

This article is published in a peer-reviewed section of the Utrecht Law Review

Towards a Future-Proof Framework for the Protection of Minors in European Audiovisual Media

Madeleine de Cock Buning*

1. Introduction

The current regulatory and supervisory arrangements for the protection of minors in audiovisual media need urgent re-evaluation.¹ This is fuelled by the dominant trend of the convergence of differently regulated media in Europe's media landscape and the importance of a level playing field as a necessary condition for qualitative and diverse media in our European democratic societies.² Especially the protection of vulnerable groups such as minors has become an ever greater challenge. The protection of minors is therefore considered to be one of the key issues for the European audiovisual media policy in the coming years.³

In this contribution we will examine whether the implementation of a private-public regulatory and enforcement regime can be an effective and flexible way of regulating the protection of minors in the rapidly changing audiovisual media sector.⁴

More specifically, a shared private-public regulatory and enforcement regime that is currently in place for the protection of minors in the traditional linear audiovisual media sector in the Netherlands shall be examined. Its potential to be implemented for other forms of regulation and supervision to modern mass media on a European level shall be analyzed. Could such a system be used for on-demand

* Madeleine de Cock Buning (e-mail: m.decockbuning@uu.nl) is Professor of Copyright, Media and Communications Law at the Utrecht University School of Law (RENFORCE/CIER), Chair of the Board of the Dutch Media Authority (CvdM) and Vice-Chair of the European Regulators Group for Audiovisual Media Services (ERGA).

1 P. Iosfidis, 'The emerging Governance Patterns in Media and Communications', in E. Psychogiopoulou (ed.), *Media Policies Revisited: The Challenge for Media Freedom and Independence*, 2014, pp. 7-22; M. de Cock Buning, *De mediamachine als zevenkoppig monster* (inaugural speech, Utrecht University), 2006.

2 S. Papathanassopoulos & R. Negrine, *European Media*, 2011; J. Bardoel & J. van Cuilenburg, *Communicatieveleid en communicatiemarkt, over beleid, economie en management voor de communicatiesector*, 2003, pp. 14 et seq.; E.J., Dommering, *Informatierecht, fundamentele rechten voor de informatiesamenleving*, 2003; F.W. Grosheide & M. de Cock Buning, *Hoofdstukken Communicatie- & Mediarecht*, 2007, pp. 28 et seq.; *Focus op functies: uitdagingen voor een toekomstbestendig mediabeleid*, WRR report, 2005.

3 *Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, Brussels, 24.4.2013, COM(2013) 231 final.

4 Demmke carried out research on the flexibility of public-private arrangements in environmental law. Ch. Demmke, *Towards Effective Environmental Regulation: Innovative Approaches in Implementing and Enforcing European Environmental Law and Policy*, Academy of European Law online, partnership between the Jean Monnet Center, NYU School of Law and the Academy of European Law, the European University Institute, 2001. At <<http://www.jeanmonnetprogram.org/archive/papers/01/010501.html>>, last visited 8 December 2014.

audiovisual media services (AVMS)⁵ as well as for user-generated content (USG)⁶ In this contribution we focus on content media within their specific fundamental rights context; games are left outside the scope of this article.

For this we will start by outlining the main features of co-regulation as is currently in place for the protection of minors in the traditional linear audiovisual media sector in the Netherlands (Section 1). After this we will look into the challenges and obstacles with the application of co-regulatory arrangements in general (Section 2), and further elaborate on the challenges which are specific to the application of co-regulatory arrangements for European audiovisual media (Section 3).

Adding these challenges to the overwhelming developments in the field of audiovisual media (Section 4) and after placing this in the current European regulatory context (Section 5), seven conditions for successful private-public arrangements for the protection of minors in the modern audiovisual landscape will be defined (Section 6). In the conclusion we will summarize our findings and will look at some of the lessons learned (Section 7).

2. Private-public arrangements: the co-regulatory triangle

The focus in this contribution is on co-regulation as a shared private-public regulatory and enforcement regime. Co-regulation is a rather broad notion; it encompasses a range of different regulatory phenomena.⁷ It is a hybrid regulatory form providing a legal link between self-regulation and general legislation.⁸ Grabosky and Braithwaite⁹ consider co-regulation as a form of enforced self-regulation.¹⁰ Co-regulation is generally considered an attractive option by supervisory authorities that have to live up to ever greater societal expectations of the efficiency of their supervisory activities with rapidly shrinking budgets. In this contribution we examine co-regulation that comprises both regulatory as well as supervisory aspects. Such co-regulatory forms require the creation of a specific organization that deals with private supervision and regulation. It has to have certain discretionary powers, as well as regulation and procedures to influence decisions implemented and accomplished by the addressees of the norm.¹¹

5 On-demand audiovisual media service (i.e. a non-linear audiovisual media service) is defined in the Audiovisual Media Services Directive as an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider, Art. 1(g), Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95, 15.4.2010, pp. 1-24 consolidating Council Directive 89/552/EEC, OJ L 298, 17.10.1989, p. 23, Directive 97/36/EC of the European Parliament and of the Council OJ L 202, 30.7.1997, p. 60 and Directive 2007/65/EC of the European Parliament and of the Council OJ L 332, 18.12.2007, p. 27.

6 User-Generated Content is defined as 'Any form of content such as blogs, wikis, discussion forums, posts, chats, tweets, podcasting, pins, digital images, video, audio files, and other forms of media that was created by users of an online system or service, often made available via social media websites.', T. Chua et al., *Mining user generated content*, 2014, p. 7.

7 Ch.T. Marsden, 'Internet Co-Regulation and Constitutionalism: Towards a More Nuanced View', 2012 *International Review of Law, Computers & Technology* 26, no. 2-3, pp. 211-228.

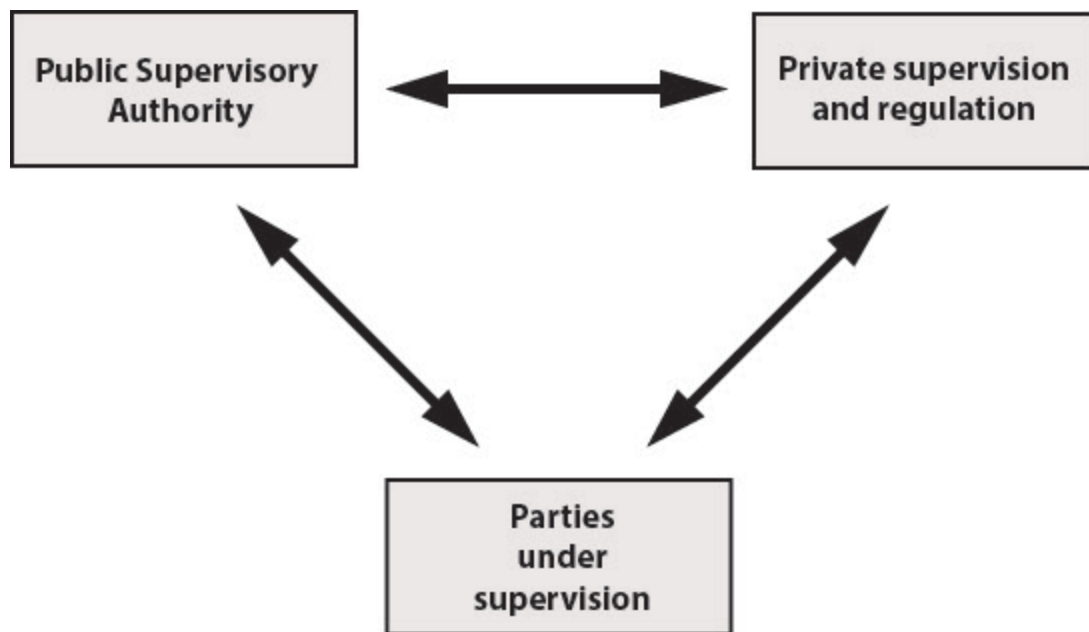
8 I. Bartle & P. Vass, *Self-Regulation and the Regulatory State: A Survey of Policy and Practice*, Centre for the Study of Regulated Industries (CRI): Research Report 17, University of Bath, 2005.

9 P. Grabosky & J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, 1986.

10 Self-regulation is a voluntary initiative that enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves, Interinstitutional agreement on better law-making (2003/C 321/01), OJ C 321, 31.12.2003, pp. 1-5, Preamble 22.

11 H.G. van der Voort, *Naar een drie-eenheid van co-regulering* (dissertation TU Delft), 2013.

Figure 1 Three actors involved in co-regulation: the parties under supervision, the public supervisory authority and, as the third actor involved, an entity of private supervision and regulation with discretionary powers to influence decisions by the parties under supervision.



