

# Setting the Scene – Self-regulation (and co-regulation) after the Audiovisual Media Services Directive (AVMSD)

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“Opportunities (and limits) for media and copyright regulation  
and self-regulation”

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Faculty of Law,  
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# Some conceptional notes and a little history...



- This is not the place for an elaboration on concepts, but:
  - “self-regulation” even though not coined as such is not new, e.g. in context of codes developed and implemented by press councils (take note also of Rule of Law-Reports)
  - When we talk about self-regulation we mean a spectrum of different forms of industry sectors/companies/associations giving themselves rules in a formalized manner
    - From “pure” self-regulation to setting rules but subjecting them to oversight
  - And co-regulation refers to inclusion/interaction of self-regulated approach with “hard law”
    - statutory/regulated self-regulation from approval to subsequent monitoring or substituting by NRAs
- And history?
  - Commission since two decades on different approaches to regulation
    - Interinstitutional Agreement on Better Law-Making of December 2003
    - Commission Communication on a renewed EU strategy 2011-14 for Corporate Social Responsibility
    - 2013 Principles for better self- and co-regulation
    - Commission Communication on “Better Regulation for Better Results – an EU Agenda” 2015
  - Enter the Scene: AVMSD and AVMSD 2.0

# Co- and self regulation as guiding theme in the Audiovisual Media Services Directive (AVMSD)



## ■ AVMSD and AVMSD 2.0

- From no mention to a brief inclusion as general option (in Art. 4(7)) in AVMSD 2010/13/EU (via amendment to TwF in 2007) and lengthy recital
- to extensive definition of concept (in new Art. 4a), multiple references and detailed recitals

## ■ Art 4a AVMSD (2018-Version)

(1) Member States shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct adopted at national level in the fields coordinated by this Directive to the extent permitted by their legal systems.

Those codes shall: (a) be such that they are broadly accepted by the main stakeholders in the Member States concerned; (b) clearly and unambiguously set out their objectives; (c) provide for regular, transparent and independent **monitoring and evaluation** of the achievement of the objectives aimed at; and (d) provide for effective **enforcement** including effective and proportionate **sanctions**.

(2) Member States and the Commission may foster self-regulation through Union codes of conduct drawn up by media service providers, video-sharing platform service providers or organisations representing them, in cooperation, as necessary, with other sectors such as industry, trade, professional and consumer associations or organisations. (...)

# Co- and self regulation as guiding theme in the AVMSD



## ■ Art 4a AVMSD continued

(2) Member States and the Commission may foster self-regulation through Union codes of conduct drawn up by media service providers, video-sharing platform service providers or organisations representing them, in cooperation, as necessary, with other sectors such as industry, trade, professional and consumer associations or organisations.

Those codes shall be such that they are broadly accepted by the main stakeholders at Union level and shall comply with points (b) to (d) of paragraph 1. The **Union codes** of conduct shall be without prejudice to the **national codes** of conduct. In cooperation with the Member States, the *Commission shall facilitate* the development of Union codes of conduct, where appropriate, in accordance with the principles of subsidiarity and proportionality.

[PROCEDURE] The signatories of Union codes of conduct shall submit the drafts of those codes and amendments thereto to the Commission. The Commission shall consult the Contact Committee on those draft codes or amendments thereto. The Commission shall make the Union codes of conduct publicly available and may give them appropriate publicity.

