I. Introduction

Dealing with harmful content, particularly in order to protect minors, has been a growing concern for the past few years. Due to the decentralised, border-crossing and permanently available nature of the new information and communication networks, increasing attention has been brought to the difficulties associated with efficiently protecting minors against harmful information and images, which were not as easily accessible before. The importance European policymakers attach to this normative goal of protection against harmful content has recently been emphasised by its inclusion in the i2010 strategy, as part of one of the challenges that need to be addressed (“security”).

In this paper, the focus will be on the issue of harmful content, as opposed to illegal content. The concept “harmful content” is not clearly delineated and has thus been defined in a variety of ways, from “content that is legal, but liable to harm minors by impairing their physical, mental or moral development”, to “content which adults responsible for children (parents or teachers) consider to be harmful to those children”. The key difference between harmful and illegal content is that the former is subject to personal choice, “based on one’s beliefs, preferences and social and cultural traditions”, while the latter is a matter of state choice. This crucial conceptual difference automatically leads to a divergence in regulating both categories of content. With regard to illegal content, the state decides which content should
be considered illegal and what consequences should be linked to this classification (for instance prohibition of publication and distribution).\textsuperscript{10} When tackling harmful content on the other hand, it is argued that the state should create an environment that enables citizens to decide for themselves (or for their children) which content they consider suitable and thus worth accessing. This approach fits in with pleas for and trends towards “user empowerment”, a shift from top-down control by the state to bottom-up control by the user.

In addressing harmful (new) media content, alternative regulatory techniques have been brought into play, in reply to increasingly visible constraints on the use of state regulation.\textsuperscript{11} Self-regulatory instruments, co-regulatory mechanisms and the use of technical tools, for instance, have gained popularity due to their potential to tackle harmful media content in a (more) efficient way.\textsuperscript{12} These alternative regulatory techniques, however, cannot be developed in a legal vacuum. On the contrary, they need to fit in with the existing regulatory framework.\textsuperscript{13} It is crucial not to lose sight of fundamental legal (international and European) principles when establishing alternative regulatory instruments or developing technological tools. This is essential, particularly in view of the growing popularity of co-regulation – entailing more government involvement than self-regulation – since governments cannot act outside the legal framework they operate in.

In this paper, an overview and analysis of the most important (relevant) legal requirements that need to be kept in mind will be presented, interspersed with illustrations.

\section*{II. Convention of the rights of the child}

The United Nations Convention of the rights of the child,\textsuperscript{14} which serves as the relevant international legal framework ratified by 192 countries, asserts that children\textsuperscript{15} too have a number of fundamental rights. Article 13 confirms the child’s right to freedom of expression

\begin{footnotesize}
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\item From early on, the catchphrase “what is illegal offline, is illegal online” was taken up. See for instance the Communication on illegal and harmful content on the Internet, op. cit.
\item Such as the technological nature of the new communication and information networks (for instance the Internet is decentralised and global, making it much harder to effectively control information flows), the (nearly) unlimited number of (media) participants, the difference in cultural traditions with respect to harmful content and minors, the unwieldiness of legislative procedures versus the speed with which new technologies develop, the possible limitations legislation can entail with regards to the fundamental right of freedom of expression (see also Mifsud Bonnici, J.P. and De Vey Mestdagh, C.N.J., loc. cit., 135-136).
\item Notwithstanding the fact that a detailed discussion of the spectrum of existing definitions of self- and co-regulation does not fall within the scope of this paper, it is important to clarify the broad concepts used further on. The notion ‘self-regulation’ will be used when discussing initiatives without any state involvement (for instance voluntary agreements between industry partners), whereas the concept ‘co-regulation’ will be reserved for schemes entailing (a degree of) state involvement. For an overview of definitions see Hans-Bredow-Institüt für Medienforschung & EMR, Study on Co-regulatory Measures in the Media Sector - Interim report, 19 May 2005, available at http://europa.eu.int/comm/avpolicy/stat/2005/coregul/coregul-interim-report.pdf, and Dumortier, J., Lievens, E. and Ryan, P.S., “The Co-Protection of Minors in New Media: A European Approach to Co-Regulation”, Journal of Juvenile Law & Policy, forthcoming 2005.
\item At the level of the European Union, for instance, it was stated in the Interinstitutional agreement on better law-making that “the Commission will ensure that any use of co-regulation or self-regulation is always consistent with Community law”. See European Parliament, Council and Commission, Interinstitutional agreement on better law-making, 2003/C 321/01, 31 December 2003, http://europa.eu.int/eur- lex/privein/oj/dat/2003/c_321/c_32120031231en00010005.pdf, §18.
\item Article 1 of the Convention defines a ‘child’ as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.
\end{enumerate}
\end{footnotesize}
“which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice”. This article is through its technology-neutral phrasing most certainly applicable to the Internet. Linked to article 13 are article 12, ensuring that the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, and article 17 on good quality mass-media, guaranteeing children access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. A final noteworthy provision in this context, especially relevant when dealing with harmful content, is article 5, which refers to the responsibilities, rights and duties of parents (or other persons legally responsible for the child), to offer, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance to the child exercising his or her rights. Parents thus have a responsibility to (try to) support their children in their approach to new media.

