the Films and Publications Act of 1996 (as amended by the Films and Publications Amendment Act 18 of 2004) internet service providers are now required to report knowledge of child pornography on their websites directly to the police.\textsuperscript{55} The amendments to the Film and Publications Act were a response to South Africa’s undertaking to bring legislation in line with the Council of Europe’s Convention on Cybercrime. As one of the signatories to this Convention, South Africa has undertaken to adopt legislation that would implement the principles in the Convention and that would establish the possession of child pornography 'in a computer system or on a computer-data storage medium' as a criminal offence.

In South Africa a \textbf{Child Pornography Hotline}, where Internet users can report child pornographic content on the Internet, was launched on 10 December 2004. This is a step forward in combating the problem of online child pornography\textsuperscript{56} and is in line with the trend in other jurisdictions.\textsuperscript{57}

\textsuperscript{55} S 27A of the Films and Publications Act 69 of 1996 (as amended by the Films and Publications Amendment Act 18 of 2004).


\textsuperscript{57} Australia, Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Spain, Sweden, the UK, US and Canada. The list of members of the Association of Internet Hotline Providers in Europe is available at http://www.inhope.org/english/about/members.htm. See also ‘Report Child Pornography International Agencies’ at http://www.vachss.com/help_text/report_child_porn_intl.html
V. The Film Sector

Introduction

South Africa has one of the oldest film industries in the world with the first film, *The Great Kimberley Diamond Robbery*, produced in 1910. During the Anglo-Boer War (1899-1902) the first ever newsreels were produced and distributed internationally. Yet, during the years of apartheid it has become a struggling industry despite numerous government subsidy schemes. Such schemes mainly favoured the production of Afrikaans films with a limited market. The film industry was, however, seen to be an important instrument in the production of Afrikaner nationalism.

Market Overview

Today, the industry has been rediscovered and a number of projects and incentives are in place to boost production. The focus is on black empowerment and on finding ways to enter the international and African markets. More than a thousand producers are registered and in 2004 the film industry contributed R1.4 billion to the R7.7 billion entertainment industry (comprising film and television production, cinema, and interactive industries). In 2003, 24 feature films were produced. The Department of Trade and Industry launched a Film and Television Rebate in 2004 to provide for the production of both foreign and large-budget films made in South Africa or under co-production agreements. In this regard South Africa has now entered into a number of international agreements. The three largest film distributors in the country are Ster-Kinekor, United International Pictures and Nu-Metro.

V.1. Regulation of the Film sector

V.1.1. State Regulation

The Films and Publications Act 69 of 1996 was drafted against the backdrop of two opposing points of view in the community: on the one hand, that the free flow of information should be protected and on the other, that the community should be free to shield itself against material, which the majority finds offensive. The end product was therefore a compromise: the maximum amount of freedom is awarded to adults but at the same time it attempts to protect

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children against material that is harmful or disturbing. The Film and Publications Act 69 of 1996\textsuperscript{59} has two functions. It regulates the distribution of certain publications and the screening and distribution of films. The regulation is done by means of a classification system, by imposing age and other restrictions and by giving consumer advice. Publications which are deemed to have some degree of literary, artistic, educational or scientific merit are excluded from the classification system. In order to fulfil this function, the act also provides for the establishment of the Film and Publications Board.

State Regulatory Authorities

The classification is done by administrative bodies and their decisions are enforced by means of the criminal law. Films are subjected to prior censorship before distribution and screening – therefore they are, as a general rule, classified before distribution and should have a certificate of classification when screened. In contrast, publications are not submitted to any form of pre-censorship. They are only classified once published and a member of the public lodges a complaint with the \textbf{Film and Publication Board}. The Film and Publication Board appoint classification committees (consisting of a chief examiner and one or more examiners) that actually do the classification work in respect of publications and films. Appeal against a decision of the classification committee is heard by the Review Board. In certain instances, where a film has been classified as XX or X18 by the Review Board, the relevant parties may appeal against the decision to the High Court within 30 days. The members of the Board and Review Board are appointed by the President.

The National Film and Video Foundation (NFVF) is a statutory body established in terms of the National Film and Video Foundation Act, Act No 73 of 1997. It has been established by Parliament, \textit{inter alia}, to promote the growth and development of the film and television industry in South Africa.

The NFVF strives for a South African Film and Video Industry that is representative of the nation, is commercially viable and encourages development. It conducts research into any field of the film and video industry. Furthermore it is expected to monitor measure and plan national strategies for the industry and advise the government on policy relating to the

\textsuperscript{59} The full text of the Film and Publication Act can be found at \url{http://www.fpb.gov.za/documents/a65-96.pdf}. 

877
industry, and to coordinate effective relationships between government, the film industry and regulatory bodies\textsuperscript{60}.

\textbf{CONCLUSION}

The above overview is a broad descriptive exposition of the main sectors and role-players in the South African media industry, of the main acts in the field, and of its state and non-state regulatory bodies. Given the complexity of the industry and its continued metamorphosis, the overview does not pretend to be complete. Since the demise of apartheid at the beginning of the 1990s, the industry was, and still is, subjected to numerous policy developments, revisions, implementations or even the lack of implementation. These are changes and developments in the effort of establishing a more democratic and free media system in line with the global trends of liberalisation and privatisation. As such, these developments are open for interpretation with regard to the question of whether or not they have or are contributing to a better and freer media system and whether or not they contribute to the development and expansion of the media in a new democracy. Providing such interpretations was not the purpose of this overview. Suffice it to say that numerous arguments and counterarguments are brought to bear in discourses on these issues.

The foundation of all regulation of the media in South Africa lies with the Constitution, particularly Section 16 – Freedom of expression. A number of non-governmental institutions, such as the FXI, MISA and MMP, make use of Section 16, together with Section 14, access to information, in order to monitor the freedom of the media. The regulation of the press is non-state, whereby the implementation of rules and codes are presided over by an independent Ombudsman appointed by representatives of the newspaper industry. Similarly, the advertising industry is also regulated by a non-government organisation, the ASA. But, the advertising industry is subject to a far greater amount of legislation that the press industry. Films and publications are subject to classification by the Film and Publication Board, which is established by, and gains authority, from legislation. On the other hand, telecommunications and the Internet are subject to regulation by ICASA, a government organisation whose activity is determined by various legislation.

In contrast, and typical of international tendencies, broadcasting is subject to rigorous regulation by state and non-government regulators. The BCCSA, a division of the industry

appointed NAB, is responsible for the regulation of content within the scope of the BCCA’s code of conduct, but only when complaints are made, whereas ICASA is responsible for such aspects as the setting and regulating local content limits as part of its regulation of licensing requirements. However, radio stations who are not members of the NAB, (these are small community radio stations). are answerable to the BMCC, a division of ICASA, with specific regard to complaints about content.

When looking at the criteria (provided for the purpose of the study) for a link between non-state and state regulation three of the four criteria mentioned are clearly fulfilled, with the fourth only partially.

- Policy is determined by non-state organisations with the exception of telecommunications and broadcasting.
- The basis for non-state regulation lies in the Constitution and subsequent legislation.
- Discretionary power is left to non-state regulators with the exception of telecommunications and partially for broadcasting.
- Codes are set by the industry with the exception of telecommunications and partially for broadcasting, which means that the state only partially uses regulatory resources to influence the non-regulatory system.

From this point of view, one can argue that a kind of co-regulation in the media does exist in South Africa.