Co-regulation can be beneficial to both the public partner and the private partners. Such combinations of hard and soft law can enhance the effectiveness, efficiency and legitimacy of regulation and supervision.¹² Schooten and Verschuuren point at co-regulation as one of the emerging forms of smart regulation.¹³ Private organizations can profit from co-regulation because of the positive effects for the legitimacy of their private regulation. Their privately installed regulation is given an official status through co-regulation; this prevents criticism of alleged ‘window-dressing’ by private parties. Co-regulation is expected to create win-win situations by satisfying various interests and thereby creating stronger support for the regulation at hand.¹⁴ This makes compliance with such rules more self-evident and enforcement less necessary. Today such aspects of co-regulation are especially important, given the current reality of an ever heavier supervisory burden due to the higher density of (traditional) rules and regulations that aim at regulating augmented societal complexity. Due to this development, supervisory authorities have been confronted with a substantive increase in their workload; more and more tasks are being added to their work programmes.¹⁵ This is especially true for authorities that have to supervise domains with a high technological change rate such as telecommunications and the audiovisual media. Further to this, supervisory authorities have to be very cost-efficient due to repetitive budget cuts.¹⁶

Building a system of co-regulation can however be quite an investment. Cost reduction cannot therefore be the only argument in favour of gearing towards such a system.¹⁷ Honingh and Helderma identify as co-regulation’s most important positive feature the augmented learning abilities of organizations. In classical vertical regulation and supervision arrangements the parties involved hardly get any insight into the causes of the violations within the organization and the reasoning behind the norms because they are less involved in both the matters at stake and the procedures surrounding the norms; parties therefore experience a larger distance. On the other side, co-regulatory arrangements can create learning

12 I. Ayres & J. Braithwaite, *Responsive Regulation: transcending the deregulation debate*, 1992.

13 H. van Schooten & J. Verschuuren, *International Governance and law: state regulation and non-state law*, 2008.

14 B.D. Dorbeck-Jung et al., ‘Contested hybridization of regulation: failure of the Dutch regulatory system to protect minors from harmful media’, 2010 *Regulation & Governance* 4, no. 2, pp. 154-174, p. 155.

15 A. Ottow, *De markt meester? De zoektocht naar nieuwe vormen van toezicht*, 2009, p. 15.

16 M. de Cock Buning, ‘Zicht op toezicht’, 2013 *Tijdschrift voor toezicht*, no. 2, pp. 3-7.

17 M.E. Honingh & J.K. Helderma, ‘Voor wie of wat is systeemtoezicht zinvol?’, 2010 *Tijdschrift voor Toezicht*, no. 2, pp. 6-25, p. 13.

organizations.¹⁸ Such organizations have a much larger possibility of future improvements. According to Honingh and Helderma this learning ability may very well be one of the largest advantages of co-regulation in a sector.¹⁹ Working together in a co-regulatory system by sharing norms and procedures between private and public partners can generate a true understanding of each other's positions, the normative framework and the underlying policy goals. This learning effect between the public and private domains could indeed contribute to the prevention of future violations of norms by organizations in the audiovisual sector. It is through such means that regulatory authorities try to find creative ways of internalizing the regulatory norm.

Apart from these (mutual) benefits, there are also several substantive reasons to reconsider the regulatory arrangement in a certain legal domain towards a private-public arrangement of co-regulation instead of traditional regulation. Traditional command and control *top-down* regulation can have serious restrictions in dynamic sectors with a high change rate such as the audiovisual media.²⁰ First of all, such vertical traditional regulation is inflexible and will by default lag behind those innovative sectors that have a rapid pace of innovation. Secondly, there is often a knowledge gap among legislators with regard to technologies that are essential for the sector. Thirdly, traditional regulation can be blind to the practical interests of the actors in the system. Fourthly, forum shopping towards safe havens outside national territories is more likely to occur when only traditional regulation is in place.²¹ Fifthly, especially for legal domains that concur with the domain of fundamental rights, such as the freedom of expression which is relevant for the regulation of audiovisual media, government control should principally be as restrained as possible. On the other hand, exactly because of the fact that the fundamental right of the freedom of expression is at stake here, it is co-regulation rather than self-regulation that should have primacy; both self-censorship and censorship in general should equally be avoided.

2.1. Challenges and vulnerabilities of co-regulation

Apart from the obvious advantages of co-regulation, several serious challenges and vulnerabilities have to be noted also. The good cooperation between the partners involved that is necessary for the success of co-regulatory arrangements proves to be a significant challenge. Attitudes differ profoundly, from the learning attitude connected to private supervision to the control attitude of public authorities.²² Also the willingness to share information between the public and private partners can be a challenge. Private partners may fear that the information they share can be used against them by the public authority in some way or another. Distortions in collaborative relations and tension between the parties involved in co-regulation can have a negative effect on the effectiveness of public-private supervisory arrangements.

According to Van der Voort the potential success of co-regulation largely depends on the ability to diminish those tensions and potential distortions in the relationship between the partners. This requires constant interaction.²³ In his research on co-regulation Van der Voort makes three observations with regard to the challenges that seem to characterise the specific relations between the parties involved within co-regulatory arrangements.

First of all, Van der Voort points out the risk of only a partial commitment by public and private actors. Although co-regulation is generally an attractive option for all parties involved, the commitments which are essential for compliance turn out to be less attractive in practice. Concerns by public authorities about the incompatibilities of the private system, on the one side, and a fear by private actors that they will be too greatly influenced by public obligations, on the other side, can have a negative effect on the commitment of both parties involved. It can come to mere window-dressing instead of a true

18 Learning organizations can be framed in terms of the classical work of C. Argyris & D.A. Schön, *Organizational Learning: A theory of Action Perspective*, 1978, cited by Honingh & Helderma, *supra* note 17.

19 *Ibid.*, p. 25.

20 P. Valcke et al., 'Audiovisual Media Services in the EU. Next Generation Approach of Old Wine in New Barrels?', 2008 *Communications & Strategies* 71, no. 3, pp. 103-118; I. Onay, 'Regulating webcasting: An analysis of the Audiovisual Media Services Directive and the current Broadcasting law in the UK', 2009 *Computer Law & Security Review* 25, no. 4, pp. 335-351.

21 W. Schulz & T. Held, *Regulated self-regulation as a form of modern government*, Interim Report, Hans Bredow Institute for Media Research at the University of Hamburg, October 2001, p. 10.

22 H.G. van der Voort, *Naar een drie-eenheid van co-regulering* (dissertation TU Delft), 2013, p. 213.

23 H.G. van der Voort, 'Confrontaties van coregulering. Over bestuurlijke afstemming tussen publieke toezichthouders, private toezichthouders en ondertoezichtgestelden', 2011 *Tijdschrift voor Toezicht*, no. 2, p. 59.

commitment.²⁴ This risk is even more prominent when organizations have a large self-interest at stake that is not coherent with the general interest. Especially when commercial and public interests do not coincide, the latter are easily left aside. Another risk factor for true commitment is formalism on the side of either the public or private authority and stringently upholding only one's own public or private standards. The refusal to find common principles under the respective public and private standards can also lead to only a partial commitment by the private actors involved. When this tension is not resolved, low confidence in the co-regulatory system will result in relatively low compliance levels.

Secondly, Van der Voort points out the vulnerability for capture in co-regulatory arrangements. Cooperation by public supervisory authorities with the sector and individual organizations may result in them being captured by these private actors seeking to influence their decisions and in rules being applied too leniently. When they are too accommodating, public supervisory authorities are at risk of becoming too involved and of losing their objectivity. Especially employees who form the personal liaisons between the three organizations involved and have to deal with the tensions described above will have a higher risk of capture with a dominant preference for the (private) interests of the sector involved.

The third risk is the risk of overdesign where the public party tries to control the co-regulatory regime in such a way that risks are minimized, thereby making the public authority responsible for the system and causing the private parties involved to feel more at a distance and less responsible for the functioning and results of the co-regulatory system. This has a negative effect on the effectiveness of co-regulation.

Marsden outlines legitimacy and representation as other substantive risks of co-regulation.²⁵ In his research, that combines a multitude of other (empirical) studies, on the whole spectrum of 12 levels of self-regulation and co-regulation he identifies some form of (indirect) government involvement or funding at almost every level. According to Marsden 'bringing co-regulatory arrangements between government and corporations into the light can prove an aid to better regulatory strategy, taking into account the multiplicity of 'impure' European co-regulatory forms, whose impurity has led to their invisibility from narrower legal positivist analysis'. Marsden further suspects that this could even lead to the 'exposure of unconstitutional bargains and trade-offs made in the shadows but exposed to the sunlight of regulatory scrutiny'.

In a critical publication, specifically focusing on the protection of minors in over the counter media such as DVDs and games, Dorbeck-Jung et al. point to the fact that the potential pitfalls are poor combinations of regulatory tools, conflicts between private and public interests, and poor performance by certain (groups of) actors.²⁶ In their research they establish serious problems with compliance on the shop floors and in cinemas. They conclude that although the proper classification rate of the media in itself is high, it is the store and cinema personnel who refuse to apply it in daily practice by failing to check the young customers' age.²⁷ One should realize, however, that no meta-supervision by any public authority is in place for this part of the system involving retail distribution, making it in fact a form of self-regulation. Also given the fact that in this contribution we only focus on modern digitally communicated audiovisual media, over the counter sales as discussed by Dorbeck-Jung et al. – regulated in penal law; Article 240a Penal Code – are outside the scope of this contribution. The publication by Dorbeck-Jung et al. does however provide valuable insights into the challenges involved; the more actors that are involved in the process – as in this case, all the shop personnel are selling over the counter media – the greater the challenge of adhering to the norms by all those actors will be.

All these challenges demonstrate the necessity to make clear arrangements on what is expected of *all* the actors involved. Transparency and communication throughout the process and supervision, together with a clear design of the regulatory arrangements and tools, including critical meta-supervision, are therefore an absolute necessity.

