Case Study Report

Transnational Private Regulation in the Advertising Industry

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Case study conducted within the framework of the

Research Project

Constitutional Foundations of Transnational Private Regulation

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The research to this report was concluded in December 2010. It reflects the state of play in the advertising industry and regulatory framework at that moment. Developments following that date, in particular on the topic of online behavioral advertising have not been included. The usual disclaimer applies.

Florence, March 2011
Paul Verbruggen

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List of Abbreviations

AAAA –American Association of Advertising Agencies
AANA – Australian Association of National Advertisers
AFAA – Asian Federation of Advertising Associations
AICV – L'Association des Industries des Cidres et Vins de fruits de l'UE
ANA – Association of National Advertisers
ASB – Advertising Standards Bureau
ASC – Advertising Standards Canada
ASA – Advertising Standards Authority
ASAI – Advertising Standards Authority Ireland
ARPP – Autorité de Regulation Professionnelle de la Publicité
AVMS – Audiovisual Media Services
BBB – Better Business Bureaus
BPRs – best practice recommendations
CA – Consumentenauthoriteit
CAP – Committee of Advertising Practice
CARU – Children's Advertising Review Unit
CBBB – Council of Better Business Bureaus
CEEV – Comité Européen des Entreprises Vins
CEPS – Confédération Européenne des Producteurs de Spiritueux
CIAA – Confederation of the Food and Drink Industries of the EU
CSA – Conseil Supérieur de l'Audiovisuel
CvdM – Commissariaat van de Media
DMA –Direct Marketing Association
DGCCRF – Direction General de la Concurrence, de la Consommation et de la Répression des Fraudes
DG INFSO – Directorate General for Information Society
DG SANCO – Directorate General for Health and Consumer Policy (Direction Général de la Santé et des Consommateurs)
DW – Deutscher Werberat
EACA – European Association of Communications Agencies
EASA – European Advertising Standards Alliance
ECJ – European Court of Justice
EEC – European Economic Communities
EFRD – European Forum for Responsible Drinking
EGTA - Association of Television and Radio Sales Houses
ERSP – Electronic Retailing Self-regulation Program
FEDMA – Federation of European Direct and Interactive Marketing
FTC – Federal Trade Commission
IAA – International Advertising Association
IAP - Istituto dell'Autodisciplina Pubblicitaria
ICC – International Chamber of Commerce
IFBA – International Food and Beverage Alliance
ISP – Internet service provider
JEP – Jury d'Ethique Publicitaire
NAD – National Advertising Division

NARB – National Advertising Review Board
NAI – Network Advertising Initiative
MCA – Misleading and Comparative Advertising
OBA – Online behavioral advertising
OECD – Organisation for Economic Co-operation and Development
OFCOM – Office of Communications
OFT – Office of Fair Trading
Ro – Reklamombudsmannen
RAC – Responsible Advertising and Children
RIA – Regulatory impact assessment
SRC – Stichting Reclame Code
SRO – Self-regulatory organizations
TAG – The Amsterdam Group
TIE – Toy Industries of Europe
TPR – Transnational Private Regulation
TPRER – Transnational Private Regulatory Regime
UCP – Unfair Commercial Practices
UCP – Uniform Customs and Practice for Documentary Credits
UK – United Kingdom
US – United States
UWG – Gesetz gegen den unlauteren Wettbewerb
WBZ – Wettbewerbszentrale
WFA – World Federation of Advertisers
WHO – World Health Organization

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Executive Summary

Introduction

1. This report provides an analysis of the emergence and governance of transnational private regulation (TPR) in the advertising industry. TPR is a concept that is used in the academic discourse to capture the emergence of regulatory regimes developed by non-state, private actors that seek to regulate the behavior of their constituents or of other actors. These regimes are private in the sense that non-state actors are the main constituents, including firms (acting individually and in associations), non-governmental organizations (NGOs) and other civil society representatives. The regimes are transnational in the sense that they have effects across territorial borders. Because they are not constituted via treaties (i.e. the domain of international law), but are fundamentally private in nature, the connotation 'international' is not a preferred label for these regimes.

2. The advertising industry has developed an elaborate regime of TPR. This report seeks to identify the linkages between the development of transnational and national private regulatory activities and between public and private regulatory norms. It focuses on the activities pursued by the International Chamber of Commerce (ICC), the European Advertising Standards Alliance (EASA) and European trade associations in the alcohol, food and digital media sectors. By studying these activities, which have their most profound impact in Europe, the report outlines the current governance design of TPR of advertising and presents an evaluation of private regulatory regime for the control of advertising and other marketing practices. The research questions central to the report are:

- What conditions have lead to the *emergence* of TPR in the advertising industry?
- Through which mechanisms is this regime of TPR *governed*?
- Whether and to what extent can this regime be considered *successful* in terms of its legitimacy, enforcement, effectiveness and quality?

Emergence

3. The European advertising industry (i.e. advertisers, advertising agencies and the media) has a well-established tradition of private regulation. The general aim of private regulation of advertising and other marketing practices is to ensure fair competition between firms, raise ethical standards in the industry, and contribute to a high standard of consumer protection, all based on the premise that advertising should be legal, decent, honest and truthful. These key principles generally apply to advertising, its content and related marketing practices, but have been specified in relation to various product sectors (e.g. alcohol, food), vulnerable groups (e.g. children, women) and media used for advertising purposes (e.g. print, broadcast and digital). These private standards have also been detailed in relation to marketing communication techniques other than advertising (e.g. sales promotion, sponsorship and direct marketing).

4. Private regulation of advertising develops within a complex arrangement of national and transnational, public and private actors. Within this context, four circumstances can be

identified as key contributors to the adoption of private regulation. A first factor that has been conditional to the creation of TPR and mechanisms for oversight, control and administration concerns the strong degree of organization of the main constituents of the advertising industry. Advertisers, agencies and media owners have created associations and meta-associations, both at the transnational and national level, through which they develop codes of conduct for all type of commercial advertising and marketing communications. Second, pressures by government to undertake legislative or executive action have been crucial for the adoption and further development of these codes, as well as for the private regimes that oversee the application of these codes by advertising practitioners and media. Third, changes in technology and media have strongly motivated the industry to adoption and revise transnational codes.

5. The industry also has a strong endogenous driver for the proper functioning of private regulatory regimes, namely that of reputation. Where these regimes are able to clear the market of deceptive, offensive and irresponsible ads the audience of advertising, consumers and business, are more likely to trust, appreciate and pay attention to advertising. This increases the chances that advertising achieves its primary goal: to build brand reputation and persuade the targeted audience to buy the products or services advertised. The success of advertising is thus dependent, but not solely, on the attitude of the potential buyer to advertising. This makes advertising vulnerable to societal concerns. Such concerns motivated advertisers in the alcohol and food sectors, as well as media platforms for digital advertising to undertake regulatory action and establish codes of conduct of their own.

Architecture of private governance

6. A strong interplay between transnational and national codes of advertising practice can be observed. Both transnational and national trade associations adopt such codes of conduct. Transnational codes – such as the 2006 Consolidated ICC Code of Advertising and Marketing Communication Practice – generally serve as a baseline for the national industry to negotiate and adopt their own standards at the national level. Alternatively, individual firms can use the transnational codes as an example for the adoption of their internal company codes. National industries commonly establish a separate body, a self-regulatory organization (SRO) to administer the adoption of the code, its review and its enforcement. Different legal traditions and market structures have led to strong variations in the way in which national industries have adopted transnational codes in the national context. Accordingly, we observe considerable differences between the various private regimes for advertising control existing at the national level, both in terms of the material norms governing advertising and its industry, as well as the procedural rules governing the operation of the SROs.

7. In Europe, the strong variations in the scope and content of national codes of advertising practice led the European Commission to intervene in the early 1990s and pressure the European advertising industry to design mechanisms of coordination that would be equipped to deal with complaints on cross-border advertising campaigns. If the industry would fail, the alternative was legislative action. The industry heated the threat and was quick to establish EASA, an SRO network mandated by the national SROs to oversee a

cross-border complaint handling mechanism enabling the transfer of complaints lodged before an SRO in the country where the advertisement appeared to the SRO in the country where the editorial decision to publicize the campaign was made.

8. In 2002, EASA extended its membership also to include 15 European organizations representing industry interests. Since then it has been mandated to develop so-called 'Best Practice Recommendations' (BPRs). These recommendations do not lay down material norms to control advertising practices like the Consolidated ICC Code does for example, but include a set of performance standards for EASA SRO members. The purpose of these BPRs is to optimize the regulatory activities of the SROs and enhance their impact and effectiveness. A crucial factor in explained why EASA started to develop BPRs was the accession of ten new Member States to the EU in 2004. Few of the Central and Eastern European Member States were familiar with the concept of private regulation and often centralized systems of private regulation for advertising practices supported by advertisers, agencies and media were absent. The design of a common European model of private advertising regulation – the EASA Best Practice Self-Regulation Model – would benefit the creation of systems of private regulation in these countries. This would be particularly important if forthcoming EU legislation on advertising practices (i.e. the Unfair Commercial Practices (UCP) Directive in 2005 and Audiovisual Media Services (AVMS) Directive in 2007) were to recognize private regulation in the advertising industry and allocate a complementary function to it in regulating commercial practices and media. In designing the common European model, the EASA drew from the features and practices of the Western-European SROs, though the British SRO appears to have been particularly influential.

9. The approach taken by EASA in driving the coordination and integration of different regimes of private regulation in Europe was discussed among a group of concerned stakeholders during the "Advertising Self-Regulation Roundtable", which was organized by the European Commission in 2005 at the request of EASA and the World Federation of Advertisers. The concluding report of the Roundtable – the Madelin Report – singles out much of the same elements for the effective operation of SROs as the EASA Best Practice Self-Regulation Model did. Consequently, the Madelin Report to a large extent validated EASA's model and confirmed it as 'the' common European roadmap to enhance the effectiveness of private regulation in advertising. The backing of its efforts by the Commission has implicitly mandated EASA to drive further the integration of the different national approaches to private regulation in the European advertising industry. To benefit from EASA's recognized expertise and practices, sector-specific European trade associations increasingly engage with EASA to develop and revise their own codes of conduct, and to conduct pan-European monitoring exercises on the compliance of their codes.

10. More recently, EASA has extended its pivotal role in the development of private regulation in Europe to other parts of the world. In 2008, it established the International Council on Advertising Self-Regulation, hosting SROs from non-European advertising markets (i.e. Australia, Brazil, Canada, Chile, India, New Zealand, Peru and South Africa). In addition, EASA has assumed a central role in the adoption and revision of the ICC codes by becoming a member of the Commission on Marketing and Advertising and its General Director co-chair of the Commission's Code Revision Taskforce.

11. Accordingly, private regulation of advertising practices is governed via a complex multilevel network of private actors. The ICC and other transnational trade associations set out the general principles for advertising practices in their codes of conduct, whilst national SROs administer and apply national codes of conduct, which might be based on or derived from the transnational standards. At the European level, EASA provides guidance via its BPRs, detailing how SROs should fulfill their tasks and can optimize their impact. The regulatory chain might thus be considered as a vertical one (ICC-EASA-SROs). However, it must be stressed that there is no legal hierarchy between these three actors: SROs are not obliged to follow ICC codes and EASA guidance, and EASA is not the transmission belt of the ICC driving the implementation of ICC codes by national industries. Furthermore, SROs have a direct or indirect influence on transnational processes as they are represented in the membership structures of the ICC and EASA. Flows of regulation thus move up and down the regulatory chain: transnational codes strongly interact with national regimes and might sometimes be the product of it, while at the same time national regimes might be established or updated as a result of new transnational codes.

12. The analysis also reveals strong interplays between (inter)national public regulation and private regulation. For one, the threat to adopt public regulation, renew existing laws or take executive action is a powerful driver to establish and develop private codes. Moreover, private regulatory regimes generally complement existing laws and regulations on advertising in that they provide an additional route to challenge advertising practices or dispute a particular claim. As such, procedures before an SRO can be a faster, cheaper and less burdensome course of action, both for consumers and competitors, when compared to the procedures available under public law. At times, public frameworks recognize these attributes of private regulation and explicitly encourage the submission of advertising dispute to the SRO-run regimes. In some jurisdictions, public regulators have also established collaborative arrangements with SROs in order to coordinate standard-setting, monitoring and/or enforcement policies. The private regimes, for their part, stress their subordinate position to applicable laws. As the Consolidated ICC Code puts it: 'The code is to be applied against the background of whatever legislation may be applicable'.

Legitimacy

13. The report has sought to evaluate this complex and multilevel regime of TPR in terms of legitimacy, enforcement, quality and effectiveness. Four evaluative criteria were used in relation to the dimension of legitimacy, namely: (i) the inclusion of the regulated entities and those that are supposed to benefit from the application of the private codes; (ii) procedural transparency; (iii) accountability; and (iv) the relationship with public legal frameworks. The analysis points out that those subject to the codes of conduct (i.e. firms concerned with the business of advertising) are usually enabled to participate in the processes leading to the adoption of these codes. Members of the standard-setting institution are in a good position to participate via their membership rights. However, codes may have spillover effects on non-members, who are typically excluded from code drafting processes. The involvement of supposed beneficiaries, in this case mainly consumers and NGOs, is not strongly developed yet. However, a positive trend can be signaled as standard-setting bodies, both at the transnational and national level, increasingly invite non-industry stakeholders to participate in drafting processes by organizing consultation rounds. Levels of procedural transparency

are generally low, however. Code drafting procedures remain largely secretive in that little information is publicly available on who writes the codes and what procedure is followed for that purpose. Also enforcement practices remain closed to the public: it is only the result of the enforcement activity (i.e. the SRO jury decision) that is publicized.

14. Low levels of procedural transparency also affect levels of accountability. Members of the trade associations can hold the decision-makers privately accountable for their actions by following internal governance mechanisms (e.g. voting procedures or budgetary approval), but several other accountability mechanisms exist. At the transnational level, several European trade associations and confederations have engaged in informal dialogues with the European Commission and non-industry stakeholders, and have made public commitments to promote and establish effective private regulatory schemes that can contribute to a high standard of consumer protection in the EU. Third-party auditors are paid to verify the fulfillment of these commitments and the results are published and presented in public to these institutions. At the national level, on the other hand, complaint handling processes before independent SRO juries are the principal means through which advertising practitioners and, indirectly, the private rule-maker can be held to account. Only seldom private regulators are formally held to account before courts and administrative agencies, and if this happens it is at the national level.

15. Finally, the legitimacy of TPR in the advertising industry is also dependent on its relationship with public legal frameworks. The more a legal framework or public actor recognizes or incorporates the private regime, the more it lends legitimacy to it. At the European level, the European Directives on UCP and AVMS recognize the complementary role SROs and codes of conduct may play in clearing the market from deceptive and irresponsible advertising. In addition, the European Commission has informally recognized EASA's efforts to increase the effectiveness of private regulation in the advertising industry and continues to work with EASA in related projects. At the national level, however, there are strong differences between the ways SROs may derive a degree of legitimacy from public law or public actors. Delegation of rule-making and enforcement powers provides a strong example of how an SRO and its regulatory activities may gain legitimacy. However, formal delegation was only observed in the United Kingdom in the field of broadcast advertising and appears to be very exceptional in Europe. In other countries, a more diffuse degree of legitimacy is awarded to SROs via the *ex post* recognition of their regulatory activities through hard law (e.g. endorsement in consumer protection regulations) or soft law means (e.g. enforcement policy of the authority enforcing advertising laws). In European countries and jurisdictions around the world, however, advertising laws remain silent as to the issue of private regulation and no understandings but for informal ones have appeared between public authorities and national SROs. In these latter cases, SROs can hardly be said to borrow legitimacy from the public law framework.

Enforcement

16. The dimension of enforcement is evaluated with reference to: (i) the monitoring activities on code compliance; (ii) the use of *ex ante* compliance mechanisms to improve levels of compliance before advertising campaigns are used in the public; (iii) the availability and application of remedies and sanctions in case of non-compliance; and (iv) the available

means to enforce remedies and sanctions on the code violators. It must be stressed first, however, that monitoring and enforcement activities are largely decentralized and take place in the local context: national SROs are primarily responsible for these activities. Only a small number of SROs are actively concerned with organizing monitoring activities and have established their own monitoring policies and programs. Most of the SROs in Europe have only been involved in monitoring activities that were commissioned and funded by European trade associations in the food and alcohol sectors, and coordinated by the EASA network. Underdeveloped monitoring strategies are likely to create potential gaps in SRO oversight, in particular where consumers do not submit their complaints to the SRO or violations are difficult to discover without specific expertise.

17. Copy advice and pre-clearance constitute two *ex ante* control mechanisms used by SROs to reduce levels of code non-compliance. By offering copy advice to advertising practitioners, the SRO assesses, prior to publication, to what extent an advertisement complies with applicable advertising standards, public or private, or both. The advice is voluntarily obtained and non-binding for both the practitioner and the SRO jury. Pre-clearance works in a similar way, but implies a duty to submit copy to an inspection body prior to its publication. It typically concerns finished and ready-to-broadcast campaigns. The use of copy advice and pre-clearance is fully decentralized: only national SROs offer these facilities. However, strong variations can be observed. Pre-clearance is required in only a handful of countries and may apply to advertising through particular media (broadcast advertising in France and UK), or to particular products (e.g. pharmaceuticals the Netherlands). In other countries, pre-clearance is generally banned for historical, cultural and legal reasons (e.g. Germany). While copy advice is more common, not all SROs have developed a strong policy here. All circumstances being equal, the application of the two *ex ante* compliance mechanisms reduces the need for *ex post* complaint adjudication. They may also generate important revenues for SROs as they are typically provided on the basis of payments. Accordingly, SROs should install and optimize their copy advice and, where possible, use pre-clearance as a sanction for repeat offenders.

18. SROs have at their disposal a wide set of remedies and sanctions (e.g. claim substantiation, orders to withdraw or amend ads, and membership expulsion), sometimes supplemented with more interventionist sanctions (e.g. pre-clearance, corrective statements, fines, withdrawal of trading privileges, referrals to public authorities). These means are applied following an implicit sanction escalation policy. Such policy not only allows the SROs to settle most of the disputes with the least interventionist means, but also at great speed. Accordingly, the report finds that SROs generally remain very reluctant to impose deterrent sanctions and primarily follow a persuasive approach to achieve code compliance. This can be explained by reference to one of the principal aims of private advertising regulation, namely to raise ethical standards in the industry. The application of deterrent sanctions to violations of the codes of advertising practices does not fit neatly with this purpose. In addition, the majority of the complaints dealt with by European SROs (60%) concern issues of taste and decency, social responsibility and health and safety. These issues do not lend themselves to be controlled by remedies and sanctions with compensatory or punitive rationales. Accordingly, the principal purpose of SRO enforcement is to correct and educate firms, not to penalize them. This approach appears to be rather successful. SROs can often settle complaints via informal and mediated intervention. Should a complaint be

formally investigated and tried before the jury, SROs are able to attain compliance in most cases, some SROs reporting levels of compliance with jury decisions of over 95%.

19. Those firms that have been found to breach the applicable codes cannot easily ignore the remedies or sanctions administered by the SROs. The enforcement of sanctions greatly benefits from the involvement of media owners to the private systems. Media owners play the role of gatekeeper and can effectively deny media access to code-infringers where they have included the obligation to comply with the code as part of the underlying advertising contract. This safety stop of a media boycott is an effective and cost-efficient means to achieving code compliance. However, if media fail to act as gatekeepers, SROs are prone to enforcement gaps. Most acute is this concern in the case of digital media advertising, where major media owners (e.g. Internet Service Providers (ISPs), internet search engines, auction websites, and social network communities) have not (yet) fully committed to the systems of private control of advertising practices. Individual SROs have so far struggled to engage with these actors and come to an agreement over the removal of non-compliant advertising on search engines, online media platforms, auction websites or social network communities. These developments are worrisome and also have their implications for the effectiveness of the system.

Quality

20. Finally, the dimension of quality is concerned with measuring and evaluating the impact and performance of private regulation and the regulatory regime as a whole. The central questions here are: do standard-setters use regulatory impact assessments in relation to the codes they adopt; do they reflect on the organizational structures, capacity and performance of bodies concerned with private regulation; what type of mechanisms does it employ for that purpose? Unlike in the public domain, solid analytical analysis of the impact of regulation is absent in the private sector. *Ex ante* evaluations of codes of conduct are foreign to the advertising industry. The *ex post* evaluation of private regulation is limited to the periodic review of codes, without any systematic assessment of the achievements and costs of the codes.

21. A practice that is much more developed in the advertising industry – and in particular when compared to other industries – is the use of performance indicators to strengthen the effectiveness of private regulatory activities, including standard-setting, monitoring and enforcement. Here, EASA is at the forefront of evaluating the regulatory performance of European SROs. The EASA BPRs developed since the early 2000s on issues such as the code drafting, funding and administration, independence of SRO juries and effective sanctioning have provided common indicators for SRO members to benchmark their own performance in relation to other SROs and third parties, and identify areas of improvement. EASA has systematically (though not independently) monitored performance on these indicators by the SRO members annually and reported to the European Commission on progress. As such, EASA has been very effective in driving considerable institutional changes among the SROs, enhancing the regulatory performance of SROs and increasing the overall effectiveness of private regulation of advertising practices in Europe.

Effectiveness

22. Effectiveness concerns the degree to which the regime of TPR in the advertising industry meets its own objectives. As noted above, the regime sets out to ensure fair competition between firms, raise ethical standards in the industry and contribute to a high standard of consumer protection based on the premise that advertising should be legal, decent, honest and truthful. Meeting those aims is dependent on a number of factors that partly overlap with the criteria discussed in relation to the dimensions of legitimacy and enforcement, including: (i) the degree of industry commitment and capacity to adopt codes and ensure that these are complied with; (ii) the alignment between private interests and the aims of the regime; (iii) government support and oversight; and (iv) the credibility of sanctioning policies.

23. The effectiveness of TPR in the advertising industry is positively influenced by the considerable degree of support that is given to it industry-wide. This commitment is signaled by the fact that industry members have established regimes that typically include all the segments of the industry, fund these systems entirely by themselves and regularly review and update the codes in the light of changing legal frameworks, technological developments and societal concerns. However, the resistance of weighty players in the digital media industry to pledge to existing SRO practices strongly undermines the otherwise thorough commitment of the European advertising industry. These players (e.g. ISPs, search engines, online ad networks, auction websites and social network communities) are fairly new to the scene and do not yet have an established tradition of private regulation. In their search for a bigger share in the online advertising market, they have so far preferred not to (fully) submit themselves to the current private systems for the control of advertising practices.

24. Therefore, interests in the advertising industry do not appear to be aligned and this poses serious problems to the effectiveness of the private regimes. Given that digital advertising is likely to become one of the main avenues of advertising in the near future, it is key that digital media owners become actively involved not only in the adoption of private regulation, but also in processes of monitoring and enforcement. As noted above, the effective operation of the governance design of TPR in the advertising industry is strongly dependent on the participation of the media, for their gate keeping capacity allows the SROs to enforce sanctions on code violators. If the present architecture of private regulation of advertising is to endure in the age of digital advertising, the digital media owners need to be onboard.

25. A complementary approach to promote and ensure code compliance in digital advertising practices is to incorporate a clause in the accompanying advertising contract, which requires the digital advertiser to comply with the applicable advertising codes. Such compliance clauses, which are for example used in the contracts that Google nowadays adopts under its digital advertising service called Adwords, do not directly enable SROs to enforce its decisions vis-à-vis digital advertisers. They do, however, offer the company enabling the advertiser to promote its goods through digital means the leverage to undertake enforcement action against breaches of advertising codes. Accordingly, a more proficient use of compliance clauses in digital advertising contracts may contribute to motivating compliance with codes of conduct in digital advertising.

26. Government has proven an important driver for the establishment and development of private regulatory regimes in the advertising industry. Both at the national and transnational level governmental bodies have pressured SROs and the industry at large to progress and innovate systems of private regulation. At the national level, pressures and oversight by government have proven significant in harnessing the effectiveness of SROs. In the UK, Spain and Netherlands, for example, support by legislative measures and oversight by public authorities exercising enforcement powers in relation to advertising regulation have helped these national systems to gain important public functions in the control of misleading and comparative advertising. Clearly, such recognition has boosted their status as industry watchdogs in these countries.

27. The effectiveness of private regulation is further dependent on the credibility of sanctioning policies. SRO juries face the potential risk of being captured by industry interests should they be composed of (a majority of) industry representatives. To mitigate this risk, prevent industry biases, and signal credibility and independence of the SRO jury to the public, non-industry stakeholders should hold the majority of votes in SRO juries. Experiences of SROs with non-industry stakeholder majority in their juries are positive and suggest that fears, if any, of losing 'control' over the private regime remain unfounded.

28. As regards the aim of consumer protection it should be specifically noted that the European SROs provide an important contribution to levels of consumer protection in the EU. First of all, the procedures before an SRO provide a faster, cheaper and less burdensome course of action, both for consumers and businesses, to address disputes on advertising when compared to the procedures available under public law. Further, the SROs and their codes may at times exceed the level of protection that is provided by EU legislation, in particular as regards issues of taste and decency. Importantly, they continue to play a crucial role in promoting and institutionalizing notions of fair competition and consumer protection in Central and Eastern European Countries that have recently become EU members or that are hoping to access the EU.

29. However, this role of private regulation in enhancing levels of consumer protection is limited and only complementarity to public law. SROs do not have available the public competencies and type of instruments (i.e. legally binding sanctions) that ensuring consumer protection would require. Partly as a result of this, SROs face difficulties in securing full compliance with their codes, in particular in the case of recalcitrant and repeat offenders (often called 'rogue traders'). Moreover, ensuring consumer protection would also require a more proactive approach to enforcement. SRO enforcement is typically complaint-based and reactive, and, as noted above, the monitoring activities generally underdeveloped.

Summary of findings

30. The following table summarizes these conclusions on the dimensions of legitimacy, enforcement, quality and effectiveness, and uses a simple scale of ++, +, +/-, -, and -- to indicate the degree of conformity with the evaluative benchmarks.

Evaluative criteria	*Score*	*Remarks*
Legitimacy		
(i) Inclusion	+	Industry participation is generally high in both transnational and national trade associations adopting codes of conduct. The involvement of beneficiaries (i.e. consumers and NGOs) is not strongly developed, but has improved recently.
(ii) Procedural transparency	-	Code drafting remains largely secretive and enforcement procedures generally take place behind closed doors.
(iii) Accountability	+/-	Low levels of transparency also affect accountability. Mainly members hold trade associations to account for their rule-making activities, but are supplemented with mechanisms such as reporting, complaints handling and judicial review.
(iv) Recognition and support by government authorities	+	Private regimes only occasionally enjoy endorsement for government, although their overall effectiveness appears to benefit from such support.
Enforcement		
(i) Monitoring	--	SRO monitoring policies are underdeveloped, making enforcement activities fully dependent on outsiders' input.
(ii) *Ex ante* compliance mechanisms	+/-	While copy advice and pre-clearance facilities are in place in many countries, the state of development varies strongly between different SRO.
(iii) Remedies and sanctions	+	SROs have at their disposal several remedies and sanctions, which are applied following an implicit sanction escalation policy. This allows the SROs to settle most of the disputes with minimal effort and at great speed, but also makes them vulnerable to critiques of regulatory capture.
(iv) Enforcement of sanctions	+/-	There are several private and public means via which SROs can enforce their sanctions. Media are key and have been profound gatekeepers in print and broadcast advertising. Digital media owners have yet to commit to such a role.
Quality		
(i) Regulatory impact assessment	-	Solid analytical impact assessment of regulation is lacking. Whether regulatory action needs to be taken and in what forms is determined mainly on the basis of private interests and intuition.
(ii) Regulatory performance indicators	++	The European advertising industry has been heavily concerned with the evaluation of its regulatory performance. Since the early 2000s EASA has developed BPRs to benchmark SRO performance in relation to others and identify areas of improvement. EASA monitors progress on a yearly basis and reports this to the European Commission.
Effectiveness		
(i) Industry commitment and capacity	-	While industry commitment and capacity are generally strong in the area of print and broadcast advertising, digital media have yet to fully subscribe to current systems of private regulation. This gap dents the industry's capacity to regulate advertising and ensure compliance across all media.
(ii) Private interests	+/-	Industry interests such as reputation and brand value strongly align with the objectives of private regulation, though not necessarily with public policy objectives. Interests of digital media owners to increase their share in the advertising market create tensions with traditional media and may prevent their full commitment to private regulation.

Evaluative criteria	*Score*	*Remarks*
Effectiveness (continued)		
(iii) Government support and oversight	+	Government has driven the establishment and further development of private regulation. Recognition in legal acts and oversight by national public authorities has assisted SROs in assuming important public functions in the control of advertising.
(iv) Credible sanctioning policies	+/-	Sanctioning policies gain credibility where SRO juries have a majority of independent, non-industry stakeholders. Although most of the European SROs have involved such stakeholders in their adjudicative procedures, few SROs allow them to have a majority in the jury.

Policy recommendations

31. Given the complexity of the governance design of the regime of TPR in the advertising industry, the following policy recommendations are divided according to (i) the governance level on which regulation is adopted and (ii) the type of media involved in advertising. In addition, several recommendations are given to improve the quality of regulation and regulatory performance (iii).

i. Governance level

a. The transnational level

32. The development of relationships between advertising and single fields ranging from food safety to health, from environmental protection to antidiscrimination suggests that coordination at the transnational level needs to improve both in relation to sector-specific international organizations and local SROs. The ICC often reacts to recommendations proposed by international and intergovernmental organizations (e.g. World Health Organization (WHO)) or by other transnational private regulators. These relationships are informal or take the form of exchanges of observers in the governance bodies. To better coordinate between the various regulatory bodies (public/private) regulators we propose to deploy instruments that can operate as framework agreements with both binding and non-binding commitments. Such agreements can be adopted in a double form: bilateral and multilateral between the ICC and other transnational private regulators and intergovernmental organizations in order to coordinate policy and making commitments to comply with sector-specific rules. They can:

(i) Commit to comply with regulations adopted by other organizations;
(ii) Define common procedural rules that range from mutual consultation to co-regulatory processes;
(iii) Or define common rules concerning standard setting (for example in the field of food safety definitions of what risks for health means can be agreed upon between Codex Alimentarius Commission of the WHO and the ICC).

b. The European level

- Increased coordination

33. The differences between public and private strategies at EU level require careful scrutiny. The move towards full harmonization with the UCP Directive reinforced the coordinating function of EASA given the lack of any similar institution or mechanism in the public domain. EASA, having incorporated many new SRO members from Central and Eastern European states, is undergoing a relevant transformation that requires a careful design of its governance, taking into account incentives of national SROs, among which competitive dynamics coexist with cooperative interactions. This in part reflects different industries market powers, and in part different regulatory traditions in the field of advertising.

34. At the European level the choice of EASA has been that of coordinating practices taking place at Member State level without engaging directly into definition of rules. EASA does not draft codes concerning substantive issues, but the digital media debate – specifically the role of EASA in the drafting process of digital advertising code of the Interactive Advertising Bureau (IAB) Europe – shows that a new dynamic is emerging. However, given the developments in the public regulatory domain, where the UCP Directive has introduced fully harmonized standards on advertising, it seems appropriate for the private domain to follow suit. Therefore we propose that the European advertising industry, preferably through EASA, promote new forms of coordination among national SROs, which can include all or only a limited number of organizations.

- Development of SRO activities

35. In addition, EASA and the European advertising industry at large, should maintain their efforts to stimulate the creation of effective SROs where they still do not exist. For the settlement of disputes and frustrations over advertising practices SROs have proven to be important complementary mechanisms to public law enforcement. Consumers may gain substantially benefits from the presence of such private dispute settlement systems if compared to a situation where such systems are absent. As such, the European advertising industry can make an important contribution to the objective of EU law to create a level-playing field between EU Member States as regards the regulation of fair competition and consumer protection.

c. The national level

36. The evaluation of the operation and practices of the various national SROs in Europe suggests that improvements should mainly be made in relation to three topics:

- Non-industry stakeholder involvement

37. The involvement of non-industry stakeholders should be advanced further, both in terms of rule-making and enforcement activities. Such involvement enables those individuals that are supposed to benefit from the application of the rules, consumers and NGO

representatives in such activities, to contribute to code adoption and application. Specifically, public consultations on code drafting and other forms of outsider involvement in rule-making procedures facilitates transparency and helps industry rule-makers to be accountable also to non-industry actors that benefit from their activities. Also in relation to enforcement activities, the inclusion of non-industry stakeholder in juries offers benefits to the industry. Outsider involvement signals credibility and independence, and reduces risks of capture. Furthermore, the inclusion of experts (e.g. judges and academics) in SRO juries may enhance the quality and consistency of decisions rendered.

- Enforcement capacity

38. To enhance the capacity of SROs to promote and ensure rule-compliance in the industry it is necessary to strengthen the monitoring policies of individual SROs. If violations are detected, this should lead to an inquiry and/or adjudication before the jury. If resource constraints impel the SRO to hold structural monitoring exercises, SRO staff should at least have the possibility of submitting a complaint to the SRO upon the discovery of advertising practices that are at odds with the applicable codes. Potential concerns over misuse of powers in this *ex officio* practice are mitigated where the jury is composed of a majority of non-industry representatives.

39. Second, SROs should more actively engage in *ex ante* compliance mechanisms. Copy advice and pre-clearance services reduce the need for complaints handling and may thus reduce costs related to such *ex post* control mechanisms. At the same time, copy advice and pre-clearance can generate important resources for the SROs. Pre-clearance, however, may run counter to legal, cultural and historical obstacles, in particular in relation to the freedom of expression, and may thus not be feasible in all circumstances. SROs also free, however, to use pre-clearance as a sanction, particularly in relation to repeat offenders, and require them to submit advertising copy before they launch a new campaign. Concerns over the freedom of expression are unlikely to arise in relation to copy advice, as this *ex ante* control mechanism remains voluntary and not binding for the advertising practitioner. Its compliance function can nonetheless be significant.

40. Third, it should be considered to promote the practice for juries to refer to past decisions having broadly the same factual context as part of the argumentation to decide a case. This enhances transparency in the decision-making process and can also improve consistency between decisions.

- Public-private coordination

41. SROs and public regulators should actively engage with each other to discuss and design possible ways of collaboration. Such collaboration between public and private regulators could be formalized through protocols, covenants or delegation acts. Collaboration should facilitate information sharing between the two. This creates a win-win situation: cooperation allows government to prioritize and focus increasing tight enforcement resources, while the SRO's legitimacy and enforcement activities benefit from the support and oversight of government.

ii. Digital advertising

42. Digital advertising will continue to gain importance as a means for advertisers to reach potential customers. However, to overcome the challenges this development poses to the current architecture of private regulation of advertising practices, greater commitment must be obtained from digital media owners and service provides. Private bodies recognized throughout the industry, such as the ICC and EASA, have a key role to play in creating such commitment. In the past, however, also government pressures have been important drivers for industry to create and further develop systems of private regulation. Such pressures may again be relevant in relation to digital advertising and motivate the main actors concerned to submit to existing systems of private regulation. Improving regulatory quality by refining indicators is certainly one of the most important challenges ahead for private regulation.

43. In parallel, it is advisable that industry bodies such as the ICC, EASA and individual SROs promote the use of codes of conduct in the terms of conditions of advertising contracts between advertisers and digital media owners, so that advertisers are obliged, by contract, to comply with the local advertising codes. The incorporation of such compliance clauses in the contracts generates important attention for codes and their application to digital advertising. Moreover, the contract makes compliance with the codes and decisions binding on the advertiser and this improves the enforceability of codes in this domain.

iii. Quality of regulation and regulatory performance

44. Improving regulatory quality by refining indicators is certainly one of the most important challenges ahead for private regulation. The European advertising industry provides one of the most advanced attempts to introduce performance indicators in private regulation. A more structured process following the path of performance indicators would improve both effectiveness and legitimacy. Many of the regulatory objectives of private regulation (fair competition, consumer protection, privacy and data protection) are strictly correlated to the role of public authorities, in particular independent regulators but sometimes government agencies in the field of unfair trade practices. An integrated approach combining the action of private and public regulators should be able to capture the many forms of interaction that are taking place in this field. There is a strong need to coordinate impact assessment between regulators in the private and public domain and to measure the effectiveness of coordination among them.

45. Regulatory impact assessment cannot be done at each governance level separately, but needs to be coordinated given the decentralized nature of standard setting, monitoring and enforcement of advertising regulation. We propose:

(i) a set of common principles concerning quality of public and private regulation on advertising;
(ii) a full regulatory cycle impact assessment including both ex ante and ex post evaluation;
(iii) and the definition of indicators distinguishing between organizational innovation and regulatory performance.

46. While the leading role of EASA at the EU level should be maintained, a stronger approach to regulatory quality at ICC level should be introduced in order to cover the whole regulatory chain. The EASA International Council may prove an appropriate forum for this.

The indicators adopted by EASA cover both organizational innovation of SROs and regulatory activity. A clearer distinction between organizational and performance indicators and ways to define the goals and measure the degree of compliance would improve the quality of the regulatory process. The forthcoming guidelines concerning OBA in digital advertising should be complemented by indicators on both organizational innovation and regulatory performance in order to ensure a clear and effective private regulatory framework.

Preface by Fabrizio Cafaggi

Advertising in transnational private regulation: an introduction[1]

TO BE INSERTED

[1] This introduction is based on the rich and continuous discussions with several academics and practitioners at two EUI workshops held in March 2010 and February 2011 to whom goes my gratitude. I am extremely grateful to Paul Verbruggen for the comments and suggestions to this introduction and for the collaborative work that has characterized the case study on advertising throughout. Responsibility is my own.

PART (I) – Introduction. General overview

I.A. Brief introduction to the key-elements of the study

1. Topic

Advertising is about conveying information to potential buyers, both businesses and consumers.[1] It allows the advertiser to differentiate its products from others, build up a brand name, an increase its market share. More generally, advertising is said to stimulate growth and product innovations, encourage competition, and increase consumer choice: advertising can make consumers aware of the range, nature, and quality of products available to them. It also funds a good deal of the media, sports events and political campaigns.

Perhaps a more pessimistic view of the role of advertising is voiced by behavioral economists such as Hanson and Kysar,[2] who hold that the principal objective of advertising is to affect customer choice and curb it to the benefit of business. Indeed, advertisers employ sophisticated psychological conditioning techniques to persuade consumers to buy, buy more, or keep on buying the products advertised.[3] Galbraith has therefore famously argued that advertising is about creating wants rather than about responding to consumer needs.[4]

Notwithstanding the debate on the proper function of advertising, it must be held that advertising is a global commercial practice that assumes a central role in capitalist economies. After a decline in the worldwide expenditure on advertising during the recent financial crisis, global ad spend is expected to increase again by 3.5% in 2010, amounting to an estimated total of approximately $450 billion.[5] The rise of online and digital advertising is particularly fast,[6] and has the benefit over other traditional media that it creates wholly new, interactive and individuated opportunities to target potential buyers around the globe. Furthermore, the burgeoning of economies in countries like Brazil, China, India and Russia has created new demands for consumer products. Western multinational companies have thus sought to enter these new markets and create brand loyalty via advertising campaigns, albeit with varying success.[7]

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[1] I.S. White, 'The Function of Advertising in Our Culture' (1959) (July), Journal of Marketing, 8-14 See for a socialist critique of the function and meaning of advertising: J. Williamson, *Decoding Advertising: Ideology and Meaning in Advertising*, (Marion Boyars, London 1978)

[2] J. Hanson and D. Kysar, 'Taking Behaviourism Seriously: Some Evidence of Market Manipulation' (1999) 112Harvard Law Review 1420-1572.

