



Plenary Session 1

> The Protection of Minors in a Connected Environment

Comparative Background Document
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Introduction

Further to the cancellation of the 36th meeting in Jerusalem in November 2012, the session on the Protection of minors in a converged environment was re-scheduled to the meeting in Kraków on 9th May 2013. In line with the general plenary theme for 2013 of the EPRA annual work plan on *Challenges of the Regulation of On-Demand Media Services*, the plenary session in Kraków will focus on the protection of minors on on-demand media services, looking at the practical implementation by national regulatory authorities of protection of minors measures on VOD, the protection of minors across the various media platforms and the articulation between traditional regulation, co and self-regulation.

Notwithstanding the variety of remits and competences among EPRA members, the protection of minors is one of the core missions of regulatory authorities, one the 'essential characteristics' shared by all members and a major component of their field of activity. Not surprisingly, protection of minors has been a recurring motive in the discussions at EPRA meetings for the last 15 years.

Early debates have been focusing on the linear environment with the presentation of systems put in place in the various jurisdictions to regulate the access of minors to potentially harmful content, such as the '*signalétique*' introduced by the French CSA or the '*Kijkwijzer*' system of the Dutch NICAM. Issues of transnational cooperation between regulators were another focal point following discussions on '*baby channels*' and the jurisdiction over unencrypted pornographic content broadcast on satellite channels. The role played by regulators with regard to media literacy was debated and documented during the Tallinn meeting in 2009.

The protection of minors across new media platforms was only addressed at EPRA fairly recently. The very first consultations conducted by regulators on this issue were presented in a workgroup in 2010 in Barcelona. In October 2011 in Brussels, a round table brought together representatives of relevant players across the new media space to discuss how the industry responds to the challenges of the protection of minors online and what measures seem best suited to address the convergence between platforms and audiovisual content.

¹ **Disclaimer:** This document has been produced by EPRA, an informal network of 53 regulatory authorities in the field of broadcasting. It is a background information document aimed to facilitate and stimulate debate at EPRA meetings. It is not a fully comprehensive overview of the issues, nor does it purport to represent the views or the official position of EPRA or of any member within the EPRA network.

Only a couple of weeks after the opening of a European-wide consultation on the appropriateness of the current rules of the Audiovisual Media Services Directive to address the challenges of protecting minors in a converging media world, which will look into the mechanisms to increase the awareness of parental control tools, the effectiveness of age verification devices, content rating and classification, the handling of complaints and the respective roles and responsibilities of public authorities, NGOs and providers of products and services², it is thus particularly timely for EPRA to address the issue of the protection of minors on VOD again.

The Audiovisual Media Services Directive (hereafter AVMSD) extended provisions for the protection of minors from traditional TV services to 'on-demand audiovisual media services' through a system of graduated regulation. In particular, Article 12 AVMSD provides that services containing material which might seriously impair persons under the age of eighteen must be made available in a manner which secures that such persons will not normally see or hear it.

The paper will:

- briefly report on how Art. 12 AVMSD has been implemented in Member States and how the provisions relate with existing national concepts,
- look at whether NRAs have produced any additional rules, guidance and research or conducted consultations on the issue of the protection of minors on non-linear services,
- examine the role played by co and self-regulation in this field,
- describe the various technical measures aiming at restricting the access of minors to harmful material on VOD services,
- report on recent decisions and cases.

This document is based on the responses to a questionnaire prepared and circulated by the EPRA Secretariat. It compiles answers from 30 regulatory authorities: *The National Commission on TV and Radio (AM)*, *The Communications Regulatory Agency (BA)*, *The Flemish Council for the Media (BE)*, *The CSA of the French speaking Community of Belgium (BE)*, *The Council for Electronic Media (BG)*, *The Federal Office of Communication OFCOM/BAKOM (CH)*, *The Cyprus Radio-Television Authority (CY)*, *The Council for Radio and TV Broadcasting (CZ)*, *The Director's Conference of Media Authorities of the Länder (DE)*, *The Catalan Audiovisual Council (ES)*, *The Audiovisual Council of Andalusia (ES)*, *The Conseil supérieur de l'audiovisuel (FR)*, *Ofcom (GB)*, *The Greek National Council for Television and Radio (GR)*, *The Agency for Electronic Media (HR)*, *The Council for Cable TV and Satellite Broadcasting (IL)*, *The Autorita per le Garanzie nelle Comunicazioni - AGCOM (IT)*, *The Radio and Television Commission of Lithuania (LT)*, *The Conseil National des Programmes (LU)*, *The Malta Broadcasting Authority (MT)*, *The Broadcasting Council of the Republic of Macedonia (MK)*, *The Commissariaat voor de Media (NL)*, *The Norwegian Media Authority (NO)*, *The National Broadcasting Council (PL)*, *The Regulatory Authority for the Media (PT)*, *The National Audiovisual Council (RO)*, *The Republic Broadcasting Agency (RS)*, *The Swedish Broadcasting Authority (SE)*, *the Post and Electronic Communication Agency of the Rep. of Slovenia (SI)* and *The Council for Broadcasting and Retransmission (SK)*.

Foreword on non EU-Members: Stabilisation and Association countries, EEA members and others

² Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, Brussels, 24.4.2013, COM(2013) 231 final: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/convergence_green_paper_en_0.pdf

Some countries, such as the Former Yugoslav Republic of Macedonia or Serbia, do not have yet transposed the AVMS Directive. In **Macedonia**, the operation of VOD services is not covered by the current Law. The Broadcasting Council has signed a Protocol with operators of public communication networks to overcome the legal gap. The new Law on Broadcasting Activity, which will be harmonised with the AVMSD, is in phase of preparation.

The application of a new set of by-laws on audiovisual media services transposing the provisions of the AVMSD into the regulatory framework of **Bosnia and Herzegovina** started on 1 January 2012.

Norway transposed the AVMSD as recently as January 2013³. So far, traditional television broadcasts are regulated by the Broadcasting Act, while VOD is regulated by the Film and Video Act. The Ministry of Culture is currently consulting interested parties on a draft Act regarding the protection of minors, the consultation deadline is 1 May 2013. The draft aims at protecting minors from harmful content on all major media platforms, also encompassing cinema screenings and distribution of DVDs in addition to the scope of the AVMS Directive. If this act is passed, the regulation on protection of minors will be unified in one act.

Switzerland and **Armenia** have not yet introduced any specific legal provisions concerning the protection of minors on VOD services in their legal systems.

I. TRANSPOSING ART. 12 AVMSD AND THE VARIETY OF NATIONAL CONCEPTS

As mentioned in the introduction, the AVMSD introduced a two-tier regulatory system with linear audiovisual media services being subject to stricter provisions than VOD services. As expressed by Recital 58, the lighter regulation applicable to on-demand services is meant to reflect the higher degree of control and choice exercised by users and the lighter impact these services may have on society. The table below highlights the differences between the two regulatory regimes. Member States are however allowed to implement stricter provisions for the audiovisual media services under their jurisdiction.

The Directive does not define key concepts such as '*minors*', '*might seriously impair*', '*likely to impair*' or '*pornography*' which are left as a matter for Member States. Protection of minors is typically a sensitive area characterized by the diversity of cultural perceptions at Member State level.

Art. 27(1) merely mentions "*violent pornography and extreme violence*" as examples of content which may seriously impair minors in the linear environment.

The European Parliament proposed including these two non exhaustive examples of content that poses the risk of seriously impairing development in the wording of Art. 12 AVMSD, but was unable to persuade the European Commission and the Council to accept this⁴.

³ See the Norwegian Country report submitted for the Krakow meeting:

<http://www.epra.org/attachments/krakow-country-report-no>

⁴ See Alexander Scheuer and Christina Bachmaier in Protection of Minors and Audiovisual Content On-Demand, p.11, IRIS PLUS, 2012-6, p.11, Lead article by Alexander Scheuer and Christina Bachmaier, Institute for European Media Law available under: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus6LA_2012.pdf.en

	Linear services	Non-linear services
Content which might seriously impair minors must	... not be included in any programme (total ban) Art 27(1) AVMS	... only be made available in such a way that ensures that minors will not normally hear or see such on demand audiovisual media services Article 12 AVMS
Content which is likely to impair minors must be ensured, by selecting the time of the broadcast or by any technical measure (e.g. encryption), that minors in the area of transmission will not normally hear or see such broadcasts Article 27(2),(3) AVMS	No restrictions

Table 1: Overview of graduated regulation, relevant provisions in the AVMSD

Source: Protecting children in the online world Report

[1.1. The variety of national concepts as a challenge for a comparative perspective](#)

Definitions: Salient Points

- Many countries have transposed Article 12 AVMSD almost verbatim in their own national provisions.
- In most of the countries, national provisions implementing the Directive do not include a definition of “*might seriously impair the development of minors*” and “*is likely to impair the development of minors*”. This is for instance the case in the Czech Republic, Malta, Lithuania, Luxembourg or Slovakia.
- Where present, the definition of “*might seriously impair the development of minors*” quotes, with very little variation, the wording of Art. 27(1): “*pornography and gratuitous violence*”. This is for instance the case in Belgium (French and Flemish Community), Italy, Spain or Slovakia.