24 M. Potoski & A. Prakash, 'A Club Theory Approach to Voluntary Programs', in M. Potoski & A. Prakash, *Voluntary Programs: A Club Theory Perspective*, 2009.

25 Ch.T. Marsden, 'Internet Co-Regulation and Constitutionalism: Towards a More Nuanced View', 2012 *International Review of Law, Computers & Technology* 26, no. 2-3, pp. 211-228.

26 B.D. Dorbeck-Jung et al., 'Contested hybridization of regulation: failure of the Dutch regulatory system to protect minors from harmful media', 2010 *Regulation & Governance* 4, no. 2, pp. 154-174, p. 156.

27 *Ibid.*, p. 163.

3. Shared private-public regulation and supervision for the protection of minors

An example of a co-regulatory arrangement for the protection of minors is the Dutch classification system²⁸ for linear audiovisual (broadcast) media, ‘*Kijkwijzer*’. In this section its characteristics will be elaborated upon. Furthermore, the contours of *Kijkwijzer*’s public-private regulatory and supervisory arrangement will be clarified in order to obtain a clear view of its relevant elements and its key factors of success.

3.1. *Kijkwijzer* as a classification tool

Kijkwijzer provides parental guidance using symbols and pictograms to classify audiovisual materials for television. *Kijkwijzer* is also used for wholesale DVDs, the physical distribution of video and at cinema entrances, but these forms of distribution are outside the scope of this contribution. *Kijkwijzer* provides information about the possible harmful effects of audiovisual content for minors.

Since the goal of a classification system is to inform parents about the possible harmful effects of television programmes and to help them to supervise children’s use of the media, the system aims to be transparent and flexible according to their needs and in order to be used on a large scale. *Kijkwijzer* is therefore actually based on substantial parental surveys as well as scientific research. Parents indicated in these surveys that age ratings²⁹ are considered as an important asset of such a system.³⁰ The age ratings are All Ages, 6, 9, 12, and 16.

Figure 2 Age rating



This research instigated by NICAM also indicates that the majority of parents prefer a system to include information on the content of media productions, not just the age classification. In particular, parents indicated a need to be informed about violence, frightening content, sexual content, discrimination, drug abuse and coarse language. *Kijkwijzer* reflects this parental expectation since it contains both age and content ratings. NICAM recognizes six categories of content that may have harmful effects on young people. These are violence, frightening content, sexual content, discrimination, hard drugs and the abusive use of soft drugs and alcohol, and coarse language.

Figure 3 Classification of content categories



28 Classification is the general process of categorizing content into classes according to its suitability for age groups, E. Wauters et al., *The use of labels to empower minors, parents and educators in the social media environment: An explanatory report*, 2013, p. 12.

29 Rating means evaluating single content objects such as media content against a general classification network, *ibid.*

30 P. Valkenburg et al., ‘Fright reactions to Television: A Child Survey’, 2007 *Communication Research* 27, pp. 82-99.

Kijkwijzer is not only based on consumer (parental) research but also on scientific theories and research on children and the media. *Kijkwijzer* furthermore benefits from an independent Academic Committee and an Advisory Committee to keep the rating up to standard and future-proof. It is obvious that 'harmfulness' cannot be easily assessed by objective standards. The decision on whether the content of media productions is possibly harmful is a rather subjective one, which reveals what is considered desirable for individuals in societies and cultures.³¹ Judgments about possible harmfulness are subjective and depend on the morals and standards of a particular time and place. For example, academic research has demonstrated that media violence may lead to aggressive behaviour by its young viewers.³² Whether or not this effect is considered harmful depends on the acceptance of a specific society towards the use of violence in human interaction. The classification of media productions therefore inevitably takes place within this subjective context. Especially given this subjectivity, it is very important that the decisions taken during the rating process are consistent and transparent. The subjectivity and culture-dependent nature of assessing the harmfulness of audiovisual media content also require that the system is very flexible. It must be open to criticism and must constantly adapt to new scientific insights and the (ever changing) moral values and expectations of society.

3.2. *Kijkwijzer's regulatory arrangement*

As early as the 1980s a political need was felt to arrange for the protection of minors against possible harmful audiovisual content. This was further fuelled in those years by the European Commission that urged measures for the protection of minors by its Member States. In the Netherlands the focus was soon on co-regulation for the protection of minors.

The Dutch *Kijkwijzer* system for broadcast media is based on the principle of co-regulation and was established in the Media Act in 2001. It was the Dutch audiovisual sector itself that was made primarily responsible for measures to protect young people against harmful influences. According to Article 4.1(2) of the Media Act (*Mediawet*), organizations that intend to broadcast audiovisual content are obliged to join an officially acknowledged classification organisation. Should they not comply with this, they are only allowed to air content that is suitable for *all* ages. This creates a strong incentive for self-regulation. By law the sector is required to arrange for the rating and classification of content that induces fear, shows brute aggression, shows drug abuse in a positive context, is pornographic or might otherwise be harmful for children under the age of sixteen. The companies classify the content they produce or distribute. According to the Media Act the system should include rules for timeslots for broadcasting specific content and the way the classification symbols are used.

The Netherlands Institute for the Classification of Audiovisual Media (*Nederlands Instituut voor de Classificatie van Audiovisuele Media, NICAM*³³) is formally acknowledged by the Ministry of Education, Culture and Science to act as the classification institution in the Netherlands on the basis of Article 4.2 Media Act. A classification organisation such as NICAM can only obtain government permission as a private actor in the co-regulatory system when it arranges for the independent supervision of its classification system. It should also have sufficient financial means.

Such a classification organisation should furthermore be able to show enough commitment from its stakeholders in the audiovisual sector, but also consumer representatives and experts in the field of the protection of minors. Meanwhile more than 1000 companies that form the entire Dutch audiovisual industry, including the interest groups that represent them, are members to NICAM's *Kijkwijzer*. These companies voluntarily rate the content on the basis of the *Kijkwijzer* rating system.

Kijkwijzer's co-regulatory design consists of a tripartite construction. System responsibility is established with NICAM that is responsible for the rating and the classification system for audiovisual content. NICAM functions in this respect as the private regulatory and supervisory entity. It has a complaint procedure that includes an appeal procedure and can impose fines of up to EUR 75,000. NICAM also provides for the coordination of new initiatives, a constant evaluation of the classification

31 P. Valkenburg et al., 'Kijkwijzer: The Dutch Rating System for Audiovisual Productions', paper published by NICAM on <www.kijkwijzer.nl>.

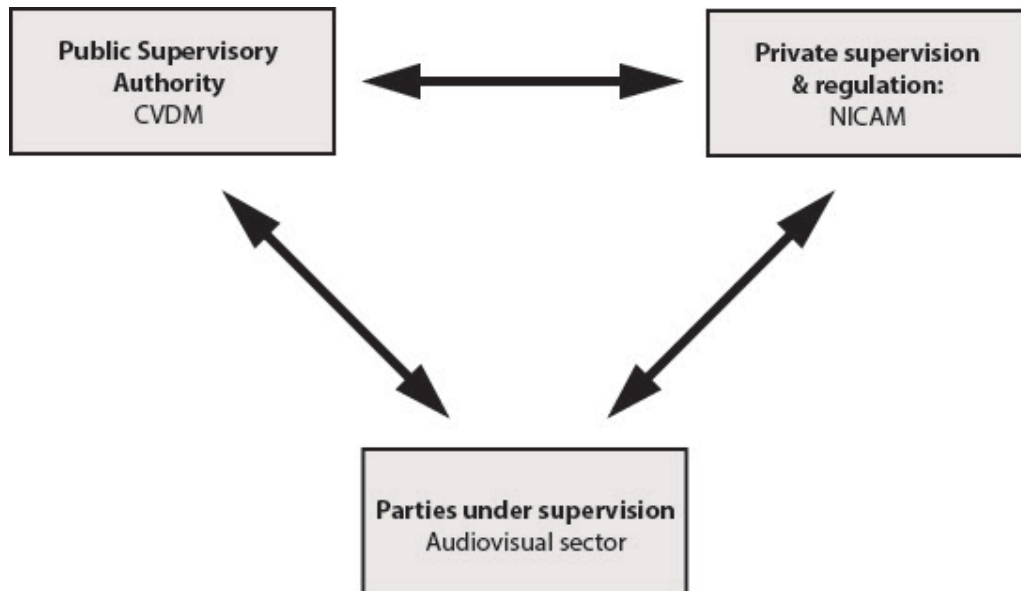
32 H. Paik & G. Comstock, 'The effects of television violence on antisocial behavior: A "meta-analysis"', 1994 *Communication Research* 21, pp. 516-546.

33 Established in 1999, <www.nicam.nl>.

criteria and the training of coders, those employees who are responsible for the classification within the media outlets.

On a meta level, both the functioning and the output of NICAM are supervised by an independent governing body, the Dutch Media Authority (*Commissariaat voor de Media, CvdM*).

Figure 4 Three parties involved in the public-private regulatory arrangement for the protection of minors.