[3] See for an early account of the use of 'motivational research' techniques in advertising V. Pickard, *The Hidden Persuaders*, (Cardinal, New York 1957).

[4] J.K. Galbraith, *The Affluent Society*, 4th ed., (André Deutsch, London 1984); White, 'The Function of Advertising in Our Culture'.

[5] http://www.groupm.com/bulleting/press-release/groupm-forecasts-35-global-ad-spending-increase-2010, accessed 31 December 2010.

[6] PriceWaterhouseCoopers, 'IAB Internet Advertising Revenue Report' (New York, 2010) http://www.iab.net/media/file/IAB-Ad-Revenue-Full-Year-2009.pdf, accessed 31 December 2010.

[7] Advertising campaigns of Western multinational companies have not always successful, in part due to the different social and ethical values in these countries. This is particularly in China. See for some insightful examples: W. O'Barr, 'Advertising in China', Advertising & Society Review (2007) 8: http://muse.jhu.edu/

It is against this background of the increasingly transnational nature of advertising practices and its industry that this study investigates the emergence and governance of transnational private regulation (TPR) in the European advertising industry. More specifically, the study aims to identify the relationship between the development of transnational and national private regulatory activities and between public and private regulatory norms. As such, the research seeks to draw broader lessons for the design of TPR in the advertising industry and suggest policy options for those concerned to enhance the effectiveness of TPR.

2. Central research questions

In the light of these objectives, and having regard to the objectives of the general research project of which this case study is part, the case study will answer the following central research questions:

1. What conditions have led to the *emergence* of TPR in the advertising industry?
2. How is TPR *governed* and whether and to what extent has this practice been successful in regulating advertising conduct?

These two central research questions will be answered through the following sub questions, which have been grouped around the themes of TPR emergence and governance:

1. Emergence
   - Under which circumstances does TPR emerge?
   - What are the incentives for the advertising industry to establish TPR?
   - Do these circumstances and incentives vary across regimes specifically designed for the media used to advertise, the benefit of vulnerable groups, or the product sector involved?

2. Governance
   - Whether and to what extent does TPR interact with national private regulatory regimes?
   - Whether and to what extent does TPR interact with (inter)national public regulation?
   - Whether and to what extent is TPR successful in regulating the conduct of the advertising industry in terms of the degree of legitimacy, enforcement, quality, and effectiveness they ensure in its operation?

3. Methodology

The study will answer these questions by drawing on the *general template* for case studies that are part of the wider HiiL project. The template is attached to this report in Annex I and sets the structure for this report.

In addition, various techniques have been used to collect data and answer the research questions. *Desk study* has provided a basis to describe the advertising sector, survey its

journals/asr/v008/8.3unit14.html, accessed 31 December 2010. See also: Z. Gao and J. Kim, 'Regulation of Soft Issues in Advertising in Confucian Societies: A Comparative Examination' (2009) 21(1) Asia Pacific Journal of Marketing and Logistics, 76-92.

regulation, and identify relevant transnational codes.[8] *Semi-structured interviews* with key actors in the regulatory regimes, national and transnational, public and private, have served to acquire additional information on such codes and their functioning. These types of interviews are particularly useful to develop a better understanding of the sector, allowing the interviewer to ask follow-up questions for clarification. A full list of interviewed organizations is provided in Annex II to this report.

To test, verify, and further detail the results obtained through the desk study and interviews a mid-term review with a number of industry stakeholders was organized. This review took the form of a *round table meeting* in which a number of hypotheses were presented and discussed. The discussion paper that was used for this meeting can be found in Annex III to this report.

Finally, in seeking to draw broader lessons for the governance design of TPR and the policy options for those administrating regimes of TPR to enhance their functionality a *comparative analysis* has been pursued to complement the results obtained via the desk study, interviews and the round table meeting. The analysis unfolds across a horizontal and vertical dimension. As regards the horizontal dimensions, several transnational codes of advertising conduct will be discussed, including the code of the International Chamber of Commerce. This code is generally applicable to all advertising used and will be compared and contrasted with codes created by other transnational trade organizations which apply to advertising carried by specific media, targeting specific audiences, or featuring specific products.

The vertical dimension is prompted by the strong multi-level structure that TPR assumes in the advertising industry. Private regulation of advertising practices has traditionally been developed and organized along the lines of national territories, thus reflecting different legal traditions and market structures. Contrasting the various national approaches and the influence of transnational bodies and standards therein is necessary to fully appreciate the interaction between national and transnational regulatory activities. To carry out this type of analysis a selection of both transnational and national systems is required.

Transnational Codes

Transnational codes regulating advertising can be grouped in those that are adopted to regulate all advertising (i.e. general codes) and those that are designed to control advertising in relation to specific product sectors, vulnerable groups, media and specific marketing techniques (i.e. specific codes). A preliminary assessment of the academic literature on advertising regulation and a discussion with key experts in the industry during the phase of designing the case study,[9] were instrumental to the process of selecting which regimes to analyze for this study. The selection presented in Table 1 below is based on the following considerations: the type of regulatory norms concerned (material norms on advertising v. performance standards for regulatory bodies), the geographical scope of these norms, and

[8] Throughout the study the term 'code' is used to describe a document adopted by a private actor containing a set of defined norms aimed to direct the behavior of those addressed by it. It encompasses terms like 'codes of practice', 'codes of conduct' 'guidelines', 'guidance', 'best practice', 'policy', 'recommendations', etc.

[9] The experts with whom discussions were held are Mr. Jean-Pierre Teyssier, former president of the French national private regulatory regime L'Autorité de Régulation Professionnelle de la Publicité (ARPP) and of the European Advertising Standards Alliance (EASA) and Dr. Oliver Gray, Director General of EASA and co-chair of the ICC Code Revision Taskforce.

the practical importance of the codes to the advertising industry. Of importance was also the existence of a so-called 'track record' of the regimes, meaning that prior to this case study other academic or policy studies have been conducted on the adoption and functioning of the regimes in point.

Organization	**Code**	**Object**	**Type of norms**	**Geographical Scope**
International Chamber of Commerce (ICC)	*Consolidated Code of Advertising and Marketing Communication Practice (2006)*	General and specific (media and marketing techniques)	Material	Global
	Framework for Responsible Food and Beverage Communications (2006)	Food advertising to children	Material	Global
International Food and Beverage Alliance (IFBA)	*Global Policy on Marketing and Advertising to Children* (2009)	Food advertising to children	Material	Global (company specific)
European Forum for Responsible Drinking (EFRD)	*Common Standards for Commercial Communication* (2008)	Alcohol advertising	Material	Europe
Brewers of Europe (Brewers)	*Guidelines for Commercial Communications for Beer (2003)*	Alcohol advertising	Material	Europe
European Advertising Standards Alliance (EASA)	*Best Practice Self-Regulation Model (2004)*	General	Performance	Europe
	Digital Marketing Communications Best Practice Recommendations (2008)	Digital advertising	Performance	Europe
	Draft Best Practice Recommendation for Consumer Controls in Online Behavioural Advertising (2010)	Online advertising	Material and performance	Europe

Table 1. Overview of transnational codes selected

Rules generally applicable to advertising are set out by PART I (General Provisions) of the 2006 *Consolidated ICC Code of Advertising and Marketing Communication Practice*. These ICC rules are widely considered as the most authoritative set of private rules regulating

advertising. In fact, the ICC Code has been referred to as the 'bible of advertising self-regulation'[10] and is thought to serve as the basis of all private regimes in place today around the world.[11] The general rules have been specified in relation to specific media, vulnerable groups, and sectors involved in advertising. To assess the extent to which the rules specifically designed for these categories differ in terms of emergence and governance, a number of transnational codes have been selected, namely those regulating advertising through digital media including Internet, advertising of food and beverage products to children, and advertising of alcoholic beverages.

National Systems

At the national level, local industries have established approximately fifty centralized systems for the regulation of advertising. These national regimes are typically administrated by so-called 'self-regulatory organizations' (SROs). Since the 1970s, a number of studies have been published comparing the central characteristics of these SROs.[12] The comparative analysis pursued in this study does not seek to compare national regimes *per se*. Instead, it has the specific purpose of tracing the impact that transnational codes have on national regimes and *vice versa*. This will allow the study to give an answer to the question whether transnational regimes stimulate the birth and governance of national regimes or whether national private regulation fosters transnational regimes. The study will do so by contrasting ways in which national industries have implemented transnational codes, with the main purpose to show the variation in approaches taken by the national industries.

However, the evaluation of the way in which private regulation of advertising is enforced does require a comparison between national regimes. As will be described below in Part II of the study, the enforcement of TPR in advertising takes place solely at the national level. The rationale used to select regimes is, again, contrasting: four models of enforcement will be contrasted to highlight the approaches taken by the national industries.

The question remains then what regimes are selected for analysis. In the selection, the study will mainly draw from European regimes. The reason for this is twofold. Private regulation in Europe and the European Union (EU) is most developed if compared to other regions in the world. Arguably, its well-articulated state is the result of close cooperation between the European ad industry and the various national SRO through the network provided by EASA. This allows for the construction of different models of enforcement by looking at the remedies and sanctions available to the regimes and their relationship with public enforcement activities. Second, the relatively high state of development and concentration

[10] J.J. Boddewyn, *Advertising Self-Regulation and Outside Participation: A Multinational Comparison*, (Quorum Books, New York 1988), 3.

[11] European Advertising Standards Alliance, *Advertising Self-Regulation in Europe: An Analysis of Self-Regulatory Systems and Codes of Advertising Practice*, 5th ed., (Poot Printers, Brussels 2007), 14.

[12] See for example: A.B. Stridsberg, *Effective Advertising Self-regulation*, (International Advertising Association, New York 1974); J.P. Neelankavil and A.B. Stridsberg, *Advertising Self-regulation: A Global Perspective*, (Hastings House, New York 1980); Boddewyn 1988*, op. cit.*, and J.J. Boddewyn, *Global Perspectives on Advertising Self-Regulation. Principles and Practices in Thirty-eight Countries*, (Quorum Books, Westport, Connecticut; London 1992). EASA also publishes a 'Blue Book', which details the main characteristics of its SRO members. In 2010, EASA released the 6th edition of the Blue Book, including an overview of the regimes in place of European SROs, as well as in Australia, Brazil, Canada, Chile, India, New-Zealand and South-Africa. See: European Advertising Standards Alliance, *Advertising Self-Regulation in Europe and Beyond: An Analysis of Self-Regulatory Systems and Codes of Advertising Practice* 6th ed., (Poot Printers, Brussels 2010).

of regulatory activities in Europe also allows for reasonably easy data collection. This enables the analysis to go deep into the practice of adopting, monitoring and enforcing private regulation on advertising. More specifically, the analysis will mainly draw from the regimes in place in the France, Germany, the Netherlands, Spain, Sweden and the UK. Non-European regimes are referred to only incidentally and, in particular, where they provide a better illustration of the issue discussed.

4. Outline of the study

The remainder of PART I will provide a wider context to TPR in the advertising industry. First, it offers a brief description of the history of the advertising industry, introduces the main industry actors associated with advertising TPR, and sketches the main developments in the advertising industry (Section B). Next, the analysis will give an account of the regulatory landscape for the commercial practice of advertising, describing the main rationales for advertising regulation, its regulators, instruments, scope, and locus (Section C). Finally, PART I will draw the observations made thus far together and highlight the transnational dimension of the advertising industry (Section D).

In PART II of the study, the transnational codes identified above will be analyzed by discussing the scope and substance, emergence, drivers and incentives, relationship with public regulation, standard-setting mechanisms, implementation, and monitoring and enforcement processes of these regimes. PART III provides answers to the research questions identified above. To that end, it describes how TPR has emerged in the advertising industry and the way in which it is governed. Subsequently, it evaluates the regimes in terms of their legitimacy, enforcement, quality and effectiveness.

I.B. Brief historical description of the advertising sector

This Section will address: (1) the origins and development of the advertising industry; (2) its main actors; and (3) current developments.

1. Origins and development

While claims have been made that the ancient Egyptians, Greeks, and Romans were already familiar with the concept of advertising, it is generally acknowledged that the birth of the advertising industry coincides with the industrial revolution.[13] The advance of industry signaled the beginning of mass production of consumer products. To distribute their wares, producers established their own retail outlets or set up distribution chains with wholesalers and intermediary retailers. To market the names and virtues of their products, spark the attention of consumers and establish a relationship with them, producers branded their goods, and so advertising was born.

Initially, this branding of products took the form of packaging. Producers packed their products not just to protect them and warrant their quality, but also to make them more visible and build a relationship with consumers.[14] Soon, however, producers turned to mass media to increase the effect of their advertising. In this respect, the rise of the printed press, in particular the advance of the newspaper as a mass medium since the 1850s, was central to the development of the advertising industry. Not only did newspapers offer producers (advertisers) a podium to promote their wares in the public domain, but it also created the opportunity for middlemen to offer advertising services to producers. The first company providing advertising services, that is, an advertising agency, is said to be that of Volney B. Palmer. It opened its doors in Philadelphia in 1842, describing itself as "the duly authorized agent of most of the best newspaper of all the cities and provincial towns in the US and Canada, for which he is daily receiving advertisements and subscriptions (…)."[15]

At that time, the role of advertising agencies was thus to sell advertising space in newspapers. Instead of working for advertisers, they worked for the newspaper. This, however, changed at the beginning of the 20th century, when illustrators working on a commercial basis began to emerge.[16] This signaled a change for advertising itself: it became more visual, playing on the sentiments of consumers, and emphasizing the unique feature of the product advertised that would set it apart from all others. That the persuasive force of advertising could also be used effectively for political purposes was shown during the First World War, when the US army successfully used the poster with a stern Uncle Sam demanding 'I want YOU for US army' to attract volunteers for the European front.

By the 1920s, advertising agencies were going global. Instrumental to this stage of the development of the advertising industry was the emergence of multinational companies. US-based companies like General Motors, Ford, and Coca-Cola had established subsidiaries around the globe and required local advertising services. As a consequence, US advertising

[13] See about the history of the relationship between mass production and the emergence of mass marketing techniques: S. Ewen, *Captains of Consciousness: Advertising and the Social Roots of the Consumer Culture*, (McGraw-Hill, New-York 1976).
[14] T. Douglas, *The Complete Guide to Advertising*, (Chartwell, New Jersey 1984).
[15] As cited in M. Tungate, *Adland. A Global History of Advertising*, (Kogan Page, London; Philadelphia 2007) 14.
[16] Ibid., 16.

agencies such as J. Walter Thompson (JWT), Batten, Barton, Durstine & Osborn (BBDO), and N.W. Ayer & Son were keen to set up offices in London, Paris, Buenos Aires and São Paolo.[17] Advertising agencies thus grew into monolith companies themselves, occupying offices in around the world.

Equally important to the creation of a globalized advertising industry was the rise of the radio and television as commodity goods in the 1920s and 1930s. As such, by 1940, advertising was able to penetrate every household in the modern world, not only through newspapers. However, the golden age of television advertising was only to set in four decades later, in the 1980s. The use of cable television and the launch of MTV in 1981 allowed advertising to widely target a new breed of consumer: those young, prosperous, mobile and susceptible to lifestyle imaging.[18] As such, lifestyle advertising took off, promoting luxury items for independent and fashionable youngsters.

By the end of the 20th century, the advertising industry received a new impulse through the creation of a new, truly global medium: Internet. Since the mid-1990s, Internet technologies, combined with the use of other media such as television and mobile telephone, have offered the industry fast, direct and innovative avenues to reach potential buyers around the globe. While television and newspaper remain the media on which most money is spend in terms of advertising, the rise of Internet advertising is fast and is expected to grow even more the coming decade.[19] Also the emergence of new markets in Africa, Asia and Latin America, and the transition toward more market-based and globally integrated economies in Russia and China, where the socialist regime banned advertising from 1966 through 1978,[20] is providing new business opportunities to the industry.

2. Actors

The previous exposé of the advertising industry's history clearly shows that it has three key actors: *advertisers* that seek their products to be advertised and pay for the advertising, *media owners* that convey the advertisement to the targeted audience, and *advertising agencies* that are involved in the creative process of the advertisement. To have its product or company successfully branded in the media, an advertiser will generally contract an advertising agency.[21] The agencies form the link between advertisers and media and are indeed the true middlemen of the industry.

It is important to stress the large interdependency of the three industry segments. Firstly, modern advertising campaigns almost always require a medium.[22] For advertising to reach the targeted audience, the advertiser thus needs one form of media, be it print, television, radio, (mobile) telephone or Internet.

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[17] Ibid., 28.

[18] Ibid., 99. See for other contemporary trends that triggered new advertising regulation: J.J. Boddewyn, 'Advertising Regulation in the 1980s: The Underlying Global Forces' (1982) 46(1), Journal of Marketing, 27-35.

[19] PriceWaterhouseCoopers, 'IAB Internet Advertising Revenue Report' (New York, 2010) http://www.iab.net/media/file/IAB-Ad-Revenue-Full-Year-2009.pdf, accessed 31 December 2010.

[20] R.D. Petty, 'Advertising Law and Social Issues: The Global Perspective' (1994) 17Suffolk Transnational Law Review, 309-439, 318.

[21] Alternatively, the company might have an in-house advertising department.

[22] Direct marketing and outdoor advertising are exceptions here.

Conversely, media owners are for a great deal dependent on the revenues they receive through advertising.[23] Commercial television programming, for example, largely depends on advertising revenues. Should advertising be prohibited here, a direct consequence can be that programming must stop. This happened, for example, in the UK where, following the introduction of regulatory restrictions on children's food and beverage advertising in 2007, the leading commercial broadcaster had to stop commissioning children's programs.[24]

Moreover, to convey their message as effective as possible, advertisers typically outsource their promotional activities to advertising agencies. These agencies have the expertise on how to best market products: they are specialized in shaping the advertisers brand, recognizing consumer trends and behavior, and identifying any possible niche market for the advertiser. Furthermore, they employ specialists that are familiar with a range of psychological conditioning techniques that can be used to persuade target groups, persons that are trained to determine when and where an ad should be placed to ensure maximum impact among its target audience and experts that can negotiate and purchase the necessary advertising space in the different media.

Advertisers, agencies and media owners have united themselves in *trade associations*, either at local, national, regional, or global level.[25] Here, they discuss the recent business trends, technological changes, and the adoption of new regulation. To represent the interests of the advertising industry as such, advertisers, agencies and media owners have also established *tripartite* associations, both at the national and transnational level. Private regulation is typically adopted by such tripartite associations since then support by all constituents of the industry can be ensured. International tripartite associations play a significant role in the emergence and governance of private regulation in advertising and will be discussed in Section I.D below.

3. Current State and Developments

The advertising industry is vast and has grown into a full-scale global industry. The US is the leading market. At the turn of the millennium, an estimated eighteen billion display ads appeared every day in US newspapers and magazines and another fourteen billion shopping catalogues were mailed directly to consumer households.[26] The total expenditure on advertising in the US in 2007 amounted to a staggering $16.3 billion. China, placed second on the list of country expenditures, managed to spend not even half as much on advertising ($7.5 billion).[27]

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[23] See for a critical analysis: E.S. Herman and N. Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media*, (Pantheon Books, New York 1988).

[24] Responsible Advertising and Children, 'Advertising and television programming', http://www.responsible-advertising.org/advertisingandchildren.asp, accessed 31 December 2010.

[25] For example, multinationals may be member of the World Federation of Advertisers (www.wfanet.org), US advertising agencies can join the American Association of Advertising Agencies (www2.aaaa.org), and a part of the British media has united itself in the British Interactive Media Association (www.bima.co.uk).

[26] J. Hanson and D. Kysar, 'Taking Behaviourism Seriously: Some Evidence of Market Manipulation' (1999) 112Harvard Law Review 1420-1572, at 1438.

[27] World Federation of Advertisers, 'Annual Report 2008' (Brussels, 2009) http://www.wfanet.org/documents/3/WFA%20Annual%20Report%202008.pdf, accessed 31 December 2010, 34.

The recent financial crisis has had a considerable impact on the advertising industry. Global advertising expenditure has dwindled over the last few years.[28] However, the outlook for 2010 is more promising with an expected rise of 3.5% in global ad spend, thus amounting to an estimated total of approximately $450 billion.[29] The increases in money spend on digital advertising is particularly noteworthy. Advertisers can market their products on their own website, but may also make use of online trading platforms, such as eBay and Craigslist. Key players in the market for online advertising are also Google (including YouTube), Yahoo!, and Microsoft, which offer a wide set of advertising services. Advertising through the search engines these companies operate accounts for about half of the advertising expenditure online.[30] Further, the advertising industry is increasingly using social network communities such as Facebook, LindedIN, and Myspace to market brand names and products.[31]

The increased role of digital media, in particular the Internet, in advertising not only has implications for the practice of advertising (a), but also challenges the power relations between traditional media (print and broadcast) and new media (digital) in the market for advertising (b).

a. Behavioral Targeting

Internet technologies allow for advertising to be targeted to individual consumers.[32] The general term under which this increasingly important practice of matching advertising with individual consumer interests is discussed is 'behavioral targeting'. This ad delivery technique uses data about web browsing behavior of individual Internet users collected over a certain period of time. This data can consist of, for example, the page views, page clicks, ad views, ad clicks and search terms entered. This data is then used to form an interest profile of the web user. Mathematical algorithms calculate, in real-time, which advertisements should be served to meet the profile of the individual web user. The advertising shown to the web user thus increasingly suits individual interests and, arguably, enhances the chance of it being successful.[33]

Three main forms of behavioral targeting have been distinguished.[34] In the first type, on-site behavioral targeting, the trader that advertises products on its own website collects the viewing, clicking and buying behavior of the web user and may combine this data with other

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[28] . The World Federation of Advertisers reports that after five years of consecutive growth, the recession of the global economy over the last two years has resulted in a drop of advertising expenditure in 2008 of 1.5% and the outlook for 2009 was a further fall of 1.1%, World Federation of Advertisers 2009, *op. cit.*, 32.

[29] http://www.groupm.com/bulleting/press-release/groupm-forecasts-35-global-ad-spending-increase-2010, accessed 31 December 2010.

[30] PriceWaterhouseCoopers 2010, *op. cit.*, 9.

[31] See for recent figure on advertising expenditure within Facebook and MySpace: 'Ad Spending on Facebook to Top $1.2 Billion this Year' (eMarketer press release, 12 August 2010) available at: http://www.emarketer.com/PressRelease.aspx?R=1007867. Recently, also Twitter announced the ambition to set up an advertising service based on Google's Adwords.

[32] D.S. Evans, 'The Online Advertising Industry: Economics, Evolution, and Privacy (2009) 23(3) *Journal of Economic Perspectives*, 37–60.

[33] See: H. Beales, The Value of Behavioral Targeting' Report for the Network Advertising Initiative. (2010), http://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf and Jun Yan, Gang Wang, En Zhang, Yun Jiang, & Zheng Chen, How Much Can Behavioral Targeting Help Online Advertising? *WWW 2009 MADRID!* (2009) 261-270, http://www2009.eprints.org/27/1/p261.pdf, accessed.

[34] J. Koëter, 'Behavioral targeting en privacy: een juridische verkenning van internet gedragsmarketing' (2009) (4) *Tijdschrift voor Internetrecht*, 104-111, 105-106.

information, such as the referring search engine, date and time of the visit, browser preferences, but also personal information (name, age, sex, home address, email accounts, etc.). This data is typically stored in a 'cookie' placed on the user's computer. This cookie can be updated and revised on every visit to the website, thus allowing for the creation of a more sophisticated and up-to-date profile. Amazone.com is an example of a website that uses on-site behavioral targeting.

The second type of behavioral targeting, network behavioral targeting, collects data on the web browsing behavior of users across a set of different websites, which might either be owned collectively by one company or be part of a network of "hundreds of thousands" of websites.[35] In the latter case, online ad network operators administer these networks and ensure that ads are delivered on websites in designated and paid-for spaces. Upon the visit of one of the websites belonging to the network, a cookie is installed on the user's computer to store his or her viewing behavior. The cookie is updated and revised every time the user visits a website within the network. A study of the New York Times indicated that the major ad networks of Google, Yahoo!, Microsoft and America OnLine were able to register as much as 336 billion transmissions per month.[36] Such services might be particularly valuable to small websites (e.g. blogs), which are less appealing for big advertisers to engage with directly, or publishers (e.g. newspapers), were content is diverse and advertisements are difficult to match the content.[37] A web user may experience network behavioral targeting where he or she has shown interest in buying a hybrid car by verifying prices on a price comparison website and is presented with ads of hybrid cars while visiting a news website that is also part of the network.

A third type is Internet Service Provider (ISP) behavioral targeting. In this case, the behavioral targeting firm enrolls ISPs into its advertising network and uses browsing data collected through these ISPs to target advertising to individual users. Since ISPs route all data traffic of their customers, their enrollment in the network of the firms effectively allows the firms to screen much, if not all, of the web behavior of users, including email, blog and social network activities. However, also details on banking, personal health and sexual orientation can be disclosed via this type of behavioral targeting and in turn be used for marketing purposes. The level of intrusiveness in ISP behavioral targeting is indeed substantially and raised considerable controversy in the last years. In the US and Europe the behavioral targeting firms of NebuAd (US) and Phorm (EU/UK) were already subject of enforcement activities of data protection agencies.[38]

b. Advertising market shares: old v. new media

The ability to convey information to a targeted audience has been said to be a distinguishing feature of the Internet. It creates important competitive advantages over traditional media (print, television and radio) in the market for advertising.[39] In the past few years a clear shift

[35] Google Adwords, 'Advertise your business on Google', https://www.google.com/accounts/ServiceLogin?service=adwords&hl=en_US&ltmpl=adwords&passive=false&ifr=false&alwf=true&continue=, accessed.

[36] L. Story, 'To Aim Ads, Web Is Keeping Closer Eye on You' (2008) http://www.nytimes.com/2008/03/10/technology/10privacy.html?pagewanted=1&_r=2&adxnnl=1&adxnnlx=1297865076-c98F5wGqp1XNG1JYrGx8jw, accessed.

[37] Evans 2009, *op. cit.*.

[38] *Ibid.*.

[39] D. Bergemann and A. Bonnatti, 'Targeting in Advertising Markets: Implications for Offline v Online Media'

has occurred in the way in which advertising expenses are distributed over the various media. Figure I.1 shows the striking changes in the aggregate spending for advertising on the different types of media between 2004 and 2009 in the leading advertising market, the US.

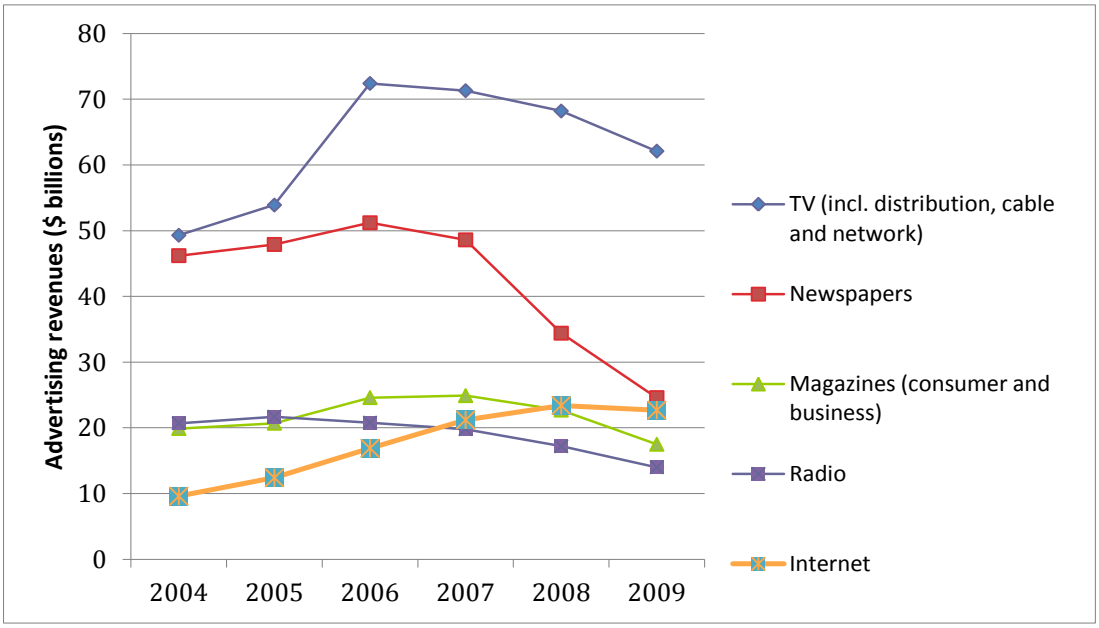

Figure 1. Revenue comparison across media in US advertising market
Source: Interactive Advertising Bureau Annual Reports by Price Waterhouse Coopers[40]

The chart shows that ad revenues for print (newspaper and magazines) and broadcast (TV and radio) media have been dropping since 2006, whereas Internet advertising has steadily increased its market share since 2004, almost overtaking also newspaper advertising in 2009.

Indeed, the growing importance of Internet as a platform for advertising reshuffles the power relations between the different types of media in the advertising market. This will also have important consequences for the creation and operation of systems of private regulation, which strongly dependent on media participation for their operations and which have historically been created with the supports of only traditional media, such as print, television and radio. The question arises to what extent digital media like Internet portals, search engines, online trading website and social network communities, but also mobile telecom operators, conform to private regulation and participate in the systems. This question will be addressed in Section III.B below.

(2010) Cowles Foundation for Research in Economics at Yale University Discussion paper No. 1758, http://ssrn.com/abstract=1577691, 2.

[40] http://www.iab.net/insights_research/947883/adrevenuereport, accessed 31 December 2010.

I.C. General overview of advertising regulation

This section offers a general account of advertising regulation and seeks to address (1) the main rationales of advertising regulation; (2) its regulators; (3) the scope; (4) instruments; and (5) locus of advertising regulation.

1. Why regulate? Rationales for advertising regulation

What are the main rationales for adopting rules to regulate the commercial practice of advertising? Several objectives for regulating advertising by legal statutes have been identified in the academic and policy literatures.[41] A very traditional objective of advertising law is to achieve *truth* in the marketplace.[42] Departing from this angle, advertising that produces incorrect and misleading claims is unlawful *per se*. However, the simple true-false dichotomy that this approach to advertising regulation implies is hard to sustain in the practice of the modern advertising industry. Advertising is specialized in the art of making statements that are neither true nor false; it sells hopes and impressions, not just goods or services.[43]

Consequently, other rationales have been prevalent in advertising regulation. *Market failure justifications* can also be an objective of advertising rules. Regulation requiring an adequate level of information for the potential purchasers of the products advertised seeks to remedy information asymmetries produced by advertising.[44] To the extent that this economically inspired type of regulation would prohibit misleading advertising, an advertisement would be deceptive when it induces people to buy a good or service that they would not have bought otherwise. Here, regulation will typically prohibit deception, but it may also impose specific requirements on traders to disclose information.[45] While such disclosure obligations are often primarily geared to protect consumers from deceptive advertising, they may also reduce unfair competition among the advertisers. A good example of public regulation with such a two-sided objective is the Unfair Commercial Practice Directive adopted in the framework of the European Communities.[46] In the recitals of the Directive, the European legislature holds that:

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[41] See for a concise overview, on which this overview builds: I. Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, 2nd ed., (Hart Publishing, Oxford and Portland 2007), 398-400.

[42] See for example: N. Reich and H.-W. Micklitz, *Consumer Legislation in the EC Countries: A Comparative Analysis*, (Van Nostrand Reinhold Co., New York 1980), 40-49. See also Z.K. Hansen and M.T. Law, 'The Political Economy of Truth-in-Advertising Regulation during the Progressive Era' (2008) 51(2), Journal of Law & Economics, 251-269 and I. Ramsay, *Advertising, Culture and the Law: Beyond Lies, Ignorance and Manipulation*, (Sweet & Maxwell, London 1996), at 12-21 who explore the development of truth-in-advertising rules in the US.

[43] Paraphrasing Charles Revson, founder of the US cosmetics company Revlon, who is held to have said: "In our factory, we make lipstick. In our advertising, well sell hope."

[44] See for example: R. Pitofsky, 'Beyond Nader: Consumer Protection and the Regulation of Advertising' (1977) 90(4), Harvard Law Review, 661-701 and H. Beales*, et al.*, 'The Efficient Regulation of Consumer Information' (1981) 24(3), Journal of Law and Economics, 491-539.

[45] Ramsay 2007*, op. cit.*, 398.

[46] Recital 8 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') *(OJ L 149, 11.6.2005, p. 22).*

"*This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it*."

Social and ethical considerations also play a role in the adoption of advertising laws. The dominant purpose of regulation addressing information asymmetries is to ensure the protection of the reasonable or rationale consumer against information failures. Rules that go beyond that purpose and are, for example, concerned with consumer health, the dignity of women, or the vulnerability of children, have been accused of government paternalism.[47] Nonetheless, a great part of advertising regulation is based on such social and ethical considerations. Departing from this perspective, advertisements exploiting psychological sentiments and desires of particularly vulnerable consumers like children are restricted. Also the promotion of potentially harmful products (e.g. alcohol, drugs, and cigarettes) and advertising making use of the stereotyped portrayal of particular groups can be subject to limitations when regulation seeks to ensure social and ethical objectives. This rationale for advertising regulation moves beyond a market-based concept of information requirements and is concerned with what is often termed 'unfair advertising'.[48]

2. Who regulates advertising? Public v. private regulators

Who adopts the norms regulating advertising, monitor compliance with them and enforce them? Public, state actors – legislature, government, regulatory agencies and the judiciary – all create rules affecting the business of advertising. Public regulation (law) enables, limits, and sometimes even outlaws advertising. While the constitutional right of the freedom of (commercial) expression offers the advertising industry the chance to pursue its business in a fair and equitable way, there are several legislative measures that may limit that freedom. In particular, jurisdictions around the world have accepted that advertising can be prohibited where it is misleading and results in unfair competition.[49] In addition, laws have been enacted to restrict advertising space and time for media broadcasting and to ban advertising for reasons of public health. The most important manifestations of these bans are laws prohibiting tobacco, alcohol, and pharmaceuticals or gambling advertising.

However, there is a global acknowledgement that the control and regulation of advertising behavior should not be entirely left to public actors. In many countries, normative standards have been adopted, monitored and enforced by private actors – trade associations, groups of individual companies, consumer associations and NGOs – to complement public rules on advertising.[50] The industry typically governs these private regulatory activities through so-called *self-regulatory organizations* (SROs). The SROs, which operate at the national level,

[47] Pitofsky submits that 'charges that an ad, though not deceptive, tends to take advantage of a vulnerable group will usually raise controversial questions of government paternalism'. Pitofsky 1977, *op. cit*., 684. See also Brown, Ralph S. Jr. Advertising and the Public Interest: Legal Protection of Trade Symbols 1948 Yale Law Journal 1165-1206 vol 57 Issue 7.

[48] Ramsay 2007*, op. cit.*, 423-431.

[49] In the US, Canada and Europe, legal prohibitions of misleading advertising, children's advertising and tobacco advertising have been upheld in the light of challenges before courts based on the freedom of expression. See: R. Shiner, *Freedom of Commercial Expression* (Oxford University Press, Oxford 2003), 110.

[50] J.J. Boddewyn, Advertising Self-Regulation: Organization Structures in Belgium, Canada, France and The United Kingdom, in W. Streeck and P. Schmitter (eds.), *Private Interest Government* (Sage, London 1986), 30-43.

generally comprise three bodies: a standard-setting body, an adjudication body and a secretariat.[51] The standard-setting body is responsible for the adoption of codes of conduct. It represents the constituent parts of the national advertising industry – advertisers, agencies and media – and has as its members the incumbent national trade associations. The adjudication body – often called 'jury' – assumes the task of interpreting the codes of conduct in force, handling incoming complaints submitted by competitors, consumers, NGOs or public bodies about publicized advertising, and deciding whether the litigious advertising complies with the applicable codes. The secretariat employs personnel to administer the daily operation of the standard-setting and adjudication bodies and has the task to promote the private system among industry members and to the general public. Often the SRO secretariat will also provide industry members with guidance on whether the advertising copy they intend to use for marketing purposes complies with the applicable codes of conduct. This preliminary check is called copy advice where it is voluntary and pre-clearance where there is an obligation of the advertiser or agency to submit their copy to an *ex ante* check.[52]

Some fifty countries around the world host SROs. While a concentration of the SROs can be found in the America's, it is Europe that hosts about half of these systems. The high state of development of private regulation in Europe is linked to its embedment in EU and national laws regulating advertising. The four main EU Directives on advertising, that is, the Unfair Commercial Practices (UCP) Directive, the Misleading and Comparative Advertising (MCA) Directive,[53] the Audiovisual Media Services (AVMS) Directive,[54] and the E-commerce Directive,[55] all recognize the role that private regulation plays in the control of advertising. In fact, the AVMS and the E-commerce Directive require from Member States that they 'shall encourage' the creation of codes of conduct on the matters regulated by their provisions.[56] Also the UCP (applying in B2C relations) and the MCA (applying in B2B relations) Directives spur Member States to establish private regulatory regimes, but do not impose a legal obligation to do so.[57] Instead, the UCP Directive holds in Article 10 that it 'does not exclude the control, which Member States may encourage, of unfair commercial practices by code owners'. However, Article 10 clearly defines the limitations to the use of private regimes as pre-litigation mechanisms of control: they can only be used 'in addition to court or

[51] Adopting European Advertising Standards Alliance, 2007 *op. cit.*, 13-14.

[52] See for a detailed discussion Section I.C.4 below.

[53] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) *(OJ L 376, 27.12.2006, p. 21).*

[54] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 332, 18.12.2007, p. 27)).

[55] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1).

[56] Article 3(7) AVMS Directive stipulates that Member States: "(…) shall encourage co- 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."Article 16(1) E-commerce Directive reads: "Member States and the Commission shall encourage: (a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15."