In order to be able to understand the whole picture in its complexity, it would therefore be imperative to look at how the transposed provisions relate with pre-existing national concepts and classifications with regard to the protection of minors.

The articulation between illegal content and content which might seriously impair the development of minors is particularly relevant.

In **Germany**, the Interstate Treaty on the protection of minors – JMStV⁵ forms the legal basis for assessing content distributed in broadcasting or telemedia services; it distinguishes between absolutely illegal content which must not be distributed in broadcasting services or in telemedia services; pornographic content, certain listed (indexed) content and content which obviously seriously impairs minors which may be distributed in the internet only on the condition that the

⁵ http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/JMStV_Stand_13_RStV_mit_Titel_english.pdf

provider ensures that access is possible for adults by means of a closed user group and “content impairing development”.

The possibility introduced by the AVMSD of allowing content which “*might seriously impair*” the development of minors for VOD providers under the condition that such content is not accessible to children raised a dilemma for the legislator in **the UK**. Until then, there were broadly two categories of content banned on television, content considered as illegal under general legislation (obscene or extremely pornographic material) or content that would not get an approval certificate by the British Board of Film Classification (R18+, i.e. extremely violent pornography) and R18 material (hardcore porn). The transposition raised the issue of what type of material could be qualified as content which might seriously impair the development of minors and what should be the restrictions around it. Against the background of this issue of categorisation, there was concern on the impact that lowering the protection of minors requirements for VOD services, by allowing a restrictive interpretation of “might seriously impair”, could have - especially in a country with a traditionally rather strict approach towards sexually explicit content on television⁶. A too encompassing definition, however, could bring about unjustified restrictions of the freedom of expression and information. These were some of the dilemmas addressed by an extensive Ofcom report to the Department for Culture, Media & Sport (DCMS)⁷.

In contrast, **France** and in **Belgium** (French speaking Community), resolved the issue of the kind of material subsumed under the category of “*content which might serious impair*” by equating it to illegal material and by prohibiting it on VOD altogether. In practice, this includes illegal pornographic programmes and programmes violating human dignity.

The relation between the transposed provisions and the pre-existing national concepts and classifications with regard to the protection of minors would be worth a separate study and will not be developed further in this paper. For a foretaste, however, respondents to the EPRA questionnaire were asked, to define and describe, with the help of concrete examples, what kind of material they currently consider as “*might seriously impair the development of minors*” and “*is likely to impair the development of minors*”. The answers highlight the variety of the systems put in place by NRAs to assess harmful content. The annexed table on p. 21 attempts at roughly summing up the answers to this question⁸. As a rule, in the absence of precise legal definitions, NRAs evaluate the material according to the context and presentation on the basis of their case law. Many NRAs have developed indicators to assess the level of harm.

The majority of respondents have implemented national labelling and rating systems (i.e. visual signs) for different types of potentially harmful content which as a rule - yet not systematically – correspond to material “*likely to impair the development of minors*”.

⁶ Under the procedure set in the TVWF Directive, the UK government issued several proscription orders against foreign pornographic satellite TV channels (notably Red Hot Television, TV Erotica, Rendez Vous, Satisfaction Club Television, Eurotica Rendez Vous, Eros TV, Channel Bizarre and Satisfaction, Adult X and Extasi TV).

⁷ Sexually explicit material and Video on Demand Services, A Report to DCMS by Ofcom, 4 August 2011, available at: <http://stakeholders.ofcom.org.uk/binaries/internet/explicit-material-vod.pdf>

⁸ For a more detailed overview, see the full answers to the questionnaire (only accessible to EPRA members): <http://www.epra.org/surveys/epra-plenary-questionnaire-protection-of-minors-on-vod/results.pdf>

1.2. Material which “might seriously impair” the development of minors on VOD

The great majority of countries have chosen to implement the graduated approach of the AVMSD and allow material which might seriously impair the development of minors on VOD provided it is not accessible for minors. This is the case in the Czech Republic, Malta, Greece, Belgium (Flemish speaking Community), Spain, Norway, Portugal, Germany, Slovakia, Netherlands, Croatia, Italy, Romania, Slovenia and the UK.

However, several countries have opted for a stricter legal approach and have introduced a general prohibition for material which might seriously impair the development of minors on VOD. This includes France and the French Community of Belgium but also Bulgaria, Lithuania, Sweden and Poland. Note however that the definition of the material which might seriously impair may be quite a restrictive one.

In the vast majority of the countries which allow the broadcast of content considered as seriously harmful for minors, there is no difference between the regimes applicable to public service and commercial providers. In some countries, however, public service broadcasters may be subject to stricter rules than commercial broadcasters, and are not allowed to broadcast material which is likely to seriously harm minors on VOD (Spain, the Netherlands, Italy, Romania, Malta).

1.3. Material which “is likely to impair” the development of minors on VOD

As noted in the Ofcom Report to DCMS⁹: *“The AVMS Directive and 2009 Regulations are silent regarding material on on-demand programme services which is ‘likely to impair’.”*

From the results to the questionnaire, material considered as likely to impair the development of minors is allowed on VOD in the majority of countries considered.

As a rule, there is no distinct regime applicable to public service and commercial VOD providers. However, the NRAs in Malta and Romania indicate that such material is not allowed on PSB.

Thirteen regulatory authorities report that material which is likely to impair the development of minors is allowed with some forms of protection on VOD (Czech Republic, Malta, Spain - Catalonia, Germany, Belgium - French-speaking Community, France, Netherlands, Croatia, Poland, Portugal, Romania, Slovenia and UK). In **France**, content classified as “18” can only be offered on pay VOD if associated with technical measures. Free-to-air content classified as “16” may only be broadcast from 22:30 to 5:00 on VOD.

Eight regulatory authorities report that material which is likely to impair the development of minors is allowed on VOD without protection: Cyprus, Norway, Belgium - VRM, Greece, Slovakia, Italy, Spain - Andalusia and Sweden. In **Sweden**, restrictions concerning material which “is likely to impair minors” on VOD are included in the Radio and Television act.

II. GUIDANCE, RESEARCH AND CONSULTATIONS ON THE PROTECTION OF MINORS ON VOD

⁹ Sexually explicit material and Video on Demand Services, A Report to DCMS by Ofcom, op. cit. paragraph 2.17.

2.1. Guidance and rules

From the responses to the questionnaire, it appears that only a few regulatory authorities have issued specific rules and guidance on the protection of minors on on-demand audiovisual media services. The regulatory bodies in France, Italy and the UK have adopted specific rules in order to set the technical arrangements, relating to PIN numbers, filtering or identification systems applying to on-demand media services.

In **France**, the *Conseil Supérieur de l'Audiovisuel* adopted a Deliberation on the protection of young audiences, deontology, and the accessibility of programmes on on-demand audiovisual media services, replacing the deliberation of 14 December 2010, on 20 December 2011¹⁰. The aim of the text is to lay down specific rules for on-demand audiovisual media services, and more specifically to set new technical arrangements for programmes in Category V, i.e. “cinematographic works that may not be viewed by persons under 18 years of age, and pornographic or extremely violent programmes that may only be viewed by an informed adult public”.

In the **UK**, ‘ATVOD’s Rules and Guidance’ sets out the statutory requirements with which providers of On Demand Programme Services must comply. The accompanying guidance is non-binding and is provided purely as an aid to interpretation of the statutory requirements. Of particular relevance is ATVOD’s guidance to Rule 11 Harmful Material: Protection of Under-18s¹¹ which requires an effective Content Access Control System (“CAC System”) verifying that the user is aged 18 or over where R18 equivalent material is made available.

In **Italy**, following the amendments to the Italian AVMS Code introduced in July 2012, Agcom adopted on 4 October 2012 a deliberation establishing a ‘Technical Board’ to adopt, through co-regulation procedures, technical measures to prevent minors from viewing content on VOD services that “might seriously impair” their physical, mental or moral development¹². The aim of the Board is to identify procedures to communicate personal identification numbers (PIN) and to use filtering or identification systems, so that solutions involving all interested stakeholders may be eventually agreed upon.

In several other countries, such as **Bulgaria, Croatia, Germany and Slovenia**, regulatory authorities have issued rules and general guidance for the protection of minors on audiovisual media services, whether linear or on-demand.