As the Public Media Authority, the CvdM has a specific regulatory status.³⁴ As an independent governing body the CvdM upholds the rules which are formulated in the Dutch Media Act as well as in the regulations based on this act, such as the Media Decree (*Mediabesluit*). It is responsible for audiovisual content and the distribution of that content. It grants licences to broadcasters, registers video on demand (VOD) services and systematically monitors compliance with the rules on quotas, advertising and the protection of minors. The CvdM supervises the national public broadcasting (PSB) TV channels, approximately 300 local PSB TV channels, 250 commercially licensed TV channels (including around 10 main national private channels, many satellite channels and text TV services), the providers of VOD services and radio channels. The CvdM can issue warnings, impose fines and suspend or revoke a licence. If a sanctioning decision is not complied with, the CvdM can impose additional penalties.

With respect to the protection of minors, the CvdM has a specific task. The CvdM directly supervises the absolute prohibition of broadcast content that can cause *serious* damage to minors as laid down in Article 4.1(1) of the Dutch Media Act. Also with regard to the obligatory technical protection measures that are imposed by law on commercial websites that contain seriously harmful content offered on demand, the CvdM has a direct supervisory task. On a second level the CvdM is also responsible for the (meta) supervision of NICAM and the quality of its classification. It functions as a safety net for NICAM's co-regulation.³⁵ Within the framework of its meta supervision, NICAM reports in its annual quality assessment report to the CvdM on how it safeguards the quality of the coders' classification as reliable, valid, stable, consistent and precise. The process is laid down in an agreement between both parties. On the basis of its research CvdM reports yearly to the Ministry of Education, Culture and Science.

34 CvdM functions as a regulatory institution independently from the government. About three quarters of the budget comes from state funding and one quarter from surveillance fees paid by market players. Fines imposed are transferred to the state budget and will be used for purposes of media policy (in the widest sense).

35 Ch.T. Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace*, 2011, p. 154.

3.3. Key factors in the success of *Kijkwijzer*

During the years of its existence *Kijkwijzer*, as implemented by the audiovisual industry and facilitated and enforced by NICAM, has been stringently meta supervised by the independent government supervisory authority. With some exceptions both the quality and the quantity of rating and classification have proved to be up to standard according to CvdM as the public authority. Under this meta supervision and driven by its ambitious board NICAM is involved in a process of ongoing quality improvement. *Kijkwijzer* is widely accepted and implemented by the audiovisual industry and parents are well acquainted with and frequently use *Kijkwijzer*. *Kijkwijzer*'s co-regulatory arrangement is even considered a best practice for the broadcasting industry concerning the protection of minors.³⁶ What could be the key factors of this success?

An important aspect is validity. A rating system should be valid in such a way that the questions in the coding form are drawn up so as to result in the intended and desired age ratings. The system must be reliable and consistent. Various coders should in principle arrive at the same coding result. NICAM aims at an optimal design of the coding forms to that end. Therefore the possibility of coders filling in the same response to any particular question is maximized. This also requires enough competent coders who recognize children's cognitive level and have a perception of their environment at different ages. *Kijkwijzer* should furthermore constantly improve its quality and remain flexible in order to gain maximum acceptance; new content is constantly being developed and academic knowledge on the topic increases and changes over time.

Kijkwijzer is obviously a subjective system due to its partially subjective norms; what is considered to be sexually explicit by one, is considered to be natural by another. Interpretation plays a considerable role at several levels. The scientific research literature, that forms the basis of the coding system, is interpreted by the members of the academic committee. Also the coding performed by the industry itself is an interpretative process. This subjectivity is recognized by NICAM and is addressed by transparency and an openness to criticism. Both consumers and the industry itself should be able to check how a particular rating has come about and have access to the underlying mechanisms of the coding process. *Kijkwijzer* is therefore in principle applicable to any geopolitical scope, and also because of its flexibility and the evidence-based nature of its rating system.³⁷ *Kijkwijzer* has been implemented with government support in Turkey, Finland and Iceland. On several occasions other European countries have demonstrated their interest in introducing (at least certain elements of) *Kijkwijzer*.

Transparency, validity, reliability, consistency and flexibility all adding to societal acceptance have proven to be important factors for the success of *Kijkwijzer* as a co-regulatory system, not only on the side of the audiovisual media sector that has to comply with the classification system, but also on the consumer side. Acceptance by and the appreciation of parents is a key factor. The fact that NICAM is embedded in a co-regulatory arrangement, that it can, and regularly does, impose penalties on offenders and the fact that it is under critical meta supervision and validation by an independent government regulatory authority further strongly contributes to the effectiveness of this system for the protection for minors against harmful content.³⁸

4. A rapidly moving sector in a tight regulatory framework

After this overview of the functioning of a co-regulatory arrangement for the protection of minors in the traditional broadcasting domain, we will now look at the current developments in European media.

The European audiovisual sector operates against the contours of an extremely rapidly moving media landscape. The old (and long) evenings of passive TV watching with the family on the couch are increasingly being substituted by the individual use of new services. Millions of Europeans watch video on demand through websites like YouTube and Netflix or catch up with their favourite TV series on a computer or smartphone. In the meantime they can put their own user-generated content online or find

36 F. Sauerwein & M. Latzer, 'Regulatory choice in communications: the case of content-rating schemes in the audiovisual industry', 2010 *Journal of Broadcasting & Electronic Media* 54, no. 3, pp. 463-484.

37 Ch.T. Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace*, 2011, p. 155.

38 List of case files and penalties <<http://www.kijkwijzer.nl/behandelde-klachten/page181.html>>, last visited 8 December 2014.

out more about what they are watching or interact with either their friends or with the TV programme itself. Furthermore, in 2014 there are now more than 40.4 million Connected TVs³⁹ in Europe that fully integrate TV and the Internet. It is expected that these Connected TVs will be in the majority of EU households by 2016.⁴⁰

Traditional boundaries between consumers, broadcast media and the Internet are diminishing. Lines are blurring between the familiar 20th century consumption patterns of linear broadcasting received by TV sets versus on-demand services delivered to computers or Connected TVs. Moreover, with smartphones and tablets and converged production as well as the consumption of media content, there will be a further shift from 'lean-back' consumption to active participation.⁴¹ This progressive merger of traditional broadcast services and the Internet is known as 'convergence'. This trend towards convergence has long been forecast,⁴² but is now becoming a reality with the speed of the light. Although linear general viewing still occurs around four hours a day across the EU,⁴³ convergence is rapidly progressing at the same time. Technology already allows the user to create, distribute and access all types of content irrespective of the time, place or device.

The shift in the use of media by consumers, and particularly by children, including the growing use of on-demand services on the Internet is significant. Children are increasingly adding to their media consumption on-demand services through the Internet, on computers or on smartphones and tablets.⁴⁴ These technological developments offer many opportunities for these young audiences, but they also imply new challenges regarding their protection.

In a convergent era, the proliferation of different screens and devices makes it more and more difficult to ensure an appropriate level of protection for minors. An important question is therefore how to provide for such protection taking account of the specific character of this progressively converged world. It is a generally accepted notion that children should be safeguarded against potentially (seriously) harmful audiovisual content, no matter where it comes from.⁴⁵

This is especially a regulatory challenge, since the European regulatory framework as implemented in all of its Member States currently treats linear (television broadcasts) and non-linear (on-demand) services in different ways.⁴⁶ The original rationale behind these different approaches was a lack of scarcity in the on-demand environment, an assumed supposed lower level of impact and a higher level of user control. In the days of drafting the Audiovisual Media Services Directive, the fact that consumers would have more choice and greater control about what they view in on-demand services, since viewers have to actively visit on-demand content and are not suddenly confronted with it, gave rise to the belief that on-demand content would have less impact than linear content.⁴⁷

However, convergence and Connected TV are now blurring these lines. Consumers may sometimes find it hard to tell the difference. That is especially true for the recent generation of children who are being raised with iPads and laptops rather than with watching family programmes on TV while sitting on the couch together with their parents. Connected TVs as where linear and non-linear content come

39 A connected TV, also known as a smart tv or hybrid tv, fully integrates TV, computer and the Internet. It delivers content (photos, movies and music) and provides access to Internet-based services including traditional broadcast TV channels, catch-up services, video on demand (VOD), electronic program guides, interactive advertisements, games, and social networking.

40 *Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, Brussels, 24.4.2013, COM(2013) 231 final, p. 1.

41 *Ibid.*, p. 2.

42 M. de Cock Buning, *De mediamachine als zevenkoppig monster* (inaugural speech, Utrecht University), 2006, on Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, pp. 1-24 consolidating Council Directive 89/552/EEC, OJ L 298, 17.10.1989, p. 23, Directive 97/36/EC of the European Parliament and of the Council OJ L 202, 30.7.1997, p. 60 and Directive 2007/65/EC of the European Parliament and of the Council OJ L 332, 18.12.2007, p. 27.

43 *Yearbook of the European Audiovisual Observatory 2013*, Volume II, p. 171.

44 L. Haddon et al., *Children, Risk and Safety on the Internet, research and policy challenges in comparative perspective*, 2012.

45 O.C. Füg, 'Save the Children: The Protection of Minors in the Information Society and the Audiovisual Media service directive', 2008 *Journal of Consumer Policy*, pp. 45-61; Preamble to Directive 89/552/EEC, supra note 42.