[57] Recital 20 UCP Directive and recital 18 MCA Directive.

administrative proceedings' and 'shall never be deemed the equivalent of foregoing a means of judicial or administrative recourse'. The MCA Directive echoes this principle in much of the same words.[58]

Importantly, the UCP Directive finds a commercial practice unfair:

'(…) if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. This is particularly so when the practice involves (…) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound'.[59]

The Directive thus promotes the breach of a set of privately established rules to an infringement of statutory law. Arguably, this provision provides a window for consumers and public authorities exercising administrative enforcement powers to hold liable any trader for the breach of a code of advertising practice, either in court or in administrative proceedings. Such finding is, however, conditional on the facts that the commitment of the business to the code is 'not merely aspirational', but 'firm' and verifiable, and that 'the trader indicates in a commercial practice that he is bound by the code'.[60]

The European experience clearly shows that public and private regulators do not simply co-exist and function in parallel, autonomous spheres. Many types of interactions exist between the two. Government can for example trigger private regulation by threatening to adopt statutory regulation, a dynamic often termed as 'the shadow of hierarchy'.[61] Alternatively, governmental agencies can delegate their powers under national statute to SROs or simply leave this advertising regulation primarily to industry bodies.[62] Taking the extent to which government is involved in private regulation has proven a significant variable to distinguish between different forms of private regulation. Indeed, much of the scholarly work done in the field of regulation has used this variable, suggesting a regulatory spectrum with on the one end traditional 'command-and-control regulation' and the other end 'self-regulation'.[63] This has lead scholarship to define a whole range of typologies of

[58] Article 5 and 6 MCA Directive.

[59] Article 6(2) UCP Directive.

[60] G. Howells, Codes of Conduct, in G. Howells*, et al.* (eds.), *European Fair Trading Law. The Unfair Commercial Practices Directive*, (Ashgate, Aldershot 2006), 195-215. 206-210.

[61] Boddewyn concludes after his extensive review of 12 national systems of private regulation in advertising that the threat of legislative or executive action has been a powerful driver for the establishment and development of these systems. See Boddewyn 1988, *op. cit.* 279-289. See in general on this dynamic: G. Halfteck, 'Legislative Threats' (2008) 61 Stanford Law Review, 629-710 and A. Héritier and D. Lehmkuhl, 'The Shadow of Hierarchy and New Modes of Governance: Sectoral Governance and Democratic Government' (2008) 28(1), Journal of Public Policy, 1-17.

[62] See for a comparative overview of this practice in relation to advertising in broadcast media: Hans-Bredow-Institute for Media Research, 'Study of on Co-Regulation Measures in the Media Sector. Study for the European Commission, Directorate Information Society and Media. Final Report' (Hamburg, 2006) http://ec.europa.eu/avpolicy/docs/library/studies/coregul/final_rep_en.pdf, accessed 31 December 2010.

[63] See for example D. Sinclair, 'Self-Regulation Versus Command and Control? Beyond False Dichotomies' (1997) 19(4), Law & Policy, 529-559; J. Black, 'Constitutionalising Self-Regulation' (1996) 59 Modern Law Review, 24-55; I. Bartle and P. Vass, 'Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?' (2007) 85(4), Public Administration, 885-905; and F. Cafaggi, Rethinking Private Regulation in the European Regulatory Space, in F. Cafaggi (ed.), *Reframing Self-Regulation in European Private Law*, (Kluwer Law

private regulation, including 'mandated self-regulation', 'enforced self-regulation', and 'co-regulation'.[64] In each of these classifications, public law rules or executive action aim to harness the rule-making, monitoring and enforcement capacities of private regulatory regimes.

3. What is regulated? Scope of advertising regulation

What is the scope of advertising regulation? What is and what is not regulated? Advertising rules may concern all aspects of advertising, including the content of advertising, to whom it is directed, the way in which it targets audiences (and the privacy concerns related to that), and its timing and quantity.

In terms of the content of advertising regulation, rules generally applying to advertising seek to ensure that it is honest, truthful, decent and/or not misleading. Both public and private regulators have designed open-ended standards prohibiting the use of deceptive and false advertising. For example, the European legislature prohibits in the UCP Directive all unfair commercial practices, including misleading advertising.[65] In the US, Section 5 of the Federal Trade Commission Act declares unfair or deceptive acts or practices unlawful. Similarly, the Consolidated ICC Code of Advertising and Marketing Communication Practice requires advertising to be 'legal, decent, honest and truthful'.[66]

These general advertising rules have been specified in relation to specific (i) *product sectors*, (ii) *media* and (iii) the *techniques* used for marketing purposes. Sectors submitted to specific rules include the alcohol, tobacco, pharmaceuticals, cosmetics, gambling, food and financial services industries. Rules can also differ for the medium through which advertising is communicated. A basic distinction may apply between broadcast (television and radio) and non-broadcast (written press, direct mail, telephone, outdoor) and digital media (online, gaming, on demand television). Finally, different rules have been designed to address the specificities of different marketing techniques, such as sales promotion, direct marketing and sponsorship. These techniques raise different issues than advertising as such, including concerns of privacy and data protection, which has led the industry to adopt specific rules.

Advertising regulation may furthermore be designed to protect particular groups in society. For example, it may apply to business-to-business (B2B) and/or business-to-consumer (B2C) communications. Advertising rules may also apply more specifically to those which have been perceived particularly vulnerable to advertising, like children and minors. Advertising regulation may also protect the interests of particular groups featuring advertising, thereby

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International, Alphen aan den Rijn 2006), 3-75. Other variables on the basis of which forms of private regulation can be distinguished include the degree of formality, legal status, scope of application, and the participation of non-industry members (outsiders) in the creation of the rules. See for example: A. Ogus, 'Rethinking Self-Regulation' (1995) 15(1), Oxford Journal of Legal Studies, 97-108, 99-100; M. Priest, 'The Privatization of Regulation: Five Models of Self-regulation' (1997) 29(2), Ottawa Law Review, 233-302; and R. Baggott, 'Regulatory Reform in Britain: The Changing Face of Self-regulation' (1989) 67(3), Public Administration, 435-454, 436-438.

[64] See for a dense overview: J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a Post-regulatory World' (2001) 54, Current Legal Problems, 103-147, 114-122.

[65] Articles 5 through 7 of Directive 2005/29/EC.

[66] Article 1 Consolidated ICC Code

addressing the stereotypical portrayal of human beings in advertising, but in particular, women in advertising.[67]

It should be pointed out that no specific domain is exclusively reserved for either public or private actors to regulate. Both public and private regulators have been able to devise rules covering aspects of advertising and its industry. It is difficult to draw any general lines about who regulates what. The fact that no specific domain is exclusively reserved for the public or the private to regulate raises the question whether there is a certain preference of allocation of topics or domains amongst them? It must be held that the answer to this question is principally determined by the scope that public regulation leaves to the private sector to set rules. Clearly, this scope varies according to the tradition of state regulation and governance over business and society in a given country.[68] As a consequence, the exact scope of public regulation, and therefore also of private regulation, will be dependent on the jurisdiction concerned.

What is obvious, however, is that private regulation of advertising must respect public regulation. Public law sets the framework within which private regulation has to operate. For example, a case in which private regulation of advertising is perceived to be inappropriate is where it disproportionately limits the exercise of human rights such as the freedom of (commercial) speech and religion. Also if the risk of collusion too big, private rules of advertising are inappropriate. Thus if the adoption of private advertising rules leads to the fixing of prices or market shares, competition law rules may preclude the use of these rules. In 1997, collusive practices in the accreditation system for advertising agencies motivated the Australian Competition and Consumer Commission (ACCC) to revoke the authorization it had previously given to a media council, which was part of the Australian SRO.[69] This decision triggered the collapse of, at the time, one of the best-established SROs in the world, since the system would not be able to operate effectively without the support of the media. As a result, the Australian advertising industry needed to establish a new system and did so one year later.[70] In Europe, however, the mere adoption of deontological rules does not seem to be caught by competition law.[71]

4. How to regulate? *Instruments of advertising regulation*

What instruments are used to regulate advertising? A host of regulatory instruments have been used, some of which have already been briefly discussed above. First, *mandatory information duties* are used to regulate the content of advertising. They frequently appear in consumer protection legislation in the form of mandatory private law rules. Other commonly used regulatory tools are legislative or administrative *prohibitions* and *bans*. Public law rules

[67] See for an overview: J.J. Boddewyn, 'Controlling Sex and Decency in Advertising Around the World' (1991) 20(4), Journal of Advertising, 25-35.

[68] See for an insightful analysis of the national determinants of the split between public and private regulation in Asia: Z. Gao and J. Kim, 'Regulation of Soft Issues in Advertising in Confucian Societies: A Comparative Examination' Asia Pacific Journal of Marketing and Logistics (2009) 21(1), 76-92.

[69] ACCC Determination revoking authorisations granted to the media, 9 July 1997, ATPR (Com) 50-248.

[70] See for a discussion: D. Harker*, et al.*, 'Developing Effective Advertising Self-regulation in Australia: Reflections on the Old and New Systems' (2001) 9(1), Australasian Marketing Journal, 7-19.

[71] See for a more elaborate discussion of the role of EU competition law and private regulation: F. Cafaggi, Self-regulation in European contract law, in H. Collins (ed.), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law*, (Kluwer Law International, Alphen aan den Rijn 2008), 93-139.

generally applying to advertising prohibit the use of misleading or deceptive advertising.[72] Bans have also been used in relation to specific media, vulnerable groups or products. Well-known are the bans on tobacco advertising and sponsorship,[73] but another example is provided by legislation in Canada (Quebec) and Sweden that outlaws television advertising to children under a specific age.[74] Third, jurisdictions can limit advertising space by enacting legislation that imposes time length caps on television and radio broadcasting.[75]

The advertising industry also used prohibitions, bans and time limits to regulate advertising, though it uses different instruments to do so. Private advertising regulation is primarily based on normative documents, such as codes of advertising practice, guidelines and recommendations. These find application through membership obligations of the trade associations adopting them or by including them in binding contractual agreements that underpin the advertising activities of firms.

In addition, the SROs have developed two instruments through where they assess the compatibility of advertising with advertising rules – public or private, or both – before the campaign is publicized. First, SROs can provide *copy advice* to its members on a specific advertisement preceding its publication. While this advice is non-binding, it can substantially reduce the risk that the advertisement is subject to complaints once it is used in the public domain. Secondly, SROs may provide *pre-clearance* facilities. Pre-clearance, which is also known as pre-vetting, works in a similar way as a copy advice, but implies a duty to submit copy to an inspection body prior to its publication. Pre-clearance can be required by law, contract, or codes of conduct in relation to a particular product (e.g. pharmaceuticals) or medium involved (e.g. television). It can also be used as a sanction imposed by the SRO against firms who have breached a code of advertising practice.[76] An important difference between the copy advice and pre-clearance is that copy advice concerns an unfinished product (e.g. sketches and storyboards), while pre-clearing deals with finished advertising.

[72] As noted above, Articles 5 through 7 of the Unfair Commercial Practices Directive in Europe (Directive 2005/29/EC) are an example of such a prohibition.

[73] In Europe, the Tobacco Advertising Directive bans the advertising of tobacco products and sponsorship for non-professional purposes. See Article 3 of Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products *(OJ L 152, 20.6.2003, p. 16).*

[74] In Canada (Quebec) television advertising to children under 13 is prohibited under Section 248 of the Consumer Protection Act 1980. In Sweden, the 1996 Radio and Television Act (Radio- och TV-lagen, kap 7, § 4) bans television advertising to children under 12 years.

[75] In Europe, the Audiovisual Media Services Directive determines the maximum length programming may be interrupted for commercials, as well as the maximum minutes of advertising during the hour and day. See Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 332, 18.12.2007, p. 27)). Similar advertising caps are in place in Australia. The US forms an exception to this worldwide practice: it does not restrict the broadcasting of commercials, except during children's programming. See S.P. Anderson, Regulation of Television Advertising, in P. Seabright and J. Von Hagen (eds.), *The Economic Regulation of Broadcasting Markets. Evolving Technology and Challenges for Policy*, (Cambridge University Press, Cambridge 2007), 189-224, 189.

[76] European Advertising Standards Alliance 2010*, op. cit.*, 20.

5. Where to regulate advertising? Levels of regulation

On which governance level is advertising regulated? Advertising regulation is adopted at the local, national, regional and global level. Importantly, various interactions between the different governance levels exist. An example of such a multilevel system is the body of rules stemming from the EU legislature. Here, public law rules deeply affect advertising and its regulation at the national level. For example, primary EU law, i.e. EU Treaty rules, have precluded, on numerous occasions, the use of national advertising rules, including those prohibiting misleading advertising, for their restrictive effects on the freedoms of goods and services.[77] In addition, an array of sector-specific pieces of secondary EU law touches upon the issue of advertising.[78] The four central measures of secondary EC legislation affecting advertising rules are the aforementioned UCP, MCA, AVMS, and E-commerce Directives.

Private regulation also operates across various governance levels. As noted above, many jurisdictions around the world have developed national private regulatory regimes. At the transnational level, however, the undisputed hallmark of private regulation is the Consolidated ICC Code of Advertising and Marketing Communication Practice, which was adopted in 2006. The code, which has its roots in the International Code of Advertising Practice first adopted by the ICC in 1937, lays down several key principles for advertising, and specifies them in relation to sales promotion, sponsorship, direct marketing, advertising using electronic media and telephone, and environmental claims. The ICC Code is widely considered to be the most authoritative piece of private regulation on advertising. The European Advertising Standards Alliance (EASA) holds that all advertising codes used today, in Europe and elsewhere, have their origins in the 1937 ICC Code.[79] Nonetheless, many variations exist between the private regimes administered in jurisdictions. National private regulatory bodies have adopted rules that go beyond those set out by the ICC Codes and have adapted them to local market structures and legal frameworks.

Accordingly, also in the case of private regulation important interactions take place between the transnational and national level of regulation. Similar to public advertising regulation, the private regimes operate within a *multilevel* regulatory structure: a high level of interdependency can be detected between national and transnational regulatory activities. In order to fully understand the operation of these private multilevel systems it needs to be established how these interactions unfold: do they take place in a top-down fashion in which transnational rules shape national private regimes, or, rather, in a bottom-up fashion where national regimes stimulate the development of transnational regimes? This will be established in Part II of this study.

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[77] See for a comprehensive overview of the case law of the European Court of Justice D. Doukas, Untying the Market Access Knot: Advertising Restrictions and the Free Movement of Goods and Services, in C. Barnard (ed.), *The Cambridge Yearbook of European Legal Studies 2007*, (Hart Publishing, Oxford and Portland 2007), 177-215; S. Weatherill, *EU Consumer Law and Policy*, (Edward Elgar, Cheltenham 2005); and H.-W. Micklitz, Unfair Commercial Practices and Misleading Advertising, in H.-W. Micklitz*, et al.* (eds.), *Understanding EU Consumer Law* (Intersentia, Antwerp and Portland 2009), 61-118, 61-118.

[78] Examples include the Directives on doorstep selling (Directive 85/577/EEC) and off-premise contracts (Directive 97/7/EC) in the area of consumer protection, the Prospectus Directive (Directive 2003/71/EC) in the field of financial service, t*he Foodstuffs Directive (Directive 2000/13/EC) in the field of food safety, as well as the* Directives on data privacy (Directive 2002/58/EC) and tobacco advertising (Directive 2003/33/EC).

[79] European Advertising Standards Alliance, *Advertising Self-Regulation in Europe: An Analysis of Self-Regulatory Systems and Codes of Advertising Practice*, 5th ed., (Poot Printers, Brussels 2007, 14.

I.D. International dimension

This Section highlights the international dimension of the advertising industry and its regulation by discussing the central and most important institutions concern with private regulation from an international perspective, their respective (regulatory) roles, and the relationships they entertain with each other. The analysis points out that the advertising industry is highly organized and very active in the promotion, adoption, and development of private standards regulating its advertising. A broad distinction is made between (1) global and regional organizations operating in (2) Europe, (3) North America (excluding Mexico), (4) Latin America, (5) Asia and (6) Africa.

1. Global

At the global level, three organizations play a key role in the promotion, adoption, and development of private regulation for the advertising industry. These three organizations have a strong US/Europe based focus. This can be explained by the membership structures and funding of the respective organizations.

a. International Chamber of Commerce

The first attempts to coordinate advertising standards at the global level can be traced back as early as 1911 when the 'Associated Advertising Clubs of the World' proposed to establish the Truth in Advertising Resolution.[80] Since the mid-1930s, however, it has been the ICC that has played the central role in coordinating industry efforts to establish private regulatory regimes for the control of advertising conduct. The ICC was founded in 1919 as an organization to promote the interests of international business.[81] Its membership is composed of 84 national committees and about 7.000 individual companies.[82] A significant deal of the ICC funding is provided by the International Court of Arbitration (62%). Other revenues are obtained through the membership fees of the committees and companies, publications, and business seminars. There is an overriding North American – European influence on the ICC governance. Of the 44 Chairmen, 27 were European and 16 North American (excluding Mexico). Also the majority of the membership fees from national committees and companies come from European and North American countries.[83]

The creation of the ICC can be understood as part of the construction of a new world order following the end of the First World War.[84] As a reaction to the plans to establish a 'League of Nations', corporations from various industrialized nations took the initiative to set up a weighty international business organization. Upon the invitation of the US, at the time the most developed and important industrial nation, a large number of businessmen met in Atlantic City in October 1919 to discuss this initiative. One year later, the businessmen met again in Paris, were the inaugural congress of the ICC took place.

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[80] .P. Neelankavil and A.B. Stridsberg, *Advertising Self-regulation: A Global Perspective*, (Hastings House, New York 1980), 7.

[81] It pursues this aim as a private *association déclarée* under French civil law, Article 5 Loi relative au contrat d'association, of 1 July 1901.

[82] An indicative list can be found at www.iccwbo.org/home/intro_icc/membership.asp, accessed 31 December 2010.

[83] Data from: D. Kelly, 'The International Chamber of Commerce' (2005) 10(2), New Political Economy, 259-271, 264.

[84] L. Brandmair, *Die freiwillige Selbstkontrolle der Werbung*, (KiSin: Cad Heymanns, 1978), 3.

Ever since, the ICC has employed regulatory activities with the aim: 'to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital'.[85] Following this objective, the ICC has adopted a number of influential international business standards, including standards on advertising. In 1937, it published the first transnational advertising rules: the ICC's *International Code of Advertising Practices*. The specific purpose with which the code was adopted was to establish a number of specific principles upon which national systems of private advertising control should be based.[86] The International Code of Advertising Practices, and the subsequent revisions thereof, has played a crucial role in the development of private regulation in advertising.[87]

b. International Advertising Association

The ICC's efforts to promote these standards worldwide have been complemented by the activities of the International Advertising Association (IAA). Established in New York in 1938, only one year after the adoption of the original ICC Code, the IAA was initially only comprised of American advertising agencies. While the membership of the IAA expanded since the 1950 and came to represent a total of 58 countries,[88] the representation of American opinions and views remains strong today as its membership is made up chiefly of US based companies. Organizations of advertisers, agencies, and media owners are members, but also organizations of related services of the market communications industry (e.g. direct marketing, sales promotion, and public relations) are members. As such, the IAA is a tripartite trade association that brings together representatives of the three key sectors of the advertising industry.

The IAA has been very instrumental in the encouragement and expansion of the use of private regulation to regulate the advertising industry. In 1973, it published a manifesto titled 'The Global Challenge to Advertising', in which it outlined a broad strategy to counter the wishes from government and consumer movements to submit the industry to public regulation by making the claim that this type of regulation cannot meet the global challenges facing the advertising industry. Instead, it argued that 'a global challenge needs a global response'.[89]

Still today, the IAA sees as one of its core missions 'to fight unwarranted regulation on behalf of all those engaged in responsible commercial speech and to act as an advocate for freedom of choice for individuals across all consumer and business markets (bolds omitted / PV)'.[90] It views the promotion and development of private regulation as a prerequisite to this mission as it is committed 'to encourage greater practice and acceptance of advertising self-regulation'.[91] The IAA has thus financed several research projects with a view to foster a

[85] ICC, 'What is ICC?' http://www.iccwbo.org/id93/index.html, accessed 31 December 2010.

[86] J.J. Boddewyn, *Global Perspectives on Advertising Self-Regulation. Principles and Practices in Thirty-eight Countries*, (Quorum Books, Westport, Connecticut; London 1992), 16.

[87] See Section II.A.1 below.

[88] IAA, Our history, http://www.iaaglobal.org/default.aspx?id=a841eb14-acd5-4de6-b697-f734ef7f4f7d&print=true, accessed 31 December 2010.

[89] As cited in A. Mattelart and M. Palmer, 'Shaping the European Advertising Scene - Commercial Speech in Search of Legitimacy' (1993) 1(1), Réseaux. Communication - Technologie - Société, 9-26, 13.

[90] IAA, 'Our mission', http://www.iaaglobal.org/default.aspx?id=badadfa3-af68-42b9-a039-91951451e09d, accessed 31 December 2010.

[91] Article 2.3 of the International Advertising Association Bylaws (2009), http://www.iaaglobal.org/file.ashx?fid=95a489ce-4cca-4ae3-9cfe-58538ed9a1aa, accessed 31 December 2010.

greater understanding of the national differences in private regulation on advertising, with the ultimate aim to promote 'the internationalization of advertising regulation'.[92]

c. World Federation of Advertisers

In spearheading the promotion and development of private regulation as a strategy to regulate the advertising industry and calling for the coordination of national efforts at the transnational or global level, the ICC and IAA have received valuable support of the World Federation of Advertisers (WFA). The WFA was initially established in 1953 as the 'International Union of Advertisers Associations'. Under this name, it described itself as a collection of national associations representing advertisers' interests in Belgium, France, Italy, and Sweden.[93] Since 1984, however, the WFA changed its mission and assumed, as its current name suggests, a worldwide mandate.

Today, the membership of the WFA includes 55 national advertising associations and approximately 50 of the world's top 100 marketers, that is, multinational companies. It holds that its membership represents 90% of global marketing communications, about US$ 700 billion per year.[94] Financed through membership fees, its mission is to build trust in the advertising industry, and seeks to achieve this, *inter alia*, by helping to 'set self-regulatory standards for responsible marketing communications worldwide'.[95] Like the IAA, the WFA is keen to promote industry self-regulation as an effective alternative to public regulation. In relation to the emergence of online advertising, the President of the WFA holds that his organization:

"(…) has been at the forefront of shaping efforts to self-regulate the digital space. The consequences of not doing so are unthinkable. Failure to apply meaningful and robust industry standards to emerging media at a global level could lead to regulation, which could strangle the burgeoning potential of these new media."[96]

2. Europe

Two tripartite organizations have played a central role in the promotion, adoption and development of private regulation for the advertising industry in Europe.

a. European Advertising Tripartite

Inspired by the achievements of the industry associations operating at the global level, the advertising industry in Europe has sought to organize itself at the European level since the late 1970s. The chief driver of this European surge for industry-wide alliances was the plan of the European Economic Communities (EEC) to adopt a Directive on misleading and unfair

[92] Research projects included: A.B. Stridsberg, *Effective Advertising Self-regulation*, (International Advertising Association, New York 1974); Neelankavil and Stridsberg 1980, *op. cit*; Boddewyn 1988*, op. cit.*; and Boddewyn 1992, *op. cit.*.

[93] Mattelart and Palmer 1993, *op. cit.*, 16.

[94] World Federation of Advertisers, 'About WFA', http://www.wfanet.org/about.cfm, accessed 31 December 2010.

[95] World Federation of Advertisers, 'WFA Mission: Building Trust', http://www.wfanet.org/about.cfm, accessed 31 December 2010.

[96] World Federation of Advertisers, 'Annual Report 2008' (Brussels, 2009) http://www.wfanet.org/documents/3/WFA%20Annual%20Report%202008.pdf, accessed 31 December 2010, 2.

advertising.[97] In designing the draft of this Directive, the European Commission did not consult any specific European representative of the advertising industry. Instead, it decided in 1979 to appoint the IAA as the official consultative body.[98] Following the pressing appeal by the influential Dutch adman Rijkens to European advertisers to defend their industry from such regulatory threats,[99] the different sectors of the European advertising industry erected the *European Advertising Tripartite* (EAT) in 1980. Membership of the EAT comprised associations from all sectors of the industry and, as such, it served as a true *meta*-association. The WFA represented the advertisers, the European Advertising Agency Association (EAAA)[100] represented the advertising agencies, and the media was represented by, *inter alia*, the European Federation of Direct Marketing (EFDM), the European Publishers Council (EPC), and the Association of Commercial Television (ACT).[101] The IAA acquired an observer status in 1984.

During the 1980s, the EAT was mainly concerned with the adoption of the so-called Television Without Frontiers Directive.[102] The EEC Directive sought to regulate television advertising time in Europe and the EAT was deeply involved in its successful lobby.[103] However, following the adoption of the EEC Directive in 1989, which was considered favorable to the advertising industry, the EAT struggled to define its role.[104] With only a very small office in Brussels, the EAT saw a number of its members pull out in the 1990s. In 2002, this resulted in the dissolution of the EAT.

b. European Advertising Standards Alliance

The representative role of EAT has since 2002 been assumed by the European Advertising Standards Alliance (EASA).

i. Establishing EASA

In a speech delivered at the Forum Europe Conference in Brussels in June 1991, Sir Leon Brittan, then Vice-President of the European Commission and Commissioner for competition policy, challenged the European advertising industry to self-handedly resolve the problems for the creation of the Single Market raised by national private regulatory regimes for the

[97] See for a comprehensive discussion of the drafting processes and its consequences for the creation of a European dimension of private regulation in advertising: R. Rijkens and G.E. Miracle, *European Regulation of Advertising*, (North-Holland Amsterdam 1986).

[98] Mattelart and Palmer 1993, *op. cit*., 15.

[99] Rijkens held that: "European advertisers must defend their industry (…) Given the fact that the nature of such attacks is political and not professional – one generally is forced into political dialogue, invariably in defence of the freedom of the manufacturer to market and advertise his products – its is not hard to see why creative advertising minds usually have little interest in and even time to marshal a defence" as cited in Mattelart and Palmer 1993, *op. cit*., 11.

[100] Nowadays, the EAAA is known as the European Association of Communications Agencies (EACA).

[101] A. Cunningham, 'Advertising Self-regulation in a Broader Context: An Examination of the European Union's Regulatory Environment' (2000) 5(2), Journal of Promotion Management, 61-83, 65.

[102] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities. (OJ L 298, 17.10.1989, p. 23). The Television Without Frontiers Directive has recently been amended by the Audiovisual Media Services Directive (AMSD) (Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (OJ L 332, 18.12.2007, p. 27)).

[103] Mattelart and Palmer 1993, *op. cit*., 18-20.

[104] Cunningham 2000, *op. cit.*, 65.

control of advertising. The alternative would be intervention by the European legislature, adopting detailed legislation on the matter. As Brittan explained:

> *"Self-regulation on a purely national basis cannot cope with the distortions that arise with trans-frontier TV advertising if the two codes of practice (or legislation) are different in substance. That is a real problem. (…) If the advertising of particular product is to be governed by self-regulation on a national basis – as at first sight seems reasonable – then different brands of the same product could end up being advertised in a particular territory according to different sets of rules. (…) The point I want to make, therefore, is that not only should we be looking at the scope for self-regulation at the national level, but also at the European level. That is a challenge I, personally, would like to see picked up by the industry. No doubt it would take some time to put the necessary structures into place, but their existence would open up the possibility for the Commission to deal with some of the real problems thrown up by the Single Market by means of cooperation with the industry rather than legislation."*[105]

The EAT heeded Sir Brittan's words and brought together representatives of the advertising industry at the Corsendonk Priory in Belgium in November 1991.[106] Here, the industry agreed to give formal, independent status to a hitherto *ad hoc* grouping of national SROs from a number of European jurisdictions, which had for some years informally discussed coordinating their efforts to regulate the industry.[107] The body thus created was named the European Advertising Standards Alliance (EASA) and was given the specific task by the European advertising industry and the various national SROs to oversee the coordination of private regulation of advertising throughout the European Single Market.[108]

EASA officially came into being in 1992. Following its mandate, it first set up a system for handling cross-borders complaints about advertising. This system was to enable the quick transfer of complaints lodged before an SRO in one Member State to the SRO in the Member State where the editorial decision to publicize the advertising was made. However, EASA was not to adopt European-wide codes of conduct governing the behavior of the advertising industry. This task was to remain with the national representatives of industry. Instead, EASA was to coordinate between SROs in order to effectively deal with cross-border disputes on advertising.

ii. A new mandate

In 1997, a second Corsendonk conference was held, during which industry representatives jointly endorsed EASA's progress and achievements. In 1998, Sir Leon Brittan held that its work 'had reduced the perceived need for legislative intervention.'[109] The ill-defined role of the EAT and the success of EASA, convinced the European advertising industry to reshuffle its representative structures and to renew its mandate. As a result, in 2002 the EAT was dissolved and EASA was structured as a partnership between national SROs – which had until then been the only members – and the European advertising industry associations representing advertisers, advertising agencies, and the media. Accordingly, EASA became the single and official spokesman of the advertising industry and its regulatory activities in

[105] Brittan, 20 June 1991 as cited by Cunningham 2000, *op. cit.*, 64.
[106] See for an overview of the conference proceedings: European Advertising Tripartite, *European Seminar on Self-regulation in Commercial Communications* (EAT, Brussels 1997).
[107] European Advertising Standards Alliance 2007, *op. cit.*, 31.
[108] European Advertising Standards Alliance, *EASA Guide*, 2nd ed., (EASA, Brussels 1996), 5.
[109] European Advertising Standards Alliance 2007, *op. cit.*, 31.

Europe. Currently, 25 SROs from 23 European countries (21 EU Member States, plus Turkey and Switzerland) and 15 European industry associations are members of EASA. Both the SROs and industry members are represented in EASA's Board.[110]

With the backing of both the European Commission and the European advertising industry, EASA adopted a wider mission than the handling of cross-border advertising complaints. Now, it sets out to promote 'high ethical standards in commercial communications by means of effective self-regulation, while being mindful of national differences of culture, legal and commercial practice.'[111] As such, its mission is to 'promote responsible advertising throughout the Single Market, through best self-regulatory practice, in the interests of both consumers and business.'[112] EASA seeks to fulfill this mission by sharing best practices, supporting the creation and development of national advertising self-regulation regimes and by providing best practice guidance. Still, however, EASA does not itself adopt pan-European codes of conduct discouraging the use of certain advertising practices. Industry members have sought to keep this task outside the mandate of EASA. Rather, EASA sets standards to guide the operations of SROs and to maximize their impact.[113]

EASA has been rather successful in terms of creating and developing new SROs, particularly in the Central and Eastern European Member States.[114] As a result of EASA's efforts there are 25 currently SROs active in the EU, while before its creation in 1992 this number was only nine.[115] EASA is currently heavily involved in the creation of new SROs in Estonia and Cyprus. It also entertains close contacts with the industry in the European Economic Area (Switzerland) and with (potential) EU accession states (Turkey, Croatia, Serbia, Ukraine) on how to develop new and improve existing regimes.

iii. EASA's role beyond Europe

Recently, EASA has sought to extend its role of promoting and facilitating the development of private regulation beyond the borders of Europe. In 2008, it set up EASA International Council, which has as its current members the SROs in Australia, Brazil, Canada, Chile, India, New Zealand and South Africa. For these countries, and other non-European countries wanting to establish a private system, it has developed at 'International Guide to Developing a Self-regulatory Organisation', which includes a number of Best Practice Recommendations that it developed with its European membership.[116]

With its membership including more and more non-European SROs, EASA's regulatory role in the international domain steadily increases. To coordinate its own regulatory efforts with those undertaken by the ICC, EASA also entertains a close rapport with the ICC. For one, EASA has become a member of the ICC. It has also assumed a crucial position in the ICC

[110] See for the organizational structure of EASA: http://www.easa-alliance.org/About-EASA/Decision-making-structure/page.aspx/112, accessed 31 December 2010.
[111] http://www.easa-alliance.org/page.aspx/110, accessed 31 December 2010.
[112] European Advertising Standards Alliance 2010, *op. cit.*, 45.
[113] However, a shift can be observed here more recently. This will be discussed in detail in Section II.C. below.
[114] European Advertising Standards Alliance 2010, *op. cit.*, 61.
[115] EASA, 'European SRO Members', http://www.easa-alliance.org/page.aspx/55, accessed 31 December 2010.
[116] European Advertising Standards Alliance, 'International Guide to Developing a Self-regulatory Organisation: Practical Advice on Setting up and Consolidating an Advertising Self-regulatory System' (EASA, (Brussels, 2009) http://www.easa-alliance.org/01/MyDocuments/EASA_International_ Guide.pdf/download, accessed 31 December 2010.

standard-setting processes.[117] To further increase coordination between the two organizations, EASA has recently teamed up with the ICC to develop special training programs to promote responsible advertising among advertising professionals around the world.[118] Also the contacts between the WFA and EASA are very close since WFA is one of the industry members of EASA.

3. North America

Unlike in Europe, the private regimes in place in North America have not established a transnational body to coordinate regulatory activities. In fact, the Canadian SRO has joined the EASA International Council as corresponding member to collaborate with other SROs.

The US regime has developed somewhat differently than the Canadian and most European SROs. Unlike these SROs, the US system comprises various bodies, including the National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB), the Children's Advertising Review Unit (CARU) and the National Advertising Review Board (NARB). Their procedures and policies are coordinated through the Advertising Self-Regulatory Council, which also supports the Electronic Retailing Self-regulation Program (ERSP) and Online Interest-Based Accountability Program. While the systems for children's advertising and online behavioral advertising are based on guidelines and principles, the NAD enforces national advertising laws and has not adopted a formal code of advertising practices.[119] As a result, private regulation of advertising practices in the US covers unfair and deceptive advertising and only it occasionally extends to issues of taste and decency,[120] and more recently to privacy in online behavioral advertising.[121]

Another marked difference between the US system and those in place in Canada and in Europe is that the press and broadcast media have not subscribed to the national system, in part because of antitrust concerns.[122] Instead of participating in the system developed by the advertisers, media companies perform separate clearance practices. However, as they often miss the right incentives or expertise to perform this task vigilantly, this form of private control is said to remain imperfect.[123] It has thus been held that the absence of media participation curbs the effectiveness of the system.[124]

So far, the bodies comprising the US system have not joined the EASA International Council.

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[117] See Section II.A.5 below.

[118] European Advertising Standards Alliance, *Advertising Self-Regulation in Europe and Beyond: An Analysis of Self-Regulatory Systems and Codes of Advertising Practice* 6th ed., (Poot Printers, Brussels 2010), 48.

[119] It has been argued, however, that its performance would benefit from a code of practices. See: G. Miracle and T. Nevett, *Voluntary Regulation of Advertising. A Comparative Analysis of the United Kingdom and the United States* (Lexington Books, Toronto 1987), 282-285.

[120] Boddewyn 1988, *op.cit.*, 132.

[121] Interactive Advertising Bureau, Council of Better Business Bureaus, the Direct Marketing Association, the American Association of Advertising Agencies, the Association of National Advertisers, and the Network Advertising Initiative, 'Self-Regulatory Principles for Online Behavioral Advertising'(2009), http://www.iab.net/, accessed 31 December 2010.

[122] P. LaBarbera, 'The Antitrust Shadow over Advertising Self-Regulation', Current Issues and Research in Advertising (1992) 4, 57-70.

[123] H. Rotfeld, Power and Limitations of Media Clearance Practices and Advertising Self-regulation', *Journal of Public Policy & Marketing* (1992) 11, 87-95 and C. Galloway, H. Rotfeld and J. Richards, 'Holding Media Responsible for Deceptive Weight-Loss Advertising', *West Virginia Law Review* (2006) 107, 353-384.

[124] Miracle and Nevett 1987, *op. cit.*, 121.

4. Latin America

In Latin America, SROs have organized themselves in a way that is similar to the organization of SROs in Europe. In June 2008, the SROs from Argentina, Brazil, Chile, Colombia, El Salvador, Mexico and Peru created a network called CONARED.[125] The main purpose of the network is to promote responsible advertising in Latin America, share information and best practices amongst its members, and support global initiatives that encourage private regulation in advertising.[126] In 2009, CONARED expanded with the membership of the newly established SRO from Uruguay.[127]

The activities and achievements of CONARED network are not to be compared with those of EASA. CONARED is a network that is very much in development and no fixed secretariat has been created. It has not (yet) assumed the functions EASA has as regards the promulgation of best practices and facilitating cross-border copy advice and pre-clearance services, and complaint handling. Some of the CONARED members (Argentina, Brazil, and Chile) may benefit from these services, as they are also members of EASA International Council.[128]

5. Asia and the Pacific

Also the advertising industry in Asia has sought to organize its activities for the promotion of private regulation of advertising. In 1978, industry representatives of ten Asian countries established *Asian Federation of Advertising Associations* (AFAA). The idea to establish the AFAA had developed since 1958, when the first Asian Advertising Conference was held in Tokyo, Japan. On this occasion, a group of prominent leaders of the Japanese advertising industry put forward the idea to create a single association 'to sharpen their skills in what was regarded as a largely westernized craft'.[129] Current membership of the AFAA includes the advertising industry associations from fourteen countries.[130] The AFAA seeks to enhance advertising standards, ethics, and practices, foster the contribution from advertising to regional and national socio-economic development, and develop the use of self-regulation. To achieve these goals it organizes the Asian Advertising Congress known as 'AdAsia' held once in every two years, it develops and implements educational programs, and it produces country reports on the advertising industries in the countries represented in the membership.[131]

The AFAA does not host a SRO network equivalent to that established and run by EASA in Europe or CONARED in Latin America. There are several SROs active in the region, mostly in those countries that share a colonial history with the UK, including India, Hong Kong, Malaysia, the Philippines, and Singapore.[132] Well developed are the regimes that are in place in Australia and New Zealand, which have been organized in broadly the same way as the

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[125] The acronym CONARED stands for: *Red de Consejos Nacionales de Autorregulación Publicitaria*.

[126] World Federation of Advertisers, 'CONARED: Autorregulacion Publicitaria Latinoamericana', http://www.wfanet.org/hispanoticias.cfm?id=114, accessed 31 December 2010.

[127] European Advertising Standards Alliance 2010, *op. cit.*, 191.

[128] EASA, 'EASA International Council', http://www.easa-alliance.org/page.aspx/245, accessed 31 December 2010.

[129] AAFA, 'Who We Are' http://www.afaaglobal.org/afaa/weare.html

[130] These countries are: Bangladesh, India, Indonesia, Japan, Republic of Korea, Nepal, Malaysia, Mongolia, Pakistan, Philippines, Singapore, Taiwan, Thailand, and Vietnam.

[131] AAFA, 'What We Do' http://www.afaaglobal.org/afaa/wedo.html

[132] See for an overview of the SROs in these countries: Boddewyn 1992, *op. cit.*.

European SROs. Together with the SRO active in India, the SROs from Australia and New Zealand have joined the EASA International Council.

Private regulation of advertising in China, the second largest advertising market in the world, is underdeveloped, however. This is presumably so because of the hostile climate of political freedom and democracy in which private organizations find it difficult to compete with state authorities over regulatory matters.[133] While other trade associations exist, the Chinese Advertising Association (CAA) is the most important representative body of the Chinese advertising industry. It adopts codes of conduct, which in fact do little more than publicizing national laws and policies on advertising. In addition, the CAA is fully government funded and its top officials work also as regulators for the State Administration of Industry and Commerce. The CAA did until recently not monitor advertising, nor did it process complaints from consumers or competitors.[134] The CAA has not joined the EASA International Council nor does it entertain any formal (membership) relations which the IAA.