Equally important is the right of children to privacy, formulated in article 16 of the Convention. Children cannot be subjected to arbitrary or unlawful interference – by state authorities or by others (e.g. private organisations) – with their privacy, family, home or correspondence. Moreover it is clearly stated that the law should protect a child against such interference. The right to privacy must apply to all children and is to be protected in all situations.

The Convention thus explicitly acknowledges children’s rights to freedom of expression and privacy – two fundamental rights that need to be kept in mind when setting up regulatory schemes to tackle harmful content.

III. Freedom of expression

**Principle**

Freedom of expression is a fundamental right in any democratic society, “one of the basic conditions for its progress and for the development of every man”. At European level the core provision guaranteeing this right is article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (EHCR). Freedom of expression includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This fundamental right encompasses two facets: on the one hand states need to refrain from interfering with the freedom of expression of their citizens (passive), while on the other hand they also might

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16 A similar provision can be found in article 24 §1 of the Charter of Fundamental Rights of the European Union.
20 The Convention is an initiative of the Council of Europe. Through Article F of the Treaty on the European Union it is absorbed into the legal framework of the European Union. The right to freedom of expression is also included in the Charter of Fundamental Rights of the European Union (article 11).
21 The international equivalents are article 19 of the International Declaration on Human Rights (1948) and Article 19 of the International Covenant on Civil and Political Rights (1966).
have to ensure that the freedom of expression of those citizens is not restricted too much by private persons or organisations (active “duty to care”). Ensuring pluralism and diversity of media output is also part of this active duty to care.

Exceptions

However, the right to freely express ideas and opinions is not an absolute right. Restrictions can be imposed if they are (1) prescribed by law, (2), introduced with a view to specified interests, such as the protection of health or morals, and (3) necessary in a democratic society. The applicability of article 10 ECHR on the Internet (and new media in general) has unequivocally been accepted. Different policy documents point to the utmost importance of respecting freedom of expression (and for that matter all rights enshrined in the ECHR) in the information age, regardless of new technological developments, and member states are incited to ensure that “freedom of expression and information is fully respected with regard to Internet content with any restrictions not going beyond what is necessary in a democratic society”. In addition, the European Commission confirmed explicitly that the right to freedom of expression needs to be fully respected with regard to the issue of harmful (Internet) content and the protection of minors.

Delicate balance

Finding an adequate balance between free speech and the protection of minors against harmful content is an extremely delicate issue, which for the past few years has gripped the attention of all parties involved (governments, policy makers, human rights activists, scholars, etc.). Trying to tackle content which is considered harmful to minors could result in unwanted side-effects on the freedom of expression of adults, who should be able to access such content freely. Therefore states should act very cautiously in attempting to attain the normative goal of protecting children. Arbitrary restrictions on access to harmful content would not go down well with the European Court of Human Rights, given that the conditions of Article 10 §2 that need to be fulfilled to legitimately interfere with the freedom of expression

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23 Uyttendaele, C., Openbare informatie – Het juridisch statuut in een convergerende mediaomgeving, Antwerpen-Apeldoorn, Maklu, 2002; 169 [on the legal status of public information in the converging media environment].