(3) Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in compliance with this Directive and Union law, including where their *national independent regulatory authorities* or bodies conclude that any **code of conduct or parts thereof have proven not to be sufficiently effective**. Member States shall report such rules to the Commission without undue delay.’;

# Co- and self regulation as guiding theme in the AVMSD



## ■ Subsequent mention in detail

### • **Protection of minors**

- Art. 6 (3) and (4) descriptors/flagging re. harmful content
- Art. 9 specific forms of commercial communication ((3)-(5))
  - (3) alcoholic beverages-c.c.-exposure
  - (4) “foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended”-c.c.-exposure (namely “accompanying or included in children's programmes”)
  - and in the latter case with indications of the additional aim: “do not emphasise the positive quality of the nutritional aspects of such foods and beverages”

### • **Protection of consumers**

- Art. 9 (3) alcoholic beverages
- Use in the context of obligations by **Video-Sharing-Platforms (VSPs)** in Art. 28b
  - for commercial communication-related measures self- or co-reg.
  - for other content-related measures ONLY co-reg. (4)

# Overview of actual use – details here:



## **IRIS Special 2019-2** **Self- and Co-regulation in the new AVMSD** European Audiovisual Observatory, Strasbourg

Download at:

<https://rm.coe.int/iris-special-2019-2-self-and-co-regulation-in-the-new-avmsd/1680992dc2> (EN)

<https://rm.coe.int/iris-special-2019-2-selbst-und-ko-regulierung-in-der-neuen-avmd-richtl/1680992dc4> (DE)

<https://rm.coe.int/iris-special-2019-2-autoregulation-et-coregulation-dans-la-nouvelle-di/1680992dc3> (FR)

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of the European Audiovisual Observatory





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Member States covered in IRIS  
Special 2019 edition:  
**AT, BE, DE, FR, HU, IT, PL, SK**

For current overview of  
transpositions visit **EAO Revised  
AVMSD Tracking Table:**

<https://www.obs.coe.int/en/web/observatoire/avmsd-tracking>

# Overview of actual use – main findings

- Long-standing experience in MS for self-(/co-)regulatory approaches mainly concerning
  - Journalistic standards / Deontology codes → not in focus here
  - **Advertising** – typically irrespective of the medium by which the advertising (or: commercial communication) is disseminated
  - many of the relevant self-regulatory organisations created in the 1960s/70s with rules “binding” on those companies of the industry sector that signed guidelines/codes
  - “enforcement” of decisions of these bodies according to the self-regulatory instruments are typically based on naming, shaming/blaming
- More common to rely on (at minimum) co-regulation concerning
  - **Protection of minors** where regulatory authorities have a strong influence although sometimes also here purely self-regulatory solutions
  - in addition especially in this area also relevance of technical systems to protect minors from unsuitable content → self-regulatory development of access conditions, but with influence from regulatory authorities



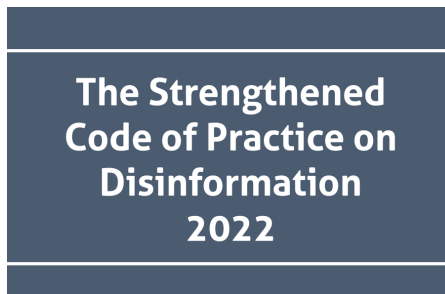
# Overview of actual use – main findings



- Concerning **VSPs** the situation is different
  - new (obviously), not of the same relevance in the different MS but still transnational character of many of the relevant platforms, only limited application so far
  - compromise (?) between non- and full regulation? no full extension of AVMS-related rules to these types of platforms, therefore also specific approach to categories of regulation
  - interesting to highlight that **co-regulatory approach in focus** in Art. 28b
  - already in 2019 some VSP-arrangements in co-/self-regulatory schemes had been reached, but especially for this question the most relevant is the AVMSD-transposition in Ireland (pending) until “best practice-exchange” moderated by Commission or creation of Union codes of conduct have been realized
  - consider also ERGA-“Framework for Effective Co-Regulation of VSP”