6. Africa

Private regulation of advertising in Africa is underdeveloped. A positive exception in the SRO that is active in South Africa, which operates on the basis of a national code that is founded on the International Code of Advertising Practice adopted by the ICC. The South African SRO is a member of the EASA International Council. Since 1995 it has entertained contacts with EASA.

[133] Z. Gao, 'Harmonious Regional Advertising Regulation? A Comparative Examination of Government Advertising Regulation in China, HongKong, andTaiwan', Journal of Advertising (2005) 34 (3), 75-88, at 79-80.
[134] Z. Gao, 'Controlling Deceptive Advertising in China: An Overview' *Journal of Public Policy and Marketing* (2008) 27, 165-177, at 167.

PART (II) – The Emergence and Governance of TPR

A plurality of transnational codes exists in the advertising industry. This Part of the study will describe a number of such codes, contrasting different types: general v. sector-specific, global v. regional, and qualitative v. process. As such, this Part will distinguish between codes adopted by the ICC (A), codes designed by sector-specific industry bodies (B), and the best practice recommendations established by EASA (C).

To properly address the questions identified in the General Case Study Template (Annex I), each Section will include an analysis of the following characteristics:

- Scope and substance
- Emergence
- Drives and incentives
- Relationship with public regulation
- Standard-setting
- Implementation
- Monitoring and enforcement

II.A. International Chamber of Commerce

In 1937, the International Chamber of Commerce (ICC) adopted the first transnational code for the advertising sector: the International Code of Advertising Practice. In 2006, this code went through its latest revision and is now known as *the Consolidated ICC Code of Advertising and Marketing Communication Practice* (hereinafter: the Consolidated ICC Code).[1]

1. Scope and substance

The Consolidated ICC Code employs the term 'marketing communications' to address not just advertising, but also the use other marketing techniques, such as sales promotion, sponsorship, and direct marketing. Following the definition given by the code, marketing communication is to mean "any form of communication produced directly by or on behalf of marketers intended primarily to promote products or to influence consumer behaviour."[2] By adopting a scope of application wider than just the issue of advertising, the ICC was able to consolidate the various codes it produced over the years, and embrace the debate on digital marketing techniques. In addition, it would allow it to respond to the use of broader terms like 'unfair commercial practices' and 'commercial communications' by the European legislature in the Unfair Commercial Practices Directive and Audiovisual Media Services Directive respectively.[3]

The preamble of the Consolidated ICC Code stipulates that in applying the rules of the code, no differentiation should be made as regards the parties concerned with marketing communications. The code is to apply across the board, that is, to all firms concerned with

[1] International Chamber of Commerce, Consolidated ICC Code, http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/Statements/330%20Final%20version%20of%20the%20Consolidated%20Code%20with%20covers.pdf, accessed 31 December 2010.
[2] Consolidated ICC Code, 11.
[3] Interview EASA, 24 November 2009, Brussels.

advertising activities and most notably to the advertisers, advertising agencies and media. This is again stressed in Article 23 titled 'Responsibility', of which the first two paragraphs read:

> *"These general rules on responsibility apply to all forms of marketing communication. Rules on responsibility with special relevance to certain activities or media can be found in the chapters devoted to those activities and media.*
>
> *Responsibility for the observance of the rules of conduct laid down in the Code rests with the marketer whose products are the subject of the marketing communication, with the communications practitioner or agency, and with the publisher, media owner or contractor.*"

The Consolidated ICC Code is split in two principle parts. Part I is titled '*General Provisions on Advertising and Marketing Communication Practice*' and contains the provisions that apply to 'all advertising and other marketing communication for the promotion of any kind of goods and services, corporate and institutional promotion included'.[4] Article 1 spells out the most basic requirement of the code: "All marketing communication should be legal, decent, honest and truthful." Accordingly, marketing communications should not be offensive (Article 2. Decency), abuse the trust or lack of experience of consumers (Article 3. Honesty), or mislead (Article 5. Truthfulness). Marketing communications should also be respectful to human dignity and should not incite or conduce discrimination or violence, play on fear or superstition, or exploit misfortune of suffering (Article 4. Social responsibility). Articles 6, 7, 8 and 11 serve to further specify the provision on truthfulness, laying down requirements for the use of scientific data, the use of the word "free", claim substantiation, and comparisons. Articles 9 and 10 stipulate that marketing communication should be clearly distinguishable as such and not misrepresent its true purpose, and need to display the identity of the marketer. Article 12 prohibits denigration. Articles 13 through 16 require that marketing communications do not wrongfully use, portray, or refer to testimonials, persons, companies, trademarks, or marketing communication of other marketers.

In addition, marketing communications should not portray potentially dangerous situations (Article 17. Health and safety), should take special care when directed to or featuring children (Article 18. Children and young people),[5] and not contravene generally accepted standards of environmentally responsible behavior (Article 22. Environmental behaviour). Where marketing communications collect or use personal data from individuals, this needs to be notified and securely processed to protect the personal data (Article 19. Data protection and privacy). Article 20 requires that costs for marketing communications are transparent and Article 21 discourages the use unsolicited marketing communications.

Articles 23 through 26 include a number of general provisions aimed at improving the functioning of self-regulation schemes. Article 23 addresses the responsibility marketers, agencies, and media to observe the code. Article 25 stipulates that the provisions and principles in the code should be adopted and implemented, nationally and internationally, by the relevant local, national or regional self- regulatory bodies. Interpretation of the principles in the code can be submitted to the ICC Interpretation Panel, subject to the

[4] Consolidated ICC Code, 10.

[5] These provisions relating to children will be addressed specifically in Section II.A.2 below.

conditions set out in the Annex to the code. Finally, Article 26 requires marketers, agencies or media to respect and follow the decisions of SROs.

Part II of the code is called '*Detailed Chapters*' and contains rules that specify the general provisions of Part I in relation to marketing techniques other than advertising. These are sales promotion (Chapter A), sponsorship (Chapter B), and direct marketing (Chapter C). Part II also includes two chapters on advertising in 'electronic media and the telephone' (Chapter D) and 'environmental claims' (Chapter E). The provisions laid down in Part II should be read in conjunction with Part I.[6]

Further specifications of the general provisions of the Consolidated ICC Code are also found in the so-called 'Framework interpretations'. These documents provide additional clarification to the code provisions and can be adopted relatively fast, in between the revisions of ICC codes. As such, the ICC seeks to address contemporary and pressing issues in advertising and provide more guidance to the industry in how to deal responsibly with such topics in advertising. Recent examples of these framework interpretations are Framework for Responsible Environmental Marketing Communications,[7] as well as the Framework for Responsible Food and Beverage Communications, which will be discussed below.

2. Emergence

Soon after its creation in 1919, the ICC recognized that the manifest differences among national legal systems regulating advertising conduct hindered the effective competition among businesses worldwide.[8] The absence of uniform standards regulating the advertising industry offered national governments the chance to adopt and maintain protectionist rules for local business and raise barriers to trade. Since the ICC sought to promote trade and investment, open markets for goods and services, and the free flow of capital, it spearheaded business initiatives to address this absence and the consequences thereof at an international level. With an increasingly globalizing advertising industry, which had already managed to organize itself through representative organizations in the 1920 and 30s, the wish to create a set of global private rules for the advertising industry gained momentum.

Accordingly, the German delegation to the 1935 ICC Congress proposed to establish a 'Commission for Commercial Advertising' that would set uniform standards to guide the conduct of the advertising industry.[9] There were only a few countries that had some experience with private regulation. Germany had adopted the Unfair Competition Law Act (*Gesetz gegen den unlauteren Wettbewerb*) in 1909 and the industry had responded by establishing the trade association the *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (*Wettbewerbszentrale – WBZ)* in 1912. The 1909 Act had allowed for easily accessible civil

[6] The Consolidated ICC Code should also be read in conjunction with a number of other ICC codes, principles and framework interpretations, such as the ICC International Code of Direct Selling, the ICC/ESOMAR International Code of Marketing and Social Research Practice, and the ICC Principles on Responsible Deployment of Electronic Product Codes.

[7] International Chamber of Commerce, 'Framework for Responsible Environmental Marketing Communications' (Marketing and Advertising Commission, ICC Document N° 240-46/557) (Paris, 2010) http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/pages/557_FRAMEWORK_ ENVIRONMENTAL_CLAIMS_FINAL_140110.pdf.

[8] L. Brandmair, *Die freiwillige Selbstkontrolle der Werbung*, (KiSin: Cad Heymanns, 1978), 5.

[9] Ibid., 6.

litigation procedures to address false and misleading advertising and no need was felt by the industry to adopt a code of conduct to control advertising.

In the UK and US, on the other hand, the industry had some experience with private regulation at the national level, where newspapers, consumer magazines and the poster industry had created private systems to counter advertising that discredited the industry.[10] Also in Sweden, the advertising industry had gained experience with private codes. In 1919, Sweden had adopted an Unfair Competition Act, which was revised in 1931. Unlike the German Unfair Competition Law Act, the Swedish Act did not provide for easily deployable enforcement instruments and remained rather limited in scope due to the broad interpretation of the freedom of expression by Swedish courts. The industry was triggered to address false and indecent advertising by private regulatory systems. In 1934, it established the Industry Opinion Board and in 1935 the Advertising Opinion Board followed.[11]

Building on these national experiences, the Commission for Commercial Advertising adopted the 'International Code of Advertising Practices' in 1937. This first transnational code on advertising conduct included three parts: the first concerned the principles of fair advertising to consumers, which included rules on moral and ethical advertising and misleading claims and puffery. The second part introduced rules on fair advertising among competitors. The final part was addressed to advertising agencies and media, prohibiting them to publish misleading claims or campaigns. With the adoption of these international advertising standards, the ICC provided, in the absence of any international public regulation – and even national public regulation – on the matter, a global level playing field for cross-border advertising activities.

Since 1937, the ICC has established codes of advertising practice.[12] This first took the form of the periodical updating of the 1937 code, but later other codes were added to address specific changes in legislative frameworks, marketing techniques, and societal or technological developments. Over time, however, this practice raised concerns of inconsistency. In 2004, the revision practice had resulted in the existence of almost ten different ICC documents on advertising.[13] These documents – named codes, guidelines, or frameworks – employed different terminology to describe the same principles, and were not revised in any systematic fashion. As such, it was felt by industry representatives that the practicability of the ICC rules was at stake. The adoption of the Consolidated ICC Code in 2006 was thus largely motivated by the need to present a clear, coherent, and workable body of advertising rules.[14] Now, Part I of the Consolidated ICC Code includes general provisions, while Part II details these to specific marketing techniques, media or topics.

[10] G.E. Miracle and T. Nevett, 'A Comparative History of Advertising Self-Regulation in the UK and the United-States' (1988) 22(4), European Journal of Marketing, 7-23.

[11] See for a comprehensive analysis of the development of the German and Swedish (private) practices of advertising control: A. Bakardjieva Engelbrekt, *Fair Trading Law in Flux? National Legacies, Institutional Choice and the Process of Europeanisation* (Stockholm University (PhD Thesis), Stockholm 2003.

[12] The revisions of the original ICC Code took place in 1949, 1955, 1963, 1973, 1987, 1997, and 2006.

[13] These specific codes included rules on sales promotion, sponsorship, direct marketing, direct selling, marketing research, the environment, food and beverages, and Internet.

[14] Interview EASA, 24 November 2009, Brussels.

3. Drivers and incentives

What factors have driven the creation of ICC codes? Following the brief historical analysis of the ICC's International Code of Advertising Practices it can be observed that conflicting national legal advertising regimes, the absence of international rules empowering an institution to harmonize these regimes, and the restrictive impact this had on competition motivated multinational companies to create global codes. In present times, we can distinguish between three key incentives for the industry to adopt private standards for advertising.

Reputation, trust, and societal concerns

The 1937 ICC code offered business and the advertising industry in particular, the first possibility to show to consumers and government their commitment to high ethical standards for advertising. Indeed, advertising relies on trust.[15] If potential buyers – consumers and businesses alike – do not have confidence in the message the advertisement is trying to convey, advertising fails to achieve its prime goal, that is to persuade its audience to buy, continue to buy, or buy more of the products that are advertised. In addition, a substantial part of a company's market capitalization is represented by its brand reputation.[16] Consumer trust in the brand builds brand loyalty, increases sales, and increases market share. This implies that consumer trust in the company's brand plays a crucial part in the success of the company. Accordingly, advertisers and the advertising industry at large are incentivized to adopt or sign up to private standards concerning misleading and offensive advertising, and clear the market from advertisements that do not comply with these standards simply because such behavior of fellow market players is detrimental to the success of their own advertising and marketing activities. Private regulation and the effective operation thereof is thus considered a crucial instrument to ensure a high level of trust in advertising and the advertising industry, or as the ICC puts in the 2006 Consolidated ICC Code:

> *"Responsible advertising and marketing communication, based on widely supported self-regulatory codes of conduct, are an expression of the business community's recognition of its social obligations. The fundamental value of self-regulation lies in its ability to create, enhance and preserve consumer trust and confidence in the business communities behind it, and thereby in the marketplace itself. Active self-regulation is also an instrument for the protection of individual companies' goodwill and reputation."*[17]

The importance of trust in advertising and the company reputation makes advertising particularly vulnerable to societal concerns. Concerns in the public domain are likely to affect buyers' attitudes toward advertising and the industry is well aware of the reputational implications the associated societal concerns can have on sales and brand names. By

[15] See for a discussion of the role of trust and ethics in advertising: J. Dalla Costa, *In Trust. Ethics in Advertising. A Canadian Enquiry into What is Necessary and What is Possible*, (Association of Canadian Advertisers, Toronto 2008).

[16] Consulting firm Interbrand Ltd annually surveys brands owned by firms in a number of industries for changes in value. According to their estimates, the brand value represents approximately forty percent of the market value of equity and recognized assets for an average firm. See: M.E. Barth*, et al.*, 'Brand Values and Capital Market Valuation' (1998) 3(1), Review of Accounting Studies, 41-68, 41. This percentage is often higher in case of brands in the Internet services industry. See R.E. Hall, 'The Link Between the Stock Market and the Labor Market in the 1990s' (2000) (2), Brookings Papers on Economic Activity, 73-102.

[17] Consolidate ICC Code, 8.

responding to specific societal concerns by way of adopting private advertising regulation, the industry tries to mitigate potential negative effects on its reputation and raise the ethical standards for the business.

Government pressures

As held above,[18] a strong interplay exists between private regulation of advertising and public regulation. Private regulation in the advertising industry has been motivated by the threat to adopt new regulation, reinforce existing laws or take executive action.[19] By adopting rules of its own, the industry has sought to match legal standards, but also to reduce the need for legislation to be adopted. This latter motive features explicitly in the 2006 Consolidated ICC Code, which lists as one of its objectives: 'to minimise the need for detailed governmental and/or inter-governmental legislation or regulations.'[20] Thus, the adoption of global advertising codes is also meant to send a powerful message to government. By demonstrating the ability to establish high standards for advertising and ensuring the effective application thereof by advertisers, agencies and media, the industry seeks to prevent states from adopting more stringent advertising laws.

A good illustration of this dynamic is the adoption of the ICC Framework for Responsible Food and Beverage Communications (ICC Framework).[21] The ICC originally adopted the Framework in April 2004 to provide guidance to the advertising industry on how to apply the multi-sectoral rules enshrined in the Consolidated ICC Code in the specific context of food and beverage communications, in particular as regards communications to children. The adoption of the guidelines set out in the framework was, however, preceded by activities of the World Health Organization (WHO) to promote physical activity and healthy diets, combat childhood obesity, and reduce the risk of chronic diseases. At the occasion of the World Health Assembly in 2002, the Member States of the WHO expressed the wish that the WHO should adopt an action plan related to unhealthy diets and physical inactivity.[22] Following two years of preparatory talks, the Member States approved in 2004 a 'Global Strategy on Diet, Physical Activity and Health' (hereinafter: WHO Global Strategy),[23] which seeks to reduce chronic diseases related to unhealthy diets and physical inactivity, raise awareness about these issues, and promote actions plans and research on diets and physical activity.[24] Within this global strategy, the WHO Member States adopted a number of formal recommendations, including the following:

> *"Food advertising affects food choices and influences dietary habits. Food and beverage advertisements should not exploit children's in-experience or credulity. Messages that encourage unhealthy dietary practices or physical inactivity should be discouraged, and positive, healthy messages encouraged. Governments should work with consumer groups and the private sector*

[18] Section I.C.2 above.

[19] J.J. Boddewyn, *Advertising Self-Regulation and Outside Participation: A Multinational Comparison*, (Quorum Books, New York 1988), 279-289. See also: Miracle and Nevett 1988, *op. cit.*.

[20] Consolidated ICC Code, 9.

[21] International Chamber of Commerce, ICC Framework: http://www.iccwbo.org/uploadedFiles/ICC/Policy_pages/332%20FINAL_Framework_Food_and_Beverage.pdf, accessed 31 December 2010.

[22] Resolution WHA55.23.

[23] Resolution WHA57.17.

[24] World Health Organization, 'Global Strategy on Diet, Physical Activity and Health' 2004) http://www.who.int/dietphysicalactivity/strategy/eb11344/strategy_english_web.pdf, accessed 31 December 2010, 3-4.

(including advertising) to develop appropriate multisectoral approaches to deal with the marketing of food to children, and to deal with such issues as sponsorship, promotion and advertising."[25]

As governments acknowledged the link between food advertising and the choice of food products and dietary habits, the likelihood of government action against the advertising of unhealthy foods increased. This put great pressure on the food and beverage industry to make sure that its marketing communications are responsive to the concerns underlying the WHO Global Strategy. Indeed, also the advertisers and media were called upon in the WHO Global Strategy to take action against obesity and physical inactivity:

"The private sector can be a significant player in promoting healthy diets and physical activity. The food industry, retailers, catering companies, sporting-goods manufacturers, advertising and recreation businesses, insurance and banking groups, pharmaceutical companies and the media all have important parts to play as responsible employers and as advocates for healthy lifestyles. (…) Specific recommendations to the food industry and sporting-goods manufacturers include the following:

- *promote healthy diets and physical activity in accordance with national guidelines and international standards and the overall aims of the Global Strategy*
- *limit the levels of saturated fats, transfatty acids, free sugars and salt in existing products*
- *continue to develop and provide affordable, healthy and nutritious choices to consumers*
- *consider introducing new products with better nutritional value*
- *provide consumers with adequate and understandable product and nutrition information*
- *practise responsible marketing that supports the Strategy, particularly with regard to the promotion and marketing of foods high in saturated fats, transfatty acids, free sugars, or salt, especially to children*
- *issue simple, clear and consistent food labels and evidence-based health claims that will help consumers to make informed and healthy choices with respect to the nutritional value of foods*
- *provide information on food composition to national authorities*
- *assist in developing and implementing physical activity programmes."*[26]

Governments have sought to implement the WHO Global Strategy by initiating awareness campaigns, creating education programs and at time adopting new laws and regulations. In Europe, the European Commission has channeled the activities of the EU Member States in this field by establishing the 'EU Platform for Action on Diet, Physical Activity and Health' in 2005.[27] While the EU does not have a clear legal mandate to regulate these issues, it has been active in steering and influencing national policies in this field.[28] The Platform takes the form of roundtable meetings that are chaired by the Commission during which industry

[25] Recommendation 40(3) Global Strategy on Diet, Physical Activity and Health.
[26] Recommendation 61 Global Strategy on Diet, Physical Activity and Health.
[27] See at: http://ec.europa.eu/health/ph_determinants/life_style/nutrition/platform/platform _en.htm. The platform was recently evaluated by the Commission: European Commission, 'Evaluation of the European Platform for Action on Diet, Physical Activity and Health' (DG SANCO, (Brussels, 2010) http://ec.europa.eu/health/nutrition_physical_activity/docs/evaluation_frep_en.pdf, accessed 31 December 2010.
[28] A. Garde, *EU Law and Obesity Prevention* (Kluwer Law International, Alphen aan de Rijn 2010), 200-204.

actors, NGOs, academics and public officials undertake voluntary commitments to promote healthy diets and physical activity.[29]

The ICC Framework must be understood as the business response to the WHO initiative and subsequent governmental regulatory initiatives. Following much of the wording of the WHO Global Strategy, the ICC stresses the important role the advertising industry has to play in promoting the use of healthy foods, especially with regard to food and beverage communications to children.[30]

In a study commissioned by the WHO, Hawkes recently assessed what the impact has been of the adoption of the WHO Global Strategy in terms of regulation adopted worldwide. She finds an increased development of self-regulatory codes by the advertising and food industries and a "slower development of statutory regulation by some governments, despite strong advocacy by public health and consumer groups for legal restrictions on the volume of food marketing experienced by children".[31] Hawkes suggests that the ICC Framework has been particularly influential in forestalling government regulation in a number of countries and has lead to the adoption and revision of national advertising codes.[32]

The WHO Member States reaffirmed their commitment to implement the Global Strategy most recently in 2010[33] and issued a new set of recommendations to national governments on how to design new and/or improve existing policies on the marketing of foods and non-alcoholic beverages to children.[34]

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[29] The platform was recently evaluated by the Commission: European Commission, 'Evaluation of the European Platform for Action on Diet, Physical Activity and Health' (DG SANCO, (Brussels, 2010) http://ec.europa.eu/health/nutrition_physical_activity/docs/evaluation_frep_en.pdf, accessed 31 December 2010.

[30] The ICC Framework originally adopted in 2004 holds:

> *"The increasing worldwide attention to diet, nutrition and physical activity is of great significance to the international food and beverage community and to the broader business community of which it is a part. The following framework has been prepared by the Commission on Marketing and Advertising of the International Chamber of Commerce (ICC) to address some of the issues raised by these concerns. (…) World business supports the notion that responsible commercial communications can assist consumers in making appropriate choices about food and beverage products, and in understanding the role of nutrition, diet and physical activity in healthy lifestyles. By conveying commercial communications consistent with principles of good nutrition, diet, physical activity and personal choice, business can play an important role."*

At the same time, however, the ICC is keen to stress that it does not hold the advertising industry accountable for obesity and unhealthy dietary choices. It holds that:

> *"Communicators must advertise and sell their products to children in a responsible manner. ICC remains mindful, however, that parents and other adults responsible for a child's welfare play a primary role in the broad range of decisions affecting their children, including choices about lifestyle, physical activity and diet. Moreover, parents, educators, the media, entertainment content providers and others have important roles in helping children develop a critical understanding of advertising and other media messages so that they become better informed."*

[31] C. Hawkes, 'Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006' (World Health Organization, (Geneva, 2007) http://www.who.int/dietphysicalactivity/regulatory_environment_CHawkes07.pdf, accessed 31 December 2010, 9.

[32] Ibid., 10-11.

[33] Resolution WHA63.14.

[34] World Health Organization, 'Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children' (Geneva, 2010) http://whqlibdoc.who.int/publications/2010/ 9789241500210_eng.pdf, accessed 31 December 2010.

Technological development

The adoption by the ICC of new codes and guidelines following the first draft of the general advertising code in 1937 have also served to adjust private regulation to the changing characteristics of advertising and its industry. Of particular importance has been the technological development of the media and communications sectors. For example, the revision of the International Code of Advertising Practice in 1963 was primarily instigated by the importance the medium of television had assumed in society. The previous ICC code (1955) was considered inadequate to address the type of advertising this medium had trigged by the industry and thus the ICC Advertising Commission – which is now known as the Commission on Marketing and Advertising – introduced the 'International Rules on Television Advertising'.[35]

Also the most recent revision of 2006 was, in part, motivated by the rise of a new medium. The strong development of electronic communication techniques, such as Internet and mobile telephone, had offered advertisers new and more intrusive ways of to reach potential buyers. In 1996, the Commission on Marketing and Advertising already adopted the 'ICC Guidelines on Advertising and Marketing on the Internet' to offer the industry rules on Internet advertising.[36] To update these guidelines and fully address the industry's responsibility in using Internet and telecom techniques for advertising purposes, the ICC adopted a new set of rules on advertising via electronic media and telephone, now placed in Part II Chapter D of the Consolidated ICC Code.[37]

4. Relationship Public Regulation

Above, the relationship between public law and the ICC codes was briefly addressed by explaining the effects pressures by government and law may have on the motivation of the advertising industry to adopt private standards. *Vice versa*, also the ICC codes have sought to pressure governments to change existing legislation. An example of this motive for adopting private advertising standards by the ICC can be found in the 1960s. At that time, national bans of commercial television were commonplace. By introducing private standards to regulate TV advertising with the revision of 1963, the ICC not only sought to demonstrate the lasting commitment of the industry to private regulation, but also to pressure national government to lift the bans on commercial television.[38] In Europe, such pleas were not successful, however, and television broadcasting only opened up for commercial television in Europe in the 1980s.[39]

The Consolidated ICC Code further details the relationship in which it sits with public law. Article 1 of the code requires that all advertising and all other forms of marketing

[35] Brandmair 1978, *op. cit.*, 7.

[36] These guidelines were revised in 1998, which are available at: http://www.ftc.gov/bcp/icpw/comments/iccguidelines.htm, accessed 31 December 2010.

[37] The introduction to the 2006 ICC Code reads: 'At the present time, rapid technological developments in the media – including television, interactive radio, the electronic media, video games and the telephone – as well as public concern about the protection of children and other potentially vulnerable groups, are focusing attention on future forms of regulation. In this environment it is particularly important that this new edition of the Code, based on the best available expertise, becomes a daily reference source for everyone involved in the preparation, distribution and regulation of marketing communication.' Consolidated ICC Code, 10.

[38] Brandmair 1978, *op. cit.*, 7.

[39] J.A. Coleman and B. Rollet, Television in Europe: Issues and Developments, in J.A. Coleman and B. Rollet (eds.), *Television in Europe*, (Intellect, Exeter 1997), 12.

communications should be 'legal, decent, honest and truthful'. Accordingly, public law and private regimes for advertising control should be viewed as complementary mechanisms, rather than mutually exclusive ones.[40] The ICC code makes this even more evident in its preamble where it states that 'The Code is to be applied against the background of whatever legislation may be applicable'. Accordingly, all the provisions of the code should be viewed as complementing applicable legislation. Exceptionally, however, SROs may also apply legal standards to control advertising. This is for example the case for the US regime (NAD / CBBB / CARU / ERSP / NARB) and for the trade association called WBZ in Germany.

5. Mechanisms for standard-setting

In general, ICC policy statements, recommendations, and standards are prepared by ICC Commissions. These commissions, 16 in total, are composed of representatives of business and industry and cover a wide number of topics, including competition and intellectual property, transport and logistics, and advertising and marketing. When ICC rules related to these topics are adopted or amended, these commissions are in charge: they prepare and decide on the new standards. Therefore, the business representatives in the commissions are crucial in shaping the ICC policies and rules. Over the years, the ICC has designed a number of well-known international commercial standards. The Uniform Customs and Practice for Documentary Credits, for example, were originally adopted in 1933, and in their newest version – the UCP 500 of 1994 – are widely used by credit institutions (e.g. banks) to facilitate the financing of international trade. The Incoterms are another famous example of ICC private standard setting. First adopted in 1936 and lastly amended in 2002, the Incoterms provide standardized definitions of universally applied shipping terms.

The ICC codes on advertising and marketing communication practices are prepared by the *Commission on Marketing and Advertising*. The Commission is composed of representatives from ICC member companies from the marketing and advertising industry, including legal advisors of companies and lawyers in private practice.[41] In order to be adopted as formal ICC policy, the preparatory work of the Commission needs approval of the ICC Executive Board or the Chairmanship of the ICC.[42] The Chairmanship comprises the Chairman, Vice-Chairman, and Honorary Chairman of the ICC World Council. This council is the highest governing body of the ICC and is composed of the business delegates of the 84 national committees that are member of the ICC.

The process of adopting and revising ICC codes has changed over time. Initially, the ICC Commission on Marketing and Advertising followed the practice of designating informal groups composed of a limited number of its members with the task to draft the rules. These members were appointed by the ICC and represented, in the first place, the business concerns raised by advertising regulation. Where the standards were related to a specific sector, for example digital media, representatives of worldwide leading businesses were also consulted. In addition, the ICC allowed a number of observers in the drafting process and as

[40] J.J. Boddewyn, Advertising Self-Regulation: Organization Structures in Belgium, Canada, France and The United Kingdom, in W. Streeck and P. Schmitter (eds.), *Private Interest Government* (Sage, London 1986), 30-43.

[41] ICC, 'About the Commission on Marketing and Advertising', http://www.iccwbo.org/policy/marketing/id857/index.html, accessed 31 December 2010.

[42] On the basis of Article 10(6) (ICC Commissions) of the ICC's Constitution (2009) this condition applies to all policies and standards adopted by the ICC, including the UCP and Incoterms.

such EASA, WFA, and the Federation of European Direct and Interactive Marketing (FEDMA) have been able to express their views and give input to the drafting process.[43]

As describe above,[44] the ICC followed a rather uncoordinated approach in renewing and setting new standards, necessitating the overhaul of all the codes and bring them together in one single document, the 2006 Consolidated ICC Code. To this end the 2006 revision followed a different drafting procedure. With the view to formalize the code revision procedure, the ICC Commission on Marketing and Advertising established a special group called the 'Task Force on Code Revision'. The Task Force is composed of advertising practitioners (advertisers, advertising agencies, and media) and representatives from bodies involved in advertising self-regulation,[45] including the WFA, IAA and EASA. Accordingly, the input to the revision process – what to review and how to review it – was received from business and those dealing with the operation of private regulation of advertising on a daily basis.

To further formalize the code adopting and revision procedure of ICC advertising codes, the Commission on Marketing and Advertising has recently adopted an 'ICC Paper on Code Drafting'.[46] Here, it is spelled out how the Commission and its Code Revision Task Force should go about future code adoptions and revisions. The paper lays down four general principles for creation and revision:

- *"Codes and their revisions should be relevant, authoritative and set global standards.*
- *Regular review processes should ensure the codes remain timely and up to date, and prioritised in line with changes in the market, consumer concerns, and if appropriate, insights obtained through informal dialogue with stakeholders.*
- *To ensure that practitioners have had time to use and adjust to the new codes, comprehensive code revisions should generally occur only once every 3 to 4 years. To maintain the flexibility and responsiveness of self-regulation, however, the business community is encouraged to raise discrete issues "off-cycle" for consideration and action as needed by the ICC.*
- *Finally, all codes should be presented in a simple and user-friendly manner, use clear and consistent terminology, and remain flexible enough for their global application."*

The ICC Paper on Code Drafting also details the steps that are taken now for code revision. These steps are as follows:

- *"A proposal from an ICC National Committee or one of their members in the Code Revision Task Force initiates the drafting or revision of a code if there is sufficient agreement and members with appropriate expertise willing to do the work. At or before this stage it may be*

[43] Interview EASA, 24 November 2009, Brussels.
[44] Section II.A.2 above.
[45] International Chamber of Commerce, 'Frequently Asked Questions. Consolidated ICC Code for Advertising and Marketing Communication Practice' (ICC Commission on Marketing and Advertising, (Paris, 2006) http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/Statements/338%20FAQs%20ICC%20Advertising%20and%20Marketing%20Code.pdf, accessed 31 December 2010.
[46] International Chamber of Commerce, 'ICC Paper on Code Drafting: Maintaining the Effectiveness of Self-regulation in Marketing Communications' (Commission on Marketing and Advertising, ICC Document No. 240-46/557) (Paris, 2010) http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/pages/548%20ICC%20paper%20on%20code%20drafting%20FINAL%20130110.pdf, accessed 31 December 2010, 2.

appropriate for those working on the project to request that the ICC reach out to other stakeholders to assure that those working on the revision have an adequate understanding of the issues.

- *The Code Revision Task Force consists of a selection of members from the Marketing and Advertising Commission. Where necessary it is reinforced with experts from a specific industry or business sector according to the code or issue being considered. This is especially important with regard to new areas, forms of media or techniques. It has an important role in vetting these proposals and making recommendations to the Marketing & Advertising Commission for its consideration and approval. In the case of code revision, the review may reveal the need to either partially or completely review a code. A draft text is then drawn up.*
- *Through ICC's comprehensive review process, every national committee is consulted, thus spanning countries from every region of the world, all business sectors and members from large, medium and small businesses. Their comments and suggestions are taken into account and the draft text is adjusted accordingly.*
- *Appropriate cross-commission consultation within the ICC to ensure consistency with other relevant ICC initiatives e.g E-business, IT and Telecoms, Environment and Energy, Intellectual Property etc.*
- *The Marketing and Advertising Commission and ICC national committees comment on and approve the final text provided usually by the Code Revision Taskforce.*
- *The text is sent to the ICC Executive Board for approval. While the Executive Board may delay approval until further changes are made, any modification is made under the leadership of the Commission chair."*

Importantly, the ICC Paper also suggests the introduction of informal, non-binding consultations of third party stakeholders in the drafting process. This is the first time since 1937 that the business organization appears to allow non-associated business and non-business stakeholders such as consumer groups, NGOs, and public authorities to participate in the drafting of its advertising codes.[47] However, participation is subject to ICC command. As the paper holds, the representation of views of non-associated businesses, consumers and others may come through ICC national committees first. Alternatively, presentations and discussions in ICC meetings can be considered. The paper suggests three criteria for the ICC to assess the 'appropriateness of consultation with other stakeholders at ICC meetings', which are:

- *"offer new information or insight on technologies, techniques and consumer understanding of, or reaction to marketing and advertising that would inform the code drafting process.*
- *either identify issues to examine in the code and/or evaluate appropriate code revisions,*
- *provide feedback on practical impacts of the code"*[48]

Accordingly, the paper does not suggest that non-industry members get a voting right on the norms that are in the end adopted. The ICC keeps firm control over who can provide input, on what the input can be, and what is done with the input. The involvement of third parties is thus limited, only consultative.

[47] The paper reads on page 2: "The code development process in an international business organization such as the ICC is business- driven but does not occur in a vacuum. (…) Direct input from outside third parties not active in the ICC can be useful in helping those working on the code to understand current issues.

[48] ICC Paper on Drafting Codes 2010, 3.

The Consolidated ICC Code dates from 2006. In the meantime, the industry has seen a number of important developments, most notably a financial crisis and the expansion of online advertising. While the ICC Commission on Marketing and Advertising has been able to provide some guidance since 2006 on recent issues,[49] a full revision of the Consolidated ICC Code is scheduled for mid 2011.

6. Implementation

The ICC codes, guidelines and framework interpretations are not applied by a centralized transnational regulatory body. Rather, they require implementation – i.e. the adoption, operationalization and application of the ICC norms – by SROs, which are typically in charge of the administration of national private regimes. The Consolidated ICC Code clarifies this in Article 25 (Implementation), which reads:

> *"The Code and the principles enshrined in it, should be adopted and implemented, nationally and internationally, by the relevant local, national or regional self-regulatory bodies. The Code should also be applied, where appropriate, by all organisations, companies and individuals involved and at all stages in the marketing communication process.*
>
> *Marketers, communications practitioners or advertising agencies, publishers, media-owners and contractors should be familiar with the Code and with other relevant local self-regulatory guidelines on advertising and other marketing communication, and should familiarise themselves with decisions taken by the appropriate self-regulatory body.*
>
> *Requests for interpretation of the principles contained in this Code may be submitted to the ICC Code Interpretation Panel."*

Despite the compelling wording of this provision, the ICC does not have any formal legal powers to require SROs to adopt or implement the ICC code in a uniform way. In fact, the way in which the ICC Codes have been adopted at the national level is determined by the legal tradition and market structures of every country.

As a consequence, there are considerable differences between the national private regimes for advertising control. Three approaches might be distinguished. First, there are systems, such as in Sweden and Finland, which only just apply the ICC Code. They take the most updated version of the ICC codes, guidelines, and framework interpretations are their normative set of rules and decide on cases which come before their juries on that basis.

Second, there are regimes, like in France, Belgium, Turkey and Portugal, which integrally apply the ICC standard and have adopted additional rules to deal with specific products (such as alcohol, cars, pharmaceuticals) or topics (such as portrayal of woman in advertising and food advertising to children). In France there are over forty of such specific codes. The specific codes that have been adopted by the national industry representatives constitute the manifestations of concerns at the national level to which the industry felt it was required to respond and address in a code.

[49] For example: International Chamber of Commerce, 'Framework for Responsible Environmental Marketing Communications' (2010) *op. cit.*.

Finally, and this is the big majority, there are regimes that have used the ICC standards, either explicitly or implicitly, as a broad guideline for the adoption on their own codes of conduct. Here, the individual national codes use the same principles as outlined by the ICC, but have adopted their own wording, structure, and have gone beyond the standards expressed in the ICC codes. In the UK, for example, the first sections of the new adopted 2010 Non-Broadcast Advertising, Sales Promotion and Direct Marketing developed by the Committee of Advertising Practice (CAP),[50] closely mirror the first general provisions of the Consolidated ICC Code. The same is true for, for example, the Code of Ethics adopted by the Australian Association of National Advertisers,[51] the code of advertising practice of the Advertising Standards Authority of South Africa, and the Canadian Code of Advertising Standards administered by the body called Advertising Standards Canada.[52] In Spain, the General Code of Advertising Practice, which is administered by the SRO called 'Autocontrol', defines a particular relationship between itself and the ICC Code in the section 'Scope and Application of the General Rules'. It stipulates that:

> *"8.- Subsidiary and complementary rules to the Code.*
> *In all not foreseen in this Code, the current Code of Advertising Practice of the International Chamber of Commerce will apply.*
> *The following will also apply:*
> - *Complementary to the above, the advertising codes of ethics for specific sectors which have been approved by the Autocontrol and, subsidiary to these, those established for specific sectors by the International Chamber of Commerce.*
> - *Complementary to the above and by way of a substitute for the above, the advertising codes of ethics adopted by the business associations for specific sectors, once they have been approved by the Executive Board of the Autocontrol. This approval will be temporary pending final approval by the General Meeting.*
> - *The aforementioned regulations will apply as long as they do not oppose this Code or the current legislation."*[53]

The Spanish approach thus suggests that even where the ICC Code has been implemented at the national level, it may still have a (residual) role in resolving disputes about advertising.

A particular approach to implementing ICC advertising rules can be distinguished in relation to the ICC Framework for Responsible Food and Beverage Communications. The framework must be read in conjunction with the Consolidated ICC Code, and serves the purpose of explaining how several of the provisions of the general code should be applied to food and beverage advertising. As the ICC Framework is an addition to the Consolidated Code, it too requires a local, national, or regional implementation. International industry associations, such as the WFA and the Association of Television and Radio Sales Houses (EGTA), have played a significant role in driving the local implementation processes. Both organizations joined the so-called 'EU Platform for Action on Diet, Physical Activity and Health', which was

[50] CAP Code 2010, http://www.cap.org.uk/The-Codes/CAP-Code/CAP-Code-pdf-versions.aspx, accessed 31 December 2010.
[51] ANAA Code of Ethics, 2009, http://www.aana.com.au/documents/AANACodeofEthicsAugust 2009.pdf, accessed 31 December 2010.
[52] Canadian Code of Advertising Standards, http://www.adstandards.com/en/Standards/canCodeOfAdStandards.aspx, accessed 31 December 2010.
[53] General Code of Advertising Practice, 2002. http://www.autocontrol.es/pdfs/cod_pub_ingles.pdf, accessed 31 December 2010.

launched by the European Commission in 2005 as the European follow-up to the 2004 WHO Global Strategy on Diet, Physical Activity and Health.[54] As a member participating to this EU platform, the WFA committed to update the ICC Framework and to have all national codes in Europe updated and mirroring the revised framework.[55] The WFA has facilitated meeting this latter commitment via its Responsible Advertising and Children (RAC) Programme, which was already established in 1999.[56] The RAC Programme constitutes a coalition of advertisers, advertising agencies, media and other industry stakeholders, such as the European representative association for toy producers – Toy Industries of Europe (TIE) – and seeks to promote responsible advertising to children by disseminating good practices and guidelines to their national member associations.