46 M. de Cock Buning, *De mediamachine als zevenkoppig monster* (inaugural speech, Utrecht University), 2006.

47 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, Art. 4.7.

together, combined with the possibilities of e-commerce behind the red button further fuel this blurring development.

5. Regulatory context: the European framework for the protection of minors

After this short overview of the overwhelming developments in the field of audiovisual media, we will now look into the European regulatory framework that is currently under evaluation. This is the context for possible co-regulatory arrangements for the protection of minors on a European level. We will look at the Commission's view on co-regulatory arrangements in this domain. This is especially of relevance since European co-regulation presupposes the prior establishment of a general legislative framework by the European legislature and thus takes place within the scope of the Union's competence.⁴⁸

5.1. Fundamental rights involved

Independent media are of crucial importance for the functioning of the European Union, as well as its Member States. Both the European Convention on Human Rights of the Council of Europe and the Charter of Fundamental Rights of the European Union⁴⁹ determine that freedom of expression is the point of departure. Regulation should be a well-reasoned exception:

Article 11 Charter of Fundamental Rights:

- '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.'

According to Article 52 of the Charter these rights and freedoms have the same content and scope as Article 10 of the European Convention on Human Rights. Furthermore, according to Article 53 of the Charter nothing in the Charter can be interpreted as restricting fundamental rights as recognized by Union law and international law, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions. The limitations to this right can therefore not be further-reaching than those provided in Article 10(2):

Article 10 European Convention on Human Rights:

- '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

Before deciding on any regulatory arrangement in the field of the media where primacy principally lies with the freedom of expression, the crucial first question is therefore whether regulation and supervision

⁴⁸ L. Senden, 'Soft law, self-regulation and co-regulation in European law: where do they meet?', 2005 *Electronic Journal of Comparative Law* 9, no. 1, p. 26, <www.ejcl.org>.

⁴⁹ 2010/C 83/02.

in this specific domain for the public interest of the protection of minors is actually necessary and proportionate. This is especially relevant when content is made (partially) inaccessible to protect minors from its harmful effects on the basis of age ratings, for example when content that is considered harmful for minors is inaccessible before 9 p.m.

Referring to possible non-transparent governmental influence on co-regulatory arrangements, Marsden warns, especially in the domain of the Internet, against eventual 'shadowy co-regulatory arrangements (...) insufficiently constitutionally protective of the freedom of expression.'⁵⁰ He expects the Court of the European Union (CJEU) to be able to capture such an indirect influence within its web of rights for citizens and responsibilities for governments as codified in the Charter of Fundamental Rights. According to Lievens any regulation of the protection of minors against harmful media content 'must take into account an additional point of particular importance: the balance between the fundamental right of freedom of expression and the public-interest objective of protecting minors'.

The need to reflect on fundamental rights in regulatory arrangements is also recognized by the European Commission in the Audiovisual Media Services Directive (AVMSD):

'Measures taken to protect the physical, mental and moral development of minors and human dignity should be carefully balanced with the fundamental right to freedom of expression as laid down in the Charter on Fundamental Rights of the European Union.'⁵¹

5.2. Audiovisual Media Services Directive

The Audiovisual Media Services Directive (AVMSD) sets out a framework of rules to address the challenge of protecting minors concerning both linear and non-linear services. As indicated in Section 4, this regulatory system consists of two separate regimes, one for broadcast content and one for on-demand audiovisual content that can often be found online. However, nowadays this on-demand offer is often, but is not necessarily, exclusively distributed online. Often the same on-demand media service can be accessed through different platforms and techniques at the same time: an over the top application like the digital portal of a Smart TV, a managed network like IPTV, a digital package of a cable operator or a website accessible on the open internet. The current European regulatory framework as laid down in the AVMSD on the protection of minors in television broadcasting is formulated as follows.

Article 27

1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.
2. The measures provided for in paragraph 1 shall also extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.
3. In addition, when such programmes are broadcast in unencoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.⁵²

50 Ch.T. Marsden, 'Internet Co-Regulation and Constitutionalism: Towards a More Nuanced View', 2012 *International Review of Law, Computers & Technology* 26, no. 2-3, pp. 211-228.

51 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, pp. 1-24, Recital 60.

52 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, Art. 27.

The protection of minors in the on-demand world is however reflected as follows in the text of the AVMSD:

Article 12

‘Member States shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see such on-demand audio visual media services.’⁵³

This framework boils down to the following two different regimes. Content which *might seriously impair* minors cannot be included in any (linear) broadcast programme (Article 27(1)), and can only be made available on demand in such a way that ensures that minors will not normally hear or see such on-demand services (Article 12). Content which is *likely to impair minors* must be fenced off, by selecting the time of the broadcast or any other technical measure (e.g. encryption), so that minors in the area of transmission will not normally hear or see such a broadcast (Article 27(2) and 27(3)). For on-demand services there are no restrictions in this field. What exactly should be understood to be ‘seriously impairing’ for minors and ‘likely to impair’ the development of minors is left undefined and is up to the Member States to determine, taking into account the cultural differences involved.

As indicated, the Commission’s reasoning behind a less strict regime for on-demand content lies in the fact that its users make a conscious choice to watch it, whereas the content of (linear) broadcast programmes enter living rooms more spontaneously and thereby having a greater impact. One may however question whether this rationale is also valid for minors. In any case, in our fully converged audiovisual world where the dividing lines between television broadcasting and the Internet are blurred, such a system needs to be reconsidered with an eye on the core values behind the regulatory framework. This includes possible evolutions of the current regulatory framework interlocking the public and the private spheres.

5.3. European Commission stimulates co-regulatory arrangements but also has to take into account the Interinstitutional Agreement on better law-making

For many years, co-regulation has generally been viewed by European policy-makers as an effective means of protecting children against the harmful effects of audiovisual material. In this field co-regulation can be a valuable alternative to traditional *top-down* regulation.⁵⁴ This was already laid down in the recommendation from the Council of the European Union of 24 September 1998. This recommendation argued for an effective European rating system to protect young people by means of co-regulation. In the past few years the EU has been developing a new regulatory policy which increasingly puts emphasis on the use of instruments that are complementary to traditional command-and-control legislation. Senden points out that the aim of the diversification of the Union’s regulatory instruments is inspired by the concern to enhance the effectiveness, legitimacy and transparency of EU action.⁵⁵

Also in the context of its documents on better regulation the Commission has stressed that a careful analysis of the appropriate regulatory approach is necessary in order to establish whether legislation is preferable for the relevant sector and issue, or whether (also) alternatives such as co-regulation can be considered.⁵⁶ On the use of these alternative methods of regulation the Interinstitutional Agreement (IIA)

53 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, Art. 12.

54 P. Valcke et al., ‘Audiovisual Media Services in the EU. Next Generation Approach or Old Wine in New Barrels?’, 2008 *Communications & Strategies* 71, no. 3, pp. 103-118.

55 L. Senden, ‘Soft law, self-regulation and co-regulation in European law: where do they meet?’, 2005 *Electronic Journal of Comparative Law* 9, no. 1, <www.ejcl.org>.

56 Better regulation for growth and jobs in the European Union. Communication from the Commission to the Council and the European Parliament, COM(2005) 97 final, 16 March 2005.

on better law-making states that is the Community's obligation to legislate only where this is necessary, in accordance with the principles of subsidiarity and proportionality. Where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms can be used. Co-regulation and self-regulation should, however, always be consistent with Community law and be transparent. The parties that are the stakeholders in such alternative regulation should all be duly represented. However, the Interinstitutional Agreement on better law-making makes clear that these mechanisms will not be applicable where fundamental rights are at stake.⁵⁷ Given the fact that the fundamental right of freedom of expression is involved in this field, that has to be taken into account. While co-regulation can be a complementary method of implementing certain provisions of the Audiovisual Media Services Directive, it could not entirely constitute a substitute for the obligations of the national legislator. According to the AVMSD co-regulation should therefore allow for the possibility of state intervention in the event of its objectives not being met.⁵⁸

Co-regulatory instruments, implemented in accordance with the different legal traditions of the Member States and taking into account the fundamental rights aspects involved, can, however, play a role in delivering a high level of consumer protection. According to the European Commission, also measures aimed at achieving public interest objectives in the emerging audiovisual media services sector can be expected to be more effective if they are taken with the active support of the service providers themselves. The Commission therefore urges Member States, in accordance with their different legal traditions, to recognise the role which effective co-regulation can play as a complement to the legislative and judicial mechanisms in place.⁵⁹ The Audiovisual Media Services Directive therefore also explicitly encourages the use of co-regulation and self-regulation:

Article 4.7

'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.'⁶⁰

In almost all Member States responsibilities are somehow being shared with industry, educational institutions and parents, mostly through systems of co-regulation. Some Member States have implemented a classification system that involves some shared responsibility between the media service provider and the media authority, so far all primarily connected to (linear) broadcast content.

6. Towards successful co-regulation for minors in the modern European media landscape

Examining whether and under which conditions a co-regulatory system can be used for the effective protection of minors in the modern European media landscape, we will look at the opportunities and challenges to be expected. These opportunities and challenges will be elaborated upon in this section, but first we will look at the initiatives which have already been taken in this domain.