# "After AVMSD": Code of Practice Disinfo,...

- 2022 new/updated ("reinforced") **EU Code of Practice on Disinformation**
  - Aim to achieve objectives of improving weaknesses that Commission had pointed out
  - Expanding range of commitments and introducing further measures
  - Signatories (currently 34) developed new set of commitments and sign up to them
    - commit to take action concerning e.g. demonetising dissemination of disinformation; ensuring transparency of political advertising; empowering users; enhancing cooperation with fact-checkers; providing researchers with better access to data
    - implementation period and reporting "obligations" to Commission
  - Self-regulation by signatories ("inspired" by Commission guidance), in view of possible legislative action
    - link to Digital Services Act as possible code of conduct under that framework
    - Commissioner Breton: "...**To be credible**, the new Code of Practice will be backed up by the DSA - including for heavy dissuasive sanctions. Very large platforms that repeatedly break the Code and do not carry out risk mitigation measures properly risk fines of up to 6% of their global turnover."
    - institutional setup foreseen (Transparency Centre/Task Force) to provide transparency on implementation and recognizing updating needs



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(i) The Signatories recognise that the integration of information from and cooperation with third-party organisations providing information and solutions regarding Disinformation content are important to reduce monetisation of Disinformation.

Therefore, the Signatories of this Code commit to the following:

#### DEMONETISATION OF DISINFORMATION

**Commitment 1.** Relevant Signatories participating in ad placements, commit to defend the dissemination of Disinformation, and improve the policies and systems which determine the eligibility of content to be monetised, the controls for monetisation and ad placement, and the data to report on the accuracy and effectiveness of controls and services around ad placements.

*In order to satisfy Commitment 1:*

- Measure 1.1. Relevant Signatories involved in the selling of advertising, inclusive of media platforms, publishers and ad tech companies, will deploy, disclose, and enforce policies with the aims of:
- first avoiding the publishing and carriage of harmful Disinformation to protect the integrity of advertising supported businesses
  - second taking meaningful enforcement and remediation steps to avoid the placement of advertising next to Disinformation content or on sources that repeatedly violate these policies; and
  - third adopting measures to enable the verification of the landing / destination pages of ads and origin of ad placement.

<sup>20</sup> "The notion of "Disinformation" does not include misleading advertising, reporting errors, satire and parody, or clearly identified partisan news and commentary, and is without prejudice to binding legal obligations, self-regulatory advertising codes, and standards regarding misleading advertising."

<sup>21</sup> Communication "Tackling online Disinformation: a European Approach", [http://ec.europa.eu/pressroom/dae/document.cfm?doc\\_id=51904](http://ec.europa.eu/pressroom/dae/document.cfm?doc_id=51904).

# “After AVMSD”: ..., DSA, and beyond

- after July-vote EP **Digital Services Act (DSA)-Regulation** close to e.i.f.
  - And yet again: key role of Codes of Conduct (terminology no longer “Union codes...” but “Codes... at Union level”)
  - As a general instrument in achieving “proper application” of the DSA
  - EDSB and Commission “encourage and facilitate” their creation
  - Codes shall include “KPIs” that can be monitored
  - Besides reporting, evaluation, encouraging updating Art. 35 (4) also mentions that “In case of systematic failure to comply with the Codes of Conduct, the Commission and the Board may invite the signatories to the codes of conduct to **take the necessary action.**” → ?
  - Specific areas such as for risk mitigation by VLOPs and VLOSEs, advertising, accessibility
- Something from the past?
  - Code of Conduct against illegal hate speech 2016
    - latest participation announcement June 2022
    - multilingual!

# “After AVMSD”: ...and beyond

- **GDPR**
  - **Approved** Codes of Conduct
- **AI Act Proposal**
  - Voluntary extension of obligations of high-risk AI to others by codes of conduct (concrete application suggestion), but also: for some areas (high-risk AI) reserved to “real” regulation
  - Details on broad inclusion of participants in preparation and broad range of possibilities (specific for one or more AI systems)
- **And there is more (and should be considered)...**
  - **Council of Europe** “[Recommendation CM/Rec\(2022\)11](#) of the Committee of Ministers to member States on **principles for media and communication governance**” (April 2022)
    - inclusion of “self- and co-regulatory organisations”
    - in appendix “definition” of “industry self-regulation”, “co-regulation”/“regulated self-regulation”, “private ordering initiatives” and extensive reference in [Explanatory Memorandum](#)

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