24 Other interests are national security, territorial integrity or public safety, the prevention of disorder or crime, protection of the reputation or the rights of others, preventing disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary (Article 10 §2 ECHR).


are interpreted very strictly.\textsuperscript{28} State legislation restricting the publication and distribution of allegedly harmful content could be perceived as a form of censorship.\textsuperscript{29}

\textbf{From self- to co-regulation}

This had led to fierce advocating of the use of self- and co-regulatory mechanisms and/or technological tools when it comes to safeguarding minors from harmful content. It is argued that using alternative regulatory mechanisms could provide more guarantees for the protection of freedom of expression. Yet, after initial wild enthusiasm for self-regulation, concerns arose that self-regulatory initiatives regarding the protection of minors against harmful content could lead to private censorship, \textit{i.e.} censorship by companies or private bodies. Currently, co-regulation seems to be the preferred instrument, as the involvement of the government (in some way or another) can provide democratic guarantees in trying to attain the normative goal of the protection of minors, while at the same time respecting freedom of expression.\textsuperscript{30} In other words, the government has an interest in trying to attain the normative goal of protecting minors (more so than private companies) and can provide a safety net in case the self-regulatory action falls short, while it stays in the background and therefore interferes with the freedom of expression in the least possible way. It cannot be stressed enough that any alternative regulatory scheme really needs to take account of the right to freedom of expression,\textsuperscript{31} and moreover consider the delicate balance that has to be pursued very carefully, crucial elements being the role of the various parties involved and the possible use of technological tools.

\textbf{Technological solutions}

Technology is in many cases an essential part of an alternative regulatory strategy. The use of filtering tools,\textsuperscript{32} for instance, is a prime example of the shift away from top-down state control. Filtering technologies present a way of transferring control of and responsibility for managing harmful content from governments, regulatory agencies, and supervisory bodies to end users, primarily parents.\textsuperscript{33,34} The fierce advocacy of filter use by policy makers at

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\textsuperscript{28} This does not mean that there have not been cases in which the Court decided that certain restrictions were legitimate in the light of the protection of minors. See for instance European Court of Human Rights, Handyside v. United Kingdom, 7 December 1976.

\textsuperscript{29} Mifsud Bonnici, J.P. and De Vey Mestdagh, C.N.J., \textit{loc. cit.}, 136. In this context we can refer to the situation in the United States where the Supreme Court found several attempts at protecting minors against harmful Internet content by means of legislation, such as the 1996 Communications Decency Act (CDA) and the 1998 Children Online Protection Act (COPA), to be too restrictive with respect to the freedom of expression.


\textsuperscript{31} The 1998 Recommendation on the protection of minors and human dignity (op. cit.), which promotes self-regulation, stresses that “protection of general interests sought in this manner must be seen in the context of the fundamental principles of […] freedom of expression”.

\textsuperscript{32} \textit{i.e.} tools that are used to prevent or block access to specified types of content.


\textsuperscript{34} Put another way, filtering promotes parental bottom-up control rather than top-down censorship by state agencies. See Communication Illegal and harmful content on the Internet, \textit{op. cit.} Also on the subject of filter technology in the case \textit{Ashcroft v. American Civil Liberties Union et al.}, S. Ct. No. 03-218, slip opinion at 9, 15 (June 29, 2004), the
\end{footnotesize}
European level illustrates the trend towards “user empowerment”. Mifsud Bonnici and De Vey Mestdagh argue that this concept of “user empowerment” can be seen as the mirror image to the right to free speech: “one has the right to publish harmful content (since it is not illegal to do so), while the recipient has the right to determine what content to receive and not to receive”. Filtering technologies, however, have been the subject of significant criticism, due to their possible “over-inclusiveness” or “under-inclusiveness”, lack of accountability and the ease of circumvention. Filters should not be seen as an infallible remedy to protect minors against harmful content, but as an empowerment tool which provides parents with the possibility to decide for themselves what content their children can and cannot see.

With a view to the protection of freedom of expression governments should promote rather than mandate and enforce the use of filters, whereas users should apply these on a voluntary basis. In France, for instance, access providers are legally obliged to inform their subscribers of the existence of technical tools which allow for the restriction or selection of access to certain content on the one hand, and to offer them one of those tools on the other hand, leaving the final decision to the end user.