Recently, also EGTA made the commitment in relation to the EU Platform for Action on Diet, Physical Activity and Health to help implement the ICC Framework in the EU Member States. To this end, the association, which is also a member of the WFA sponsored RAC Programme, issued its 'Guidelines on the ICC Framework on Food and Beverages'.[57] The Guidelines are aimed to offer EGTA's national media members' guidance on how to implement the ICC Framework.[58] The implementation efforts by the WFA and EGTA have resulted in the fact that the ICC Framework has been already been transposed into national private advertising codes in a number of countries worldwide, including Argentina, Australia, Brazil, Canada, Chile, India, Mexico, New Zealand, South Africa, US, and almost all EU Member States.[59]

Why has the ICC left the implementation of the norms enshrined in its codes, guidelines and interpretative frameworks open to national SROs? The reason why this approach has been taken, rather than creating an international body for the application of the norms, relates to the fact that advertising is principally based on local opinion, sentiments, and practice. The way in which advertising conveys its message is inspired on the preferences of the target audience. It is at this local level that advertising has its commercial and normative impact and needs to deliver its message. It therefore plays on local sentiments and opinions by using language, humor and sentiments. Complaints about advertising will inevitably relate to these matters and bodies that operate at the same level on which the advertising is used are likely to best address the concerns of deception, offensiveness or responsibility underlying the complaints.

The fact that the majority of the SROs take the ICC codes, guidelines, and framework interpretations as a broad guideline for the adoption on their own codes of conduct adoption has led to considerable differences in the procedures and substance of national private regulatory regimes. In Europe, this divergence amongst codes and systems led the European Commission to pressure the European advertising industry to initiate harmonizing

[54] See Section II.A.3 above.
[55] Interview WFA, 26 November 2009, Brussels.
[56] World Federation of Advertisers, 'The Responsible Advertising and Children Programme' (Brussels, http://www.responsible-advertising.org/media/data/RAC_OnePageSummary_final.pdf
[57] See for example EGTA's 'Guidelines on the ICC Framework on Food and Beverages', (Brussels, 2010), http://www.egta.com/documents/2010_egtas_guidelines_on_the_icc_framework.pdf, accessed 31 December 2010.
[58] Interview EGTA, 24 November 2009, Brussels.
[59] WFA, Frequently Asked Questions, http://www.responsible-advertising.org/faq.asp#11, accessed 31 December 2010.

measures; otherwise it would have to deal with more restrictive European legislation on the matter.[60] The chief task of EASA has been to drive this process of coordination.[61]

Very recently, however, also the ICC has sought to offer more guidance on how to implement the codes it adopts by publishing the 'Implementation Guide for the ICC Marketing Codes'.[62] The guide, as it states:

> *"(…) provides principles and guidance for the implementation of the ICC Marketing Codes within an organization (company, firm, undertaking or association), including measures for maintaining and improving compliance with them. Where appropriate the Guide can also be used in connection with other commitments of a self-regulatory nature.*

The guide is therefore not intended to help the SROs to implement the ICC Codes, but the entities subject to the control of SROs. To that end, the guide suggests, *inter alia*, that management of companies should endorse the codes, the codes should be integrated in company policies, employees should be trained and educated in using the codes, code compliance should be promoted, and sufficient resources should be dedicated to the these activities at company-level.

7. Monitoring and enforcement

The ICC Codes do not include a clause on the monitoring or enforcement of the standards it prescribes. Following the implementation clause of Article 25 of the Consolidated ICC Code, the ICC requires that its provisions are adopted and implemented by local, national or regional self-regulatory bodies. It must therefore be held that the monitoring and enforcement of the framework rules primarily take place at the local, national level. Indeed, after the national advertising industry has implemented the framework rules in their codes, local SROs assess the compliance with the codes they administer and in case of non-compliance seek to enforce them.

Data made available by EASA suggests that around 55.000 copy advices are offered annually, while almost 75.000 advertisements are pre-cleared by SROs per year in Europe. In addition, some 50.000 complaints are filed with the SROs on a yearly basis, which correspond to approximately 15.000 unique ads. In more than 30% of these complaints a code violation is found. Over 40% of the complaints concern the deceptiveness of advertising, while issues of social responsibility and taste and decency concern approximately 20 and 15% respectively.[63] If a centralized body was to deal with this caseload it would face considerable obstacles in terms of costs. Centralizing the enforcement of transnational private standards would most likely also cripple the speed with which complaints are now resolved.[64]

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[60] See at Section I.D.2 above.

[61] This will be addressed in Section II.C below.

[62] International Chamber of Commerce, 'Implementation Guide for the ICC Marketing Codes' (Marketing and Advertising Commission, ICC Document N° 240/619) (Paris, 2010) http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/Statements/619%20ICC%20Implementation%20Guide%20FINAL%20050310.pdf, accessed 31 December 2010.

[63] Data taken from European Advertising Standards Alliance, 'European Trends in Advertising Complaints, Copy Advice and Pre-clearance. 2008 data' (Brussels, 2009) on file with author, 8.

[64] EASA claims that 86% of the complaints are resolved within one month. Ibid., 14.

This sub-section first offers a general overview of how monitoring and enforcement is organized by SROs at the national level by contrasting different models of private regimes. Here, it will mainly draw from the structures and practices of the SROs active in the UK, France, Germany and the Netherlands. These are among the most developed systems of private regulation in the world operating on the basis of codes of conduct.[65] Next, it discusses the transnational scope of monitoring and enforcement in relation to ICC Codes.

a. National models of enforcement

There are three principal variables to the way in which private enforcement mechanisms are designed and operated by SROs at the national level. They concern: (i) the timing of enforcement activity; (ii) the participation of non-industry members in enforcement; and (iii) and remedies and sanctions.

i. Timing: *ex ante* and *ex post* controls

SROs seek to ensure that advertisements comply with the applicable codes of conduct both before (*ex ante*) and after (*ex post*) ads are used in the public domain. The two principal mechanisms for the *ex ante* control of advertising are the instruments of copy advice and pre-clearance. On these instances, advertisers or advertising agencies submit an advertisement to the SRO prior to its use in the public domain in order to receive from the SRO secretariat a preliminary indication on the compliance of the advertisement with the national codes in force. In the case of copy advice this is done voluntarily, whilst pre-clearance implies a duty to submit copy to an inspection body prior to its publication. This duty can be laid down in contracts, licenses, law, or be the result of a sanction imposed by the as a result of *ex post* controls. These latter controls, on the other hand, comprise the handling of complaints by a separate enforcement body of the SRO, often called the 'jury'.

The extent to which the national regimes rely on the *ex ante* or *ex post* mechanisms of control vary greatly. The French SRO, for example, is characterized by its strong reliance on *ex ante* control mechanisms. Copy advice on advertising and pre-clearance of television commercials constitute the main activities of the SRO. In 2009, the SRO secretariat gave 15.196 non-binding advices on the compatibility of copy for radio, Internet and printed advertising. The copy advice suggested in 9.457 (62 per cent) cases the amendment of the ad and in about 656 (4 per cent) that the ad should not be published at all. As for the pre-clearance activities, a number of 20.566 television advertisements were surveyed in 2009. Out of these 2.407 (12 per cent) were required to be modified. The *ex post* control activities the SRO jury pursues are much more limited. In 2008, only 518 consumer complaints were handled by the enforcement body.[66]

By contrast, the two SROs operating in Germany have a much less strong reliance on *ex ante* control mechanisms. As a general rule, advertising is not pre-cleared in Germany, since this is historically associated with censorship. The SRO dealing with complaints about taste and decency in advertising, the *Deutscher Werberat* (German Advertising Council – DW) has started up a copy-advice service only very recently, in 2009, and has handled only few

[65] On this account, the private regulatory systems administered by the NAD in the US and the WBZ in Germany are left out of the analyses given that these systems do not monitor and enforce compliance with codes, but with applicable laws of unfair trade practices.

[66] Data taken from: Autorité de Regulation Professionnelle de la Publicité, 'Activite 2008', www.arpp-pub.org, accessed 31 December 2010.

requests so far. The other SRO, the *Wettbewerbszentrale* (WBZ), has since long offered copy-advice, but these activities do not outweigh the handling of complaints.[67]

ii. Outside participation

Non-industry members have been included in the enforcement of codes of conduct in three particular ways.[68] They may act (i) as *complainants* by submitting complaints about advertising to the SRO; (ii) as *litigator* by being a party to the dispute dealt with before the SRO jury; and (iii) as *adjudicator* by being member of the SRO jury and deciding whether practices are compliant with the applicable codes. All of the national private regimes allow for complaint submission by non-industry members. In fact, some regimes only deal with outsiders' complaints and do not consider competitor complaints,[69] or have adopted further restrictions to deal with such complaints, such as requiring fees for competitors[70] or restricting the topic in relation to which these parties can complain.[71] Complaints submitted by consumers constitute the principal source of complaints handled by SROs. In 2008, 95 % of the total of complaints about advertising in Europe came from consumers. Competitors submitted only 3% of the complaints. Civil society groups and public authorities accounted for the rest.[72]

Second, non-industry members can be involved in SRO enforcement processes as party to the dispute, that is, as litigator. This possibility is, however, subject to the rules of procedure governing the complaint handling process. The British Advertising Standards Authority (ASA), for example, does not grant complainants standing in the procedure. In addition, no provision is made for oral hearings.[73] Instead, designated teams of the SRO assume responsibility over a complaint once it is filed, assess the complaint on its merits and collect necessary evidence to construct a reasoned draft recommendation on the complaint.[74] Much like a public prosecutor in case of criminal proceedings, SRO staff prepares the case, does the fact-finding – even *ex officio* – and determines the scope of the dispute.[75] The SRO jury, the ASA Council, is there primarily to control the pre-trial investigation and adjudicates on the basis of the draft recommendation.

[67] Wettbewerbszentrale, 'Jahresbericht 2009' (Berlin, 2010), http://www.wettbewerbszentrale.de/, accessed 31 December 2010

[68] Compare: Boddewyn 1988, *op. cit.*.

[69] This is the case in Belgium. Here, the *Jury d'Ethique Publicitaire* (JEP) abolished competitor complaints in the overhaul of the system in 2008.

[70] This is the case in the Netherlands, where the *Stichting Reclame Code* (SRC) (Advertising Code Foundation) requires competitors to pay a fee for complaint handling.

[71] This is the case in Australia, where the Advertising Standards Bureau (ASB) does not consider competitor complaints as regards misleading or comparative advertising.

[72] EASA 2009, *op. cit*., 13.

[73] Paragraph 28 Non-Broadcast Complaint Handling Procedures read: "The investigation executive will present the recommendation to the [jury], which adjudicates. No provision is made for oral hearings." The procedures for non-broadcast and broadcast advertising (which are *grosso mode* the same) are available at www.asa.org.uk, accessed 31 December 2010.

[74] Paragraph 26 Non-Broadcast Complaint Handling Procedures holds: "On receipt of the response and any further written comments or clarification [of the industry member], the investigation executive will analyse the case and prepare a draft recommendation."

[75] Paragraph 11 Non-Broadcast Complaint Handling Procedures holds: "[the SRO] might itself initiate an investigation into what it believes are potential Code breaches (…)"

In France and the Netherlands, by contrast, a more prominent role has been given to the complainant as litigant. Here, the complainant can present and argue its case before the SRO jury, thus allowing him or her to be actively involved in the dispute.[76] This seems most relevant in disputes between competitors, where the complaining competitor may want to bring scientific evidence rebutting the claims made by the advertiser. Accordingly, these procedures assume a more adversarial character.

Finally, non-industry members are also involved in enforcement processes as adjudicators. In Europe, this practice is commonplace after the European Commission pressed industry to increase the independence and impartiality in complaint adjudication.[77] Now, 21 of the 25 EASA SRO members include non-industry members in the composition of the juries residing in first instance and in appeal (if available).[78] These persons can be consumers, NGO representatives, lawyers, judges, academics, former public officials, laymen, etc. Government officials are not included in the jury composition. In several systems, the Chairperson of the jury is an honorable person who is not associated with the industry. In the United Kingdom, for example, this is a member of the Supreme Court, while in France it is a member of the *Conseil d'Etat* who chairs the SRO jury. In sharp contrasts with common European practice sits the *Deutscher Werberat*, which is only composed of industry representatives and does not allow outsiders to participate.

iii. Remedies and sanctions

Once a complaint has been upheld in the adjudication before the SRO jury, it will seek to remedy the non-compliant situation or impose sanctions on the code offender. SROs do not usually provide for redress mechanisms. The industry views the decision that the ad cannot be used a sufficiently strong deterrent since the investments made in the creation of the ad will be lost.[79] Claim substantiation has been described as an important alternative remedy to misleading advertising and is recognized by the Consolidated ICC Code (Article 8) and is also part of Northern America and European commercial practices law.[80] Claim substantiation requires advertisers support the claims made in the advertising by documentary proof. One obvious benefit is that it significantly reduces enforcement costs as it effectively reverses the burden of proof.[81] This evidently lowers the threshold to submit complaints, in particular for consumers.

In addition to claim substantiation, private regimes typically have the competence to order the advertiser, agency, or media involved to stop the non-compliant conduct, equaling the function of a prohibitive injunction. These cease-and-desist orders are typically accompanied by the requirement to amend the advertisement in point. In case of such affirmative injunction-like decisions, the SRO secretariat might help the advertiser or agency to adjust

[76] Article 14 Règlement Intérieur Jury de Déontologie Publicitaire (ARPP, 2010) and Article 14(2) Reglement betreffende de Reclame Code Commissie en het College van Beroep (SRC, 2009).

[77] European Commission, 'Self-Regulation and the Advertising Sector: A Report of Some Discussion among Interested Parties' (DG SANCO, Madelin Report) (Brussels, 2006) http://ec.europa.eu/dgs/health_consumer/self_regulation/docs/report_advertising_en.pdf, accessed 31 December 2010.

[78] EASA 2010, *op. cit.*, 237.

[79] European Advertising Standards Alliance 2010, *op. cit.*, 20.

[80] J.R. Maxeiner and P. Schotthöfer (eds.), *Advertising Law in Europe and North America*, 2nd ed., (Kluwer Law International, The Hague, London, Boston 1999).

[81] I. Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, 2nd ed., (Hart Publishing, Oxford and Portland 2007), 422.

the ad to achieve code compliance. The jury of the British SRO, the ASA Council, can even require that the advertiser submits all of its advertising copy to the SRO for prior vetting over a period of time. Occasionally, SROs may also be able to restrict the time for using an ad in broadcast media. Such a prohibitive injunction can imply, for example, that a TV commercial for an alcoholic beverage can only appear after 10 p.m. during weekdays, when chances that children and minors are watching television are lower.

Further, the SROs impose sanctions on code violators. The sanctions typically at the disposal of the SROs include the denial of access to media, adverse publicity, 'ad alerts', and referral to public authorities. The denial of access to media is the result of the participation of media owners in the private regimes. Affiliated media enforce jury decisions by blocking those ads that have been found to infringe the code. Adverse publicity follows from the publication of each jury decision in the SRO monthly magazine and on its website. The naming and shaming this incites is viewed by the industry as a strong deterrent as it is expected to cause reputational damages to the advertiser in breach of the code.

So-called 'ad alerts' constitute a specific form of adverse publicity. In this case, a notification is send to the press and other media warning the public about a specific advertisement or campaign. This happens only rarely and typically in cases where the advertiser is a repeat offender or simply does not intend to comply with the jury decision, or where the infringement is so severe that the chances of affecting a large group of consumers are very high. Also the referral to public authorities happens only seldom, and if they do, the referral is made only after the SRO has exhausted its sanctioning arsenal. In the UK, for example, the low-cost airline Ryanair refused to comply with a number of SRO jury decisions that held its Internet advertising to offend the British code of advertising practice over a period of two years.[82] Eventually, the case was referred to the Office of Fair Trading in 2008, which announced only in July 2009 that Ryanair agreed to alter its practice.[83]

In exceptional cases, private regimes can also impose fines or require corrective advertising, i.e. an obligation to publish a statement correcting the initial false advertising. These sanctions are only administered on the basis of a contract between the private regime and a trade organization. In Belgium and the Netherlands, for example, the SRO juries are allowed to impose a fine in the case of non-compliant ads for alcoholic beverages. Further, statutory law might give SROs the power to sue advertisers or agencies to protect industry or public interest.[84] As ultimate sanction, SRO juries can decide to expulse the violator from its trade association. It will be the trade association than that carries out that verdict.

b. Monitoring

Enforcement of codes of advertising practice is primarily complaints-based. For the majority of the SROs the incoming complaints are the main starting point of taking of enforcement action. However, some more developed, established and financed systems also undertake

[82] Advertising Standards Authority, 'Effective Self-regulation: Keeping Advertising Standards High. Annual Report 2008' (London, 2009) http://www.asa.org.uk/About-ASA/~/media/Files/ASA/Annual%20reports/ASA_CAP_annual_report_08.ashx, accessed 31 December 2010.

[83] Office of Fair Trading (2009) 'Ryanair improves the clarity of its website and advertising' (press release), www.oft.gov.uk, accessed 31 December 2010.

[84] This is the case in the Netherlands, where Article 3:305d(1)(c) Burgerlijk Wetboek (Dutch Civil Code) grants the local SRO (SRC), the possibility to initiate such proceedings. The SRC has not used this competence so far.

monitoring exercises in order to assess the levels of code compliance in the industry. Where these monitoring exercises lead to the discovery of non-compliance, the industry members concerned will typically by faced with a complaint, brought by the SRO itself, i.e. *ex officio*. In Europe at least, only the British, Irish and French systems have developed rather structured monitoring policies. The British ASA focuses on "high profile sectors" including food, alcohol, health and cosmetics.[85] Since 2007, the Advertising Standards Authority Ireland initiates specific monitoring programs covering various sectors and media.[86] Finally, the French ARPP engages in monitoring exercises and does so as regards "sensitive issues", such as the portrayal of women, children, and ethnic minorities in advertising, and the use of environmental claims.[87]

In the British, Irish and French regimes monitoring takes place on a regular basis and several exercises are conducted within the year. However, these systems form a positive exception to the rest of the European SROs. This makes SROs vulnerable in the sense that they are mostly dependent on the submission of complaints to undertake enforcement action. This, in turn, requires SROs to acquire and maintain a high media profile, so that the organization is visible and known to consumers. In addition, complaint submission should be facilitated by making it free of charge and less burdensome to do.

c. A transnational dimension?

The question arises whether there is at all a transnational dimension to monitoring and enforcement of advertising codes. Indeed, the bulk of the monitoring and enforcement of ICC codes or the national codes that form an implementation thereof occurs at the national level for reasons outlined above. However, in exceptional cases a transnational dimension can be distinguished. For one, the absence of an international monitoring or enforcement body does not preclude competitors to bring their case before the ICC's International Court of Arbitration and have their dispute settled there. The role that arbitration, in particular that of the ICC Court of Arbitration, plays in the settlement of transnational advertising disputes has not been explored comprehensively in the academic literature, and remains out of the scope of this case study.

Important to note, moreover, is that revisions preceding the Consolidated ICC Code did provide for an international body concerned with the settling of disputes over and violations of advertising codes. At the event of the first revision of the general ICC advertising code in 1949 the ICC established the International Council for Advertising Practice, which was renamed the *International Council on Marketing Practice* in 1973. Its statute assigned this body with the task to decide on advertising cases which concerned the breach of the ICC advertising code in force. In addition, the body could offer advice to questions received from domestic courts. Its function was limited, however, to cases of an international nature. It would not deal with purely national situations, unless the national SRO and the parties explicitly wished for it to assume jurisdiction over the case.[88] The decisions taken by the International Council appeared in the form of an advice directed to the party in breach of

[85] Advertising Standards Authority, 'Monitoring compliance', http://asa.org.uk/Complaints-and-ASA-action/Monitoring-compliance.aspx, accessed 31 December 2010

[86] Advertising Standards Authority Ireland, 'Annual Report 2009' (Dublin, 2010) http://www.asai.ie/documents/ASAI%20Annual%20Report%202009.pdf, accessed 31 December 2010.

[87] ARPP, 'Etudes': http://www.arpp-pub.org/Etudes.html, accessed 31 December 2010.

[88] Brandmair 1978, *op. cit.*, 18-19.

the code, but also to the national associations of which the wrongdoer was a member, in order to allow them to take additional disciplinary measures.[89]

The practice of the International Council on Marketing Practice has been difficult to assess systematically because of the confidentiality obligations to which the proceedings were subject. Braidmair estimates that only a handful of cases had been decided in the period of 1953-1973, but signaled an increase once the body adopted its new name and was promoted among the ICC members.[90] The council still existed with 1997 version of the general ICC advertising code. Here, the implementation clause stipulated that the code: "should be implemented nationally by bodies set up for the purpose and internationally by the ICC's International Council on Marketing Practice as and when the need arises."[91] The 2006 revision has repealed this provision. Instead, the Consolidated ICC Code provides for a possibility to inquire about the interpretation of the principles in the code to the ICC Interpretation Panel. The conditions for submitting such request are set out in the Annex to the code. The Panel cannot decide on individual cases, but only provides guidance as to the interpretation of the provisions of the ICC Code. No decisions or interpretations of the Panel, if any, have been published so far.

The most significant transnational activity in the enforcement of ICC based codes is the *cross-border complaint mechanism* operated by EASA. When EASA was established in 1992, it set up a system for handling cross-borders complaints about advertising in Europe. This system was to enable the quick transfer of complaints lodged before an SRO member in one European country to the SRO member in the country where the editorial decision to publicize the advertising was made. Indeed, EASA does not adjudicate itself on the complaint, but simply refers it from one SRO to the other.

In 2008, EASA has widened the geographical scope of application of the cross-border complaint system by extending it to its non-European SRO members, which reside in EASA International Council. As this council includes, *inter alia*, SROs from Australia, Brazil, Canada, India and South Africa EASA's cross-reference system assumes and increasingly global scope. Since 1992, the system has processes over 2000 complaints.[92] Arguably, this global system of cross-border complaint handling reduces the need for the advertising industry to have in place a centralized international enforcement body.

Building on to the cross-border complaints handling system, EASA launched a cross-border copy advice and pre-clearance service in 2009. In cooperation with Clearcast, the private body that takes care of copy advice and pre-clearance in the UK, EASA now hosts a website which allows advertisers, agencies and media to request for copy advice and pre-clearance in multiple European countries.[93] EASA does not itself offer the copy advice or pre-clearance: the one-stop-shop facility only directs the individual advertiser, agency or media to the appropriate SROs.

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[89] *Ibid.*, 21.
[90] *Ibid.*, 21-22.
[91] Article 23 ICC International Code of Advertising Practice (1997) available at: http://www.iccwbo.org/id905/index.html accessed 31 December 2010.
[92] European Advertising Standards Alliance 2010, *op. cit.*, 52.
[93] www.ad-advice.org, accessed 31 December 2010.

EASA has also assumed an important role in facilitating cross-border monitoring exercises. These pan-European monitoring activities are conducted in relation to specific transnational codes, namely codes on food and alcohol advertising.[94] As regards food advertising, EASA has facilitated monitoring activities in relation to the ICC Framework for Responsible Food and Beverages Communications since 2006. Like the Consolidated ICC Code, the ICC Framework does not provide itself for monitoring or enforcement mechanisms. However, in 2005, the WFA made the commitment in the context of the EU Platform for Action on Diet, Physical Activity and Health to conduct a pan-European monitoring exercise to measure the national compliance rates with the ICC Framework as adopted in the national codes.[95] To meet this commitment, the WFA commissioned EASA in 2006 to process a monitoring report on the compliance performance of food and non-alcoholic beverage advertisers with the ICC Framework, the Consolidated ICC Code, and national codes.[96] This exercise has been repeated in 2007, 2008 and 2009.

As methodology applied in the monitoring reports of 2006, 2007, and 2008, EASA requested a number of its SRO members to assess the compliance of advertisements that have been collected in a database by a commercial third party over a certain time period. The compliance was assessed against the way in the ICC Framework had been implemented by the trade associations corresponding to the participating national SRO. As such, the 2008 report reveals that of the 1.704 television, print, and internet ads that appeared in eight countries in the first three months of 2008 96% complied with the standards against which the ads where assessed.[97] For 2009, the exercise focused on advertiser-owned websites of nine major food and beverage companies, which sponsored the exercise.[98]

8. Conclusion

The ICC is the most authoritative global standard setter of private regulatory norms for the advertising sector. Since 1937 it has adopted codes regulating advertising behavior and also still today the adoption of new ICC codes has direct impact on the ways in which advertising is regulated at the national level by SROs. The crucial function of the ICC over time has been – and is still is – the creation of a number of general principles upon which representatives of national advertising industry should based their codes on advertising practice and the systems overseeing their application. Thus, for over seventy years now, the contribution of the ICC to the regulation of the advertising industry has chiefly been the identification and promotion of a set of guiding principles offering a common ground for national industries to

[94] The activities in relation to alcohol advertising will be described below in Section II.B.1 and II.B.2.

[95] European Advertising Standards Alliance and World Federation of Advertisers, 'TV Advertising Compliance Monitoring' (Brussels, 2006) http://www.easa-alliance.org/01/MyDocuments/Food_monitoring_results_WFA_2006.pdf/download, 3.

[96] European Advertising Standards Alliance, 'Monitoring', http://www.easa-alliance.org/page.aspx/ 160, accessed 31 December 2010.

[97] L. Alexandre, 'Food and Non-Alcoholic Beverages Advertising Compliance Monitoring. Overall Compliance Report' (EASA / WFA, (Brussels, 2008) http://www.easa-alliance.org/01/MyDocuments/ 2008_food COMPLIANCE_REPORT.pdf/download, accessed 31 December 2010, 6-7.

[98] L. Alexandre, 'Top Line Report. Food and Non-alcoholic Beverages Websites Compliance Monitoring' (EASA / WFA, (Brussels, 2010) http://www.easa-alliance.org/binarydata.aspx?type=doc/DPAH_Food_2010_TOP_LINE_REPORT.PDF/download, accessed 31 December 2010.

base their local, national and/or regional private systems on for the purpose of regulating advertising practices and marketing communications.[99]

[99] Adopting Boddewyn 1992*, op. cit.*, 16.

II.B. Sector-Specific Bodies

In addition to the ICC, several sector-specific initiatives have developed over the past decade. This Section surveys the initiatives in the alcohol and the food and non-alcoholic beverage sector. The Section will first address two European initiatives, namely the Common Standards for Commercial Communications for Spirits developed by the European Forum for Responsible Drinking (1) and the Guidelines for Commercial Communications for Beer of the Brewers of Europe (2). [100] The ICC included specific rules concerning the advertising of beers, wines, ciders and spirits in its previous editions of the general International Code of Advertising Practice,[101] but it did not do so in the Consolidated ICC Code of 2006. Instead, the European alcohol industry has developed standards of its own to seek to ensure that alcohol advertising promotes responsible drinking.

Subsequently, the Section analyzes the Global Policy on Marketing and Advertising to Children adopted by the International Food and Beverage Alliance (3). This initiative seeks to address the concerns articulated by government and society as regards issues of overweight, obesity and related health diseases, in particular amongst children. It does so by imposing limits on the advertising of unhealthy food and beverage products to children.

1. European Forum for Responsible Drinking

The European Forum for Responsible Drinking (EFRD) is a consortium of six major spirits companies on the European market for alcoholic beverages.[102] Based in Brussels, it promotes responsible drinking and develops strategies and programs aimed at a reduction of risky drinking behavior and related harm.[103] The EFRD is a member of the *Confédération Européenne des Producteurs de Spiritueux* (CEPS), the European trade confederation for spirit producers, which deals with the lobby and advocacy for this industry segment in EU regulatory affairs. In 2008, the EFRD adopted the second edition of the 'Common Standards for Commercial Communications for Spirits' (hereinafter EFRD Common Standards), which aim to address these concerns and ensure responsible alcohol advertising by Europe's leading spirit companies.[104]

a. Scope and substance

The EFRD Common Standards seek to ensure that commercial communications related to spirits do not encourage or condone excessive consumption of spirits or they misuse of any

[100] Next to the spirit and beer sectors, the alcohol industry also includes a wine and cider sector. The respective European trade organizations, the *Comité Européen des Entreprises Vins* (CEEV) and *L'Association des Industries des Cidres et Vins de fruits de l'UE* (AICV), have both adopted self-regulatory codes for the advertising of wines and ciders. These regimes will not be analyzed individually, since the CEEV's EU Wine Communication Standards overlaps to a very large degree with the regime adopted by the European Forum for Responsible Drinking and the AICV explicitly supports its later regime.

[101] See for example Article B.3 Alcoholic beverages of the Annex 'Special provisions for advertising certain practices and particular goods and services' to the 1973 edition of the ICC Code. The article reads: "Advertisements should not encourage over indulgence or be specifically directed at minors within the meaning of the appropriate national law." International Chamber of Commerce, *International Code of Marketing Practice*, (ICC, Publication No. 275, Paris 1974), 52.

[102] These companies are: Bacardi-Martini, Beam Global Spirits & Wine, Brown-Forman, Diageo, Moët-Hennessy and Pernod Ricard.

[103] EFRD, 'Mission', available at: http://www.efrd.org/main.html, accessed 31 December 2010.

[104] EFRD, 'Common Standards for Commercial Communications for Spirits' (Brussels, 2008) http://www.efrd.org/ communication/docs/EFRD-Common_Standards.pdf, accessed 31 December 2010.

kind.[105] The code includes provisions on alcohol misuse, minors, drinking and driving, health aspects (including the use on the workplace and for recreation and pregnancy), alcohol content, social success, and physical and sexual performance. The Common Standards are supplemented by four Annexes: (i) Guidelines for Point of Sales Promotions; (ii) Guidelines for Commercial Communication on the Internet, For Digital and Mobile Marketing Media; (iii) Sponsorship Guidelines and (iv): Naming, Packaging and Labeling Guidelines.

In terms of the personal scope of the EFRD Common Standards, it should be mentioned that not only the six member companies of the ERFD are subjected to the standards. Also, the European trade confederations of CEPS and AICV, and Eurocommerce, the European retail, wholesale and international trade association, committed to abide by the EFRD Common Standards and promote them to their members at national level as standards of best practice.[106]

b. Emergence

The EFRD was originally established as The Amsterdam Group (TAG) in 1990 when a number of major spirit and beer brewing companies in the European alcohol market decided to promote responsible drinking messages in their advertising. TAG provided an industry-wide forum for responsible drinking and in 1994 it adopted the so-called 'Guidelines for Commercial Communications on Alcoholic Beverages'. In 2005, TAG was renamed EFRD and the TAG guidelines were fully revised and turned into the Common Standards for Commercial Communications. These standards were supplemented by four Annexes: (i) Guidelines for Point of Sales Promotions; (ii) Internet Guidelines; (iii) Sponsorship Guidelines and (iv): Naming, Packaging and Labeling Guidelines.

Altogether, the Common Standards reflected many of the issues addressed by the European Council of Ministers in its 2001 'Recommendation on the Drinking of Alcohol by Young People, in particular Children and Adolescents' and its 'Conclusions on Alcohol and Young people' of 2004.[107] As a follow-up to these recommendations and conclusions, the European Commission (DG SANCO) established the EU Alcohol and Health Forum in 2006.[108] This forum, which uses the EU Platform for Action on Diet, Physical Activity and Health as a model, draws together experts from the alcohol industry, NGOs and representatives from Member States, other EU institutions and agencies. The overall objective of the forum is to support, provide input for and monitor the implementation of an EU wide strategy to reduce irresponsible alcohol consumption and related health problems.[109]

Following the creation of this EU forum, the major beer brewing companies that were part of TAG decided to leave the industry-wide initiative and support the self-regulatory standards that their own pan-European trade association, the Brewers of Europe, had been

[105] EFRD Common Standards, Preamble and Purpose.
[106] EFRD Common Standards, 3.
[107] Council Recommendation 2001/458/EC (Official Journal L 161, 16 June 2001, 38). See also Council Conclusions of 5 June 2001 on a Community strategy to reduce alcohol-related harm (Official Journal C 175, 20 June 2001, 1) and Council Conclusions on Alcohol and Young people of 1-2 June 2004 (http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/lsa/80729.pdf).
[108] European Commission, 'An EU strategy to support Member States in reducing alcohol related harm' COM (2006) 625 final 24 October 2006.
[109] Ibid., 16.

developing since 2003 and was increasingly promoting in the context of the EU Alcohol and Health Forum.[110] From that point on the EFRD Common Standards for Commercial Communications became only the product of the spirit companies.

The EFRD, in its new composition, remained part of the EU Alcohol and Health Forum and, together with CEPS, it made several commitments to this forum to promote responsible drinking and responsible alcohol advertising, and reduce alcohol related harm.[111] As part of these commitments, the EFRD reviewed its Common Standards in 2008. This revision was strongly motivated by the organizational changes it had gone through the previous years. As the beer brewers had left the consortium, the need was felt to refocus the ERFD Common Standards to the spirit industry.[112]

c. Drivers and incentives

This background suggests that at least three factors drove the adoption of the EFRD Common Standards.

Government pressures

Since 2001, the EU has been actively involved in shaping government policies on alcohol consumption. The Recommendations and Conclusions the Council of Ministers had taken in 2001 and 2004 respectively, and the creation of a Alcohol and Health Forum in 2006 have increased the pressures on the alcohol industry to address the problems related to the irresponsible consumption of alcohol, and more recently about 'binge-drinking', drinking and driving, and alcohol-related harm. To balance these concerns, which are shared vigorously by consumer groups and other NGOs, with its own interest to advertise its otherwise legal products, the alcohol industry has sought to adopt private regulatory standards promoting the responsible use of alcoholic beverages. It was felt that a failure to act on the side of the industry would increase the likelihood of government action in this field. As such, these developments constitute key drivers for the adoption, revision and updating of the EFRD Common Standards.

Another significant development in the field of alcohol is the adoption of a WHO Global Strategy to reduce the harmful use of alcohol. In May 2008, the World Health Assembly urged the Member States of the WHO to develop with the WHO Secretariat a strategy to reduce alcohol harmful consumption and alcohol related harm.[113] In May 2010, the WHO Member States endorsed the global strategy to reduce the harmful use of alcohol developed by the WHO Secretariat.[114] With respect to advertising for alcoholic beverages this strategy considers that:

> *"31. For this area policy options and interventions include:*

[110] These are the Guidelines for Commercial Communications for Beer by the Brewers of Europe, which will be discussed in Section II.B.2 below.

[111] See for CEPS' commitments: Confédération Européenne des Producteurs de Spiritueux, 'Charter Implementation Report' (Brussels, 2010) http://www.europeanspirits.org/documents/CEPS/CEPS_report_2010v7e7low1.pdf, accessed 31 December 2010.

[112] Interview EFRD, 25 November 2009, Brussels.

[113] Resolution WHA61.4.

[114] Resolution WHA63.13.

(a) setting up regulatory or co-regulatory frameworks, preferably with a legislative basis, and supported when appropriate by self-regulatory measures, for alcohol marketing by:

(i) regulating the content and the volume of marketing;

(ii) regulating direct or indirect marketing in certain or all media;

(iii) regulating sponsorship activities that promote alcoholic beverages;

(iv) restricting or banning promotions in connection with activities targeting young people;

(v) regulating new forms of alcohol marketing techniques, for instance social media;

(b) development by public agencies or independent bodies of effective systems of surveillance of marketing of alcohol products;

(c) setting up effective administrative and deterrence systems for infringements on marketing restrictions."[115]

It can be expected that this will trigger new regulatory responses from the alcohol industry, including the EFRD.

Reputation and societal concerns

Connected with these government pressures are the more general concerns in society about 'binge-drinking', drinking and driving, and alcohol related harm. NGOs have particularly been strong in voicing these concerns.[116] By responding to these concerns by adopting private regulation the industry intends to create positive reputational effects. Indeed, such societal concerns could have a negative effect on advertising, the sale of alcohol products and the brand names of the company. Therefore, it is anticipated that a response in terms of the promotion of self-regulatory action benefits the industry's overall reputation.

Technological developments

The revision of the EFRD Common Standards was not only motivated by the organizational changes the ERFD had gone through after the brewers left the consortium in 2006. Updating the standards was also necessary because of the 'rapid evolution of marketing practices on the internet' and the 'concerns raised by some stakeholders over industry marketing practices on the net'.[117] Banners, pop-ups, search engines and social network communities regularly feature advertising messages and serve to brand alcohol products. To have a practicable and up-to-date set of private regulatory rules, these technological developments needed to be taken into account and as a result, the EFRD members expressed the wish in 2007 to review its provisions on this matter. One year later the Common Standards and in particular Annex II on 'Internet Guidelines' were revised. The current Annex II is titled

[115] World Health Organization, 'Strategies to reduce the harmful use of alcohol: Draft global strategy' (WHO Secretariat, Document A63/13) (Geneva, 2010) http://apps.who.int/gb/ebwha/pdf_files/ WHA63/A63_13-en.pdf, accessed 31 December 2010, Annex 2, 14.

[116] An example is STAP (National Foundation for Alcohol Prevention) in the Netherlands, which led a European Commission funded project on the Enforcement of national laws and self-regulation on advertising and marketing of alcohol (see at: http://www.stap.nl/elsa/elsa_project/, accessed 31 December 2010. STAP is also an active participant to the EU Alcohol and Health Forum and regularly submits complaints to the Dutch SRO. More recently, it successfully lobbied at the Dutch government for the introduction of a ban for alcohol advertising for day-time television.

[117] European Forum for Responsible Drinking, 'Stakeholder Consultation On the Guidelines for Internet Marketing. Report about Comments and Input Received through a Consultation of EFRD External Stakeholders' (Brussels, 2008) http://www.efrd.org/efrdinaction/b01d/Final%20Report%20on%20Stakeholder%20Consultation%20on%20new%20media%20guidelines-December%202008.pdf, accessed 31 December 2010, 3.