6.1. Recent initiatives and actions

Very recently Brussels has moved forward towards finding solutions to protect minors in a truly convergent audiovisual media world. The European Green Paper entitled 'Preparing for a Fully Converged Audiovisual

⁵⁷ Interinstitutional agreement on better law-making (2003/C 321/01), OJ C 321, 31.12.2003, Para. 17.

⁵⁸ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, Preamble 44.

⁵⁹ O. Castendyk et al., *European Media Law*, 2008.

⁶⁰ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, Art. 4(7).

World: Growth, Creation and Values'⁶¹ attempts to obtain feedback from Member States, stakeholders and supervisory authorities on the current rules on the protection of minors and mechanisms to ensure parental awareness. With traditional broadcast and online content available on the same TV screen in the living room, there are concerns that the current rules on children's access to content may not be up to date. The Commission points out that the substantive differences in the regulatory approach to different types of content on screen make it furthermore difficult for users to determine which authorities to complain to given the fact that various authorities are competent.

In its Green Paper⁶² the Commission refers to its framework that it set out in May 2012: the 'European Strategy for a Better Internet for Children.'⁶³ The strategy proposes a series of actions grouped around the main goals of, inter alia: stimulating the production of creative and educational online content for children as well as promoting positive online experiences for young children, scaling up awareness and empowerment including the teaching of digital literacy and online safety in EU schools and creating a safe environment for children through age-appropriate privacy settings, wider use of parental controls and age rating and content classification. It is the ambition of the Commission to have a generally applicable, transparent, and consistent approach to age rating and content classification within Europe.⁶⁴ The system should provide parents with understandable age categories. According to the Commission it is primarily the sector that should establish an age rating and content classification system which is applicable throughout Europe, building on the success of existing initiatives such as PEGI.⁶⁵ PEGI is an information system for digital games and is used in 30 countries. It uses standards and classifications that are uniform throughout almost all European countries. Major game companies take their rating responsibility very seriously, since they know that parents prefer information supplied by PEGI before they decide to buy a game. It is a form of enlightened self-interest that is also beneficial to the protection of minors. According to the Commission, building on the success of existing initiatives such as PEGI would include the deployment of interoperable platforms to provide age-appropriate services. Member States are invited to encourage relevant stakeholders at the national level to contribute to the definition and implementation of EU age-rating and content classification systems.

In its Green Paper the Commission also refers to an initiative by 31 leading companies across the value chain that have signed up to a Coalition to develop, through a self-regulatory process, appropriate measures for, inter alia, reporting tools for users, age-appropriate privacy settings, the wider use of content classification and a wider availability and use of parental control.⁶⁶ So it is the sector itself that has taken the first initiatives in this domain. MIRACLE is another initiative; it is a pilot project co-funded by the European Commission. It aims at developing a data scheme for age classification information, providing an infrastructure for interoperable and machine-readable age labels online.⁶⁷ MIRACLE will operate from February 2014 to July 2016.⁶⁸

Another initiative that has already been taken focuses on the rating of User Generated Content (UGC). It is the tool YouRateIT. NICAM, which is also behind *Kijkwijzer*, together with the British Board of Film Classification: BBFC, introduced this relatively simple tool to qualify user-generated content on UGC platforms such as YouTube on the basis of the answer to several simple questions.⁶⁹ YouRateIt applies uniform criteria and provides methods for national, tailored classifications. Currently, a pilot project is underway in Italy, set up by Mediaset in cooperation with the BBFC and NICAM. And there is the International Age Rating Coalition (IARC), a global initiative for the classification of apps, with

61 *Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, Brussels, 24.4.2013, COM(2013) 231 final.

62 Ibid.

63 *European Strategy for a Better Internet for Children*, Brussels, 2.5.2012 COM(2012) 196 final.

64 Ibid.

65 Pan European Game Information (PEGI), an age classification system for computer and video games.

66 *Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, Brussels, 24.4.2013 COM(2013) 231 final.

67 Labelling refers to the visible mark attached to a specific film, broadcast, on DVD, delivered online etc. There are numerous labelling schemes in use with the type of information they give and the method varying between different media platforms and countries. In broadcasting, for instance, films are often labelled by means of a visual symbol and/or in combination with a tonal signal, European Commission, background report on cross media rating and classification, and age verification solutions, Safer Internet Forum 2008, <<http://cnpl.lu/en/2008/09/25/1410/>>, last visited 1 December 2014.

68 <<http://www.miracle-label.eu/>>, NICAM is involved in this project together with BBFC, PEGI, FSM, NCBI, JUSPROG E.V. and OPTENET SA.

69 <<http://www.yourateit.eu/>>.

partners including USK, PEGI and ESRB. IARC applies global uniform standards, and app classifications tailored to specific continent.⁷⁰ IARC created a questionnaire based on the factors that rating authorities considers when assigning ratings. The IARC system currently includes the participation of rating authorities representing 36 countries, with more expected to participate in the future.

6.2. Positive indicators for the introduction of a pan-European co-regulatory system for cross-media classification

The initiatives that have already been taken can be added to the European consumer awareness on the subject.⁷¹ Parents want their children to be protected against harmful audiovisual content. Exactly this provides an inherent commercial incentive for the sector to voluntarily provide solutions to this parental concern. The sector could be made primarily responsible for and in control of the rating and classification system. This would also reflect the current trend to point out the social responsibility of all parties involved.⁷² Although many initiatives have already been taken and classification systems are more readily available, their use relies upon case-by-case solutions that vary greatly between and within Member States. Given the border-crossing nature of content today, pan-European solutions are therefore preferable.⁷³ This is also recognized by the Commission in its most recent documents.⁷⁴ The Commission furthermore stipulates that « given the convergent media landscape were all kinds of media content (...) can be streamed or downloaded on different (mobile) devices, the focus should be on innovative classification systems that could be used more widely across the ICT sector (manufacturers, host and content providers, etc.).⁷⁵ Therefore a pan-European cross-media classification system⁷⁶ would be the way forward.⁷⁷

Further to this, a co-regulatory arrangement with substantive checks and balances for the effective functioning of classification systems helps to avoid the failure of self-classification and would make redundant the need to take vertical legislative action at a later stage, thereby also taking account of the numerous challenges, for both regulatory and supervisory authorities, to audiovisual media. Regulating augmented societal complexity caused by a dazzling speed of innovation in the sector makes it very difficult to use vertical – *top-down* – control mechanisms. Co-regulatory arrangements can generally adapt flexibly along with the developments in the field. As indicated before, this is one of the most important assets of co-regulation for the new media sector. Making the sector a co-author and co-owner of a system for the protection of minors contributes positively to the internalization of the norm. Also with regard to fundamental rights one should be reticent with vertical regulation in the domain of freedom of expression.

70 <<https://www.globalratings.com>>.

71 Second Evaluation Report from the Commission to the Council and the European Parliament on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity, COM/2003/0776 final.

72 This responsibility is also underlined and supported by the European Commission in its *Green Paper: Promoting a European framework for corporate social responsibility*, DG for Employment and Social Affairs 19 July 2001, COM (2001) 366 final.

73 E. Wauters et al., *The use of labels to empower minors, parents and educators in the social media environment: An explanatory report*, 2013, p. 29.

74 *Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, Brussels, 24.4.2013, COM(2013) 231 final, with concrete suggestions by the Council of Europe; Recommendation CM/Rec(2009)5 of the Committee of Ministers to member states on measures to protect children against harmful content and behaviour and to promote their active participation in the new, information and communications environment, Adopted by the Committee of Ministers on 8 July 2009, <<https://wcd.coe.int/ViewDoc.jsp?id=1470045>>.

75 Report from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of Regions on the application of the Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity and the Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and online information services industry, *Protecting Children in the Digital World*, COM/2011/0556 final.

76 A rating and labelling system applying a one-stop classification mechanism independent from distribution platforms and similar categories of content across Europe

77 European Commission, Background Report on cross-media rating and classification and age verification solutions, Safer Internet Forum 2008, <<http://cnpl.lu/en/2008/09/25/1410/>>, last visited 1 December 2014.

6.3. Challenges to the introduction of a pan-European co-regulatory system

Although there are several positive indicators and some initiatives have already been taken, there are quite some challenges for a European-wide co-regulatory regime for the rating and classification of audiovisual content.

First of all, there are substantial cultural differences between the EU Member States.⁷⁸ For example, in the United Kingdom pornographic material that is rated over 18 years is considered to be seriously harmful content making it out of reach of co-regulation, whereas in the Netherlands unqualified pornographic material even if it is rated over 18 years does not fall into that category, making it subject to co-regulation.

Furthermore, also the sector should be truly willing to extend the co-regulatory system outside of the scope of broadcasting. It will be a challenge to align all of Europe's audiovisual industry behind this since the sector in some countries seems more inclined to make use of self-regulation than others. In Belgium (specifically in Flanders), for instance, the sector is very reluctant to use such a system.⁷⁹ The creation of incentives to join such a mechanism is crucial for its success, as we have learnt from Van der Voort in Section 2.1.⁸⁰

On the other side of the spectrum one may argue that the protection of minors is too important to leave rating and qualification up to the sector. Arguments can be heard along the lines of the 'examiner who marks his own paper', making the results of the rating and qualification less reliable. Lievens acknowledges this and observes: 'Interestingly, overviews of the disadvantages of co-regulation oftentimes reflect dissatisfaction with self-regulation mechanisms and techniques, when in fact the gradual shift to co-regulation in certain areas might be a way of attempting to overcome the drawbacks of self-regulation.'⁸¹ Indeed, co-regulation with the institutionalized involvement of an independent government authority that can supervise the process and quality on a meta level can strongly contribute to the system's reliability. It can increase its legitimacy and can contribute to building trust between the various stakeholders in the system.