In **Croatia**, the Agency for Electronic Media has issued rules on the Protection of minors. Article 14. OG 60/10 deals with on-demand media service providers and require them to use visual

¹⁰ Délibération du 20 décembre 2011 relative à la protection du jeune public, à la déontologie et à l’accessibilité des programmes sur les services de médias audiovisuels à la demande, Journal officiel du 31 décembre 2011

<http://www.csa.fr/Espace-juridique/Deliberations-et-recommandations-du-CSA/Recommandations-et-deliberations-du-CSA-relatives-a-la-protection-des-mineurs/Deliberation-du-20-decembre-2011-relative-a-la-protection-du-jeune-public-a-la-deontologie-et-a-l-accessibilite-des-programmes-sur-les-services-de-medias-audiovisuels-a-la-demande>

¹¹ http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf

¹² Deliberation no. 224/12/CSP “Establishment of a technical board for the adoption of the implementation rules on the technical measures to be adopted in order to prevent minors from viewing and listening to adult content made available over on-demand audiovisual media services providers, pursuant to Article no 34, legislative decree no. 177/2005, as amended by legislative decrees no. 44/2010 and no. 120/2012”

<http://www.agcom.it/default.aspx?DocID=9559>

symbols when providing programmes which are likely to impair the physical, mental or moral development of minors.

In **Germany**, the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in Electronic Media – KJM) has developed a catalogue of criteria for the regulation in broadcasting and telemedia in order to guide the assessment of depictions of violence and sexuality¹³.

In **Slovenia**, the APEK published Recommendations for the safe use of AVMS¹⁴ in November 2011. The Recommendations were designed as a tool for a conscious and informed watching of television. They were prepared on the basis of the latest research findings on the role and impact of media on children and adolescents, and by taking into account the findings and practices of the Dutch *NICAM/Kijkwijzer*, the *British Board of Film Classification*, the Finnish Board of Film Classification *Valtion elokuvatarkastamo*, US public television *PBS*, and the *Australian Council on Children and Media*.

In December 2010, the APEK also published a guidance document on the Slovenian provisions on the protection of minors from potentially harmful content for linear and non-linear services¹⁵. It provides criteria for the identification of content that might seriously impair or is likely to impair; proposes the levels and modes of the recommended protection, elaborates guidelines for classification and scheduling, and provides proposals for labeling.

In **Bulgaria**, on 25 October 2011, the Council for Electronic Media and the State Agency for Child Protection drew up criteria for the assessment of content that is adverse to, or potentially damages, the mental, moral and/or social development of children¹⁶.

In the Netherlands, the **Commissariaat voor de Media** has not published any specific guidance on the protection of minors so far but has created a special Advisory Committee to advise the regulator on issues regarding serious harmful content. The committee is comprised of five experts from the field of youth, media, law and ethics.

2.2. Recent research, reports and consultations relevant to the protection of minors on VOD

In Spain, **the Catalan CAC** conducted an internal research comparing legal instruments and best practices with regard to the protection of minors in VOD and information society services in the main EU Member States. The study (not published to date) which looked at the main initiatives in the French speaking Community of Belgium, France, the Netherlands and the UK, highlighted the serious difficulties encountered by NRAs in ‘fencing’ on-demand audiovisual media services.

In Belgium, **the CSA of the French speaking Community of Belgium** did not conduct any research on the protection of minors on VOD. However, on the occasion of its annual supervision on how providers complied with their legal obligations, the CSA checked the

¹³ *Kommission für Jugendmedienschutz (KJM)*, Kriterien für die Aufsicht im Rundfunk und in den Telemedien http://www.kjm-online.de/files/pdf1/Kriterien_23_08_2010_final_Internet_mit_logo.pdf

¹⁴ <http://www.apek.si/priporocila-za-varno-uporabo-avdiovizualnih-medijskih-vsebin>

¹⁵ <http://www.apek.si/strokovna-podlaga-za-zascito-otrok-in-mladoletnikov-pred-potencialno-skodljivimi-programskimi-vsebinami>

¹⁶ <http://www.cem.bg/download.php?id=3351>

classification of programmes, the functioning of parental control systems (e.g. the system should be locked once the viewing is discontinued, the entered code numbers should not be visible etc.), the communication by the provider to the press of the metadata of the programme (signalétique) and the presence of pictogrammes in VOD catalogues.

In Italy, in order to evaluate the overall media services landscape and to analyse the behaviour of children and teenagers in their relationship with the media, **Agcom** approved the project of an interdisciplinary study aimed at drawing up a "*White Paper on the relationship between media and minors*"¹⁷ and constituted an interdisciplinary working group. The White paper provided the opportunity to establish a dialogue with citizens associations, families' representations and the industry. A questionnaire gathered information regarding supply and consumption data, market trends, requirements for changes in the regulatory scenario, as well as challenges raised by new media.

In France, **the CSA** published a report on the protection of minors in the era of converging audiovisual media and the Internet in March 2012¹⁸. The paper deals with the protection of young audiences against offensive audiovisual content on the Internet. The report provides an overview of the current situation, and presents proposals which may require the launch of a consultation with all concerned parties with the view of adopting a legal instrument.

In the UK, as already mentioned, **Ofcom** was asked by DCMS to produce a report on sexually explicit material on VOD¹⁹. The report recommended the adoption of a precautionary approach to protecting minors from the risk of harm from accessing R18 material (and material stronger than R18) on UK-based VOD services. The report found that evidence for children being caused harm by exposure to R18 material was inconclusive and there was no regulations requiring sexually explicit material of R18 standard (or its equivalent) to be prohibited in VOD services. However, Ofcom's statutory duty to have regard to the vulnerability of children, the Government's intention to ensure protection of children from sexually explicit material on UK-based VOD services, expectations from the public, the range of approaches in Europe as regards implementing the "might seriously impair" obligation in the Directive, were arguments pleading for the adoption of a precautionary approach.

The **Slovenian APEK** appears to be the only regulatory authority who is currently conducting a public consultation on the protection of minors on VOD. So far, the main comments referred to definitions of content that might seriously impair or is likely to impair. Some of the participating subjects claimed that the definitions were too open and vague, others believed they were too strict and that they might have negative effects on the editorial freedom and business models of VOD providers.

III. THE ROLE OF CO AND SELF-REGULATION FOR THE PROTECTION OF MINORS ON VOD

¹⁷ While the results have not yet been made entirely public, the deliberation approving the project is available at: <http://www.agcom.it/Default.aspx?DocID=3256>

¹⁸ http://www.csa.fr/content/download/20592/342842/file/Protection_des_mineurs_et_internet.pdf

¹⁹ Op. cit.

Article 4 (7) of the AVMS encourages the use of co-regulation to pursue the objective set out by the Directive:

“Member States shall encourage co-regulation and/or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement.”

The Commission Staff Working paper, which was published together with the Commission Report on Protecting Children in the Digital World, stated that:

*“As regards **co/self-regulation systems** for the protection of minors from harmful content, **on-demand audiovisual media services** (where such systems are in place in eight Member States, with seven having a code of conduct) are lagging behind **television programmes** where such systems are in place in 14 Member States, with 11 of them having a code of conduct in place²⁰.”*

A cursory glance at the results of the EPRA survey would tend to confirm the general statement from the Commission Staff Paper that with regard to co/self-regulation systems for the protection of minors from harmful content, systems for on-demand audiovisual media services are probably still not as widespread than those established for TV programmes. The number of co and regulation schemes applicable to on-demand media services reported in both surveys is also identical (eight). However, such a superficial ‘arithmetic’ comparison is misleading and the countries mentioned are not always the same ones. A serious census of self and coregulatory systems would as a start require adopting a clear definition of self and co-regulation. If one adopts a broad definition, almost all Member States have a system of co-regulation that involve sharing some responsibility between service providers and the media regulatory authority²¹. For the sake of clarity, a distinction should be made between fully-fledged self and co-regulatory systems that have been implemented specifically for on-demand media services as in the UK or Ireland; fully-fledged self and co-regulatory systems applicable to both linear and non-linear services as in Germany and traditional systems that may include some elements of self and co-regulation as in Italy or the French speaking Community of Belgium.

Germany has adopted a system of “*regulated self-regulation*” applicable to both linear and on-demand services according to which organisations of voluntary self-regulation check that the provisions of the Interstate Treaty on the protection of minors (JMStV) are adhered to by their members. The Commission for the Protection of Minors in Electronic Media (KJM) checks whether decisions taken by self-regulatory organisations are in compliance with their legal scope of assessment. If a self-regulatory body exceeds its scope, by ignoring necessary procedures, committing procedural errors, or not keeping to the general principles of assessment, the KJM may take legal action. The KJM also draws up statutes and directives which the self-regulatory organisations must comply with. Organisations seeking certification by the KJM as self-regulatory organisations must file an application. The KJM conducts an assessment and hears the applicant. In order to be certified, the bodies of the organisation must meet certain requirements such as ensuring appropriate conditions for the examiners to be able to

²⁰ Commission Staff Working Paper Accompanying the document, pages 20-22 and footnotes 93, 94, 99, 100, SEC(2011) 1043 (final) http://ec.europa.eu/avpolicy/docs/reg/minors/2011_report/swp_en.pdf

²¹ Scheuer, Bachmeier, op. Cit. p. 27.

ensure the protection of minors in an effective way or recruiting independent, competent experts from civil society.