**Pluralism**

It could be argued that the “duty to care”-aspect of the freedom of expression entails that governments need to ensure a certain diversity in the “market” of technological solutions. According to this course of reasoning, governments should make sure that there are parental control tools on the market that correspond to the different (for instance religious or social) views and beliefs of parents.

**IV. Privacy**

**Principle**

Minors too have a right to privacy, as affirmed in article 16 of the Convention of the rights of the child. At European level the key provision with respect to the fundamental right to privacy is article 8 ECHR, which has the same status as the principle of freedom of expression, also being considered inherent in any democratic society. The importance attached to these two fundamental rights is apparent from the following statement:

U.S. Supreme Court stated that “[f]ilters impose selective restrictions on speech at the receiving end, not universal restrictions at the source. […] Promoting filter use does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.”

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39 Article 43-7 Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication, J.O.R.F. 1 October 1986 (as modified in 2002).
40 Green Paper on the protection of minors and human dignity in audiovisual and information services, op. cit.
Before considering what rules and enforcement measures are applicable to protection of minors and human dignity, it must be emphasized that they are all subject to two fundamental principles that are inherent in any democratic society - freedom of expression and respect for privacy.42

Exceptions
Possible restrictions to the right to privacy, as provided for by article 8 §2 ECHR, are conceived similarly to article 10 §2. They need to be (1) in accordance with the law, (2) necessary in a democratic society and (3) in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Privacy Directives
Additional rules on privacy and the protection of personal data are laid down in the Data Protection Directive43 and the Directive on Privacy and Electronic Communications.44 Both of these directives apply to the Internet45 and pertain to adults as well as children.46 The Data Protection Directive – which intends to encourage the free movement of personal data between Member States, while ensuring a high level of protection of the right to privacy – stipulates a number of essential safeguards that need to be adhered to when processing personal data. Article 6, for instance, requires that personal data must be: (a) processed fairly and lawfully; (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes; (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed; (d) accurate and, where necessary, kept up to date; and (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Whenever personal data is processed, for instance as part of a regulatory scheme to protect minors against harmful content (see infra), it must be checked if these requirements are met.

Right to anonymity
In the sphere of privacy protection, it is generally accepted that individuals have a right to anonymity. Notwithstanding the fact that this right is not as such explicitly inserted in legislative documents, references are made to it.47 Specifically with respect to the Internet, the

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41 The right to privacy is also included in articles 7 and 8 of the Charter of Fundamental Rights of the European Union. International equivalents are article 12 of the Universal Declaration of Human Rights and article 17 International Covenant on Civil and Political Rights.
42 Green Paper on the protection of minors and human dignity in audiovisual and information services, op. cit. Along the same lines: consideration 14 of the 1998 Recommendation (see infra).
43 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 23 November 1995, L 281, p. 31.
46 No distinction is made in the Directives.
Council of Europe, for instance, has stated that “in order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member States should respect the will of users of the Internet not to disclose their identity”. It is deemed essential, and encouraged by European authorities in charge of the protection of privacy, to supply anonymous Internet access to users surfing or taking part in discussion fora.

**Technological solutions**

The right to privacy can come into play when employing identification and age verification tools to protect minors against harmful (and illegal) content. In Belgium, an initiative has been launched which would provide children (over the age of twelve) with a card reader in order for them to be able to access certain “safe” chatrooms by means of their electronic identity card. This is an excellent example of using technology to achieve a certain normative goal. However, it is important not to lose sight of the child’s fundamental right to privacy. It would be unacceptable that children would be identifiable every time they log onto a certain chatroom. Therefore, it would need to be ensured that only one attribute of their identity, namely the fact that they are under a certain age, is used to allow access to the chatroom, this in light of article 6 of the Data Protection Directive (see supra). The Belgian Commission for the protection of privacy stressed the importance of using means to control age that intrude as little as possible in someone’s private sphere in their Recommendation on the protection of privacy of minors on the Internet. It will be necessary to test each new age verification instrument against the requirement of article 6 Data Protection Directive.