'Guidelines for Commercial Communication on the Internet, For Digital and Mobile Marketing Media'.

d. Relationship with public regulation

Almost every European jurisdiction has in place laws restricting the use of advertising for alcoholic beverages. There are no harmonized rules on this matter in the EU.[118] The restrictions that countries have adopted may concern the type of product that may be marketed (e.g. alcoholic beverages than contain more alcohol than a certain percentage), medium (e.g. television), broadcast times (e.g. before 9 p.m. when chances are higher that minors watch TV), location (e.g. outdoor, in schools) or specific advertiser. Alternatively, a full ban on advertising may be introduced, as was done in Norway.[119]

Where advertising of alcoholic beverages is possible the ERFD Common Standards seek to complement the legislative framework and make sure that advertising follows acceptable principles. As the standards stipulate themselves 'The general aim of these Common Standards is not to replace existing national systems, but rather to provide general criteria that should be met by national self-regulatory mechanisms, sector and company codes.'[120]

e. Standard-setting

During the 2008 revision of the EFRD Common Standards, only its second Annex on Internet Guidelines was reviewed as a result the technological changes digital media had witnessed since 2005 and the new advertising strategies this had prompted by the alcohol industry. Unlike the adoption and revision of the previous TAG and EFRD standards, a consultation process preceded the review. Following the meeting in March 2008 of the EU Alcohol and Health Forum, the EFRD decided to consult various external stakeholders that were member of the EU forum to collect their comments and suggestions on the draft of the revised Internet Guidelines.[121] Implementing these views in the final text, the newly adopted guidelines were finally adopted in December 2008 as the 'Guidelines for Commercial Communication on the Internet, for Digital Media, and for Mobile Marketing Media'.

The EFRD found the consultation process valuable and will adopt the same procedure for future revisions.[122] A revision of the EFRD Common Standards is scheduled for the nearby future to improve consistency and update it so to include the latest developments in the advertising behavior of the alcohol sector, in particular as regards digital media.[123]

f. Implementation

Much like the ICC codes, the EFRD Common Standards also need to be adopted at the national level by SROs. Alternatively, they may be implemented via company-specific codes. As the EFRD holds, the Common Standards:

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[118] See for an overview: STAP, 'Regulation of Alcohol Marketing in Europe: ELSA project overview on the existing regulations on advertising and marketing of alcohol' (Utrecht, 2007) http://www.stap.nl/content/bestanden/elsa_2_r_on_regulation.pdf, accessed 31 December 2010.

[119] STAP 2007, *op. cit.*, 23.

[120] EFRD Common Standards, Compliance & Sanctions.

[121] European Forum for Responsible Drinking 2008, *op. cit.*.

[122] Interview EFRD, 25 November 2009, Brussels.

[123] Interview EFRD, 25 November 2009, Brussels.

"(…) provide general criteria that should be met by national self-regulatory mechanisms, sector and company codes. Complaints based on / concerning an infraction of the Common Standards are dealt with by the member organizations of the European Advertising Standards Alliance (EASA), also called Self Regulations Organizations or other appropriate organizations at national level. These national organizations are best placed to deal with complaints, as only they will be able to assess and understand fully the national context and local sensitivities."[124]

The European trade associations supporting the common standards – The CEPS, AICV, and Eurocommerce – require their national membership to adopt the standards as best practice. The CEPS has even, as part of its commitments to the EU Alcohol and Health Forum, obliged its national member associations implement the EFRD Common Standards in their national advertising codes by 2010.[125]

g. Monitoring and enforcement

After the implementation of the EFRD Common Standards in national advertising codes, or sector- or company-specific codes, they will be enforced at the national level by local SROs. The enforcement of the rules is thus carried out at the national level.

Surveys of the complaints handled by national SROs in Europe show that only 1-2% of these complaints deals with alcohol advertising. While this reveals that alcohol advertising in Europe does not prompt large numbers of compliant, it does not give clear indications about the compliance performance of the alcohol industry as such. To map this compliance, the EFRD's predecessor, TAG, started to carry out monitoring exercises since the late 1990 as regards the advertisements produced by its member companies.[126] At this stage, it was the British SRO dealing with advertising complaints, the Advertising Standards Authority (ASA), that monitored the ads the companies provided to it. In 2000, however, TAG subscribed to a database complied and administered by commercial party, which contained a substantial part of the alcohol advertising used in Europe. By using the information stored in the databases, TAG was able to coordinate several monitoring exercises in the following years. Here, TAG required several national SROs to assess the compliance with the Common Standards on the basis of the advertisements collected in the database. SROs were first involved in the monitoring exercises in 2003.[127]

In 2005, TAG/EFRD commissioned EASA to coordinate the SRO action in the monitoring exercise in relation to television and print advertisements of beer, wine, cider, and spirits that were published in 13 EU Member States in 2004 and captured by the commercial database. The norms against which the SROs were to assess the ads included the EFRD common standards, national codes, and national laws. Carried out in a way very similar to the monitoring exercises undertaken by the WFA and EASA in relation to the ICC Framework for Responsible Food and Beverage Communications,[128] the 2005 report reveals compliance levels up to 96.4%.[129]

[124] EFRD Common Standards, Compliance & Sanctions.
[125] Confédération Européenne des Producteurs de Spiritueux 2010, *op. cit.*.
[126] Interview EFRD, 25 November 2009, Brussels.
[127] European Forum for Responsible Drinking, 'Advertising Compliance Monitoring' (Brussels, 2005) http://www.efrd.org/communication/docs/Monitoring%20Report%202005.pdf, 5.
[128] See Section II.A.7.c above.
[129] European Forum for Responsible Drinking 2005, *op. cit.*, 9.

After the retreat of the beer brewers from the EFRD, the European trade association for beer brewers – the Brewers of Europe – and the EFRD jointly commissioned EASA to carry out similar monitoring exercises for the years 2006 and 2007 in 13 and 15 EU Member States respectively. In 2008, however, the exercise included 19 European jurisdictions and concerned only beer, spirits, and wine advertisements on television and in print over a period of three months in 2007.

The reports of 2006, 2007 and 2008 consistently indicated very high compliance levels.[130] Therefore, in 2009 EFRD refocused the monitoring exercise to measuring the compliance of the spirits industry in relation to advertising via digital media. The EFRD commissioned EASA to carry out the exercise, which required 13 national SROs to assess the compliance of the advertisements that appeared in their countries and were captured by the commercial database in relation to the EFRD Common Standards and Annex on Internet advertising, national codes, and national laws. 93% of the Internet advertising, which was limited to pop-ups and banners, was found compliant, while only 32% complied with the requirement to provide a responsible drink message.[131]

h. Conclusion

The EFRD Common Standards have been developed by a number of leading alcoholic beverage producers in Europe since the 1990s in response to ongoing governmental and societal concerns about 'binge-drinking', drinking and driving, and alcohol related harm. When the beer brewing companies preferred to develop their own standards for alcohol advertising, the Common Standards changed ownership and have since then been adopted by six major spirits companies only. While enforcement action is solely taken at the national level, monitoring exercises are carried out in a transnational context. However, in doing so national structures are relied upon.

2. Brewers of Europe

In 2003, the Brewers of Europe (the Brewers) adopted the Guidelines for Commercial Communications for Beer (the Brewers' Guidelines), which aim to ensure responsible alcohol advertising by beer brewers in Europe.[132] The Brewers constitute a European trade confederation and was founded in 1958 to represent the voice of the European beer-brewing sector EU international regulatory affairs. It operates as a lobbying group and seeks to ensure that note is taken of the opinion of its members in any legislative initiative that is developed in a European or international forum can possibly affect the European brewing sector.[133] The Brewers' membership structure is made up by 27 national beer associations,

[130] The monitoring reports for 2006 through 2009 can be found on EASA's website: http://www.easa-alliance.org/page.aspx/160, accessed 31 December 2010.

[131] European Advertising Standards Alliance, 'Compliance Monitoring for Spirits Advertising Run by Digital Media' (Sponsored by EFRD, (Brussels, 2009) http://www.easa-alliance.org/binarydata.aspx?type=doc/2009_Spirits_monitoring_Report_EASA.pdf/download, accessed 31 December 2010, 10.

[132] available at: http://www.brewersofeurope.org/docs/publications/guidelines.pdf, accessed 31 December 2010.

[133] Brewers of Europe, 'Mission & Priorities', http://www.brewersofeurope.org/asp/about_us/l1.asp?doc_id=100, accessed 31 December 2010.

and as such claims to represent about 4000 breweries.[134] However, the beer sector in Europe is dominated by four multinational companies, which constitute four out of five of global players on the market and which produce around 60-65% of the beer in Europe.[135] These four major brewers can exercise their influence on the policies of the Brewers through the national associations of the countries in which they operate. In addition, they participate in the working groups set up by the Brewers to discuss specific topics and they hold four of the eight chairs in the Executive Board.

a. Scope and substance

Much like the EFRD Common Standards, the Brewers' Guidelines seek to ensure that commercial communications for beer do not lead to excessive consumption or misuse of any kind.[136] Chapter 2 of the code includes provisions on alcohol misuse, minors, driving, medical aspects (including the consumption of beer in hazardous activities), alcohol content, physical and sexual performance, and promotions and sampling. In addition to the rules, the Guidelines set out in broad terms why self-regulation is adopted (Chapter 1), compliance principles (Chapter 3), an implementation strategy (Chapter 4) and a communications strategy (Chapter 5).

b. Emergence

As discussed in relation to the EFRD Common Standards, the major beer brewers in the European market were part of the TAG initiative that was launched in the 1990s together with the leading European spirit companies. This initiative set a number of regulatory standards for the whole alcohol industry, but only included multinational alcohol beverage producers. At that time, the Brewers were not concerned with private regulation of alcohol advertising yet, as it was not on the political agenda. However, once the Council of Ministers adopted its 2001 'Recommendation on the Drinking of Alcohol by Young People, in particular Children and Adolescents' the Brewers started addressing this issue, both with its national members and the major European beer brewing companies.[137]

In parallel to the TAG initiative, the Brewers thus started to develop regulatory rules to promote responsible beer advertising. They adopted the Brewers' Guidelines in 2003. These guidelines clearly try to distinguish from the TAG Common Standards and note that they apply:

> *"(…) where no national self-regulatory system exists, and where a wider self-regulatory system for the whole alcoholic drinks industry, such as The Amsterdam Group (TAG) Common Standards, is not practicable, the guidelines provide an element of consistency to enable the brewing industry to regulate itself."*[138]

The reason why the Brewers thus adopted regulatory norms specifically for beer advertising relates to the ownership of the standards and the politics surrounding it. The TAG Common

[134] Its membership includes 24 national associations from EU Member States as well as the associations from Norway, Turkey, and Switzerland. Estonia, Latvia and Slovenia are not represented in the membership structure, because national associations are missing there.

[135] The other 3996 brewers can be large regional players, but often they are relatively small, including local pubs and monasteries.

[136] Brewers' Guidelines, 'What these Guidelines set out to achieve'.

[137] Interview Brewers of Europe, 27 November 2009, Brussels.

[138] Brewers' Guidelines, 3.

Standards were adopted by a set of multinational companies, and was not supported or applied by the European beer sector as a whole. Secondly, the TAG Common Standards also concerned wine, cider, and spirits advertising. There was a strong desire by the beer sector to have standards of their own and distinguish themselves from producers of other alcoholic beverages.[139] In the context of these dynamics, the major beer companies that participated in the TAG initiative step out in 2005, and decided to only support the Brewers' Guidelines.

c. Drivers and incentives

The Brewers' Guidelines emerged in parallel with the TAG/EFRD Common Standards and the incentives to adopt them were very similar to these standards.

Government pressures

For one, the Brewers' Guidelines have been the response of the alcohol industry to the various initiatives the EU has taken since 2001 in relation to the promotion of irresponsible drinking and reduction of alcohol related harm. The EU positions on the drinking of alcohol by young people and discussions initiated amongst industry representatives, NGOs, and government representatives increased the likelihood of government action in this field. Consequently, the Brewers engaged in the adoption of private regulatory standards for the beer sector itself.

Societal developments and reputational advantages

Similar to what drove the adoption of the EFRD Common Standards, the Brewers, by adopting their Guidelines, were able to respond to growing concerns in society about 'binge-drinking', drinking and driving, and alcohol-related harm. Strong feelings of ownership of these private regulatory rules made the Brewers decide not to follow the existing TAG/EFRD Common Standards, but adopt standards of their own. By adopting private standards specifically designed for the beer sector, they anticipated that social responsible marketing would specifically be attributed to the beer sector, rather than to the alcohol industry at large, and thus would provide more reputational benefits for the beer sector itself.

d. Relationship with public regulation

Similar to what was noted in relation to the EFRD Common Standards, the Brewers' Guidelines seek to complement existing national legislation on the use of advertising for alcoholic beverages. In particular, the Guidelines make various references to the legal drinking age. The Guidelines aim to warrant that persons below that age are not targeted through advertising.

e. Standard-setting

In adopting the Guidelines, the Brewers have not followed a specific standard-setting procedure. The Guidelines include, however, a very short note on what was done to prepare the standards:

> *"In producing these Guidelines, 'The Brewers of Europe' has consulted many documents and would like to mention in particular 'Advertising Self-Regulation in Europe', produced by the European Advertising Standards Alliance (EASA), and the 'Self-Regulation and Alcohol, A Toolkit for*

[139] Interview Brewers of Europe, 27 November 2009, Brussels.

Emerging Markets and the Developing World', produced by the International Center for Alcohol Policies (ICAP)."[140]

A comparison between the EFRD Common Standards and the Brewers' Guidelines learns that the main provisions of both regimes are very similar and cover the same topics.

f. Implementation

The Brewers' Guidelines do not intend to replace existing national codes. Instead, they:

> "(…) provide a common basis to be incorporated into national codes, to fill in gaps where necessary. Where no codes exist, the Guidelines will provide the basis for codes for beer."[141]

Accordingly, the Guidelines are to be implemented at country level in national codes. Chapter 4 of the Guidelines provides for a specific 'implementation strategy' to facilitate implementation. However, in 2007, this strategy was revised and the Brewers adopted a document outlining seven so-called 'Operational Standards' to private regulation. These standards aim to assist the national association of the Brewers to put in place effective regimes of private regulation and implement the Guidelines. The standards were developed in coordination with the WFA and EASA,[142] and are essentially based on EASA's best practice recommendations, which will be discussed below. They promote, *inter alia,* a wide coverage of codes of advertising practice so to include all beer advertising, the use of copy advice, speeding complaint handling before an independent jury, sanctions and monitoring. The Operational Standards were adopted as a commitment undertaken by the Brewers as participants to the European Alcohol and Health Forum. Between 2007 and 2010 the Brewers, with the support of the WFA and EASA, established and improved the operation of national regimes of private regulation in the countries where they have national members. This was in line with the Operational Standards that it adopted in 2007.[143]

g. Monitoring and enforcement

The Brewers' Guidelines require that once they are implemented in national codes local SROs enforce the standards. To offer guidance on which conditions have to be met in the national enforcement of the standards, Chapter 3 of the Guidelines provides some 'compliance principles', in essence outlining EASA best practice recommendations on complaint handling and jury composition.[144] This is re-emphasized in the Operational Standards.

Like the EFRD, the Brewers have commissioned transnational monitoring exercises on the compliance with its guidelines and the implementation thereof at the national level. Following the TAG/EFRD monitoring practice, the Brewers together with the EFRD give EASA the task in 2006 and 2007 to have a number of national SROs assess television and print advertisements of alcoholic beverages, including beer, on their compliance with the ERFD

[140] Brewers' Guidelines, 2.
[141] Brewers' Guidelines, 'What these Guidelines set out to achieve'.
[142] Interview Brewers of Europe, 27 November 2009, Brussels.
[143] Brewers of Europe, 'Responsible Beer Advertising through Self-regulation. 7 Operational Standards: A Commitment by The Brewers of Europe' (Brussels, 2010) http://www.brewersofeurope.org/docs/flipping_books/responsible_beer_ad_2010/index.html, accessed 31 December 2010.
[144] See for a discussion Section II.C.3 below.

Common Standards. It was only in 2008, that the compliance of beer advertising was assessed against the Brewers' Guidelines.[145] All monitoring exercises have been carried out on the basis of advertisement captured by the same commercial database as was used in relation to the EFRD monitoring exercises.

h. Conclusion

Similar to the ERFD Common Standards, the Brewers' Guidelines have been developed in response to ongoing governmental and societal concerns about responsible alcohol consumption and alcohol related harm. The trade confederation for beer brewers in Europe also adopted the guidelines, however, as a way to distinguish itself as a sector from other private regulatory initiatives undertaken by the alcohol industry, i.e. the TAG/EFRD initiative. The initiative requires implementation in national codes, and enforced through national SROs. Enforcement action is thus taken solely at the national level, but monitoring exercises have been carried out in a transnational context.

3. International Food and Beverage Alliance

A child's understanding of the information that is conveyed through advertising is different than that of an adult. Children have a more limited capacity of processing that information, are less experienced with advertising claims and are thus more likely to be influenced by advertising. Consequently, children require extra careful attention. Recent concerns from government and society on the issues of overweight, obesity and related health diseases have triggered an intense debate on food and beverage advertising to children. While academics hold that advertising does affect children's food choices and dietary habits,[146] the industry refuses to acknowledge that link and is keen on stressing the responsibilities of parents and other persons in the eating habits of children. Several industry initiatives have been developed to address these concerns, including the ICC Framework for Responsible Food and Beverage Communications, which was already discussed as some length.[147]

This Section analyses how the 'Global Policy on Marketing and Advertising of Food to Children' adopted by the International Food and Beverage Alliance (IFBA) seeks to regulate advertising of food and non-alcohol beverages to children.[148] This regime stands out of the previous regimes analyzed in the sense that it does not include a set of material rules on advertising. Instead, it lays down one single standard restricting the use of advertising of unhealthy food and non-alcoholic beverage products to children.

a. Scope and substance

The IFBA is a company consortium that strives to limit the advertising of fatty and sugar-rich foods and non-alcoholic beverages to children. Its membership includes ten of the world's biggest food and beverage companies that collectively represent more than 85% of the food

[145] The monitoring reports for 2006 through 2010 can be found on EASA's website: http://www.easa-alliance.org/page.aspx/160, accessed 31 December 2010.

[146] See for a comprehensive overview of academic literature on this matter: G. Cairns*, et al.*, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence to December 2008' (World Health Organization, (Geneva, 2009) http://www.who.int/dietphysicalactivity/ Evidence_Update_2009.pdf, accessed 31 December 2010.

[147] See at Section II.A.3 above.

[148] Available at: https://www.ifballiance.org/sites/default/files/IFBA%20Global%20Policy%20on%20Marketing%20and%20Advertising%20to%20Children%20%28June%202010%29.pdf

advertising spend in various markets.[149] In 2009, the IFBA adopted the Global Policy on Marketing and Advertising to Children. The basic requirement that the Global Policy lays down is that IFBA member companies:

"(…) have committed to company-specific voluntary measures to ensure that:

- *they advertise only products which fulfill specific nutrition criteria based on accepted scientific evidence and/or applicable national and international dietary guidelines to children under 12 years;*

or

- *they do not advertise products to children under 12 years at all."*[150]

The first commitment is thus a minimum requirement and, as an alternative, the companies can choose to stop advertising products to children under 12 years altogether.

The norm that the IFBA Global Policy lays down is of a different nature than the rules enshrined in the codes discussed above. Instead of prescribing how food and beverage advertising can and cannot be communicated to children, the IFBA commitment restricts all together the advertising of food or beverage products to children under 12 years that do not meet certain nutritional standards, regardless of how these products are advertised. While these rules remain qualitative in nature, their scope is different. Different is also the fact that the participating companies can choose the level of regulation they commit to. While the minimum requirement spelled out above aims to create a common commitment, individual companies can go beyond that threshold and subject themselves to more stringent, individuated measures. Finally, the IFBA standards also require further operationalization and internalization in each individual company. Rather than being a formal standard like the ICC provisions, the IFBA standards constitute the minimum requirement and have to be adjusted to the business practice of each individual company.[151]

Important to note is, nonetheless, that the IFBA rules function as a complement to the ICC codes. As the Global Policy holds: 'these commitments built upon Alliance members' existing commitments to the ICC self-regulatory codes and the ICC "Framework for Responsible Food and Non-Alcoholic Beverage Marketing Communications."'[152]

b. Emergence

How did this rather idiosyncratic initiative of private regulation of advertising come about? The IFBA was established in 2008 with the view to further develop the response of the global food and beverage industry the 2004 WHO Global Strategy on Diet, Physical Activity and

[149] The member companies are Ferrero, General Mills, Grupo Bimbo, Kellogg's, Kraft Foods, Mars, Nestlé, Pepsico, The Coca-Cola Company, and Unilever.

[150] International Food and Beverage Alliance, 'Global Policy on Marketing and Advertising to Children ' 2009) https://www.ifballiance.org/sites/default/files/IFBA%20Global%20Policy%20on%20Marketing%20and%20Advertising%20to%20Children%20%28June%202010%29.pdf, accessed 31 December 2010.

[151] See below at 'implementation'.

[152] IFBA Global Policy 2009.

Health.[153] In response to the WHO Global Strategy, the Chief Executives of IFBA's member companies addressed a letter to the WHO Director General in May 2008 expressing five commitments for the period of 2008-2013. The companies pledged to commit to:

1. "Continue to reformulate products and develop new products that support the goals of improving diets.
2. Provide easily-understandable nutrition information to all consumers.
3. Extend our responsible advertising and marketing to children initiatives globally.
4. Raise awareness on balanced diets and increased levels of physical activity.
5. Actively support public-private partnerships that support the WHO's Global Strategy."[154]

To meet the third pledge, the IFBA Global Policy was adopted in April 2009. However, a number of regional and national commitments had already preceded the IFBA Global Policy and it should be noted that this global initiative is the result from previous regional pledges. In 2006, the US food and beverage industry introduced a standard combining qualitative and quantitative norms when it agreed to devote at least 50% of their advertising directed at children under 12 to promote healthier or better dietary choices.[155] In the same year, the Australian beverage industry pledged 'not to market sugar-sweetened carbonated beverages to primary schools or to advertise these beverages on television where a majority of primary school age children are viewers.' In addition, it committed not to engage 'in any direct commercial activities in primary schools and to withdraw sugar-sweetened beverages from secondary schools where required'.[156]

Europe and Canada followed in 2007. The so-called 'EU Pledge' was inspired by the existing initiatives and features the same standard on advertising as the IFBA Global Policy, but this is couched in slightly different terms.[157] In addition, it requires participating companies to abandon 'communication related to products in primary schools, except where specifically requested by, or agreed with, the school administration for educational purposes.' The EU Pledge came about as an initiative suggested by the WFA in the framework of the 'EU Platform for Action on Diet, Physical Activity and Health' in 2005.[158]

The IFBA Global Policy has sparked new regional and national initiatives since its adoption. In 2008, the Australian pledge was also supported by the local food industry and a Thai Pledge was set up. In 2009, these initiatives were complemented by Pledges in South-Africa, Brazil,

[153] IFBA, 'About' https://www.ifballiance.org/about.html, accessed 31 December 2010.
[154] IFBA, 'Our Commitments' https://www.ifballiance.org/our-commitments.html, accessed 31 December 2010.
[155] Better Business Bureau, 'About the initiate', http://www.bbb.org/us/about-children-food-beverage-advertising-initiative/, accessed 31 December 2010.
[156] Australian Beverages Council, Marketing to Children, http://www.beveragehealth.org.au/scripts/cgiip.exe/WService=ASP0017/ccms.r?PageId=10108, accessed 31 December 2010.
[157] The first commitment of the EU Pledge reads: "No advertising of products to children under 12 years, except for products which fulfill specific nutrition criteria based on accepted scientific evidence and/or applicable national and international dietary guidelines. For the purpose of this initiative, "advertising to children under 12 years" means advertising to media audiences with a minimum of 50% of children under 12 years." See: 'EU Pledge: "We will change our food advertising to children", www.eu-pledge.eu, accessed 31 December 2010.
[158] Interview EU Pledge, 25 November 2009, Brussels.

Russia and Portugal. In 2010, pledges were initiated also in Mexico, India, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.[159]

The ten member companies of IFBA also participate in the regional and national pledges. In addition to them smaller, local market players have joined in these pledges. Indeed, the promotion of local pledges are important for the success of the overall aims of the company commitments, that is, the restriction of unhealthy food and beverage advertising to children. If local players do not set themselves the same standards, the initiative of the global companies risks being undermined.

c. Drivers and incentives

This background to the emergence of the IFBA Global Policy suggests that there are two key drivers that motivated business to adopt this policy.

Government pressures

The IFBA Global Policy constitutes the response of the food and beverage industry to the WHO Global Strategy adopted in 2004. As was noted in relation to the ICC Framework above,[160] the WHO Global Strategy implied the position of governments worldwide that food advertising should promote healthier and less unhealthy products and increased the likelihood of government action on this specific terrain. As governments have indeed taken some legislative measures to restrict unhealthy food advertising since the adoption of the WHO Global Strategy in 2004,[161] the pressure was on the food and beverage industry to respond to these developments and adopt a new self-regulatory approach.

Reputation and societal concerns

Connected to these government pressures are the more general concerns in society about physical health and (childhood) obesity. These concerns have led not only states to respond and make changes to existing legal frameworks, but also the food and beverage industry to adopt new self-regulatory standards. Framing a private regulatory response transmits the message that the industry also cares about problems related to low physical activities and obesity. Such response would, in turn, also benefit the industry's overall reputation.

d. Relationship with public regulation

Hawkes' report maps the relationships between the private regulatory initiatives that lead to the emergence of the IFBA Global Policy and the WHO Global Strategy. As said, she finds that the WHO Global Strategy has triggered much private regulation in the field, including the national or regional pledges.[162] The reaffirmation of the WHO Member States of the Global Strategy in 2010 is likely to push the development of private regulation in the area further.

[159] IFBA, 'Pledge Programs in Action', https://www.ifballiance.org/commitment-3-responsible-marketing-advertising-children/commitment-3-continued.html-1, accessed 31 December 2010.
[160] Section Section II.A.3 above.
[161] C. Hawkes, 'Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006' (World Health Organization, (Geneva, 2007) http://www.who.int/dietphysicalactivity/regulatory_environment_CHawkes07.pdf, accessed 31 December, 9.
[162] Ibid..

e. Standard-setting

The standards featuring the IFBA Global Policy have been taken from the already existing national and regional pledges. In the EU Pledge, for example, the age of 12 is taken as the proper threshold as the industry claims that there is a 'strong degree of academic consensus that by the age of 12 children develop their behaviour as consumers, effectively recognize advertising and are able to adopt critical attitudes towards it.'[163] Little evidence is provided to prove this claim, however. Also the requirement of 'specific nutrition criteria' is poorly defined and leaves much space to individual companies to determine which of their food and beverage products are healthy and which are not.

The standard-setting process is entirely company-driven. It is the participating companies that have decided on the appropriate standards and operationalize these standards to meet their own business structures. No third-party consultations have been launched. However, the observer members to the IFBA, like the *Confédération des Industries Agro-Alimentaires de l'UE* (Confederation of the Food and Drink Industries of the EU – CIAA) and the WFA have been facilitating this process of standard-setting. In the EU Pledge, the WFA has hosted the discussions among the participating companies on which standards had to be adopted. Since the core business of some of the participating companies lies with the production of food and beverage products high in fat and sugars, and the commitment was about stopping the advertising of such product to children younger than 12, the standards adopted would have serious consequences in terms of the advertising possibilities for the companies involved. As a result, the negotiations on the appropriate standard proved difficult and only after 18 months of discussions the EU Pledge could be adopted in 2007.[164]

f. Implementation

As held above, the IFBA standards need to be further operationalized and implemented in each individual company: the standards constitute the minimum and have to be adjusted to the business practice of each individual company. Also, the company has to adopt its own nutrition criteria to assess which of its food and beverage are considered healthy and unhealthy and thus which products they can advertise. As the companies participating in the Global Policy have different business operations and produce different kinds of foods and beverages, the commitments they finally assume can differ strongly. For example, the business of PepsiCo is structured around the production of beverages, while Unilever produces a huge array of food and beverage products with different nutritional values. The IFBA standards might thus mean for some participants that they cannot pursue its advertising in relation to its core business, while they still leave the later the possible to advertise for many other of the products it produces. In addition, the nutrition standards can vary according to the products. Therefore, PepsiCo has made a different commitment than Unilever has.[165]

g. Monitoring and enforcement

The IFBA commitment is voluntary and non-binding. When adopting the standards the participating companies did not have in mind binding measures enforceable before a specific

[163] World Federation of Advertisers, 'EU Pledge 2009 Monitoring Report' (Brussels, 2009) http://www.eu-pledge.eu/press.php?id=4, accessed 31 December 2010, 5.
[164] Interview WFA, 26 November 2009, Brussels.
[165] See for an overview of the different commitments made by the members of the EU Pledge: http://www.eu-pledge.eu/ipledges.html, accessed 31 December 2010.

body. However, to establish a credible initiative the companies have set up a monitoring process. In 2009, the IFBA contracted a commercial third-party to monitor the compliance of the advertising issued by the companies as regards their foods and beverages. The third-party, which had already monitored the compliance performance of companies participating in the EU Pledge, designed a methodology to assess the compliance as regards television and print advertising in twelve markets, and Internet advertising in six markets.[166] The final report, which was issued in November 2009, shows compliance levels of 98-99% for television advertising, 100% compliance for print advertising and found only one breach for Internet advertising.[167]

h. Conclusion

The IFBA Global Policy constitutes the response of the food and beverage industry to the WHO Global Strategy, regional and national regulatory initiatives, and wider societal concerns about unhealthy diets and obesity. The participating companies commit to stop advertising their products to children younger 12 years, unless these products meet certain nutritional criteria. The initiative, which is purely voluntary, constitutes a new type of private regulation. It differs in nature of the classic ICC rules on responsible advertising. Rather than stipulating provisions that advertising content and advertising practices must comply with, the IFBA Global Policy suggests a single prohibitive standard restricting the use of advertising of unhealthy food and beverage products to youngsters.

[166] See for details on the methodology of the monitoring exercise: Accenture, 'Compliance Monitoring of Global Advertising for Television, Print, and Internet for the International Food & Beverage Alliance' 2009) https://www.ifballiance.org/sites/default/files/IFBA%20Compliance%20Monitoring%20Report%2010%20Nov09.pdf, accessed 31 December 2010, 1.

[167] Ibid., 2-3.

II.C. European Advertising Standards Alliance

The analysis already showed that EASA is involved in various private regulation initiatives taken at the global, regional and local level. However, EASA also produces itself private norms in the form of so-called 'Best Practice Recommendations'. In this subsection three sets of such recommendations will be addressed: the EASA Best Practice Self-Regulation Model; the EASA Digital Marketing Communications Best Practice; and the Draft EASA BPR for Consumer Controls in Online Behavioural Advertising.

1. Scope and substance

As described above,[168] EASA was established in 1992 by the European advertising industry to administer a system for the handling of cross-borders complaints about advertising. In 2002, however, its membership, which consisted until then merely of national SROs, was extended to also include trade associations from the various segments of the European ad industry (i.e. advertisers, agency, press, television, direct marketers, etc). Since the accession of these members EASA has broadened its mandate and in addition to running a cross-border complaint handling mechanism, it also started to adopt documents promoting Best Practice Recommendations (BPRs) among SROs. In 2002, it first adopted the Common Principles and Operating Standards of Best Practice,[169] which were reaffirmed in the 2004 Best Practice Self-Regulation Model'. This model:

> *"(…) describes the various component parts of the model self-regulatory systems which EASA wishes to see in place in all existing EU member states and in Accession countries. It is designed to help EASA and its members to evaluate, initiate and develop effective and efficient systems across Europe. It will also help identify areas where investment is needed to develop existing national arrangements in order to improve the provision and operation of self-regulation (…)"*[170]

The best practice model sets operational standards for SROs as regards monitoring activities, code drafting, complaints handling, copy advice, the adjudication of disputes, funding, and communications and awareness. The model requires, for example, that SROs engage in non-industry stakeholder consultations in code drafting and revisions processes, that SROs have juries that have non-industry members, and that copy advice and monitoring activities are performed by the SROs. These recommendations are detailed in reference documents for SROs that remain undisclosed to the public. Importantly, the EASA BPRs are not primarily concerned with the business of advertising as such; they do not answer the question whether a particular advertisement is misleading, unfair or socially irresponsible. Rather, they serve to guide the operations of EASA's SRO members in regulating advertising and maximize the impact of their activities. The BPRs thus assume the character of performance standards, laying down norms and guidelines on how SROs should regulate. Historically, the industry members of EASA have sought to keep the adoption of material norms affecting advertising and its industry outside the mandate of EASA and, as a result, EASA was not to create any pan-European codes of conduct on advertising as such.

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[168] Section I.D.2.b above.

[169] Available at http://www.easa-alliance.org/binarydata.aspx?type=doc/EN_commonprinciples.pdf/download, accessed 31 December 2010.

[170] European Advertising Standards Alliance, 'EASA Best Practice Self-Regulatory Model' (Brussels, 2004), http://www.easa-alliance.org/binarydata.aspx?type=doc&sessionId=ayufse45uivrinab2lt1bh45/EN_BestPracticeModel.pdf, accessed 31 December 2010.

Accordingly, the Best Practice Self-Regulation Model aims to provide a common baseline to the organization and functioning European SROs. The model is also put forward in the 'EASA Advertising Self-regulation Charter' (Charter) of June 2004, in which the EASA members commit to establishing and maintaining effective private regulatory regimes.[171] EASA members are required to sign the Charter under EASA's rules of association. The Charter reiterates the key elements of the best practice model and stresses the full commitment to effective private regulation in advertising by all EASA members. EASA members are required to meet the following principles:

1. *"Comprehensive coverage by self-regulatory systems of all forms of advertising and all practitioners*
2. *Adequate and sustained funding by the advertising industry proportionate to advertising expenditure in each country*
3. *Comprehensive and effective codes of advertising practice*
    - *based on the globally accepted codes of marketing and advertising practice of the International Chamber of Commerce (ICC)*
    - *applicable to all forms of advertising*
4. *Broad consultations with interested parties during code development*
5. *Due consideration of the involvement of independent, non-governmental lay persons in the complaint adjudication process*
6. *Efficient and resourced administration of codes and handling of complaints thereon in an independent and impartial manner by a self-regulatory body set up for that purpose.*
7. *Prompt and efficient complaint handling at no costs to the consumer*
8. *Provision of advice and training to industry practitioners in order to raise standards*
9. *Effective sanctions and enforcement, including the publication of decision combined with efficient compliance work and monitoring of codes*
10. *Effective awareness of the self-regulatory system by industry and consumers."*

In 2008, EASA developed a specific set of BPRs for SROs concerning advertising through digital media: the 'EASA Digital Marketing Communications Best Practice'.[172] These recommendations, in essence, aim to extend the traditional model of private regulation of advertising as applied by the national SROs to advertising via digital media. Accordingly, advertising via for example the Internet, mobile telephones and game consoles will be covered by the SRO activities. This was not the case before for all SRO members. Therefore, the BPRs stress that the definition of advertising as applied by the SROs should be wide enough to allow for just that.[173] To give greater weight to this recommendation of widening the "remit" of SRO activities the document relies on the Consolidated ICC Code. In fact, the BRPs require SROs to ensure that the national codes they apply are 'consistent with the Consolidate ICC code, in particular as regards to their definitions of advertising and marketing communications'.[174] The ICC Code adopts a wide definition of these terms so to

[171] European Advertising Standards Alliance, 'Advertising Self-Regulation Charter' (EASA, (Brussels, 2004) http://www.easa-alliance.org/01/MyDocuments/SR_CHARTER_ENG.pdf/download, accessed 31 December 2010.

[172] All available at: http://www.easa-alliance.org/binarydata.aspx?type=doc/EASA_DMC_best _practice2.pdf /download, accessed 31 December 2010.

[173] EASA Digital Marketing Communications Best Practice, 13-16.

[174] EASA Digital Marketing Communications Best Practice, 10.

include digital media advertising. To make sure that the national SROs extent their activities to this type of advertising the BPRs thus suggest they follow the ICC definition.

A second set of EASA recommendations on Internet advertising concerns online behavioral targeting strategies. As explained above, behavioral targeting is of crucial economic importance to both advertisers and online media.[175] In 2010, the European trade association called the Interactive Advertising Bureau (IAB) Europe, which represents firms engaged in behavioral targeting, such as search engines, e-traders, publishers, ad networks, ISPs and telecom operators, developed a 'European self-regulatory Framework for Online Behavioral Advertising' (the IAB Europe Framework). This Framework seeks to address the consumer and government concerns about privacy and data protection in online behavioral targeting and 'lays down a structure for codifying industry good practices and establishes certain Principles to increase transparency and choice for Web users (…)'. In essence, the Framework promotes transparency about the fact that online behavioral advertising (OBA) is taking place and obliges signatories of the code to offer the consumer an electronic opt-out mechanism to exercise a choice as regards OBA. To link this Framework with existing systems of private regulation, i.e. those run by national SROs, EASA – together with its industry members, of which IAB Europe is one – has adopted a 'Draft EASA Best Practice Recommendation for Consumer Controls in Online Behavioural Advertising'.[176] The Draft BPR on OBA incorporates in full the IAB Europe Framework and suggests a two-legged mechanism for handling consumer complaints about OBA: one of the mechanisms is based on existing SRO structures, whilst the other is principally an online reference system, which allows the web user to opt-out of OBA activities through a single portal.

The question arises to what extent the EASA BPRs differ from the codes that have been adopted by the ICC and sector-specific bodies discussed above? It must be held that the principal ambit of the private norms promulgated by EASA have a different objective than the ICC and sector-specific codes. While these latter codes include material rules concerning advertising (i.e. what is allowed and what not), EASA has committed itself to developing performance standards (i.e. the BPRs) for its SRO members with the view to optimize their regulatory functions and institutional design. Clearly, these meta-regulatory standards also include a normative dimension, but are not directed at advertising practitioners and the media, but to SROs.

However, it should be emphasized that although the EASA BPRs do not seek to affect the material norms included in the codes of conduct but aim to address operational aspects of private regulation as experienced by the SROs, of the latter type of norms do influence the former and cannot be easily separated from them. The operational standards as expressed in the BPRs can have significant effects on the actual application of codes of advertising practice. At least in two instances EASA BPRs can be seen as affecting, either directly or indirectly, material norms regulating advertising. First, the Best Practice Self-Regulation Model suggests that adjudication bodies should be independent from the standard-setter, chaired by a person independent from industry and should composed of both industry and non-industry members. This means that the explanation of the material standards is left to

[175] See Section I.B.3.a. above.

[176] Available at http://www.easa-alliance.org/binarydata.aspx?type=doc/BPR_OBA_finaldraft_151210.pdf/download, accessed.

an independently led organ in which the industry may not have the final say, thus leaving the application and interpretation of the standards regulating advertising to non-industry members. Second, the Charter suggests that the codes administered by SROs should be based on the ICC Codes. Similarly, the BPRs on digital marketing communications determine the definition of advertising the SROs should adopt, namely that of the Consolidated ICC Codes so that digital advertising falls within their respective remits. This directly affects the way in which the material norms used by SROs are applied to assess the compliance of advertising with applicable codes.

The new Draft BPR on OBA presents a different scenario in which the EASA is widening its original mandate. The Draft incorporates the new European code on OBA as adopted by the IAB and introduces it as best practice to its SRO members. In addition, offers guidance on how this code needs to be monitored and enforced. By including the code, which has not yet been adopted in the jurisdictions covered by EASA's SRO membership, EASA suggests that a set of material norms (on OBA) should to be adopted and enforced by its SRO membership. This presents a new dynamic: while since its inception in 1992 EASA remained principally neutral to national and transnational European codes, it now proactively advances a European code to its SRO membership. It raises the question how this change has occurred.