Organisations of voluntary self-regulation can also be established for ‘telemedia’, i.e. the German concept echoing the European notion of on-demand audiovisual media content. The multimedia voluntary self-regulatory association FSM is one of the biggest self-regulatory organisations. Its code of conduct for providers covers both linear and non linear audiovisual media services²².

In the UK, a system of self-regulation was operated by most major providers from 2003 onwards, but has, following implementation of the AVMS Directive, been converted into co-regulation by the Association for Television On-Demand, with which providers of on-demand audiovisual media services within the scope of the Directive are required to notify. The code of conduct constitutes ATVOD’s Non-Binding Guidance for Providers of On-Demand Programme Services (ODPS). Following the redesignation of ATVOD in August 2012²³, ATVOD is now responsible for timescale of notification, receipt of notification, extent, management and enforcement of notification. ATVOD may issue enforcement notifications without consulting Ofcom. However, ATVOD must seek Ofcom’s prior written permission in order to enforce decisions surrounding notification through civil proceedings. Ofcom remains the appellate body for scope determinations, and the final decision rests with them. Only once a service provider has disputed an ATVOD determination that they are in scope may Ofcom then get involved.

Systems of co and self-regulation for on-demand audiovisual media services have been reported in other countries, such as Ireland, Finland and Hungary. However as the NRAs from these countries have not responded to the questionnaire, only basic information could be collected.

In Ireland, the Broadcasting Authority of Ireland does not regulate on-demand audiovisual Media services beyond approving draft Codes which have transposed AVMSD requirements for these services. A voluntary Code of conduct was drafted in May 2011 by the self regulatory authority ODAS and approved by the BAI²⁴. The BAI deals with appeals for non-compliance with the voluntary programming codes (none reported to date) and implements the AVMSD requirements for linear services. The Code is fairly general in its wording and does not include detailed provisions concerning the protection of minors on VOD.

In Hungary, a co-regulatory regime has been established and requires providers to notify the regulatory authority, the National Media and Infocommunications Authority.

In Finland, the recently established MEKU, The Finnish Centre for Media Education and Audiovisual Media, is responsible for the supervision of audiovisual programme provision (classification of films, protection of minors) and the coordination and promotion of national media education²⁵.

In most other countries, such as Malta, Belgium (French speaking Community), Norway or Slovenia, while the regulatory authority remains in charge of the regulation on on-demand audiovisual media services, some self-regulatory and co-regulatory practices are taking place in relation to the classification and the labeling of content and the development of technical

²² <http://www.fsm.de/voluntary-commitments>

²³ http://stakeholders.ofcom.org.uk/consultations/on-demand-programme-services/statement?utm_source=updates&utm_medium=email&utm_campaign=atvod-statement

²⁴ <http://www.bai.ie/wordpress/wp-content/uploads/Code-of-Conduct-On-Demand-Audiovisual-Media-Services.pdf>

²⁵ <http://www.meku.fi/index.php?lang=en>

measures to prevent minors from accessing content that may impair seriously their development.

In **Norway**, distributors are required to label all content on VOD services with an age limit under the provisions of the Film and Video Act. The age limits are set by the distributors themselves. Similarly, in **Belgium** (French-speaking Community), further to the law, broadcasters participate in the system of the protection of minors through the creation of internal viewing committees (Comités de visionnage) in charge of deciding on the appropriate (age-related) labeling of programmes.

A self-regulatory system for VOD services was established in **Slovenia** by Internet, cable and mobile service providers. APEK, the regulatory authority, followed and supported the preparation of the self-regulatory agreement and of the code of conduct. APEK, however, does not have any backstop powers nor plays any other role in this self-regulatory system. In 2013, the eight most important VOD providers renewed the agreement and the code²⁶ originally signed in 2011. The parties in the agreement recognize the need to protect users from harmful content, declare their willingness to cooperate with governmental, NGOs and other consumer protection organisations; they acknowledge the need to support parents and other carers to ensure safer use of public electronic communications services for children and adolescents up to 18 years and older, less educated age groups. They have also agreed to meet for assessment meetings at least once a year. The code of conduct is accompanied with a detailed classification of content and guidance for scheduling, labeling and technical protection.

In **Italy**, since 2002 all main Italian broadcasters have applied a code of conduct on 'TV and minors' (now entitled 'Media and minors') establishing watersheds for the transmission of content likely to impair minors and the representation of minors in TV programmes. This code is monitored by the Committee for the implementation of the self-regulatory code on media and minors. Being adopted before the AVMSD, it does not make any distinction between linear and non linear services.

In **Poland**, further to the new Act, which entered in force on 28 February 2013, the National Broadcasting Council's tasks also include the initialisation and the support of self- and co-regulation of VOD service providers. The Act strongly supports the development of codes of best practice, for instance in the area of specific requirements for technical measures protecting minors²⁷.

It is interesting to note that in the case of the **Netherlands**, which has been a showcase for the co-regulation of content across the media with the *NICAM/Kijkwijzer* system, the co-regulatory system does NOT apply to on-demand audiovisual services in general. The Media Act 2008 only requires public service broadcasters to apply the *NICAM/Kijkwijzer* system to their on-demand offer.

IV. THE ISSUE OF TECHNICAL RESTRICTIONS

²⁶ http://www.amis.net/web3/files/docs/Kodeks_ravnanja_za_zascito_uporabnikov_2013.pdf

²⁷ <http://merlin.obs.coe.int/iris/2013/1/article32.en.html>

The requirements concerning the technical measures necessary to prevent minors from viewing content that might seriously impair their development are not specified in the AVMS Directive. Recital 60, however, mentions the use of personal identification numbers (PIN codes), filtering systems or labeling and refers to The Recommendation on the protection of minors and human dignity and on the right of reply²⁸ which lays emphasis on the importance of labeling and filtering systems.

The Commission Staff Working paper of 2011 stated that:

*The most common techniques to signal to parents the presence of harmful content and the need for parents to restrict access are **on-screen icons** and/or **acoustic warnings** immediately prior to the delivery of potentially harmful content. This is true of both television broadcasts and on-demand audiovisual media services. Most Member States consider such signals useful, and some require them by law or their use is stipulated by codes of conduct. Less used are **technical filtering devices or software**, including **pre-locking systems** and **pin codes**. **Age classifications** and **transmission time restrictions for on-demand audiovisual media services** are applied only in a small number of Member States²⁹.*

Two categories of measures can be distinguished: technical measures from the television world (watershed, labeling/signaletique) and technical measures predominantly coming from the Internet world (age verification controls such as Pay-wall, pre-locking PIN/codes).

[4.1. Technical measures from an analogue world: transmission time restrictions \(watershed\) combined with age classifications](#)

Watershed restrictions applicable to VOD services

According to the results of the EPRA survey, six Member States have chosen to use techniques based on transmission time, i.e. watershed-based restrictions: Bosnia and Herzegovina, France, Germany, Greece, Poland and the Netherlands. Watershed-based restrictions are therefore not very widespread. Such watershed measures are, as a rule, associated to on-screen icons or age classification measures. In Germany and Bosnia and Herzegovina, such restrictions are closely linked to other technical measures, meaning that watershed restrictions are not applicable if other technical arrangements/devices that guarantee that minors do not access the programmes are in place.

In **France**, further to the new Deliberation on the protection of young audiences, deontology, and the accessibility of programmes on on-demand audiovisual media services of December 2011, transmission time restrictions only apply to free-to-air content which has been labeled as unsuitable for children under 16 years. Such content may only be broadcast between 22:30 and 5:00. The new deliberation abolished the time restrictions initially set up for (pay) on-demand services for subscribers.

²⁸ Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, OJ L 378, 27.12.2006, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006H0952:EN:NOT>

²⁹ See Staff Working Paper pages 20-22, op. cit.

In the Netherlands, the system of watersheds only applies to VOD services of public service media which are traditionally regulated in a more detailed and stricter manner. Further to the Media Act of 2008, the same system used for linear programmes applies to on-demand services. In practice, this means that harmful content is only allowed after watershed (20:00 or 22:00 depending on the programme) and that the appropriate content descriptors (i.e. Kijkwijzer symbols) have to be displayed.

The Dutch Commissariaat voor de Media reported about a case regarding the catch-up service of a public broadcaster with educational programmes about sex and drugs. Such programmes, because of their explicit nature, are scheduled after 22:00 on TV. The catch-up service could however be watched 24 hours a day. Further to the intervention of the CvdM, the public broadcaster had to modify its catch-up service to make the programme only accessible from 22:00.