The idea of using technology to identify an Internet user as a “child” is not restricted to chatrooms. A system of “kid’s mode browsing”, which would imply that “each time the browser contacts a new site, it would also transmit a digital certificate announcing the user as a child”, has been suggested with a view to preventing children to be confronted with harmful content. This feature would be set up as the default on the home computer, and adults would

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48 Council of Europe, Freedom of communication on the Internet, op. cit., 12.
50 Article 29 Working Party Working Document WP 37, op. cit., 53
51 Framework tekst PRIME, op. cit., 119.
52 Since children under the age of 12 do not have electronic identity cards, they would not be able to benefit from this initiative. However, a solution to this problem is in the making. Children under the age of 12 would be able to obtain some kind of electronic certificate which would allow them to access the chatrooms. See Datanews, “eID ‘light’ voor kinderen onder 12 jaar”, 6 June 2005, [http://www.vnunet.be/datanews/detalle.asp?ids=/News/Top_Stories/Personal_Computing/20050606012&from=buca&pagina=2](http://www.vnunet.be/datanews/detalle.asp?ids=/News/Top_Stories/Personal_Computing/20050606012&from=buca&pagina=2).
53 “Safe” meaning that only children will be present in this chatroom, and thus no adults with possible bad intentions.
54 Microsoft has already made clear it is interested to integrate this feature in its MSN Messenger application. See ZDNet, Staatssecretaris wil beveiligde chatrooms, 3 December 2004, [http://zdnet.be/news.cfm?id=41068](http://zdnet.be/news.cfm?id=41068).
55 Up to now it is unclear which age limit would be used.
56 Commissie voor de bescherming van de persoonlijke levenssfeer, op. cit., 7.
need a password to switch it off. Here again it is important for privacy reasons, that the certificate would not identify the user as a particular child, but simply as “a child”.

V. Protection of minors

1998 Recommendation
The most comprehensive legal instrument establishing a framework for the protection of minors in new media services is the 1998 Council Recommendation on protection of minors and human dignity. This was the first legal instrument at EU level concerning the content of audiovisual and information services covering all electronic media (excluding broadcasting services covered by the Television without Frontiers directive - see infra). The Recommendation is to a high degree self-regulation oriented, creating guidelines for the development of national self-regulation frameworks to protect minors (as a supplement to the regulatory framework). Key notions are codes of conduct, parental control tools, hotlines, awareness actions, multi-stakeholder involvement and cooperation across borders.

Update
An update to the 1998 Recommendation is currently being discussed in order to bring it in line with the challenges posed by new technological developments. In November 2004, a draft European Parliament and Council Recommendation on the protection of minors and human dignity and on the right of reply was endorsed by the Council. The proposal emphasises awareness, literacy, and education, and encourages measures that facilitate the identification of and access to quality content and services for minors. Codes of conduct and technological solutions, such as labelling/classification and filtering software, seem to be the favoured tools. The approach that seems to be preferred is one of bottom-up harmonisation through cooperation between self-regulatory and co-regulatory bodies in the Member States and through the exchange of best practices concerning such issues as a system of common, descriptive symbols that would help viewers assess program content. The subtle (?) shift from exclusive use of “self-regulation” in the 1998 Recommendation to an increasing occurrence of “co-regulation” is noticeable. A report drafted by MEP Marielle De Sarnez clearly stated that self-regulation does not suffice to protect minors from messages with harmful content. Moreover, “the development of a European audiovisual area based on freedom of expression and respect for citizen’s rights should be based on an ongoing dialogue between national...”

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58 Ibidem.
59 Ibidem.
60 Although a Recommendation is a non-binding instrument (given that the harmonisation of laws of the Member States is excluded from industrial and cultural policies), it sets out the policy at European level and is considered to have significant authority.
61 Council Recommendation on the protection of minors and human dignity, op. cit., 48 and 52.
62 Since governments have a duty to introduce rules that will protect the weakest members of society (see following footnote).
and European law makers, regulatory authorities, industries, associations, consumers and civil society actors.\textsuperscript{63}

While she assumes that prevention and improved parental control will always be the best form of protection against the dangers posed by Internet, some of Mrs De Sarnez propositions are quite far-reaching. She wants all actors to take responsibility for what is happening on the Internet, hence placing burdens on politicians (to provide education programmes and information campaigns), access providers (to provide automatic filtering at the source – see \textit{infra}), content producers (to classify content), and parents (to train and provide guidance). Especially the imposed classification of content by all content providers seems difficult to enforce.\textsuperscript{64} Other proposals are to put banners, warning of possible dangers, on the homepage of every search engine, to establish a free telephone number which provides information on filtering tools, and to create a top level domain “.kid”. Particularly the latter issue is controversial, since it has been argued that such a domain precisely attracts adults with questionable intentions. Moreover, a similar domain has been established in the United States and it has not been a success at all.\textsuperscript{65} In July 2005 this draft Report has been adopted (in a slightly amended version)\textsuperscript{66} by the Committee on Culture and Education. The vote in plenary is expected in September 2005.