2. Emergence

The EASA BPRs emerged following the widening of EASA's membership in 2002 so to include also trade associations of the European advertising industry. Before, the associations were organized in the largely dormant organization of EAT, whilst EASA was merely composed of national SROs.[177] The inclusion of industry representatives in EASA gave it the mandate to act as the 'single voice' of the European ad industry and adopt guidelines for SROs with the backing of the whole industry.

Another important factor in the emergence of EASA BPRs was the accession of ten new Member States to the EU in 2004. Few of the Central and Eastern European Member States were familiar with the concept of private regulation and had in place centralized systems of private regulation for advertising supported by advertisers, agencies and media.[178] The creation of a common European model of private regulation was to benefit the process of implementing new systems of private regulation in these countries.

The question was, however, what model should be used for this purpose? When reviewing the elements addressed by the Best Practice Self-Regulation Model and the Charter there is strong resemblance with the practices of the British SRO in the early 2000s. The elements of code consultation, copy advice, monitoring and dispute adjudication by an independent jury clearly were all key features of the system in place in the UK at the time. The French and German SROs, on the other hand, had very different approaches to private regulation in advertising. In France, a jury handling incoming complaints about advertising was absent and the SRO solely relied on the *ex ante* control activities (i.e. copy advice, but mainly the pre-

[177] See Section I.D.a. above.

[178] See for an analysis of the governance structures in place in central and eastern European Member States in the area of consumer protection law: A. Bakardjieva-Engelbrekt, 'The Impact of EU Enlargement on Private Law Governance in Central and Eastern Europe: the Case of Consumer', in: F. Cafaggi and H. Muir-Watt (eds), *Making European Private Law: Governance Design* (Edward Elgar, Cheltenham 2009), 98-137.

clearance of TV commercials) to regulate advertising practices. Pre-clearance was, however, not recognized as a best practice, much to the disappointment of the French SRO.[179]

Germany, by contrast, hosts two SROs that have split the competences of dealing with deceptive advertising and issues of taste and decency in advertising between themselves. The SRO concerned with deceptiveness, the *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, does not operate on the basis of code of conduct, does not have a jury, but uses (the threat to initiate) civil proceedings brought on the basis of the German Unfair Competition Law Act (*Gesetz gegen den unlauteren Wettbewerb*), to ensure compliance with that act. The second SRO, the *Deutscher Werberat* (DW), does have a jury, but this is a specific division of the German Advertising Federation (*Zentralverband der deutschen Werbewirtschaft*) that only deals with issues of taste and decency. Therefore, the jury does not include any non-industry members.[180]

What then can explain the predominance of the British take on private regulation in the EASA Best Practice Self-Regulation Model and Charter? For one, the British system is one of the most developed and well-funded systems of private regulation in the world and is considered by the industry to be very effective in securing compliance with the codes among the industry members. Building on to this leading example is a logical step to promote good practice among SROs and suggest an operational structure to the newly formed SROs. Also within EASA, the British SRO is leading by example and due to the fact that English is the language that is best understood (more than French or German) by SRO staff, materials of the British SRO can be consulted. However, next to these rather practical arguments, a salient detail appears also to be that at the time EASA Best Practice Self-Regulation Model and Charter were adopted, both the EASA Chairman – who is also the chair of the national SRO it represents – and the Director General where from the UK. Certainly, these two persons were in a key position to direct the course EASA was going to take.

Then, what made it acceptable for other SROs members to agree to the promotion of the British practice and not in their own practices? A key element here was that the EASA best practice model and Charter were effectively presented as a voluntary commitment and the individual SROs would not be held to account if they would deviate from it. Instead, the main purpose of the Best Practice Self-regulation Model and Charter would be to provide guidance to the industries in the new Member States to establish new SROs.[181] This, however, changed when the European Commission took stock of the elements identified in the model and charter (see below).

3. Drivers and incentives

What factors have driven the adoption of the BPRs? Three factors are key here.

Changes in the European legal framework

In May 2004, ten countries in Central and Eastern Europe accessed the EU. In very few of those countries centralized systems of private regulation for advertising were in place and

[179] Interview ARPP, 30 November 2010.

[180] See for a comprehensive analysis of the German private system of advertising control: A. Bakardjieva Engelbrekt, *Fair Trading Law in Flux? National Legacies, Institutional Choice and the Process of Europeanisation* (Stockholm University (PhD Thesis), Stockholm 2003.

[181] Interview ARPP, 30 November 2010.

thus guidance was needed to create and further develop such systems. EASA had already adopted its Common Principles and Operating Standards of Best Practice in 2002 and reaffirmed those in the Best Practice Self-Regulation Model in April 2004. The standards set in this model would be particularly helpful to help introduce and establish centralized systems of private regulation in the new Member States.

To take on this project and seek support by other institutions concerned EASA, together with the WFA, actively engaged with the European Commission. DG Health and Consumer Protection (DG SANCO), which had some concerns of its own in relation to private regulation in the advertising sector,[182] recognized the opportunity this presented to drive private regulation in the new accession states and saw to it that, upon the request of EASA and the WFA, the Best Practice Self-Regulatory Model and Charter were discussed in a wider forum.[183] To that end, the Commission established in 2005 a 'Round Table on Advertising Self-Regulation', including staff of the Commission, interested NGOs and representatives from the industry. The concluding report of the roundtable, the 'Madelin Report', named after the DG SANCO Director-General chairing the roundtable sessions at that time, Robert Madelin, identified a number of factors that should be used to enhance the impact of SRO activity and increase their effectiveness.[184] The elements included the provision of copy advice – in particular as regards media in which ads are used only for short periods so that adjudications have little remedial effect – the publishing of decisions, sanctions, the transparency of the system, the involvement of consumers and NGOs in the adoption of codes of conduct, the independent composition of SRO juries, the coverage of the codes, the creation of training programs, and the funding of SROs.[185]

These elements indeed closely match the guidelines of EASA set out in the Best Practice Self-Regulation Model and the Charter. By singling out much of the same elements for the effective operation of SROs, the Madelin Report to a large extent validates EASA's best practice model and confirms it as 'the' common European roadmap to enhance the effectiveness of private regulation in advertising. This was a much-desired result by EASA, which had encountered resistance within its membership to develop the private regulatory regimes in Europe along the lines of one particular model, namely the EASA best practice model. The backing of its efforts by the Commission would give EASA the implicit mandate to drive further the integration of the different national approaches. This wish by EASA to push on is recognized in the Madelin report, which holds:

> *"(…) there is a clear commitment on the part of some, if not all, [self-regulation]-practising sectors of industry to deliver increasingly high quality self-regulation, and to deliver it more evenly across the enlarged EU. This is certainly the case for EASA, which has made a public commitment to improve coverage and performance and has reached out to EU Authorities and others for help. The message heard from EASA is that they cannot deliver their vision alone. If business is to*

[182] The concerns emerged in the light of the preparatory work to the UCP Directive. See EC Commission, 'Green Paper on European Union Consumer Protection', COM(2002) final 531 of 2.10.2001, 5 and 7.
[183] Interview European Commission (DG INFSO), 15 December 2010.
[184] Directorate-General Health & Consumer Protection, 'Self-Regulation and the Advertising Sector: A Report of Some Discussion among Interested Parties (Madelin Report)' (Brussels, 2006) http://www.easa-alliance.org/binarydata.aspx?type=doc/DGSANCO_advertisingRT_report.pdf, accessed 31 December 2010.
[185] Ibid., 5-7.

commit the willpower and resources needed to improve self-regulation across the EU 25, there seems to be a need for clear public leadership to the effect that business should be doing this."[186]

The confirmation of EASA's approach that the Madelin report in fact constitutes has put EASA in the driver's seat in terms of how private regulation in advertising should develop within Europe.

Technological developments

To be sure, the recent technological developments in the digital media have further driven the adoption of the BPRs on Digital Marketing Communications and OBA. The use of Internet-based technologies and telecom networks for advertising purposes has created new and more intrusive ways of marketing products to consumers, in particular young people. These media are used ever more often, either alone or in combination with other, more traditional media, such as the television, radio, and press.[187] This increase in use of digital media advertising has also triggered a sharp rise in complaints. In 2008, Internet was the third most complaint about medium used for advertising, after television and print.[188] However, this only concerned Internet advertising in paid-for spaces, such as banner ads. Internet advertising has taken a giant leap forward and is common on the websites of marketers, search engines, trading platforms and social network communities. Some SROs were already addressing these matters, whilst others were not. To have a common approach here, EASA considered it necessary in its BPR on digital marketing communications to extent the remit of the SROs across the board and have 'a level playing field across all media'.[189]

The issue of behavioral targeting was not addressed by the BPR on digital marketing communications, however, and only came on the agenda after IAB Europe adopted its Framework for OBA and the Commission increased pressures on the online ad industry to adopt private regulation along the lines of EASA's approach here. The EASA Draft BPR on OBA should be considered in the context of both the technological developments that make behavioral targeting possible (and the privacy issues concerned with it) and the political context in Europe.

The rise of the Internet as a new and important medium for advertising has also made uniformity of private regulation of greater importance. A crucial consideration is to what extent a global medium like the Internet can be governed by different national private regimes. For global players like the major search engines that have build their business model on advertising revenues, the incentive is to have as much centralized private regulation as possible. Operating across an increasingly wide set of countries, decentralized national systems of private regulation lead to increased costs for these media. Where a global code is not possible, at least a common European solution is preferable.

In this respect, it is also important to consider that in the US private codes for OBA had been already established since the early 2000s. In 2000, the Network Advertising Initiative (NAI)

[186] Ibid., 8.
[187] See Section I.B.3 above.
[188] Data taken from European Advertising Standards Alliance, 'European Trends in Advertising Complaints, Copy Advice and Pre-clearance. 2008 data' (Brussels, 2009) on file with author, 23.
[189] EASA Digital Marketing Communications Best Practice, 7.

had established 'Self-regulatory Principles' in response to concerns from the Federal Trade Commission (FTC) and consumer groups about web user privacy in behavioral targeting.[190] In 2008, the FTC announced its discontent with the NAI principles and adopted a number of guidelines requiring a stronger self-regulatory effort from the industry. While the NAI revised its principles in 2008,[191] the FTC remained skeptic and exerted pressures on the wider ad industry to take affirmative action.[192] As a result, IAB US, the Council of Better Business Bureaus (BBB), the Direct Marketing Association (DMA), the American Association of Advertising Agencies (AAAA), the Association of National Advertisers (ANA) and NAI adopted the Self-Regulatory Principles for Online Behavioral Advertising in 2009.[193]

In terms of substance, EASA's BPR on OBA closely aligns with the 2009 Self-Regulatory Principles developed by the online ad industry in the US, both suggesting principles of transparency, consumer choice and compliance mechanisms based on existing national SROs. From the perspective of the online advertising industry, such convergence between European and US private codes is desirable, as it reduces costs for actors involved.

Government pressures

However, in relation to the matter of behavioral targeting it must be emphasized that the Draft EASA BPR of OBA is also the product of extensive pressures that public bodies, in particular the European Commission, have exerted on the European online advertising industry over the past six months to take affirmative self-regulatory action to secure the rights to privacy and data protection as warranted under the ePrivacy Directive.[194] One of these public bodies is the so-called 'Article 29 Data Protection Working Party' (Working Party), an advisory body that was established by the Data Protection Directive, and is composed of representatives of the competent supervisory authority of each Member State, a representative of the European Data Protection Supervisor and a representative of the Commission.[195]

In June 2010, the Working Party delivered an opinion on OBA in which it considered the legal framework applicable to those engaging in behavioral targeting, typically advertising networks.[196] The opinion stresses that advertising networks are bound by Article 5(3) of the

[190] NAI, 'Self-regulatory Principles for Online Preference Marketing by Network Advertisers' http://www.ftc.gov/os/2000/07/NAI%207-10%20Final.pdf, accessed.

[191] NAI, '2008 NAI Principles', http://www.networkadvertising.org/networks/2008%20NAI%20Principles_final%20for%20Website.pdf, accessed.

[192] See: Federal Trade Commission, 'Self-Regulatory Principles For Online Behavioral Advertising Staff Report (2009, Washington D.C.), http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf, accessed.

[193] http://www.iab.net/media/file/ven-principles-07-01-09.pdf.

[194] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 337, 18.12.2009, 11-36.

[195] Article 29(1) and (2) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, 31-50.

[196] Article 29 Data Protection Working Party, 'Opinion 2/2010 on online behavioural advertising' (Ref. 00909/10/EN WP 171, Brussels 2010), http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf, accessed 31 December 2010.

ePrivacy Directive, which stipulates that placing cookies or similar devices on the computers of web users or obtaining information through such devices is only allowed with the informed consent of the users. According to the Working Party, current web browser settings and opt-out mechanisms provided by the online ad industry 'only deliver consent in very limited circumstances' and it thus urges the industry to provide for 'prior opt-in mechanisms requiring an affirmative action by the data subjects indicating their willingness to receive cookies or similar devices and the subsequent monitoring of their surfing behaviour for the purposes of serving tailored advertising'.[197] More specifically, the Working Party considers that the private regulatory initiatives taken by the firms, either through their individual corporate privacy policies or collective codes of conduct on OBA, are imprecise and incomplete on the issue of behavioral targeting. It notes:

> *"So far, the ways in which the industry has provided information and facilitated individuals to control whether they want to be monitored have failed. Notices provided in general terms and conditions and/or privacy policies, often drafted in rather obscure ways fall short of the requirements of data protection legislation. In some Member States industry has made some efforts to complement existing law with self-regulation. Such efforts are welcome as they specify the general principles contained in the regulatory framework. However, the Article 29 Working Party considers that there is a long way to go. Industry should step up efforts to comply with the reinvigorated applicable laws."*[198]

Following the Working Party opinion, the Commission also increased pressure on the ad industry to take affirmative action and update existing self-regulatory initiatives. More particularly, the Commission spurred the European online advertising industry to establish effective enforcement mechanisms for private regulation in the area of behavioral targeting. In September 2010, the Vice-President of the Commission and Commissioner for the Digital Agenda, Neelie Kroes, considered in a speech to the online ad industry that:

> *"It is essential that any self-regulation system includes clear and simple complaint handling, reliable third-party compliance auditing and effective sanctioning mechanisms. If there is no way to detect breaches and enforce sanctions against those who break the rules, then self-regulation will not only be a fiction, it will be a failure. Besides, a system of reliable third party compliance auditing should be in place."*[199]

What this push for effective sanctioning mechanisms exactly meant became clear in the follow-up to this statement by the Commission's Directorate General for Information Society (INFSO). In December 2010, DG INFSO hosted a 'Roundtable on Interest Based Advertising', which was chaired by the DG INFSO Director General Robert Madelin (formerly at DG SANCO). In this forum, the IAB Europe Framework on OBA was discussed between Commission staff members, the (online) ad industry, and consumer and privacy advocates. From the very beginning it was made clear by Madelin that the EASA led SRO system was to be used as an enforcement model for the IAB Europe Framework; a European code on OBA had to be, at least, compliant with EASA's existing BPRs.

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[197] *Ibid.*, 3.
[198] *Ibid.*, 22.
[199] N. Kroes, 'Towards more confidence and more value for European Digital Citizens', Speech/10/45 delivered at the European Roundtable on the Benefits of Online Advertising for Consumers, Brussels, 17 September 2010.

In this highly politicized context and in response to this statement by the Director General of DG INFSO, EASA has now suggested in its Draft BPR on OBA, which was first presented to the public in the Roundtable on Interest Based Advertising, to fully incorporate the IAB Europe Framework and add to the framework a two-legged mechanism for handling consumer complaints about OBA. While one mechanism constitutes an online reference system through which the web user can choose to opt-out of OBA activities, the other is based on existing SRO structures of complaint handling and sanctioning in case of non-compliance with the IAB Europe Framework. Accordingly, it seeks to align the industry interests with the Commission's concerns.

4. Relationship with public regulation

EASA's Best Practice Self-Regulatory Model and Charter emerged in a context in which the EU was developing the UCP Directive, a legislative measure of maximum harmonization essential to advertising practices.[200] The advertising industry was keen to stress the role it plays in tackling unfair commercial practices and therefore lobbied to have a solid recognition of its efforts and mechanisms in the final text of the Directive. It succeeded in that where the UCP Directive encourages the Member States to establish regimes of private regulation as these regimes can be used a means to reduce the need to undertake either judicial or administrative enforcement action against unfair commercial practices, including advertising. Having in place effective private regimes would thus benefit the implementation of the Directive. Since the objective of EASA's BPRs is to enhance the effectiveness of these regimes, they may, to some degree, contribute to the implementation of the Directive at the Member State level.

The lessons taken from the Roundtable on Advertising Self-Regulation of 2005 and its report have provided significant input to the discussions on the texts of the AVMS Directive concerning private regulatory regimes. This Directive seeks to harmonize the rules in place in the members states governing the provision of audiovisual media services, including television and radio broadcasting, Internet protocol broadcasting and on demand video. It thus applies to particular media services and also covers aspects of advertising delivered through those media. The UCP Directive complements its provisions in the sense that it offers a wider legal framework that applies to misleading and aggressive advertising practices regardless of which medium is used.

As discussed above, the AVMS Directive requires that Member States encourage the creation of private regulatory regimes (self- and co-regulation) to oversee advertising.[201] In addition, the Directive requires the Member States to encourage the adoption of codes of conduct on the advertising of fatty and sugar-rich food and beverages to children. Much in the light of the discussions in the roundtable, the Directive also holds that '[t]hese regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement.'[202] As EASA BPRs touch on both the points of enforcement and effectiveness and provide guidance on how to achieve this, they are

[200] See for a discussion: G. Howells, Co-regulation's Role in the Development of European Fair Trading Laws, in H. Collins (ed.), *The Forthcoming EC Directive on Unfair Commercial Practices*, (Kluwer Law International, The Hague 2004), 119-129, 122-124.
[201] Section I.C.2. above.
[202] Article 3(7) AVMS Directive.

extremely useful to help Member States organize and assist in the creation of the regimes and make sure that the regimes meet the requirements set out in the AVMS Directive. In turn, they might also be considered as a benchmark for the Commission in assessing the extent to which the Member States have met their obligations to implement the Directive in a correct and timely fashion.

In terms of the substance of the BPRs, it can be noted that EASA has sought to comply with the Commission's Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.[203] This Recommendation suggests that alternative dispute resolution bodies, which SROs can be considered to be, should warrant the impartiality of their decisions, transparency of procedures, and the right of litigant parties to be represented by a third party. In addition, the Recommendation suggests that the procedures should be of an adversarial character, free of cost, speedy, in line with mandatory law, binding only after consent. Most of these recommendations are indeed echoed in the BPRs.

Interestingly, the Draft BPR on OBA makes explicit reference to the Data Protection Directive to define the types of data that are collected and used for the purpose of providing OBA.[204] It must also be noted, however, that the Draft comes at a time where the ePrivacy Directive has just been revised (Directive 2009/136/EC) and needs to be implemented at the national level in May 2011. Accordingly, it already seeks to provide an interpretation of how some of the provisions of the renewed Directive could be implemented.

5. Standard-setting

EASA's BPRs are drafted by the so-called 'Self-regulation Committee', which is one of the committees giving input to the Board of Directors of EASA. In this committee a number of representatives of the SRO members sit and can discuss new guidance to the SROs. The proposals of the committee require approval by the Board, in which all national SROs and European industry organizations have a seat. The Best Practice Self-Regulation Model and the Charter have been accepted in this fashion.

The BPRs on Digital Marketing Communications have been adopted in a slightly different way. Here, discussions were organized between the advertisers, agencies, media and SRO members of EASA, starting in 2007. This process was followed by informal stakeholder consultations undertaken during 2008 in which representatives of the European Commission (DG SANCO), NGOs (family, consumer, and youth representatives), academics and SRO lay-expert jury members participated.[205] A special taskforce was established under EASA Media Committee to facilitate this process: the Digital Marketing Communications Taskforce.

The BPR on OBA have gone through another process. The BPR on OBA comprises the IAB Europe Framework on OBA and offers guidance on how the rules of this framework should be monitored and enforced. Formally speaking, EASA had no influence on the content and the adoption of the IAB Europe Framework. The sections on compliance and enforcement were drafted by EASA itself, however. To this end, EASA first organized internal discussions

[203] Recommendation 98/257/EC of the European Commission of 30 March 1998, OJ L 115, 17.4.1998, 31-34.
[204] Section 3. The Framework, under Principle I. Notice. A. Third Party Notice 1(b).
[205] EASA Digital Marketing Communications Best Practice, 10.

with its members, both industry and SROs. Since the presentation of the Draft BPR on OBA to the Roundtable on Interest Based Advertising in December 2010, EASA has opened a public consultation, which was closed in February 2011. In this period, EASA invited all interested parties and the public in general to provide input for the draft.[206] It can be questioned what impact this public consultation has had. Given that the core of the BPR, the IAB Europe Framework, had already been determined by IAB Europe's membership before the consultation was held, the effect the input could have had on the Draft BPR was very little.

6. Implementation

EASA encourages both its industry and SRO members to implement the BPRs in the national systems. The BPRs are intended as guidelines for best practice for the individual SRO members and non-compliance with them will not be sanctioned. The BPRs remain non-binding and their implementation is subject to the context of national public laws and regulations, as well as negations with national industry representatives.[207] The Advertising Self-regulation Charter, on the other hand, can be considered as a binding agreement amongst EASA members as they are required to sign the Charter as an obligation under EASA's rules of association. The content of the Charter, however, remains rather imprecise in the sense that its primary function is to express the commitment of the industry stakeholders to promote effective private regulatory regimes. The BPRs are clearer in the terminology used and serve to operationalize the Charter commitments.

Because both the industry and SRO members of EASA commit to promote the EASA BPRs, the implementation of the BPRs generally follows two interlocking strategies. First, EASA can directly engage with the Board of the national SRO and encourage the adoption of the BPR set by EASA. Second, also the EASA industry members facilitate implementation. The industry members of EASA are the European trade associations or confederations of the various segments of the advertising industry. The members of these European bodies are national associations, which typically sit on the Board of the national SRO. By pressuring their national members, the European trade associations or confederations can be very helpful in achieving changes in the operations of SROs. Therefore, whenever some resistance is encountered in an individual SRO, EASA may require its industry members to pressure the national constituencies and motivate a change. In the implementation of the BPRs on Digital Marketing Communications and OBA the two strategies are applied concurrently.

In more practical terms, EASA's annual meetings provide an important forum for the industry and SRO members to discuss how to implement the BPRs.[208] SRO members present their approaches and progress during the two or three meetings EASA schedules annually. These meetings improve information sharing and joint learning. The need for such sharing and learning is strong as many of the SROs have to go through institutional or operational changes to comply with the BPRs. The issues of monitoring and copy advice, for example, have proven difficult for some SROs to implement due to the lack of expertise and resources.[209]

[206] EASA, 'Public Consultation', http://www.easa-alliance.org/page.aspx/386, accessed 31 December 2010.
[207] EASA Digital Marketing Communications Best Practice, 6.
[208] For the purpose of this research the annual meeting held in Sofia 14/15/16 April 2010 was audited.
[209] Interviews DW (Germany), Ro (Sweden), and SRC (Netherlands).

The implementation of the EASA's BPRs by the SRO members from the Central and Eastern European EU Member States proves particularly challenging. Restrictive legal frameworks, the absence of a tradition of private regulation and lack of financial and organizational capacities in some of these countries make it difficult to establish sufficiently robust systems of private regulation, and to follow the BPRs in that process. To surmount some of these difficulties EASA suggested coupling some developing SRO members to more established members, much like the twinning projects developed by the European Commission's Directorate General Enlargement preceding the accession of new EU Member States.[210] As such, the Slovenian SRO worked in close rapport with the British and Irish SROs to adopt a new code. Similarly, the Belgian SRO has held trainings of SRO jury members in a number of newly established SROs.

The implementation of the Draft BPR on OBA will pose a particular problem to all SRO members, however. The Draft affirms the IAB Europe Framework on OBA and suggests that the SROs should warrant compliance with the Framework rules addressing these privacy concerns. The IAB Europe Framework is not concerned with the content of advertising served through OBA,[211] but only deals with privacy concerns arising from OBA activities. It does so in highly technical terms, jargon that the SROs have to understand first before they can properly enforce the rules implied the Framework. The technical nature of OBA and the IAB Europe Framework makes that the monitoring and enforcement action that the SROs must carry out in relation to it, is a rather new aspect of their activity. Securing data protection and privacy in online and digital advertising is indeed a whole different ball game for which experience needs to be gained among SRO staff and jury members to properly deal with it. EASA implicitly acknowledges this in the Draft BPR on OBA by suggesting the consultation of experts by the SRO juries in the adjudication of complaints on OBA.[212] To ensure a full implementation of the Draft, EASA calls on both its industry and SRO members to support the implementation of the BPRs at the local level and ensure industry and consumer awareness.[213]

While the BPRs may be seen as legally non-binding, SROs may perceive the BPRs not as completely voluntary. There are a number of important factors that push the SROs to comply with the BPRs. First, there is strong willingness among the SROs to improve the operation of their systems and learn from other SROs how to do that. Where the BPRs can improve, committed individuals that are part of the EASA network will try to implement that. Second, the discussions of the Advertising Roundtable in 2005 and 2006 identified the recommendations of EASA Best Practice Model and Charter as the key points to improve the effectiveness of SROs in Europe. In the Madelin report, the European Commission reiterates much of EASA best practice model. By confirming the approach taken by EASA, the Commission takes stock of the BPRs and by suggesting that this is indeed the way to improve the private systems it increases the pressure on the European advertising industry and individual SROs to follow EASA's lead.

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[210] DG Enlargement, 'Pre-Accession Assistance – Twinning', http://ec.europa.eu/enlargement/how-does-it-work/technical-assistance/twinning_en.htm, accessed 31 December 2011.
[211] EASA Draft BPR on OBA 2011, 9.
[212] *Ibid.*, 31.
[213] *Ibid.*, 4-5.

Driven by these executive pressures, EASA may also itself impel its SRO members to comply. EASA annual meetings are key here. In a club-like setting, the peer pressures of leading SROs, strong appeals by the advertisers (WFA) within EASA, and encouragements by EASA Secretariat indeed generates significant pressures for the SROs members to follow the BPRs and make changes in their institutional design and operational standards. SROs simply do not want to be the worst student in class. Therefore, they work together with leading examples to improve their own conduct, for example through the twinning projects that were mentioned above.

It must also be stressed, however, that the changes in the governance of individual SROs have not only been the result of EASA's BPRs and that in some countries these guidelines only played a minor role in triggering institutional change. This can be illustrated by two examples. In 2008, the French system was overhauled and introduced for the first time a jury competent to deal with complaints submitted to the SRO about advertising in the public domain. The jury was modeled after EASA's BPRs on complaint handling and on jury composition. This change in the French SRO was predominantly motivated by the threats of the French government to undertake legislative reforms. However, the Chairman of the SRO, being also the Chairman of EASA at the time, also used the BPRs as leverage to motivate the national industry to accept the creation of an independent jury.[214] The French SRO worked together with the British SRO in the actual implementation of the BPRs.

In Germany, on the other hand, the SRO dealing with issues of taste and decency in advertising, the *Deutscher Werberat* (DW), did not provide copy advice in the past. It was only after threats by the federal government to enact a legislative ban for the advertising of alcoholic beverages and demands by multinational companies for guidance on beer advertising that the DW introduced a copy advice service in 2009. While EASA's BPRs also encourage SROs to provide copy advice, these were not viewed as influential in motivating change.[215] Thus, government pressures in particular remain a strong driver for institutional changes for SROs.

7. Monitoring and enforcement

EASA monitors progress amongst the SROs in the implementation of the 2004 Charter. The annual meetings of EASA SRO and industry members serve to highlight progress on implementation and discuss best practices. Since 2005, EASA secretariat has kept scoreboards of which commitments have been fulfilled by the SROs. As Figure II.1 illustrates, after the Best Practice Self-Regulatory Model and Charter were launched in 2004 compliance amongst the SROs was strongest in the UK and Ireland. This can be, in part, explained by the fact that most of the characteristics underpinning the Best Practice Self-Regulatory Model and Charter were derived from the practice of the British SRO.

[214] Interview ARPP, 30 November 2010.
[215] Interview DW, 4 May 2010.

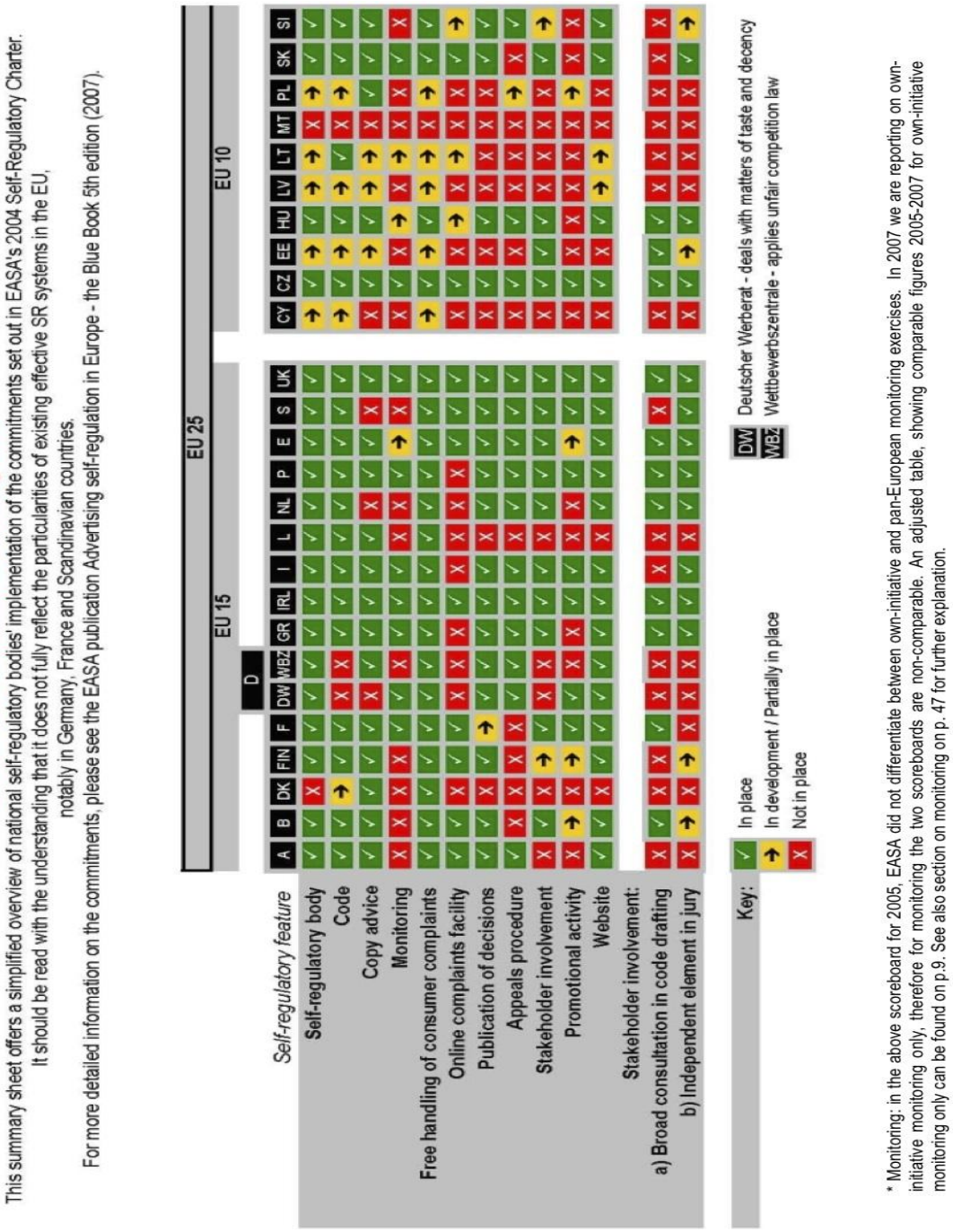

Figure II.1. EASA Charter commitments summary 2005.[216]

Since 2005 considerable progress has been made by the SROs in terms of compliance with the Charter. For example, the ARPP in France established at jury and the DW in Germany and the SRC in the Netherlands have started to provide copy advice. As shown in Figure II.2, progress has particularly been strong in the Eastern European countries, where initially few centralized SROs existed before the accession of these countries to the EU in 2004.

[216] Source: http://www.easa-alliance.org/binarydata.aspx?type=doc/Exec_summary_charter_validation_June 08.pdf/download, accessed 31 December 2010.

Figure II.2. EASA Charter commitments summary 2008.[217]

It must be held however that these scoreboards do not represent a fully accurate picture of the practice of the SRO activities. As regards the issue of monitoring, for example, it was already held above that only the British, Irish and French systems engage in frequent and systematic monitoring exercises.[218] The scoreboard shows that also countries such as Italy, the Netherlands, and Germany (DW) have in place monitoring policies. While the SROs from these countries may have participated in EASA led monitoring initiatives on the topics of

[217] Ibid, 11.
[218] See at Section II.A.7.b above.

food, alcohol, and gender issues, little to none monitoring have been undertaken by the SROs independently and on a systematic basis.

There are no sanctions for non-compliance with the BPRs. However, the scorecards of EASA are perceived as a strong incentive to comply. The older SROs do not want to lag behind the new SRO members and are incentivized to lobby for changes amongst their national constituents.

8. Conclusion

The main function of EASA's regulatory activities has been to provide a common roadmap for the development and effectiveness of private regulation of advertising in Europe and beyond, and to provide for coordination between the various national systems in place. The BPRs adopted by EASA all aim to improve the institutional design of its SRO membership. These BPRs mainly present performance standards for self-regulatory bodies. In this sense, it can be held that EASA functions as meta-regulatory body.

The BPRs adopted by EASA can have a strong influence on the application and interpretation of the material norms regulating advertising. In terms of the substance of the operational standards, it can be held that the EASA Best Practice Self-regulation Model and Charter, as operationalized by the various BPRs, have sought to promote among EASA SRO membership the elements that were most familiar to the British model of private regulation. This is particularly true for the SROs in the Eastern European countries. Here, few national industries had established centralized systems of private regulation before and the EASA BPRs were taken as principle guidelines. However, over time, also 'older' SROs have sought to bring some of their practices in line with EASA policy and have used the BPRs to implement those institutional changes.

PART (III) – Evaluation and Conclusions

The third and final part of this study seeks to provide answers to the research questions framed in Part I. To that end, it first summarizes the findings of the analysis of the various transnational norms developed by the advertising industry (A). Second, it evaluates the operation of TPR in advertising as discussed in PART II. The evaluative criteria are grouped around four pillars: legitimacy; enforcement; quality; and effectiveness and it will be explained for each pillar what condition is used as a benchmark for this exercise (B).

III.A. Emergence and Governance

The preceding analysis of the private transnational norms developed by the advertising industry reveals a number of significant general themes.

1. Emergence

Several circumstances have precipitated the emergence of TPR in the advertising industry. Four key factors can be singled out. First, the high level of organization of the principal constituents of the industry has been conditional to the creation of TPR and its mechanisms for oversight, application and administration. Advertisers, agencies and media have created trade associations, both at the transnational and national level, through which they have jointly developed codes of practice regulating advertising.

Second, pressures by government to undertake legislative or executive action have been crucial for the adoption and further develop these codes, as well as for the private regimes that oversee their application by advertising practitioners and by the media. Boddewyn already affirmed that across a wide set of countries that the development of private regulation at the national is motivated by the adoption of national consumer protection laws during the 1960s and 1970s or by government threats to adopt new and more stringent advertising laws.[1] This dynamic can also be clearly observed at the transnational level. In the EU context, the European Commission has exerted significant political pressure on the European advertising industry to better address unfair, misleading and socially irresponsible advertising practices on its own accord. Accordingly, it drove the creation of EASA and of its influential best practice recommendations. Also at the global level the threat of states adopting more stringent legal frameworks is a powerful driver for the industry to establish or review private regulation. As pointed out, the WHO Global Strategy on Diet, Physical Activity and Health has recently triggered a rise of advertising codes in the food industry.[2]

Third, the advertising industry has also a strong self-interest in the proper functioning of private regulatory regimes. Where these regimes are able to clear the market of deceptive, unfair and socially irresponsible advertising the audience of advertising, consumers and business, are more likely to trust, appreciate and pay attention to advertising. This increases the chances that advertising achieves its primary goal: to persuade the targeted audience to

[1] J.J. Boddewyn, *Advertising Self-Regulation and Outside Participation: A Multinational Comparison*, (Quorum Books, New York 1988), 335-336. See also G. Miracle and T. Nevett, 'A Comparative History of Advertising Self-Regulation in the UK and the US' (1988) European Journal of Marketing 22(4), 7-23, at 21.

[2] C. Hawkes, 'Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006' (World Health Organization, (Geneva, 2007) http://www.who.int/dietphysicalactivity/regulatory_environment_CHawkes07.pdf, accessed 31 December, at 9.

buy the products or brand advertised. The success of advertising is thus dependent, but not solely, on the attitude of the potential buyer to advertising. This makes advertising vulnerable to societal concerns. The analysis of the alcohol and food sector revealed that such concerns motivated the advertisers in these sectors that to undertake regulatory action and establish codes of their own.

Fourth and finally, changes in technology and media have strongly motivated the industry to adopt and revise transnational codes. The rise of Internet has led to changes and updates in existing regimes over the past few years, just like the growth of the medium of television did in the 1960s and 70s.

2. Private governance

TPR in the advertising industry is governed through a complex set of transnational and national arrangements and institutions. It is identified here who are the main players and what relationships exist between them.

a. Relationship between transnational and national regimes

The study reveals that TPR in the advertising industry operates across several levels of governance. Transnational codes are set at the transnational level by international trade associations, confederations or business consortia. These normative codes serve as baseline and authoritative reference for national industry representatives to negotiate and adopt codes at the national level. Standard-setting processes at the national and transnational level are therefore strongly conflated. The monitoring and enforcement of these codes take place at the national level, however.

The main reason why we can observe this apparent multilevel structure of private regulatory governance concerns the fact that advertising is principally based on local opinion, sentiments, and practices. As it is at this local, national level that it has its commercial and normative impact, debates about advertising will inevitably emerge in this confined context. Bodies familiar with the same context are likely to best address the concerns of deception, offensiveness or social responsibility underlying these debates, both in the standard-setting process and in monitoring and enforcement activities.

SROs enjoy wide discretion in what standards they adopt and how they do so. Taking the ICC codes as an example it can be observed that national SROs remain fully independent from the ICC. They can unconditionally divert from the transnational codes and remain free to determine the exact content of the code. While some SROs apply the ICC codes without any reservations, like Sweden and France, the majority of SROs have created new codes only building on to the principles set out in the ICC codes.