If private actors are too stringent, however, one could argue that there is a risk of private censorship: 'Many fear that self- and co-regulation could lead to "private censorship" (i.a. censorship by companies or private bodies) which in turn could curb fundamental rights such as freedom of expression.'⁸² Also the latter risk seems to be especially connected to self-regulation and can (and in fact: should) be overcome by a clear co-regulatory arrangement explicitly addressing this risk. Therefore when the fundamental right of freedom of expression would be endangered by a form of self-censorship by the (over-active) private actors involved, in the triangular arrangement the public supervisory authority should be able to intervene in a balanced and proportionate way. On the other hand, one can also argue that, much more than self-regulation or co-regulation, it is vertical regulation that carries the risk of censorship.

Finally, another challenge, which in fact really cannot be resolved on a European level, is the global scale of audiovisual content. The Audiovisual Media Services Directive, as a European instrument, only applies to providers under EU jurisdiction. Content delivered over the internet or free-to-air from countries outside the EU, but aimed at EU internet users, is outside the scope of the AVMSD. Even if many of the main non-EU internet players have offices or another physical presence in Europe, questions are being raised about how services currently not covered by the AVMSD can be covered by the harmonized EU legislative framework and made to obey the same rules as traditional EU-based broadcasters.

6.4. Conditions for a pan-European co-regulatory system

After having identified both the advantages of and challenges for co-regulation, we shall identify the conditions that should be fulfilled for co-regulation to be successful in this domain. For this, the relevant

78 E. Wauters et al., *The use of labels to empower minors, parents and educators in the social media environment: An explanatory report*, 2013.

79 H. Cannie & D. Voorhoof, 'Reclame in audiovisuele media gericht op kinderen. Nieuwe regels, ander toezicht?', in S. van Bauwel et al. (eds.), *Diverse mediawerelden. Hedendaagse reflecties gebaseerd op het onderzoek van Frida Saeys*, 2010, pp. 77-106.

80 H.G. van der Voort, *Naar een drie-eenheid van co-regulering, Over de spanningen tussen drie toezichtsregimes* (dissertation TU Delft), 2013.

81 E. Lievens et al., 'The co-protection of minors in new media: a European Approach to co-regulation', 2006 *UC Davis Journal of Juvenile Law and Policy* 10, no. 1, pp. 97-151, p. 146.

82 *Ibid.*, p. 147.

features of successful co-regulation are examined as well as the general conditions under which co-regulatory regimes can function properly.

1. Aiming for easy to use pan-European classification tools with a low administrative burden.

It is important to arrange for easy to use rating classification tools with a low administrative burden; this will make it possible for the audiovisual sector to move forward. To have the sector voluntarily join the system and to remain faithful to it, it is furthermore important that there is only a reasonable financial contribution required by the sector. Systems such as YouRateIt for the classification of User Generated Content are inexpensive and relatively easy to use by both content providers and consumers. According to the Commission it is primarily the sector that should establish a classification system applicable throughout Europe. Although it is up to the industry to come up with a system, the Commission could arrange for European standardization and stimulate the actual building of these systems, by arranging for standards or granting financial support.⁸³ To provide an incentive to create high-quality easy to use standardized classification systems, also a third party quality seal can be considered. It could be (economically) attractive for the sector to profit from such a quality label contributing to the image of providing child-friendly content in a safe environment. Such a positive incentive could apply to the whole value chain involved.

2. Taking account of the cultural differences built into the system

It is the ambition of the European Commission to have a generally applicable, transparent, and consistent approach to age rating and content classification within Europe,⁸⁴ but it has to be recognized that the same content may be rated as appropriate for different age categories in different countries. The system design should therefore be such that cultural differences between the Member States can be taken into account. For instance, the use of certain words in the audiovisual content, such as 'shit', will lead to it being classified as 'mild swearing', whereby the recommended age category for this classification can differ between Member States. The input for the database for rating and classification should be done according to the same categories and criteria, but the system should be built in such a way that the outcome may differ from country to country. Such a classification system should furthermore be applicable in a broad variety of content and services, making it as flexible and future-proof as possible.

3. Aligning public and private interests as much as possible

Successful co-regulation generally requires a strong self-regulatory ability in the sector and an intrinsic motivation and responsibility to internally cover potential risks by its stakeholders. As indicated⁸⁵ a potential risk for the failure of co-regulation can be a large (commercial) self-interest that is at stake with organizations that are not coherent with the general interest. Within the field of audiovisual media a common interest can be found in general parental concern with regard to the potentially harmful effects of media content on their children.⁸⁶ This concern provides an inherent commercial incentive for the sector to voluntarily take action. In this respect a genuine effort can and should be made to work with clear and broadly accepted and shared norms as much as possible. Co-regulation needs the involvement of all relevant stakeholders and complete dedication and support by the whole industry. Dominant market parties can play an important role in this involvement and commitment. Their serious and voluntary involvement creates an incentive for the rest of the market to abide by the rules. This happened, for instance, with the PEGI rating and classification system for the gaming industry where key players set the norm for the rest of the market. Also worth mentioning in this respect is an agreement concluded between NICAM and the association of VOD service providers in the Netherlands: VodNed. The providers of commercial media services are not legally obliged to use the *Kijkwijzer* system for their

⁸³ Pan European Game Information (PEGI), an age classification system for computer and video games; *Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, Brussels, 24.4.2013, COM(2013) 231 final.

⁸⁴ European Strategy for a Better Internet for Children, Brussels, 2.5.2012, COM(2012) 196 final.

⁸⁵ Section 2.3

⁸⁶ M.E. Honingh & J.K. Helderma, 'Voor wie of wat is systeemtoezicht zinvol?', 2010 *Tijdschrift voor Toezicht*, no. 2, pp. 6-25, pp. 10-12.

on-demand offer. They have voluntarily decided, however, to apply the classification system to their VOD services. More recently also HBO and Netflix have joined on a voluntary basis.

4. *Providing for an effective regulatory framework with constitutional guarantees*

Given the constitutional context of the fundamental right of the freedom of expression, on the one hand, and the European key value of the protection of minors, on the other, a classification system should preferably be embedded in an effective co-regulatory framework with constitutional guarantees.

First of all, as indicated in Section 5.3, according to the Interinstitutional Agreement (IIA) on better law-making between the European Parliament, the Commission and the Council, mechanisms of self- and co-regulation will not be applicable where fundamental rights are at stake.⁸⁷ Although in Paragraph 18 the IIA includes a narrow definition of co-regulation – ‘Co-regulation means the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations)’ – and therefore the co-regulatory triangle involving meta supervision by an independent governing body as envisaged in this contribution will possibly fall outside its narrow scope, the IIA should be adapted in order to be more lenient towards such forms of regulatory arrangements. It should be more lenient towards these new forms of (flexible) regulation and explicitly allow for co-regulation. When contradicting fundamental rights are at stake, it should at the same time require the establishment of a principle-based legislative framework, setting out a clear normative framework.⁸⁸ The point of departure for such a framework for the co-regulatory arrangement surrounding a media classification system should be the adherence to human rights principles and standards, including the right to provide for effective means of recourse and remedies, for example the possibility to reassess classification results by the users or authors of online content. Any form of content censorship should be inadmissible and there should be respect for editorial independence.⁸⁹ The normative framework should also include the possibility of state intervention in the event of either its objects not being met or if the private regulation is too stringent and creates self-censorship with its actions. As the most independent of the three parties in the co-regulatory triangle, the independent governing body could be given the task of monitoring this aspect. European legislative action could in the end be required to provide the required guarantees, including the possibility of implementing and enforcing vertical regulation.

5. *Creating a system of serious checks and balances*

Given the inherent risk of private parties taking too little responsibility for the functioning and results of the co-regulatory system,⁹⁰ all actors involved should be clearly accountable for their respective involvement. Communication and transparency are very important instruments to keep the norms clearly alive and internalized. An adequately functioning private supervisory agent that has a consistent decision-making strategy is a crucial actor in the functioning of the system. Non-compliance should indeed be sanctioned. It is important that an effective system of sanctions is in place thereby guaranteeing voluntary compliance also under difficult circumstances.⁹¹ The backstop powers of an independent public supervisory authority will further contribute to its effectiveness. Some countries have already taken this route to a certain extent. This is the case for the UK where the independent co-regulator for the editorial content of UK video on-demand services, ATVOD, and the media regulator, Ofcom, share responsibilities with regard to on-demand audiovisual media services.

87 Council of the European Union, Interinstitutional Agreement on better law-making, Brussels, 23 September 2003, 12175/03, Para. 17.

88 A principle-based legislative framework moves away from reliance on detailed, prescriptive rules and relying more on high-level, broadly stated rules or Principles to set the standards by which the regulated sector must conduct its business.

89 Council of Europe, Recommendation CM/Rec(2009)5 of the Committee of Ministers to member states on measures to protect children against harmful content and behaviour and to promote their active participation in the new, information and communications environment, Adopted by the Committee of Ministers on 8 July 2009, <<https://wcd.coe.int/ViewDoc.jsp?id=1470045>>.