\section*{VI. Television without Frontiers directive}

\textbf{Article 22}

The protection of minors in broadcasting services is regulated by article 22 of the Television without Frontiers Directive. This article requires Member States to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might \textit{seriously} impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence. The same holds true for other programmes which are \textit{likely} to impair the physical, mental or moral development of minors, except where it is guaranteed, through the selection of 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. Moreover, when such programmes are broadcast in unencoded form they need to be preceded by an acoustic warning or identified by the presence of a visual symbol.

\textsuperscript{64} Already in 1998 the European Economic and Social Committee considered the classification of all information on the Internet impracticable: E.S.C., Opinion of the Economic and Social Committee on the ‘Proposal for a Council Decision adopting a Multianual Community Action Plan on promoting safe use of the Internet’, 98/C 214/08, OJ 10 July 1998, C 214, 32.
\textsuperscript{66} Noteworthy amended considerations refer to article 24 and 1 Charter of the Fundamental Rights of the European Union (on the right of a child to human dignity: “in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration”), the need for a directive in this area (consumer protection with respect to information and communication technologies including the protection of minors), and the fact that there is nothing in the Recommendation to prevent Member States from applying their constitutional provisions and other laws and their legal practice regarding free speech.
throughout their duration. An illustration of the implementation of article 22 can be found in the recent Ofcom Broadcasting Code. The framework it constructs with regard to the protection of minors in television services is very detailed content-wise: as well as adopting the general terms of article 22, it also specifically deals with drugs, smoking, solvents and alcohol, violence and dangerous behaviour, offensive language, sex and nudity, and finally exorcism, the occult and the paranormal. Moreover it installs a regime based on protection systems (mandatory pin or other equivalent protection) for premium subscription and pay per view services, and, somewhat surprisingly, a total ban on R18-rated films – meaning that such films can simply not be broadcast.

Article 22b of the Television without Frontiers Directive stresses the importance of this chapter (Protection of minors and public order). Attention is brought to the potential of technical devices, filtering, rating systems and education and awareness.

At the end of 2003 the Commission declared in their Communication on The future of European regulatory audiovisual policy that the provisions laid down in the TWF Directive on the protection of minors were "satisfactory and adequate". In this same policy document it is carefully suggested that co-regulatory models can be very successful (possibly more successful than self-regulatory initiatives) in achieving the goals put forward by the Directive.

Revision of the TWF directive

All this praise, however, does not alter the fact that the Directive is no longer adapted to the changed media environment. Watersheds, for instance, such as advanced by article 22 §2, are no longer workable in the Internet setting, where information is available and accessible 24/7. Hence, the Television without Frontiers Directive is currently being revised. The Commission’s intention is to establish a “comprehensive framework for any form of electronic delivery of audiovisual content”. The scope of application would thus be extended to “audiovisual content services”, i.e. “services for the delivery of moving pictures with or without sound to the general public by electronic networks”. The idea would be to make a distinction between linear (scheduled) and non-linear (on-demand) services. A distinct set of obligations would be linked to each of these two tiers:

i) A basic tier of rules (covering protection of minors and human dignity, and similar principles of general interest) applying to all audiovisual content services and;

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68 The reasoning behind this is that “those viewers that subscribe to premium subscription film services have accepted a greater share of responsibility for what is broadcast into the home (and therefore have particular responsibility to oversee children’s access to material in this area)”. See Ofcom, Guidance notes Broadcasting Code Section 1: Protecting the under18s, 2005, http://www.ofcom.org.uk/tv/ifi/guidance/bgguidance/guidance1.pdf.
70 Communication The future of European regulatory audiovisual policy, op. cit., 23.
72 Ibidem.
ii) a subset of these services, linear audiovisual services, subject to rules derived from those in the TVWF Directive, but lighter and modernised.\textsuperscript{73}