In Germany, the Interstate Treaty on the protection of minors in the media refers, among various other measures, to watershed-based restrictions to prevent minors accessing harmful content. These transmission time restrictions may be applicable to linear and non linear services. Further to Art. 5 and Art. 11 of the Treaty, providers of (Internet) content which is likely to impair the development of minors may fulfil their legal duties either by “making access and perception of the content impossible or very difficult for children or adolescents of the respective age group via technical or other means” (see *infra*, p. 17), or by “scheduling transmission of or access to the content in a manner devised to ensure that children or adolescents of the respective age group do not normally see or hear the content”.

In Bosnia and Herzegovina, programmes categorised as 18+ (roughly equivalent to seriously harmful content) can only be broadcast on video-on-demand from 24:00 to 06:00 unless technical protection measures make sure that minors cannot access them.

Labeling restrictions applicable to VOD services

In addition to transmission time restrictions, a much more common requirement is the **labeling of on-demand programmes**. Such labeling systems - often based on age classification - are in use in many Member States for linear television offerings.

Labeling practices for on-demand audiovisual media services - either legally derived or based on voluntary practices - were reported in the French speaking Community of Belgium, Bosnia and Herzegovina, Norway, Catalonia, Croatia, France, Netherlands (for public service broadcasting), Germany, Greece, Romania and Slovakia.

In France, programmes are classified according to five levels of acceptability in relation to the need to protect children and young people, which the service provider must implement, more particularly by adopting special labels (pictogram and the words “not suitable for anyone under the age of”), which must be indicated to viewers each time the programme is mentioned. This includes catalogues, short extracts, self-promotion and trailers. When the programme is viewed, the pictogram is either displayed before the start of the programme for a duration of five seconds as a full screen with the mention “not suitable for anyone under the age of” or during the whole programme on the bottom right of the screen, while the mention “not suitable...” is displayed at the beginning of the programme during at least one minute.

In Bosnia and Herzegovina, the CRA’s Code on Audiovisual and Radio Media Services has introduced a uniform system for audiovisual content classification and rating (categories being

“12+”, “16+” and “18+”), together with scheduling restrictions for each category in the linear environment. More relaxed rules apply for on-demand services that do not have to obey the scheduling restrictions but have the obligation to indicate the appropriate visual symbol in the catalogue of services.

In **Norway**, in accordance with the Film and Video Act, content on VOD services must be labelled with an age limit.

In **Germany**, telemedia providers shall provide clear references to any existing labelling in the content provided if the content is wholly or largely identical with films or games which are labelled or have been cleared for the respective age group pursuant to Article 12 of the German Protection of Young Persons Act.

In **Catalonia**, Televisió de Catalunya (PSB) included age-based classification in its VOD services offer since June 2011. For +18 years content, this signaling is reinforced with a full screen warning before the beginning of the service delivery. This measure is set up on a voluntary basis.

[4.2. Technical access restrictions from the 2.0 world: filtering, PIN codes, pay walls or other age verification systems](#)

In many countries, while service providers are under the obligation to make material which might seriously impair persons under the age of eighteen available in a manner which secures that such persons will not normally see or hear it, the actual means of protection are up to the provider to establish. This is for instance the case in Bosnia and Herzegovina, Belgium (Flemish speaking Community), Greece, Norway, Netherlands, Spain and Slovakia.

In the **Flemish speaking Community of Belgium**, Article 180 of the Media Act stipulates that service providers will take all reasonable technical measures in order to ensure that access of minors to their broadcasting services, which would seriously impair their physical, spiritual or moral development, is limited, or that their offer does not comprise such services and will notify subscribers to their services of these measures. Service providers can decide themselves which reasonable technical measures they will take. In practice, most of the service providers work with a PIN code.

In **Greece**, access restriction measures are not imposed but suggested as appropriate, as the Presidential Decree 109/2012 does not specify the measures to be taken by services providers.

In **Norway**, there are no binding access restrictions by law – even though most VOD services are protected by PIN codes and payment by credit card.

In **Portugal**, based on a voluntary system, on-demand audiovisual services work with a PIN code access, which is sent to the client. This PIN code restricts access to content according to the following classification:

- High restrictions: access only to content for children;
- Average restrictions: access to all content except content for over 16 years and for adults;
- Low restrictions: access to all content, except for adult content;
- Unrestricted: unrestricted content.

By default, TV boxes are delivered to clients with low level of active constraints, i.e. with access to all contents except adult content.

In the **Netherlands**, the media authority or legislator have not opted for a detailed description of the technical measures which would be considered as adequate and sufficient. As techniques are constantly changing, they did not consider such a prescriptive approach appropriate for fear that it could soon be obsolete.

The use of a personal identification number (PIN code) to prevent minors to access harmful content is a very common measure in Europe. Further to the EPRA survey, it has been reported in Belgium, Croatia, France, Italy, Malta, Lithuania, Slovenia, Norway, Germany, Greece, Romania, UK, and Portugal.

In several countries, the use of a personal identification number (PIN code) to prevent minors from accessing harmful material is prescribed by by-laws or administrative provisions, as in Italy, France and the French Community of Belgium. The provisions may go as far as to specify the modes of communication of the PIN code, and whether it should be applied 'by default'.

In **Italy**, Article 34, para. 5 of the Italian AVMS Code mentions the use of a personal identification number (PIN) to be applied by default, but which can be deactivated through the use of a secret code. The technical measures should be implemented according to the following criteria:

- a) adult content may be offered with a parental control feature that prevents access to content. The user may disable parental control by entering a special secret code;
- b) the secret code must be communicated confidentially to the adult signing the contract for receiving the content or the service, along with a warning about its responsible use and storage. As previously mentioned, the recently introduced Technical Board is to provide further guidance.

In the **French speaking Community of Belgium**, the system is based on a parental code (PIN code) that can be set by the user according to the different labeling/rating categories (-10, -12, -16, -18) or voluntarily deactivated. The parental code should be activated by default on the decoder. In addition, the provider has to implement a procedure to guarantee that the parental code is exclusively communicated to a user over 18 years of age.

In **France**, access to 18+ content is made conditional to a PIN code, which is made secure by a configuration system based on a three-step procedure that the user is required to follow upon his first access to this specific part of the catalogue. This includes a secured access to configure the code (either in subscription menu or by giving credit card details), filling up an electronic statement that the user is above 18 years of age, receiving information on the configuration and the use of the code by the provider. The locking system can never be deactivated.

The use of pay-walls (credit cards) is also very common in the countries covered.

In the **UK**, ATVOD's guidance to Rule 11 states that it will not regard consider ownership of a Debit, Solo or Electron card or any other card (other than a credit card) as an effective Content Access Control System (CAC system) as some cards are accessible to young people under 18 years. On 16 January 2013, Ofcom imposed a fine of £100,000 on the service provider Playboy TV/Benelux Limited for failing to protect children from potentially harmful pornographic

material. In order to access the website's hardcore pornographic material users could register using a debit card, which is not an effective age verification system³⁰. ATVOD's guidance also lists several technical tools which are deemed as acceptable for age verification purposes, such as the:

*“Confirmation of credit card ownership or other form of payment where mandatory proof that the holder is 18 or over is required prior to issue.
A reputable personal digital identity management service which uses checks on an independent and reliable database, such as the electoral roll.
Other comparable proof of account ownership which effectively verifies age”.*

In **France**, the new recommendation of December 2011 abolished the original provision requiring that users' age is checked by requiring a copy of his/her ID card in order to override the restriction.

Closed user groups

In **Germany**, further to the Interstate Treaty on the Protection of Minors (JMStV), pornographic content, certain listed (indexed) content and content which obviously seriously impairs minors may be distributed in the Internet on the condition that the provider ensures that access to the content is possible only for adults by means of a closed user group³¹. Age verification systems are used to ensure the proper functioning of such closed user groups. The KJM has developed key criteria which have to be met in a two-step process based on identification and authentication.

Personal contact is required as a one-off identification process verifying that a person is of age. Concretely, this requires a face-to-face control procedure including a comparison with an official document of identification (ID card, passport). The data required for identification can be gathered in different locations (e.g. post office counter, mobile operators or lottery shops, banks etc.). The control of ID card numbers or the presentation of a certified copy of an ID card is not deemed sufficient as this does not confirm the identity of a person.

Authentication comes as the second step for each instance of accessing a closed user group via a specific, individually allocated adult password. In addition, the service provider must take protective measures to avoid the use of access permissions by unauthorised third parties.