90 Section 2.3, B.D. Dorbeck-Jung et al., ‘Contested hybridization of regulation: failure of the Dutch regulatory system to protect minors from harmful media’, 2010 *Regulation & Governance* 4, no. 2, pp. 154-174, p. 163.

91 I. Ayres & J. Braithwaite, *Responsive Regulation: transcending the deregulation debate*, 1992, p. 39.

A system of checks and balances organized through the co-regulatory arrangement with meta supervision by an independent public authority should provide a necessary clear incentive to adhere to the norms. High quality external and independent public supervision will contribute positively to the success of the co-regulatory system. Should the public meta-supervisory authority have to report that the system is failing, the legislator would be in a position to consider taking legislative action thereby overruling the co-regulatory system. The fact that legislative action can be considered in the case of non-compliance can work as a stick behind the door, thereby providing an incentive to be compliant. Only when the sector has its own effective checks and balances can legislative action be avoided. According to Ayres and Braithwaite, in this way the vertical and horizontal strategy can effectively be combined. This carrot and stick system also avoids the sector from claiming that, yes, this is very important, but then fails to implement it in practice. On the other hand, *over-design* and involvement on the part of a public authority should also be avoided, since it will endanger the willingness of private parties to voluntarily comply.

6. Guaranteeing the basic principles of good co-regulation for both public and private regulation and supervision

Within the co-regulatory arrangement, both the public and the private supervisory authorities will constantly need to balance different interests and demands, while combining carefulness with effectiveness (procedural fairness versus efficiency) and selecting the appropriate enforcement strategy (cooperation versus repression).⁹² In her handbook for supervisory authorities Ottow defines essential good regulation, or LITER, principles as guidelines for this daily balancing act. These five key fundamental principles are: legality (L), independence (I), transparency (T), effectiveness (E), and responsibility (R). The LITER principles are multi-layered. ‘Legality’ includes legal mandate, fairness, fair procedure, carefulness, proportionality, sufficient reasoning and human rights. ‘Independence’ is comprised of integrity, expertise, professionalism and impartiality. ‘Transparency’ consists of open, accountable, participation, predictable and confidentiality. The notion of ‘effectiveness’ is geared towards (the use of) instruments and tools, enforcement, speed, efficiency, flexibility and prioritization. ‘Responsibility’ refers to trust, co-operation, social responsibility and compliance. These key principles that combine the most relevant outputs from academia, national administrative law, European law, fundamental rights and governmental reports identifying good regulation principles should be embedded in the both the public and the private regulatory and supervisory authorities’ design and subsequently in their concrete actions. For the best way for the co-regulatory systems for the protection of minors to be specifically geared towards the LITER principles, I refer here to Ottow’s excellent work.⁹³

7. Arranging for frequent and adequate evaluation

In order to achieve sustainable results⁹⁴ and to keep the sector attached in the long term, the system needs an evaluation mechanism to keep it up to date, especially in the rapidly moving audiovisual media sector. Regular evaluation will also help to fine-tune any possible undesired and unnecessary effects, in particular with regard to compliance with Article 10 of the European Convention on Human Rights (self-censorship).⁹⁵ Evaluation should concern the effectiveness of the implementation of the norms, as well as the validity of the system and its underlying norms. A regular review of the content that is classified, for example by introducing a maximum length of time for the validity of the classification, could also be arranged.⁹⁶

But equally important is the constant evaluation of the co-regulation of the procedural aspects: investigating whether the three actors involved in the triangular co-regulatory framework with (partially)

92 A. Ottow, *Competition and Market Authorities. Good Agency Principles*, Oxford University Press 2015, forthcoming.

93 Ibid.

94 A. Ottow, *De markt meester? De zoektocht naar nieuwe vormen van toezicht*, 2009, p. 12

95 As also suggested by the Council of Europe, Recommendation CM/Rec(2009)5 of the Committee of Ministers to member states on measures to protect children against harmful content and behaviour and to promote their active participation in the new, information and communications environment, Adopted by the Committee of Ministers on 8 July 2009, <<https://wcd.coe.int/ViewDoc.jsp?id=1470045>>.

96 Ibid.

different interests at stake are still effectively communicating with each other. Van der Voort points out that the inherent tension between the three actors should be addressed in evaluations of the effectiveness of co-regulatory regimes,⁹⁷ thereby taking into account the dynamics of the communication process between the parties involved. Not just the centralized perspective from the government on the question whether the norms and the law are being adhered to should be evaluated, but the communication perspective should also be taken into account. Both aspects are equally important for the sustainable success of co-regulatory arrangements for the protection of minors in the audiovisual sector.

7. Summary and the lessons learned

In the rapidly moving European online audiovisual environment there is currently limited protection for children against the harmful effects of audiovisual content. Since the continuum of content across the differently regulated linear and non-linear transmission channels severely weakens the impact of the current regulatory regime for children's linear access to content, the protection of children against harmful content has become a matter of urgency.

We have looked into the question whether a public-private regulatory arrangement such as the classification system for linear broadcasting in the Netherlands, *Kijkwijzer*, could be a useful blueprint for the future-proof protection of minors in the online audiovisual environment. We have established that co-regulatory arrangements can be flexible, future-proof and can strongly contribute to the learning effect of the sector. From the point of view of effectively internalizing the norm in a rapidly moving sector, sharing the responsibility to live up to the norms between the supervisory authority and the sector through a private actor, co-regulation can indeed be an attractive option.

We have further focused on the question of what it is that makes such systems function successfully in practice and have found that important aspects are its effective co-regulatory arrangement by a private supervisory actor that takes its responsibility for the classification system seriously, on the one hand, and an independent government authority responsible for critical meta supervision, on the other. Another driving force is the incentive to join, created by law.

Although *Kijkwijzer* can indeed be established as a widely recognised best practice for the protection of minors against harmful content not only in the Netherlands, but lately also in several other European countries, we need more than this.

We need, first of all, more important media companies to join this system, or any other excellent form of classification, both those that are presently regulated under the lighter regime of the European media regulation (AVMSD), such as audiovisual media services as well as the ones that are presently unregulated such as the providers of User Generated Content platforms.

We have furthermore come to the conclusion that these co-regulatory classification arrangements are vulnerable to failure. Several conditions that have proven to be essential, also in other domains, will therefore have to be met, thereby providing for the flanking policy that is required for successful implementation. In this contribution seven essential conditions were defined. First of all, the aim should be the realization of easy to use pan-European classification tools with a low administrative burden and a high level of organization and quick decisions upon complaints. Such a system should also take account of the cultural differences within Europe. The design of an age rating and content classification system should be tailor-made to that end. The Commission could arrange for European standardization and stimulate the actual establishment of these systems.⁹⁸ Such a classification system should apply to a broad variety of content and services in order to be as future-proof as possible. Thirdly, public and private interests should be aligned as much as possible as only then will the sector be intrinsically motivated. The European legislator should fourthly provide substantive constitutional guarantees avoiding, inter alia, that freedom of expression is unduly restrained. Fifthly, any good functioning co-regulatory system has serious checks and balances effectively dealing with potential non-compliance; all actors involved should

97 H.G. van der Voort, *Naar een drie-eenheid van co-regulering, Over de spanningen tussen drie toezichtsregimes* (dissertation TU Delft), 2013.

98 Pan European Game Information (PEGI), an age classification system for computer and video games; *Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, Brussels, 24.4.2013, COM(2013) 231 final.

be clearly accountable for their respective involvement. Also private supervision should not be naïve and must remain critical and be able to differentiate between those organizations that will aim to comply and those that will not.

The guarantee of basic principles of good co-regulation for both public and private regulation and supervision is the sixth condition for a successful arrangement. Co-regulatory measures must be aligned to public purposes to guarantee the objectives of public accountability, effectiveness and legitimacy in order to become prominent tools in the audiovisual sector. Living up to the principles of good co-regulation is essential, particularly when co-regulation can have an effect on the freedom of expression.⁹⁹ And, finally, there should be frequent and adequate evaluation both concerning the effectiveness of the system and concerning the communication between the actors involved in the co-regulatory framework.

In looking forward, two last observations should be made in this contribution. Parallel to any attempts at pan-European classification tools with co-regulatory arrangements, the empowerment of users and increasing media literacy will have to play a key role. Not all parents are actively aware of safe media use by their children. Minors themselves should therefore also be addressed, thereby contributing to the most effective way of providing protection; also children can be perfectly able to make safe choices for themselves. With regard to classification systems that are effectively combined with parental control tools such as filtering systems and personal identification numbers (PIN codes)¹⁰⁰ further research is needed, given their relatively strong impact on the fundamental rights of privacy and the freedom of expression. ¶

99 P. Iosifidis, 'The emerging Governance Patterns in Media and Communications', in E. Psychogiopoulou, (ed.), *Media Policies Revisited: The Challenge for Media Freedom and independence*, 2014, pp. 7-22, p. 20.

100 *Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, Brussels, 24.4.2013, COM(2013) 231 final. The implementation of measures concerning privacy will need to be in line with the European legislation, The Commission has put forward a proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Data Protection Directive, COM(2012) 11 final.