The protection of minors is thus considered as “a policy objective valid for any kind of audiovisual services”.\textsuperscript{74} Specifically with respect to linear services there seems to be an agreement that the current article 22 would suffice. Regarding non-linear services, a similar, but “lighter” regime would be imposed, requiring measures to ensure that audiovisual content services are not distributed in such a way that might seriously impair the physical, mental or moral development of minors, and encouraging systems of co-regulation or self-regulation as well systems of filtering, age verification, labelling and classification of content to be put in place.\textsuperscript{75} The emphasis on self-regulation, co-regulation and the use of technology is noticeable and in line with recent Commission policy. It remains to be seen what the finalised version of this “comprehensive audiovisual content framework” exactly will look like. Up until now the intentions of the Commission have been and still are quite vague. The new framework is expected to be finalised at the end of the year.

\textit{Digital television}

One last comment in the area of broadcasting relates to the current growth in digital television. In line with the user empowerment trend, digital television (will) provide(s) parents with the technological possibility to decide what content they consider harmful to their children and consequently to take appropriate measures,\textsuperscript{76} such as blocking certain channels, or limiting access based on age categories.\textsuperscript{77}

\textbf{VII. Internal market ~ Free movement of services}

Free movement of services, one of the cornerstones of the European Union Internal Market can be linked to the protection of minors in different manners.

\textit{Information society services}

First of all, the protection of minors is an objective of general interest which is declared of high importance in the 2000 Directive on electronic commerce.\textsuperscript{78} This Directive has introduced the principle of free movement of information society services\textsuperscript{79} (Article 3 §2),\textsuperscript{80} linked to the

\begin{footnotesize}
\begin{enumerate}
\item ibidem.
\item Communication The future of European regulatory audiovisual policy, op. cit., 13.
\item See for instance: http://www.belgacom.be/private/nl.jsp/static/belgacomtv.jsp/.
\item Information society services are defined as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”.
\item “Member States may not, for reasons falling within the coordinating field, restrict the freedom to provide information society services from another Member State”.
\end{enumerate}
\end{footnotesize}
country of origin principle (Article 3 §1). In article 3 §4, however, a conditional framework for restrictions on this principle is constructed. Relevant to the topic at hand is the fact that Member States may deviate from the free movement of information society services if the measure is (i) necessary in the light of the protection of minors, (ii) is taken against a given information society service which prejudices this objective (protection of minors) or which presents a serious and grave risk of prejudice to this objective, and is (iii) proportionate to this objective.

The Commission clarified the fundamental principles of necessity and proportionality, developed in the case law of the European Court of Justice with regard to the freedom to provide services, in its Communication on Principles and guidelines for the Community’s audiovisual policy in the digital age. “Proportionality”, one of the over-arching general principles of European law and also explicitly foreseen in Article 5 of the EC Treaty, requires that the extent of regulatory intervention should not be more than is required to achieve the aim in question. This test demands an in-depth analysis of the service or measures concerned.

In its first report on the application of the Directive the Commission highlighted the concern that new regulatory initiatives in the area of the protection of minors give rise to the risk of regulatory fragmentation and/or distortions of competition and stressed that it would closely monitor these policy developments in order to identify possible needs for Community action.

**Broadcasting services**

Free movement of broadcasting services (again linked to the country of origin principle) is up until today regulated through the Television without Frontiers Directive. In this Directive as well, a restriction on the free movement of broadcasting services is provided for manifest, serious and grave infringements on Article 22 §1 or §2, which regulate the protection of minors.

**Free movement of services in general**

If there would be audiovisual and information society services which are not covered by the Directive on electronic commerce nor the Television without Frontiers Directive, the general rules of the internal market would be applicable, more specifically the free movement of services.
services. This means that with regard to those services “Member States are entitled to take non-discriminatory measures where justified for overriding reasons of the public interest; [...] provided they were strictly proportional to the aim pursued and that there were no other less restrictive measures of equivalent effect available.” 87

1998 Recommendation
One last noteworthy reference to free movement of services in relation to the protection of minors is situated in the Annex of the Recommendation on the protection of minors and human dignity (see supra), dealing with codes of conduct.88 As mentioned before, codes of conduct and other self-regulatory tools were strongly encouraged by this Recommendation. The Commission stresses that the proportionality of the rules drawn up in the codes of conduct should be assessed in the light of the principles of freedom of expression, protection of privacy and free movement of services.