Certified technical systems for the protection of minors

In **Germany**, Art. 11 JMStV also refers to certified youth protection programmes (“anerkannte Jugendschutzprogramme”) for telemedia content which could impair minors. Such technical systems - which are not to be confused with filtering systems for the protection of minors developed by manufacturers and are offered to families, schools, internet cafes or youth centres - must be certified by the KJM. They can be either fitted with content or be installed upstream of the content by the provider and must allow for access to the web in a manner differentiating by age. If they set up such a certified youth protection programme, providers of telemedia services that are potentially harmful to young people can distribute their content without taking any additional youth protection measures (e.g. time restrictions or technical age verification mechanisms). These privileges aim at rewarding content providers who take part in youth

³⁰ http://www.epra.org/news_items/protection-of-minors-on-vod-ofcom-fines-playboy

³¹ For more detailed information, see:

http://www.kjm-online.de/en/pub/protection_of_minors_in_teleme/closed_user_groups.cfm

protection programmes. However, until use of these programmes becomes the norm, these privileges only apply to content up to the “16+” age category. On 9 February 2012, the KJM certified two youth protection programmes for Internet services, subject to certain conditions. Both programmes provide users with age-appropriate access to online services and can be switched on and off, configured and expanded by parents or guardians³². They are also compatible with current Windows operating systems³³.

Dedicated areas in catalogues (for adult content/and family zone)

Several countries such as France, Croatia and Spain require that 18+ material is kept in a separate section of the catalogue.

In **France**, programmes in Category V (“cinematographic works that may not be viewed by persons less than 18 years of age, and pornographic or extremely violent programmes that may only be viewed by an informed adult public”), may only be marketed as part of offers requiring payment, by subscription or pay-per-view. They must be kept separate in a dedicated area of the catalogue, as must the images, descriptions, excerpts, trailers and advertisements for these programmes. A disclaimer appears when accessing the area (reminding about criminal sanctions and potential impairment on children). The special area for Category V programmes needs to be kept ‘locked’ at all times and activated the first time the service is used, by adopting a secure four digit personal code.

In **Spain**, Article 7.5 of the Spanish General Law 7/2010, of 31 March, on Audiovisual Communication states that contents which might seriously impair minors’ development must be kept separate in the VOD catalogues.

In **France**, providers of on-demand audiovisual media services that offer programmes ‘for the general public’ are required to include a special area (*‘espace de confiance’* – trust zone) in their catalogue where families and young people will find programmes that are solely intended ‘for the general public’, excluding any excerpts, programme trailers and advertisements for content or services to which young people have restricted access.

Qualified Disclaimer

In the **Czech** and the **Slovak Republic**, the Broadcasting Acts do not specify the measures that VOD providers should take in fulfil their legal obligations. The Czech Council for Radio and Television Broadcasting released a statement (standpoint) on 19 October 2010 specifying that VOD providers would meet their legal obligations by using a so called ‘qualified disclaimer’³⁴. Such a disclaimer should contain general warnings about the potential harmfulness of the content and include an additional security, such as YES-NO buttons, obligation to enter the date of birth, etc.

Similarly in Slovakia, the Council for Broadcasting and Retransmission currently considers that the use of a ‘qualified disclaimer’ is a sufficient measure to fulfil legal requirements. A simple on-screen warning would not be deemed sufficient but a warning asking for age confirmation

³² See: <http://merlin.obs.coe.int/iris/2012/4/article19.en.html> and KJM press release:

http://www.kjm-online.de/de/pub/aktuelles/pressemitteilungen/pressemitteilungen_2012/pm_032012.cfm

³³ Note that the two programmes have received certification for 18+ content from June 2013: <http://www.die-medienanstalten.de/presse/pressemitteilungen/kommission-fuer-jugendmedienschutz/detailansicht/article/kjm-pressemitteilung-032013-novelle-des-jugendmedienschutz-staatsvertrages-bewegung-auf-allen-sei.html>

³⁴ http://www.rrtv.cz/cz/static/cim-se-ridime/pravni-stanoviska/STANOVISKO_DISCLAIMER.pdf

with a click would be considered as fulfilling requirements. So far, passwords, PIN numbers or registration systems are not required.

The use of parental control software has also been mentioned by most authorities as a widespread measure.

In **Spain**, Art. 7.5 of General Law states that media service providers must provide effective, updatable, user-friendly devices or programmes which allow parental control through blocking damaging contents for minors, so that they cannot access to those which are inappropriate for them.

Balance between public and commercial service providers

According to the outcome of the EPRA survey, the legal obligations with regard to access restriction measures, as a rule, do not make a difference between on-demand service providers from private and public broadcasters. In the **Netherlands**, however, the public service broadcasters are subject to a stricter regulatory regime and may not broadcast any content which may seriously harm minors. The Media Act 2008 also requires public service broadcasters to extend the *NICAM/Kijkwijzer* system to their on-demand offer.

In **Italy**, even though Article 34 of the Italian AVMS Code does not make any difference between commercial and public service broadcasters, RAI is compelled to strictly comply with the European and national regulatory framework regarding the protection of minors on any platform and with any transmission system. Additionally, RAI has to comply with the resolutions adopted by the Committee for the implementation of the self-regulatory code on media and minors.

Access restrictions for content which might seriously impair minors vs. content harmful for minors

16 authorities state that access restrictions only apply to content which may seriously impair minors, while 12 authorities report access restrictions for content which is likely to impair minors. Several authorities have opted for a stricter application of Art. 12 AVMSD. As already mentioned **France** and the **French speaking Community of Belgium** prohibit content which might seriously impair the development of minors. In the **Netherlands**, stricter provisions apply to public service broadcasters. In **Slovenia**, explicit sexual content is categorised as content that is 'likely to impair' and may be broadcast in linear or non-linear services only if protected with technical restrictions. Hard pornography is deemed as content 'which might seriously impair' and can be broadcast only on VOD if protected with PIN or other adequate technical restrictions. In **Germany**, as highlighted in the previous paragraph, content which might seriously impair minors can only be offered by means of a closed user group. In contrast, for content which is only likely to be detrimental to minors, the legislator has not laid down any detailed requirements as to the form that technical measures must take. Technical measures must not meet the strict requirements applying for closed user groups, but can be devised to match the level of protection offered by watersheds on traditional television.

In a nutshell, it seems that even though several countries impose access restrictions on on-demand content likely to be harmful, and not only to content considered as seriously harmful, the level of restrictions which is expected from service providers is not the same, thus preserving the spirit of the Directive of a system of graduated regulation for on-demand services. This concern had been raised by the European Commission during a meeting of the Contact

Committee³⁵, when it was expressed that an extension of (*protection of minors*) rules for linear services *tel quel* to non linear services could be considered as disproportionate.

Access Restriction and Type of Content	Countries	Count
Access restrictions for content which might seriously impair	BA, BE (VRM), DE, ES (CAC-CAA), GR, HR, IT, NL, LT, PT, SE, SK, RO, SI, UK	16
Access restrictions for content likely to impair	DE, FR, NL, IL, IT, ES (CAC-CAA), FR, BE (CSA), PT, SI, UK	12

Table 2: Type of content concerned by Access Restrictions

V. RECENT/PENDING DECISIONS AND CASES

Further to the outcome of the EPRA survey, only a few cases were reported, most of them originating from the UK. The low number of cases may be explained in connection with developments highlighted in previous EPRA documents relating to the issue of scope³⁶. On-demand audiovisual services are still in their infancy in many Member States, as was also emphasised during the round table exchanges at the meeting of the group of regulators in Brussels on 16 November 2012. In several countries, there is no notification requirement for on-demand audiovisual media services, which may render the identification of providers difficult. The level of awareness of users with regard to complaint procedures for VOD material and the appropriateness of complaint-handling mechanisms have also been identified as relevant issues for consultation by the recent Green Paper published by the European Commission.

- Non-compliance with labelling of VOD programmes, watershed and family zone provisions

On the occasion of its annual supervision for 2011, the **CSA of the French speaking Community of Belgium** noticed that several programmes in VOD catalogues were not labelled with the appropriate symbols as set up by the regulatory framework. The provider was not sanctioned but was reminded of its duty to have a clear editorial policy with regard to protection of minors and to establish a coherent system of programme classification and will now be subject to reinforced scrutiny (specific monitoring)³⁷. The case also highlighted the difficulties raised by the absence of a Belgian reference system for the labelling of films and the sometimes diverging assessment made by foreign systems, e.g. French CNC vs. Dutch Kijkwijzer.

In Slovakia, the **Council for Broadcasting and Retransmission** recently imposed a sanction of EUR 100 for not complying with the legal obligation according to which programmes in the catalogue must be labelled. On 19 February 2013, the Supreme Court of the Slovak Republic confirmed the CBR's decision.