VIII. Liability of intermediaries

Intermediary service providers often play a role in initiatives concerning the protection of minors (such as for instance codes of conduct between ISPs). It is worth having a look at the liability regime currently in place, more specifically in the Directive on electronic commerce, to have a better idea of the framework in which they operate. There are four basic articles governing the liability of intermediary service providers: article 12 on mere conduit, article 13 on caching, article 14 on hosting and article 15 on the absence of a general duty to monitor. We will focus on the last two provisions, since they are the most relevant to the topic at hand.

Hosting
Article 14 entails that the intermediary, storing information provided by a recipient of the service (hosting), will be exempt from liability for this information, provided he (i) does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. This provision has raised concern due to the fact that intermediaries, who are private persons/organisations, are pushed to pass judgment on the legality of information. This is a delicate decision and it is often feared that intermediaries would be rather safe than sorry, thus blocking access to content which is possible not illegal at all.89 This potentially has grave consequences for the freedom of expression.90

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87 Green Paper on the protection of minors and human dignity in audiovisual and information services, op. cit.
89 Please note that article 14 only deals with “illegal” content. Distinguishing between illegal and harmful content can be a difficult task, and should definitely not be left to intermediaries.
No general obligation to monitor

Article 15 ensures that Member States will not impose a general obligation on providers, when supplying the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. It is broadly agreed that a general obligation to monitor is technically difficult, financially demanding (certainly for small companies) and indecisive regarding effectiveness. Moreover such an obligation as well could have possible negative consequences on the freedom of expression due to overblocking of content in order to avoid liability. 91

Filtering

Recently, in a report on the Proposal for a recommendation on the protection of minors and human dignity and the right of reply (see supra) by De Sarnez, a remarkable statement was made, promoting automatic filtering at source by the provider (filtering of violent, racist or pornographic images). 92 Although it would be positive if service providers would supply their customers with correct information on filtering and even offer them filter software, (obliging) filtering at service provider level runs counter all current trends of user empowerment and could be considered excessive. 93 However, the fact that such a provision would be included in the recommendation shows that, recently, policymakers are apparently getting more anxious and feel the need to take “firmer” action by steadily increasing the responsibility/liability of service providers. It remains to be seen to what extent such ideas will press home, since there still is and probably always will be firm opposition to any form of imposed filtering. 94

IX. Conclusion

This paper tried to provide an overview of the European (and international) legal framework which encircles the issue of protecting minors against harmful content (see also table 1). In our digital age, this normative goal remains significant to a high degree, but is challenged by the nature of the new information and communication networks. In an attempt to resolve this, alternative regulatory techniques are brought into play. It is crucial however that the use of self- and co-regulatory instruments, and technical tools, fits in with the broader legal framework. The interplay between these different regulatory frameworks is constantly

91 Bodard, K., loc. cit., 269-270.
93 See for instance: E.S.C., op. cit., 29-33. The ESC is concerned about the use of filter systems by Internet access providers: “This would mean a system which is presented as ‘user-empowering’ becoming an instrument of control, actually taking choice out of citizen’s hands”.
94 A clear position was taken up by the Organization for Security and Co-operation in Europe & Reporters sans Frontières in their recent statement (op. cit.): “Filters should only be installed by Internet users themselves. Any policy of filtering, be it at a national or local level, conflicts with the principle of free flow of information”. Yaman Akdeniz takes it one step further and argues that “[filtering] tools should never be subject to government mandated usage, or endorsement” (Akdeniz, Y., op. cit.).
evolving, and will need to keep evolving, while always striving for a carefully considered balance between the different normative interests and fundamental rights at stake.

**Table 1. Overview**

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<td>Article 12, 13, 17 (freedom of expression)</td>
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<td>Article 8 ECHR (~ Article F Treaty European Union)</td>
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<td>Article 12 Universal Declaration of Human Rights</td>
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<td>Internal market</td>
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