In France, the **CSA** warned two on-demand services providers on 16 October 2012. The CSA noted that the VOD service 'KZ Play' showed four free-to-air excerpts from the Manga 'No

³⁵ Minutes of the 35th meeting of the Contact Committee, 23 November 2011: http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact_comm/35_minutes_en.pdf, quoted by Alexander Scheuer and Christina Bachmeier, op. cit. p.13

³⁶ <http://www.epra.org/attachments/portoroz-plenary-1-new-services-and-scope-what-s-in-what-s-out-revisited-paper--2>

³⁷ Décision du Collège d'autorisation et de contrôle du 4 octobre 2012 http://csa.be/system/documents_files/1870/original/CAC_20121004_decision_SiA_2011.pdf?1350652248

Money' containing sequences of a sexual nature without displaying the proper pictogram, and did not comply with the transmission time restrictions which would have required such videos to be shown from 22:00 to 5:00³⁸. In the case of the catch-up service 'my TF1', the CSA noticed the presence of advertising for a video game labelled 16+ in the family zone (espace de confiance) of the catalogue³⁹.

In **Sweden**, in 2012 the Swedish chancellor of justice came to the conclusion that the TV-series 'The Pacific', which contained scenes of realistic violence, provided on the VOD service of Swedish public service broadcaster SVT, was in breach with the Swedish Radio and Television Act. The broadcaster had failed to take appropriate measures to hinder children from watching the programme.

- Access restrictions to seriously harmful content

In the Netherlands, **the CvdM** recently asked the Special Committee on seriously harmful programmes for an opinion in the case of an on-demand service of a private media service provider. The issue was about a pornographic video website showing fictional video clips of women being raped. The videos were fully accessible and without any restrictions such as age verification. The final formal advice of the committee is still pending yet but the most likely outcome is that the service will be considered as seriously harmful. As a consequence, the access to these videos will have to be restricted in order to ensure that minors cannot see it.

On 15 April 2013, the ATVOD published a determination that three 'adult' VOD services had breached statutory rules requiring providers to ensure that under 18s cannot normally access hardcore pornographic content. ATVOD's most recent findings against the online VOD providers 'Studio66 TV', 'G Spot Productions' and 'Abused Piggy', brought to 17 the number of adult services which were challenged by the co-regulator over the last 18 months. Several investigations have resulted in significant financial penalties.

On 16 January 2013, Ofcom imposed a fine of £100,000 on the service provider Playboy TV/Benelux Limited⁴⁰ for failing to protect children from potentially harmful pornographic material. Two on-demand programme services owned by Playboy allowed users to access hardcore videos and images without having acceptable controls in place to check that users were aged 18 or over. Ofcom concluded that Playboy's failure to protect children from potentially accessing these sites was serious, repeated and reckless. Playboy TV and Demand Adult had breached Rule 11 of the ATVOD by having no effective systems in place to protect under 18s from unsuitable free and paid-for content. Due to the serious nature of these breaches, financial penalties of £65,000 (Demand Adult) and £35,000 (Playboy TV) have been imposed on Playboy.

On 7 December 2012, Ofcom imposed a financial penalty of £60,000 on Strictly Broadband Limited in respect of its on-demand programmes service, provided through its website, 'Strictly Broadband'⁴¹. Between 31 May and 1 August 2012, users of the website could access sexually

³⁸ <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Manga-No-Money-intervention-aupres-du-service-KZ-Play>

³⁹ <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Publicite-pour-un-jeu-video-deconseille-aux-moins-de-16-ans-intervention-aupres-de-MYTF1>

⁴⁰ Playboy TV Decision: http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Playboy_TV_Sanction.pdf Demand Adult Decision: http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Demand_Adult.pdf

see also ATVOD's determinations: <http://www.atvod.co.uk/complaints/complaint-determinations>

⁴¹ Full sanction decision: http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Strictly-Broadband.pdf?utm_source=updates&utm_medium=email&utm_campaign=strictly-boardband-ondemand

explicit R18 equivalent material, without a system in place that would effectively restrict those under 18 from accessing it.

VI. CONCLUSION

On transposing Art. 12 AVMSD and the variety of national concepts

- As a rule, national provisions implementing the AVMSD do not include a definition of *“might seriously impair the development of minors”* and *“is likely to impair the development of minors”*.
- In order to get a comprehensive picture, it is imperative to look at how transposed provisions relate with pre-existing national concepts and classifications.
- Most countries have implemented the graduated approach of the AVMSD and allow material which might seriously impair the development of minors on VOD provided it is not accessible for minors.
- Several countries have opted for a stricter legal approach and have either introduced a general prohibition for material which might seriously impair the development of minors on VOD, or impose some measures for VOD material which is likely to impair the development of minors.

On guidance and rules issued by regulatory authorities

- Only a few NRAs have issued specific rules and guidance on the protection of minors on on-demand AVMS. **France, Italy and the UK** have adopted specific rules and guidance on technical arrangements.
- Several NRAs in **Bulgaria, Croatia, Germany** and **Slovenia** have issued rules and guidance for the protection of minors on AVMS, whether linear or on-demand.

On research, reports and public consultations conducted by NRAs

- Very few NRAs have conducted research on the protection of minors on on-demand media services. The most extensive research so far is Ofcom’s report to DCMS on Sexually Explicit Material and Video On Demand Services. The **Slovenian APEK** is the only NRA currently conducting a public consultation on the protection of minors on VOD.

On the role of co and self-regulation relating to the protection of minors on VOD

- Based on a wide-ranging definition of co-regulation, almost all European countries have implemented a system that involves some shared responsibility between the provider and the media regulatory authority. A distinction should be made between fully-fledged co-regulatory systems that have been implemented specifically for on-demand media services as in the UK or Ireland, fully-fledged co-regulatory systems applicable to both linear and non-linear services as in Germany and traditional systems that may include some elements of self and co-regulation as in most other countries.

On the issue of Technical Restrictions

- The requirements concerning the technical measures necessary to prevent minors from viewing content that might seriously impair their development are not specified in the AVMS Directive.

- Most Member States report a combination of access restriction measures to prevent access to minors to content of some VOD services, mostly based on content-based classification and age verification controls.
- Whereas some technical measures originate from the TV world (watershed, labeling/signaletique), other measures come predominantly from the Internet world (age verification controls such as Pay-wall, pre-locking PIN/codes)
- In most countries, the legislator did not prescribe the specific technical measures which would be considered as adequate and sufficient. However, the use of personal identification number to prevent minors from accessing harmful material is prescribed by by-laws or administrative provisions in Italy, France and the French Community of Belgium. Provisions may go as far as to specify the modes of communication of the PIN code, and whether it should be applied 'by default'. In the UK, ATVOD provides guidance on effective Content Access Control Systems and the type of payment card. In Germany, the KJM has developed key criteria based on identification and authentication that service providers need to follow to ensure that access to the content which would seriously impairs minors is only possible only for adults by means of a closed user group.
- Other reported measures include certified technical systems for the protection of minors on the Internet (Germany) and dedicated areas in catalogues either for adult content and/or family zone (France/Spain).
- The Czech and Slovak NRAs currently deem the use of a qualified disclaimer as a sufficient measure to fulfil legal requirements.

On recent decisions and cases

- Only a few cases were reported. They deal with the non-compliance with labelling of VOD programmes, watershed and family zone provisions (Belgium, French speaking, France, Slovakia).
- Most cases emanate from the UK. 17 adult services were challenged by co-regulator ATVOD over the last 18 months for breach of statutory rules requiring VOD providers to ensure that under 18s cannot normally access hardcore pornographic content. Several heavy fines were also recently imposed by Ofcom.

ANNEXES

Useful (Recent) Reference Documents**Recent relevant EPRA documents:**

- *New Media & Protection of Minors*: Introduction by Helen Keefe, Ofcom, UK for the Working group 3 on New Media & protection of minors: industry roundtable, 34th EPRA Meeting: Brussels, 5-7 October 2011
<http://www.epra.org/attachments/1885>
- *Media Literacy*: Comparative background paper EPRA/2008/02 on Media Literacy – what role for the regulators? ; prepared for the 27th EPRA meeting, Riga, 14-16 May 2008:
<http://www.epra.org/attachments/272>
- *Scope*: Comparative Background paper (EPRA/2012/02a) for the Plenary session: "New Services and Scope: What's in, What's out Revisited", 35th EPRA Meeting, Portorož, 30 May – 1 June 2012
<http://www.epra.org/attachments/portoroz-plenary-1-new-services-and-scope-what-s-in-what-s-out-revisited-paper--2>
- *Scope*: Content regulation & New Media: Exploring Regulatory Boundaries between Traditional & new Media (Plenary Session) Comparative background paper
<http://www.epra.org/attachments/102>

European Commission Documents:

- *Green Paper*: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, Brussels, 24.4.2013, COM(2013) 231 final: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/convergence_green_paper_en_0.pdf
- *Protecting Children in the Digital World*: Report from the Commission (...) on the application of the Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity and of the Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and online information services industry: (COM/2011/0556 final), of 13 September 2011
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0556:EN:NOT>
- COMMISSION STAFF WORKING PAPER Accompanying the document, SEC(2011) 1043 (final)
http://ec.europa.eu/avpolicy/docs/reg/minors/2011_report/swp_en.pdf
- Digital Agenda: Coalition of top tech & media companies to make internet better place for our kids:
http://ec.europa.eu/information_society/activities/sip/self_reg/index_en.htm
- Statement of purpose:
http://ec.europa.eu/information_society/activities/sip/docs/ceo_coalition/ceo_coalition_statement.pdf
- Report of mid-term review meeting of the CEO coalition to make the internet a better place for kids - July 2012
http://ec.europa.eu/information_society/activities/sip/docs/ceo_coalition/classif_responses.xlsx
<http://www2.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20III/Reports/EUKidsOnlineReportfortheCEOCoalition.pdf>

Other Documents of Interest:

- Alexander Scheuer and Christina Bachmaier in *Protection of Minors and Audiovisual Content On-Demand*, p.11, IRIS PLUS, 2012-6, p.11, Lead article by Alexander Scheuer and Christina Bachmaier, Institute for European Media Law available under:
http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus6LA_2012.pdf.en
- *Sexually Explicit Material and Video On Demand Services*, A Report to DCMS by Ofcom
<http://stakeholders.ofcom.org.uk/binaries/internet/explicit-material-vod.pdf>
- *ATVOD Submission to the UK Council for Child Internet Safety on parental controls*, September 2012:
http://www.atvod.co.uk/uploads/files/Parental_controls_consultation_-_ATVOD_response_FINAL.pdf

Table 3: Indicative table of material considered by NRAs as “might seriously impair the development of minors” and likely to impair the development of minors”

Country	Seriously impair	Likely to impair
BE (VRM)	(Flemish Media Act) programmes containing pornographic scenes or unnecessary violence.	(not in media act) A possible example could be offensive language.
BE (CSA)	(décret SMA, art.9) programmes containing pornographic scenes or unnecessary violence BANNED ON VOD	Programmes classified -10, -12, -16 and -18
CY	Programmes that contain pornographic scenes (rated A) or scenes of unjustifiable violence (rated 18).	Programmes that contain horror/ violence/sexuality/offensive language but not to an extreme degree (-15 and -18 rated programmes)
DE	1. Illegal material (Art. 4 JMStV) BANNED ON VOD 2. pornographic content, certain listed (indexed) content and content which obviously seriously impairs minors (Interstate Treaty on the Protection of Minors - JMStV)	Depictions of violence which could impair the development of minors are assessed according to the following criteria: <ul style="list-style-type: none"> • depictions of violence which are typical for the genre in question • close orientation of genre on reality • basic atmosphere of the content • extensive scenes of violence • suspense potential of the content • context in which violence occurs; potential for identification by characters committing acts of violence • concept of the film Criteria for assessing depictions of sexuality which can impair the development of minors: <ul style="list-style-type: none"> • depictions of sexuality which do not correspond to the development of children and adolescents such as unusual sexual practices • stereotype roles of the sexes involving discriminating patterns of behaviour • connection of sexuality and violence, in particular where children or adolescents are concerned • playing down or idealising prostitution or promiscuous behaviour
ES (CAC)	Article 7.2, Spanish General Law 7/2010, of 31 March, of Audiovisual Communication “scenes of pornography and gratuitous violence”.	7 criteria for evaluating the harmful nature of the content and rule the age classification: <ul style="list-style-type: none"> • Violence • Sex • Fear and Anxiety • Drugs • Discrimination, Racism and Xenophobia • Rude language • Uncivil conducts and values. Reiteration of these criteria, lack of justification and other considerations in a program determine age qualification. Contents which are likely to impair minor's development are classified as “18” content and must be broadcast between 22:00 – 06:00.
FR	1. Illegal programmes, i.e. - Programmes which attempt to human dignity, particularly programmes which are dedicated to the representation of violence or sexual perversions, degrading to the human person or	Programmes classified -10, -12, and -16 - 16: <i>E.g. Emmanuelle, Eastern Promises, Saw, Trainspotting, Ken Park, Spartacus, Hard.</i> -12: <i>E.g. The Godfather, Scream, the Sixth Sense, Jaws, Bad Education, Dexter, the Tudors.</i> -10: <i>E.g. French version of Big Brother, American Pie, American Dad, Spiderman 2.</i>

	<p>which lead to its debasement.</p> <ul style="list-style-type: none"> - Child pornographic programmes or programmes of hardcore violence. <p>BANNED ON VOD</p> <p>2. Programmes classified -18: Pornographic and extremely violent + content made for adults</p>	
GR	<p>(Law) pornographic material or scenes of extreme violence scenes of physical or verbal violence during news programmes unless necessary for the information of the public</p>	
HR		<p>Rules on Protection of minors, Art. 2, par 1. OG 60/10: programmes containing gratuitous violence, sex, vulgar expressions and scenes, scenes of drug or tobacco abuse as well as other scenes which are likely to impair the physical, mental or moral development of minors.</p>
IT	<p>(Art n. 34 of Italian AVMS Code, adopted in 2005, last amended in 2012): in particular, programmes that involve pornography or programmes with scenes of gratuitous, insistent or brutal violence, including cinematographic works classified as unsuitable for minors under 18.</p>	<p>In particular, cinematographic works classified as not suitable for minors under 14, or films showing sex or violence.</p>
LT		<ul style="list-style-type: none"> - N-7 (programmes, which might have harmful information for children under 7), - N-14 (programmes, which might have harmful information for minors under 14, - S (programmes, which might have harmful information for minors under 18
MT	<p>Examples: explicit sexual content, extreme violence, substance abuse and glorification of gangs/deviant lifestyles</p>	<p>Other images depicting the broadcast of human suffering, personal family tragedies and unrealistic scenarios in reality shows are among the examples which may constitute a likely impairment</p>
NO	<p>Same criteria as "likely to impair" but the "effect" or "feeling" must last for a somewhat longer period of time, for instance causing nightmares or other traumatic experiences. Gross violence and explicit pornographic content is most likely to be considered to seriously impair minors. The same applies to content which is close to being prohibited to spread in Norway in accordance</p>	<p>Content which might be frightening, disquieting or cause anxiety for minors both when watching but also in a short period after watching the content, and content which might make minors confused with regard to fundamental moral issues in the Norwegian society.</p> <p>The content is evaluated in context and on the basis of how it is presented. There is no specific list of content that is considered to "likely impair" - context and presentation defines whether or not the Media Authority finds the content in violation of the watershed (which is at 9PM). However, violence and soft pornographic content (not explicit) may often fall into this category. Age classification: All, 7, 11, 15 and 18. Content with age limit All, 7 and 11 may be broadcast before 9PM (age limit 11 between 7PM and 9PM). Content with age limit 15 and 18 must be broadcast after 9PM.</p>

	with specific provisions in the Penal Code.	
PL		<p>Regulation of the NBC (KRRiT) of 23 June 2005 concerning the classification of programmes or other broadcasts that might have an adverse impact upon a healthy physical, mental or moral development of minors and programmes or other broadcasts intended for a given age group of minors, use of graphic symbols and forms of announcements"</p> <p>(http://www.krrit.gov.pl/Data/Files/_public/pliki/regulations/23june2005.pdf) and specially it's "Appendix 3"</p> <p>(http://www.krrit.gov.pl/Data/Files/_public/pliki/regulations/23june2005_zal3.pdf) are helpful and describe material which might be improper for different age groups</p>
RO	Pornography or gratuitous violence	<p>Decision no. 320/2012 concerning the provision of on demand audiovisual media services:</p> <ul style="list-style-type: none"> - "PA" (Parental agreement); - "12" - "15" - "18"
SE	Extreme horror, violence of a realistic nature and pornography	Dangerous behaviour, misuse of drugs and alcohol, violence (not only extreme and realistic, also content that might be frightening to children) and sexual content (not necessarily pornography). The SBA has not decided on offensive language since 1992.
SK	pornography, gratuitous violence	<p>criteria for "under 18" classification.</p> <ul style="list-style-type: none"> - images of violence, in particular images of the cruel or inhumane maltreatment or violent death of a human being especially showing no mercy, portrayals of physically or mentally abused or suffering persons, demonstrations of groups of person with pathological behaviour standards or the presentation of dangerous or deliberately risky situations as an attractive form of amusement, - verbal aggressiveness, profane language, obscene expressions or gestures, - presentation of any demonstrations of intolerance or hatred, xenophobia, racism, religious discrimination and intolerance, violence against ethnic or other minorities or the presentation of chicanery (in the meaning of harassment), - images or presentation of various forms of addiction, including alcoholism, smoking, drug abuse or gambling in an amusing form, or depiction of the use of weapons as a means of aggression or promiscuous sexual behaviour in an amusing form, - images of erotic instruments or erotic scenes made exclusively for erotic presentation purposes, - sexual scenes or behaviour presented as a form of amusement as well as scenes with elements of sexual violence or sexual deviations, or - horror scenes evoking emotional feelings of fear or anxiety.