What can explain this strong divergence in national codes? What factors affect national approaches? A key element in explaining why SROs have chosen to follow or divert from transnational codes in their national codes concerns the legislative framework in place for advertising. In Sweden, for example, the ICC codes have traditionally played an important role in general advertising law. In determining whether a specific advertisement is allowed under the Marketing Practices Act,[3] both the judiciary and administrative agencies

[3] §5 of *Marknadsföringslagen* (2008:486).

frequently refer to the ICC codes.[4] Since the ICC codes thus enjoy a certain status in legal practice, it was a logical step for the Swedish SRO to simply apply the ICC Codes. In Germany, however, advertising disputes have traditionally been dealt with under the Law against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*).[5] However, the scope of application of this law has historically been limited to statements of factual content. Mere expressions of opinion, value judgments, and puffery are generally not considered as statements of fact.[6] Advertising claims appealing to feelings and of a primarily subjective nature do not readily fall within the ambit of the concept of unfair commercial practices.[7] This apparent gap in the legal framework motivated the adoption of a code of advertising practice that would be exclusively concerned with issues of taste and decency. Misleading advertising would not be addressed as this was considered the exclusive domain of the Law against Unfair Competition and the civil courts that oversee its application.

The strong divergence between national codes and the systems overseeing these codes is problematic from an economic standpoint: it increases compliance costs for advertisers wanting to promote products and service across a number of markets. Companies that use the same format to advertise their goods in different markets need to take into account different rules and possibly adjust their uniform marketing approach to each individual market. In sectors where advertising campaigns become increasing international, such as cars and cosmetics, this prompts higher transaction costs than in a situation in which uniform rules exist.

Perhaps the divergence between national private regulatory systems for the control of advertising is even more problematic in relation to online advertising. Internet allows advertising practitioners to target potential buyers across several markets, thus sidestepping geographical boundaries and jurisdictions. The global character of the medium Internet challenges the national embedding of the private regulatory regimes. There thus appears to be a misalignment between the national scope of the rules applicable to the ads and the global nature of the medium through which advertising is processed.

To overcome this problem coordination strategies are needed. The ICC provides for one opportunity, namely the interpretation scheme before the ICC Interpretation Panel which can provide guidance in case of an international advertising dispute.[8] However, it is EASA that has assumed a key position in coordinating the different approaches amongst SROs to regulate advertising, at least in Europe. As the European Commission held in the early 1990s, the different ways in which national industries have regulated advertising distorts the functioning of the European Single Market. In principle, EASA does not seek to take away the

[4] C.A. Svensson*, et al.*, *Praktisk marknadsrätt*, 7th ed., (Norstedts Juridik, Stockholm 2002), 95 and L. Jonson, 'Marknadsrätten, särskilt regelinger av reklam' (2001) Svensk Juristtidning, 293-299, 295.

[5] The act was adopted already in 1909. It was lastly amended in 2008 for the purpose of implementing the UCP Directive. See for a discussion: J. Kessler and H.-W. Micklitz, 'Das neue UWG - Auf halbem Wege nach Europa?' (2009) Verbraucher und Recht, 88-95.

[6] N. Reich and H.-W. Micklitz, *Consumer Legislation in the EC Countries: A Comparative Analysis*, (Van Nostrand Reinhold Co., New York 1981), 75.

[7] This is in line with the UCP Directive (see Recital 7).

[8] Article 12 of Terms of Reference of the ICC Code Interpretation Panel holds: "The decision whether or not to entertain a request shall be based on an assessment of the importance of providing the clarification(s) in question, particularly with regard to international aspects and matters of principle involved."

material differences between the national codes, but facilitates coordination between the national regimes by providing the cross-border complaint handling system and the European copy advice and pre-clearance facility. In addition, it drives institutional change amongst its SRO members by setting performance standards in its BPRs, which concern the way in which these SROs operate and seek to control advertising.

To be clear, EASA does not seek to undermine the authority of the ICC as a standard-setter. In fact, EASA documents consistently refer to the ICC Codes as the common global standard for private regulatory regimes of advertising control.[9] Nonetheless, because of its network function it has been able to assume a key role in downplaying the institutional differences between SROs that have resulted from the wide discretion in the adoption of the ICC codes at the national level. As such, EASA drives a process of 'soft' harmonization within the European group of SROs as to how they operate.

This process of coordination and integration unfolds according to the standards set out in EASA's recommendations. However, EASA's Charter and the Best Practice Model display a particular approach to private regulation, one that is mainly based on the practice of the British SRO in the early 2000s. Back then, requirements as regards the establishment and operation of a jury, the involvement of non-industry members in the jury and the monitoring of ads were familiar to the British SRO, but were unknown or sat uneasy with, in particular, the French and German traditions of private regulation of advertising. Nonetheless, both systems have introduced over the past few years elements as prescribed by EASA's BPRs. In France, for example, EASA's BPRs provided an important leverage for the SRO leadership to convince national industry of the importance of introducing a jury. It thus appears that EASA has served as a vehicle for the exportation and promotion of a model of private regulation to other SRO members that was build chiefly on the practices of the British SRO. This has had the most profound impact on the institutional design of SROs in the Eastern European countries. Here, national industries had not yet established SROs previously and EASA BPRs were taken as principle guidelines. Nowhere a French or German model was introduced.

Functional to the optimalization of EASA's role of driving coordination among SRO structures in Europe and beyond has been its inclusion in the standard-setting processes of the ICC. EASA has become a member of the ICC and has acquired a crucial position in the standard-setting process of the ICC advertising codes by having its Director General as a member of the ICC Commission on Marketing and Advertising and co-chair of the Commission's Code Revision Taskforce. This also allows the SRO members of EASA, through the participation of EASA in the ICC standard-setting procedures, to be represented in the ICC code adoption process. As such, the SROs can provide input to the functioning of the ICC provisions and may add much to the practicability of the rules. More recently, the ICC and EASA have further engaged in collaborations in order to develop special training programs to promote responsible advertising among advertising professionals around the world.[10]

[9] EASA Charter of Advertising Self-Regulation requires that the SRO members of EASA use codes 'based on the globally accepted codes of marketing and advertising practice of the International Chamber of Commerce'.

[10] European Advertising Standards Alliance, *Advertising Self-Regulation in Europe and Beyond: An Analysis of Self-Regulatory Systems and Codes of Advertising Practice* 6th ed., (Poot Printers, Brussels 2010), 48.

The coordinative role that EASA is playing in Europe between transnational institutions and standards and the national systems of private regulation is likely to extend to other parts of the world as EASA's membership expands to include more and more non-European SROs. The 'International Guide to Developing a Self-regulatory Organisation', which spells out all of EASA's BPRs, is a precursor to this. EASA receives requests for advice on the development of SROs in various countries across various continents.

Even amongst the various European initiatives on private regulation EASA plays an important role. The cases of the EFRD Common Standards, the Brewers' Guidelines and the IAB Europe Framework demonstrate that EASA, together with the WFA, assisted in the development of the codes concerned and is perceived as an authoritative partner in creating consensus amongst the national constituencies. In the case of the two codes on alcohol advertising EASA also coordinated the pan-European monitoring exercises that were conducted.

Figure III.1 seeks to capture the interplay between the principal actors in the multilevel structure of private regulatory governance.

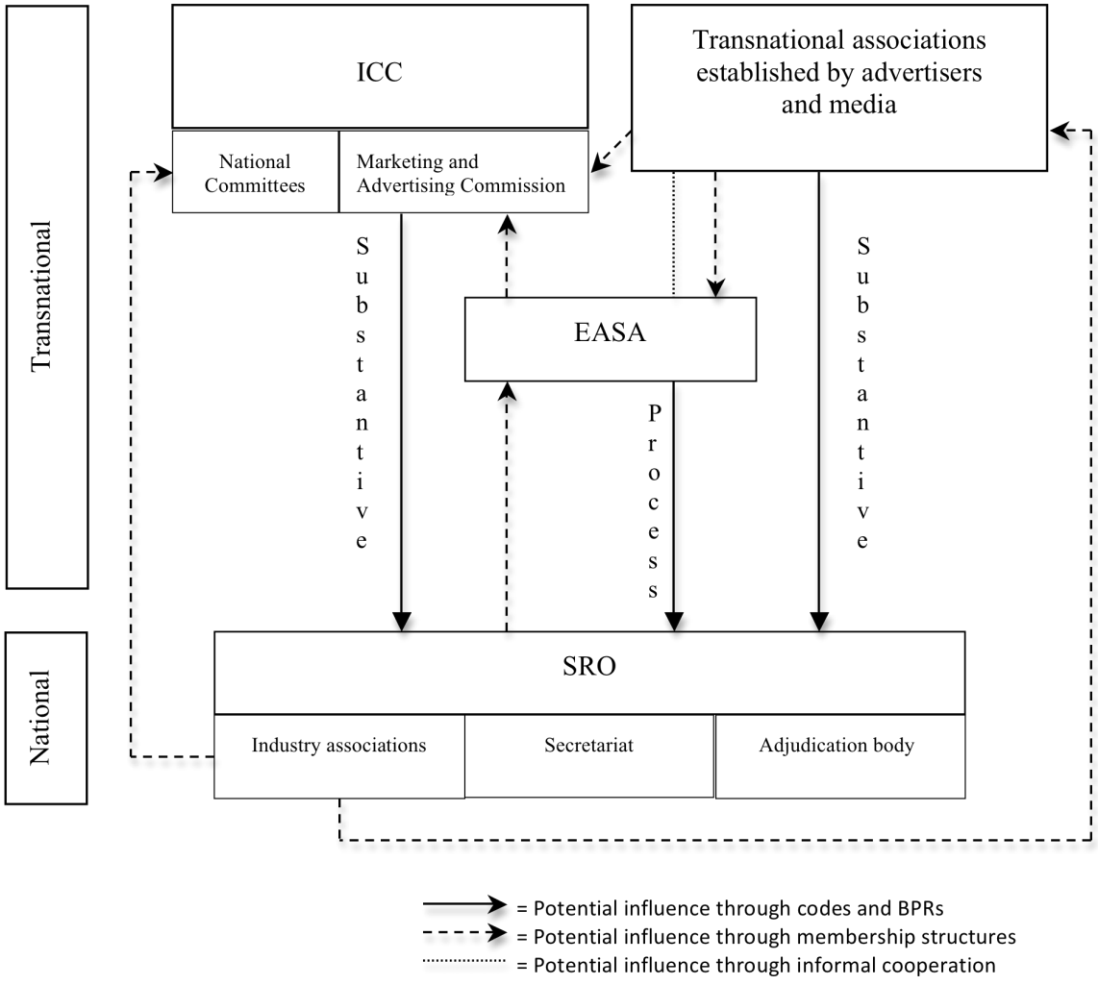

Figure III.1. Multilevel private governance in advertising
Source: own elaboration

At the transnational level, the ICC and various transnational trade associations adopt codes designed to be implemented through national or company codes. SROs typically oversee the

adoption, application and revision of these codes at the national level. EASA emerges as the center of attention in this transnational web of relationships, being able to exercises influence over standard-setting processes at the transnational level through membership structures or informal consultations, and over the functioning of SROs by adopting performance standards. Indeed, there is a strong informal network dimension to the governance of transnational private regulation in advertising given the formal and informal linkages between key players (ICC, WFA, and more recently IAB Europe) and the participation of the same individuals to drafting committees.

An important caveat to this illustration is the absence of internal company codes related to advertising. Multinational companies typically have in place internal codes that may ensure compliance with applicable national or transnational codes or legal frameworks. This practice was briefly addressed in relation to the ERFD Common Standards, which are adopted by six major European spirits companies, and the IFBA Global Policy, which required the participating food and non-alcoholic beverage companies to implement the general standards in company specific codes. Similarly, firms in the online advertising industry, such as search engines, trading platforms and social network communities, may adopt privacy policies to warrant the protection of applicable privacy and data protection rights for users. These policies can thus be seen as a company codes. Often, the privacy policy also concerns the issue of behavioral targeting in advertising, i.e. OBA. In Europe, companies so far only addressed this issue individually via their privacy policies. The IAB Europe Framework and the Draft BPR on OBA by EASA will change this fragmented stance and introduce, following the US model, a single private regulatory framework for OBA in Europe.

b. Relationship between public and private regulation

Moreover, the analysis of the various transnational codes suggests that these codes function as complements to publicly established norms regulating advertising, that is, statutory law and administrative regulation. The complementary relationship between public and private regulation in the field of advertising operates on two dimensions: (i) horizontal complementarity (i.e. between international public rules and policies and transnational private codes; and (ii) vertical complementarity (i.e. between transnational private codes and regional or national public rules and policies).

The first dimension of this particular interplay between public and private regulation occurs predominantly as regards the standard-setting process of private codes. As observed in relation to all codes discussed above, public regulation, and the threat of enacting legislation, putting in place more stringent laws and/or undertaking executive action, plays a significant role in motivating the industry to adopt new standards or improve existing ones. At the global level, for example, the WHO recommendations on dietary habits, physical activity and health and the activities spurred by these at the national and regional levels motivated the ICC to adopt the Framework on Responsible Food and Beverage Communications and the IFBA to set its Global Policy on Marketing and Advertising to Children.

The dynamic between public regulatory activities and the adoption of private codes can be witnessed even more strongly at the level of the EU. Directives, Conclusions and Recommendations addressing advertising practices have typically sought to endorse the use of private regulatory regimes to control advertising. The encouragements and obligations

that follow from these acts and executive measures to establish private regimes for advertising control at the level of the Member States have gained momentum for EASA to assume a key role in driving the creation and development of SROs in Europe. In particular, the discussions in the Round Table on Advertising Self-Regulation have enabled EASA to establish a rather strong relationship with the European Commission and gain important political credibility. Through this roundtable, EASA received the explicit endorsement of the Commission to drive further the integration of private regulatory regimes in Europe. Accordingly, the Commission has contributed to the critical position that EASA now has in the debate on private advertising regulation. The European Commission has also facilitated the creation of private regulation in more specific areas. Adopting the same roundtable approach, it has spurred private regulatory initiatives in the alcohol and food sectors by setting up the EU Alcohol and Health Forum and the EU Platform for Action on Diet, Physical Activity and Health. Also in this context, EASA has been a key player, delivering monitoring rapports to the roundtables about the achievements of industry trade associations.

The vertical dimension of complementarity (i.e. between transnational private codes and national public rules or transnational public rules and national private regimes) is equally evident. The Consolidated ICC Code expressly seeks to address the issue of complementarity with applicable legal frameworks for indeed the first provision of this code holds that: 'All marketing communications should be legal, decent, honest and truthful'. In addition, the code should be applied 'against the background of whatever legislation may be applicable', thus aiming to supplement existing legal frameworks. However, the ICC codes do not go beyond these very general statements and do not engage in more detailed discussions about the relationship between its provisions and, for example, the use of black and grey lists of prohibited and suspicious advertising practices, which is a common approach in the EU to address unfair commercial practices.

To ascertain more carefully what relationship the ICC codes and other transnational instruments of private regulation can have on regional and national advertising laws the practice of the latter needs to be analyzed. The example of Sweden shows, as discussed above, that the ICC codes can serve as an authoritative reference for the judiciary and administrative agencies to interpret the general clauses included in the law governing commercial practices. Consequently, the vertical complementarity between transnational code and national law may not so much occur in relation to standard-setting processes, but rather in relation to enforcement practices.

Furthermore, transnational public rules can facilitate the adoption and development of national systems of private regulation. In the EU, the UCP and AVMS Directive in particular promote the use of private regulatory regimes to complement existing advertising laws. In the UK, France, Spain and the Netherlands, for example, collaborative arrangements have been constructed between public regulators and SROs in order to coordinate standard-setting, monitoring and enforcement policies. These arrangements may range from informal information sharing to covenants and delegation acts.

c. Relationship between general and specific regimes

The preceding analysis also suggests a close relationship between the general and specific regimes developed in the industry. The Consolidated ICC Code operates as the general authoritative benchmark for other codes of advertising practice, regardless of the sectors

concerned or media used to convey advertising. All other regulatory initiatives complement this document and do not seek to undermine the body of rules it includes. The reason why sector-specific regimes are adopted inevitably relates to the concerns that are raised by the advertising used in this sector. The alcohol and food industry have, in addition to government pressures, experienced strong reputational concerns in on-going debates in society about the negative impact their products have on human behavior, physical health and the society at large. By adopting new rules, the industry seeks to mitigate the negative effects these concerns have on their reputation and brand value. Consequently, the main purpose of the sector-specific codes discussed above is to complement the general ICC rules and provide guidance to the sector on how to apply the multi-sectoral rules of the Consolidated ICC Code in the specific context of advertising of food, non-alcoholic beverages and alcoholic beverages.

EASA's BPRs on digital marketing communications also add to the operationalization of ICC norms in a specific domain, namely the domain of digital marketing. However, the standards that EASA has produced are not directed at the digital marketing industry and its advertising, but aim to give guidance to national SROs on how to handle complaints on digital advertising. To that end, it strategically builds on the Consolidated ICC Code, more specifically on the definition of advertising and marketing communication practices in order to ensure that its SRO members will extend the type of advertising complaints they handle and include complaints on advertising through digital media.

III.B. Evaluation

The operation of TPR in the advertising industry as discussed in PART II can be evaluated in terms of (1) legitimacy; (2) enforcement; (3) effectiveness and (4) quality. The analysis identifies strengths and weaknesses of these four dimensions in line with their terms of definition. It must be stressed from the outset that the criteria grouped within the four pillars constituting the evaluative framework are interrelated and can therefore affect each other's impact. For example, the way in which enforcement is organized may enhance the legitimacy and effectiveness of private regulation. Conversely, the effectiveness of TPR may suffer from the way in which legitimacy is ensured. In other words, the dimensions cannot always be reconciled with each other and at times tradeoffs need to be made. This all points to the issue that the criteria upon which the evaluative analysis is carried out should be spelled out clearly.

It is also important to note at this point that the multilevel character of private regulatory governance in the field of advertising requires specific attention throughout the evaluation below. This particular character suggests that regulatory processes (i.e. standard-setting, monitoring and enforcement) are dispersed over transnational and national governance levels, yet are interrelated. To accommodate this dynamic in the analysis, where appropriate an analytical distinction is made between the transnational and national regulatory activities and their relative concerns in terms of legitimacy, enforcement, quality and effectiveness.

1. Legitimacy

a. Evaluative framework

In regulatory theory, legitimacy is often perceived to constitute the acceptance that a person or organization has a right to govern by those it seeks to govern and those on whose behalf it purports to govern.[11] Regulators may claim legitimacy and may even engage in various strategies to enhance their legitimacy. As Black has stressed, such strategies are particularly relevant for transnational private regulators.[12] Like all regulators, they promote a particular behavioral response of those it seeks to regulate. A difficulty faced by transnational private regulators is, however, that they do not have the same legitimation of powers the state has in order to motivate the response they seek to attain. The transnational organizations adopting advertising standards as discussed in Part II do not pursue this regulatory activity on the basis of a legal mandate provided by national, supranational, or international law. Similarly, traditional accountability mechanisms such as courts, parliamentary committees, national auditors or ombudsman schemes do not apply to test and validate the legitimacy claims made by transnational private regulators. Perhaps more validation can be obtained through recognition of the private regulatory regimes in legislation or executive action or via the delegation of public regulatory mandates to them. The extent to which the private bodies succeed in motivating the normative behavioral response their rules suggest thus largely depends on the extent to which their activities are accepted and supported by those affected by these activities (i.e. the regulated) or those parties that are supposed to benefit from compliance with the regulation and are harmed by the breach thereof (i.e. the

[11] D. Beetham, *The Legitimation of Power*, (Macmillan, London 1991) and R. Baldwin and M. Cave, *Understanding Regulation: Theory, Strategy, and Practice*, (Oxford University Press, Oxford 1999) Ch 6.

[12] J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2), Regulation & Governance, 137-164.

beneficiaries). What then does a private regulatory regime have to do to be legitimate? In relation to what and to whom must it be legitimate?

An analysis of the academic literature on legitimacy debates in TPR suggests that the normative assessment of whether and to what extent a private regulatory regime should be regarded as legitimate can be carried out on the basis of the following criteria:[13]

i. *Inclusion* describes the degree to which the decision-making processes of the regulator allow those parties that are affected by regulatory norms to participate or be represented in those processes. In the case of advertising these parties can be (i) the regulated (the industry constituents: advertisers, agencies and media), which may or may not be member of the association adopting the rules, or (ii) the intended beneficiaries of the regulation (e.g. consumers, women, children or NGOs). Relevant questions in this respect are: who participates and for what purpose, who selects the participants, who has voting rights, and who has veto rights?

ii. *Procedural transparency* concerns the extent to which decision-making within the regulating body complies with standards of openness, accessibility, equality, consistency, proportionality, motivational duties, and fair procedures.

iii. *Accountability of regulators* refers to the mechanisms of oversight and control that render the exercise of the regulatory powers acceptable to those regulated and to those who will be affected either positively or negatively by the conduct of the regulated parties, i.e. third parties. Here a separation can be made between those whose are sought to be regulated but not legally subject to the regulatory norms and those who are supposed to benefit from compliance with the regulation and are harmed by the breach thereof. Accountability can be provided through various mechanisms, including public bodies such as courts, legislatures, executives or international organizations.

iv. *Recognition and support by government authorities* emphasizes the extent to which the legislature and/or the executive perceive private regulation as an appropriate means to regulate advertising. Government recognition may enhance the legitimacy of private regulation as it may offer a regulatory mandate to the private regime or, more generally, legalize private codes or procedures.

[13] The analytical framework suggested here builds on Black 2008, *op. cit.*; S. Bernstein and B. Cashore, 'Can Non-state Global Governance be Legitimate? An Analytical Framework' (2007) 1(4), Regulation and Governance, 347-371; F. Cafaggi, 'New Foundations in Transnational Private Regulation' (2011) 38(1) Journal of Legal Studies, 20-49; D. Casey and C. Scott, 'Crystallization of Regulatory Norms' (2011) 38(1) Journal of Legal Studies, 76-95; D. Curtin and L. Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?' (2011) 38(1) Journal of Legal Studies, 163-188; and R. Baldwin, M. Cave and M. Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press, Oxford 2011), Ch 3. Often a functional or performance dimension is added to the concept of legitmacy (see for example: F. Scharf, *Governing in Europe: Effective and Democratic?*, (Oxford University Press, Oxford 1999), at 7–13). In the framework set out here, this dimension is left out of legitimacy and explicitly considered in relation to the pillar of 'effectiveness' in Section III.D.1 below.

b. Findings

i. Inclusion

Transnational level

To what extent do the institutions that set transnational codes of advertising practice allow the parties that are affected by these codes – both the regulated and the beneficiaries – to participate or be represented in the adoption process of these codes? The interests of the regulated industry actors (advertisers, agencies and media) and strongly represented in these bodies adopting the transnational codes under review here. These institutions are all well-established European and international trade associations. In the absence of any rival trade associations at the transnational level, organizations such as the ICC, EASA, WFA and the Brewers of Europe can be said to represent the majority of the industry segments they aim to regulate.[14] Their internal governance structures enable potentially every (corporate) member to have a say in the code adoption procedure. In the case of the EFRD and IFBA, however, membership structures are organized differently. Here, a number of leading firms in the alcohol and food industries, which account for the bulk of the advertising expenditure in these particular markets, have collectively set standards for their own marketing behavior.[15] They govern the consortium and thus all the firms are directly involved in the adoption of the private norms that will guide their advertising behavior.

Concerns of inclusion and participation do arise where the transnational bodies under review adopt norms that affect third parties. In line with the constitutional right of freedom of association, the prerogative of these bodies is that they can adopt rules that govern their members' behavior. Due to the private law nature of these codes, the rules can only bind the members of the associations and those that voluntarily submit themselves to them. In the case of advertising, however, there are two groups of third parties of whom the interests can nonetheless be affected by private codes of conduct, namely market players that are not affiliated with the body adopting codes and have not committed to those codes, and groups of individuals that supposedly benefit from the application of the codes (i.e. beneficiaries). For example, the codes of advertising practice developed by the ICC can have a considerable impact on businesses that are not part of ICC's membership. In fact, the ICC codes simply hold that their rules apply to all market players that engage in advertising activities, regardless of whether they are ICC members or not. Importantly, the codes also stipulate that SROs are to apply these norms at the local level, which they will do so without distinguishing between associated and non-associated business. As a result, non-ICC members may be confronted, against their will, with the application of the code.[16]

[14] The Brewers of Europe, for example, represents the majority of beer brewers in Europe (some 4000 in total), including those four major multinational companies that produce around 60-65% of the beer in Europe. The WFA, which is a key EASA member and involved in the adoption of ICC codes, is comprised of over 50 national advertisers' associations and 60 corporate members that are among the world's biggest marketers. As such, the WFA claims to represent about 90% of the global advertising expenditure. World Federation of Advertisers, 'About', http://www.wfanet.org/about_new.cfm, accessed 31 December 2011.

[15] Where market leader collectively set behavioral standards concerns of antitrust arise. So far, deontological codes set by associations have not been found to infringe European competition law rules. See for a discussion: F. Cafaggi, 'Self-regulation in European contract law' in H. Collins (ed.) *Standard contract terms in Europe: a basis for and a challenge to European contract law* (Kluwer Law International, Alphen aan den Rijn, 2008) 93-139.

[16] See for a more detailed discussion Section III.B.2 below on enforcement.

Another way in which the transnational codes of the ICC, EFRD, Brewers of Europe and IFBA have implications for third parties is by claiming that these codes are designed to benefit consumers: consumers are expected to gain additional protection from the norms, and thus to benefit from the application of the codes. This benefit may exist in the clearing from the market of deceptive advertisements, commercials promoting the irresponsible use of alcoholic beverages or advertising to children of fatty and sugar-rich foods and non-alcoholic beverages.

The fact that the regulatory effects of the transnational codes under review here go beyond the members of the associations or bodies adopting and administrating private regulation, raises the question of how these bodies ensure that the interests of these different private actors are represented in the governance of these codes. In the case of the ICC, where these spillover effects of private codes seem most evident, participation of non-members in the adoption of code is particularly restricted. In fact, the ICC has been described as an elite club of businessmen.[17] Its governance structure allows principally only business members to participate in the elaboration of its policies and codes. This is also true for the domain of advertising. The ICC codes currently in force have been drafted by the 'Task Force on Code Revision', a specific working group designated by the ICC Commission responsible for the adoption and revision of ICC codes on marketing communications, the ICC Commission on Marketing and Advertising. This task force is composed of major businesses and industry bodies concerned with self-regulation representing the views of advertisers (WFA) and SROs (EASA), but may be extended to include business experts from specific industries or sectors. The ICC appoints the members of the task force, which all are associates of the ICC. When a draft is ready, the national ICC Committees and other ICC Commissions are consulted. A final draft is submitted for approval to the ICC Executive Board.

Accordingly, the input received for the standard-setting process is restricted to industry perspectives and the consultation and approval of draft codes is limited to ICC membership. It has only very recently been that the ICC has been willing to consider the consultation of third-party stakeholders. The 2010 Paper on Code Drafting suggests that the ICC only considers the consultation of such stakeholders appropriate where they bring in new perspectives and information and can identify problems in the practicability of the code. However, the ICC is in full control of who can provide input, when and as regards what they can provide input, and what is done with the input. Third-party stakeholders do not get voting rights on the adoption of the norms that are in the end adopted. The suggestions in the ICC Paper on Code Drafting have not been used so far and are expected to be when the Consolidate Code is revised mid 2011. Nonetheless, the 2010 ICC Paper on Code Drafting marks a considerable change to the standard-setting process of ICC codes as this is the first time that the ICC suggests that third party can participate in the drafting process. So far consumer groups, NGOs or government representatives had not been able to express any views in the code adoption and revision processes. Therefore, all existing and previous ICC codes, guidelines or frameworks had been solely the product of business input.

Also in the case of the EFRD, Brewers of Europe, IFBA and EASA the industry perspective is dominant. However, consultative practices for interested third parties have been used in

[17] D. Kelly, 'The International Chamber of Commerce' (2005) 10(2), New Political Economy, 259-271.

recent years. Accordingly, non-affiliated industry members, consumer groups and NGOs were able to comment on code drafts in relation to the EFRD Common Standards, the Brewers' Guidelines and EASA's BPR on Digital Marketing Communications and Draft BPR on OBA. In all cases, however, the parties consulted do not have any voting rights and were only allowed to present their views on the matter. Moreover, the consultative phase may come at a point where the strategic decisions about what to incorporate in the code have already been made, as was shown in relation to the EASA BPR on OBA. This raises the question what the practical effect of third party consultations may be and whether such consultations in a final stage are not just window-dressing exercises.

The case of the IFBA Global Policy stands out by not providing any consultative process at all: here only the members of the initiative have been able to provide input for the standards that have been adopted.

National level

However, where transnational codes require the implementation of their provisions in a national or company-specific context, the various concerns of inclusion and participation existing at the transnational level might be mitigated by the provision of a *new process of standard-setting* at the national level. As explained above, the majority of the national industries have used the transnational codes of the ICC and other bodies as a mere guideline to adopt their own standards. By involving national industry representatives in this process, national concerns that have failed to be addressed adequately in the transnational standard-setting process or concerns of businesses that were not associated with the transnational organizations can be incorporated. In addition, national adoption processes administered by SROs can remedy failures to include potential beneficiaries of the regulatory activities, such as consumers and NGOs.

It should be mentioned that there is a trend at the national level to provide for third-party stakeholder consultations. Two decades ago there was considerable resistance within the industry to allow for non-industry participation in the adoption of codes.[18] Only exceptionally, non-industry stakeholders were included.[19] However, the European SROs, as spurred by EASA's BPRs and the Madelin report, have increasingly been facilitating non-industry stakeholder consultations. According to EASA, 15 out of its 25 SRO members provided for a process of non-industry consultation during code drafting or revision in 2010.[20] The hallmark of this was the process of revision led by the British Committee of Advertising Practice (CAP). The codes applying to non-broadcast and broadcast advertising were revised in 2009 and entered into force in September 2010. The revision process included a 12-week public consultation and subsequent internal review. In the process, advertisers, agencies, media, government, NGOs and members of the public were included.[21]

[18] Boddewyn 1988, *op. cit.*, 346 and 350.

[19] This was for example the case in the Netherlands, were consumer organizations have been included in the SRO board since the 1970s.

[20] European Advertising Standards Alliance 2010, *op. cit.*, 237.

[21] See for a description: http://www.cap.org.uk/CAP-and-BCAP-Consultations.aspx, accessed 31 December 2010.

The developments at the national level seem to have spurred the ICC also to make a move in terms of third-party stakeholder consultations. The participation of EASA in the drafting process and the role EASA Director General plays as the co-chair of the Taskforce on Code Revision have been instrumental here. EASA has promoted consultations of third party stakeholders in code adoption procedures as one of the best practices for private regulation in advertising over the past decade. Where the ICC as most authoritative standard-setter for codes of advertising practice in the world subscribes to follow such good practice, this may also induce SROs adopting its standards to engage in the same practice.

However, there is a second important dimension to the participation of non-industry stakeholders in national systems of private regulation. In addition to the trend of including consumers, NGOs and even government authorities in the adoption and revision of standards, such *third party stakeholders have also been actively engaged in enforcement processes*. It was established above that non-industry stakeholders can assume three distinct roles in the enforcement of advertising codes, namely by acting as complainants that submit complaints about advertising to the SRO, as litigator to the dispute dealt with before the SRO jury, and as adjudicator deciding as member of the SRO jury whether practices are compliant with the applicable codes.[22]

As regards the first role, it can be held that the submission of complaints by consumers, consumer groups and NGOs serve three general aims. First, the submission of complaints by these third parties presents a cost-efficient alternative to monitoring policies. Complaint handling mechanisms allow consumers to complain easy, fast, and at low costs, if any at all. Where SROs enjoy familiarity and reputation among these third parties, and these parties are willing to submit their complaints to the SROs, it assures itself of a constant feed of complaints from which is can distil the most pertinent cases which require adjudication before its jury. Second, complaint-handling mechanisms can be used as a proxy by the industry to test applicable codes to current social opinion. Trends in complaints feed standard-setting procedures and may lead to the enactment of new codes.[23] Third, complaint-handling mechanisms also serve as a safety valve, allowing consumers to 'blow off steam'.[24] Advertising may at times be shocking and repulsive to some. Complaint mechanisms then help to ease the temper and show that industry is concerned about social values.

Unfair competition rationales may motivate the competitor to submit a complaint to the SRO. Where ads are deceptive or indecent, or it misleadingly compares the wares marketed with products of the competitor, this can harm the reputation of the competitor and may give the advertiser an unjust competitive advantage. Government authorities, on the other

[22] See Part II, Section A.7.a.ii above.

[23] This was for example the case in Belgium, where a trend in complaints about emission claims in car advertising motivated the adoption of a new sector-specific code dealing with sustainability claims in car advertisements: Jury d'Ethique Publicitaire, 'Code en matière de publicité pour les véhicules automobiles ainsi que leurs composants et accessoires (code FEBIAC) (Brussels, 2008) http://www.jep.be/media/pdf/code_ sectoriel/pubcode_fr__2008.pdf, accessed 31 December 2010 Source: Interview JEP, 24 November 2009, Brussels.

[24] I. Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, 2nd ed., (Hart Publishing, Oxford and Portland 2007), 445 paraphrasing A.O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*, (Harvard University Press, Cambridge, Massachusetts 1970), 124.

hand, may want to submit complaints to SROs because of lack of resources. In various countries enforcements budgets constraint public agencies to pursue enforcement action as advertising practices. Often they are required to focus their attention to substantial law infringements. The SRO procedures may serve as welcome 'first option' to settle the infringement. If the process is successful in that, it can save costs for the public purse. Where SRO action fails, or it is not satisfactory, the agencies can still take action itself. Accordingly, the submission of a complaint to the SRO by the agency might be used as a springboard to take up administrative enforcement action itself or initiate court proceedings.[25]

As regards the third role, namely that non-industry members can also be involved in private regulatory regimes by acting as adjudicator in enforcement processes, it can be noted that in Europe, this practice is commonplace: 21 of the 25 EASA SRO members include non-industry The participation of non-industry members as adjudicators may help to inform decision-making and secure that industry and non-industry concerns are balanced properly. It also signals credibility and independence from industry to outsiders, in particular where an outsider chairs the jury. The signal of industry independence becomes even stronger where no industry representatives sit in the SRO jury, which is for example the case in France.

Importantly, the participation of non-industry stakeholders as adjudicators might challenge the strong industry ownership of the rules. Where the jury is composed of a majority of non-industry persons, the final application and interpretation of the rules is not anymore in the hands of industry. Indeed, where the SRO jury enjoys a large degree of independence its rule-shaping activities may suggest a different scope or interpretation of the rules as originally meant by the standard-setter. In some countries, for example France, this has lead to concerns amongst the SRO members that the jury would 'walk away' with the rules.[26]

The participation of non-industry stakeholders in adjudication is thus an important element in preventing regulatory capture of the SRO jury. In regulation theory, the term 'capture' suggests that a public regulator created to warrant public interests (e.g. environmental protection, food safety, or consumer protection) in a particular industry or sector does not fully ensure these interests, but instead pursues the interests of the industry that it was charged to oversee. Private regulation implicitly suggests already a large degree of capture where the regulator coincides with the regulated. However, the inclusion of non-industry members is an important strategy to mitigate the risk of capture. Since capture may prevent any real enforcement action from happening, such inclusion is also crucial to the effectiveness of the enforcement activities overseen by the SROs.

ii. Procedural transparency

Transnational level

The decision-making processes within the organizations adopting transnational codes of advertising practices do not always follow patterns that are transparent. For example, it was largely unclear to outsiders how the most authoritative standard-setter in the industry, the ICC, operated when adopting or revising rules. It was only at the occasion of the 2006 revision of the ICC codes that a specific task force was established to coordinate the work

[25] Interview Dutch Consumer Authority (*Consumentenauthoriteit)*, 22 October 2010, The Hague.
[26] Interview ARPP, 29 November 2010, Florence.

and collect sufficient expertise to get the job done. The recent ICC Paper on Code Drafting aims to further structure and clarify, also to the outside world, how the code provisions are set and revised.

In addition, it should be mentioned that the drafting process of transnational codes has traditionally remained closed and secretive. In the case of the ICC, Brewers of Europe, or the IFBA, drafts of advertising codes are not made available to the public. Where consultative processes were facilitated, the results of these consultations were usually not shared. A positive exception here is the EFRD, which hosted a public consultation in 2008 on the revision of its 'Internet Guidelines' Chapter of the Common Standards. The outcomes of the consultation were published online.[27]

EASA, on the other hand, hosted an 'informal consultation meeting' in 2008 with non-industry stakeholders for the adoption of the BPR on Digital Marketing Communications. Both the draft and the discussions during this meeting were not disclosed to the public. In 2010, EASA did make public a draft of its BPR on OBA and solicited for comments and suggestion in the period December 2010 – February 2011. It is unclear whether the outcomes of the consultations will be publicized. It should be noted, however, that these recent practices of EASA suggest increasing levels of transparency as regards EASA's role as a standard-setter for SROs. The EASA BPRs that were adopted following the Charter and Best Practice Self-regulation Model in 2004,[28] have until now not been made available to the public. Only an abstract of their contents can be found on the EASA website.

National

Where national industries and SROs do not simply copy the transnational codes into their own, they might have in place very open and transparent standard-setting procedures. As a leading example, the British revision of the applicable codes of advertising practice, as discussed in the previous subsection, can be recalled. Here the national industry led a revision process included a 12-week public consultation and internal review, invoking ample responses from various parties concerned.

However, levels of procedural transparency at the national level are also influenced by the enforcement procedures carried out under supervision of SROs. On the one hand, outcomes of copy advice and pre-clearance services remain undisclosed. SRO jury decisions, on the other hand, are generally made available to the public through the SRO website or monthly magazine. While in some cases the full decision can be accessed without costs, in others only abstracts are provided and access to the full decision is subject to paid-for subscription. No statistics are generally provided as to the types of remedies and sanctions administered by the jury.

[27] See European Forum for Responsible Drinking, 'Stakeholder Consultation On the Guidelines for Internet Marketing. Report about Comments and Input Received through a Consultation of EFRD External Stakeholders' (Brussels, 2008) http://www.efrd.org/efrdinaction/b01d/Final%20Report%20on%20Stakeholder%20Consultation%20on%20new%20media%20guidelines-December%202008.pdf, accessed 31 December 2010.

[28] There are BPRs on advertising monitoring, code drafting and consultation, complaints handling, copy advice, jury composition, publications of decisions, SRO communications, SRO funding, SRO standards of service and on substantiation of claims. In 2008, a BPR on Digital Media Communications was added. In 2011, a BPR on OBA in online advertising will be adopted.

Unlike court procedures, adjudication procedures before SROs are typically not accessible to the public. This is a logical consequence of the fact that most SROs provide only for a written procedure. In that case, no information is provided to third parties but for the final outcome of the dispute. If SROs provide for oral hearings, these usually take place behind closed doors.[29] Also the decision-making process is secretive in that no documentation is provided on the deliberation of the jury members. Moreover, the juries do not generally follow a practice of dissenting opinions as used by courts in some jurisdictions.[30]

iii. Accountability

Accountability has been considered as a key determinant to the legitimacy of public and private, transnational and national regulatory bodies.[31] Accountability can be understood as 'an institutional relation or arrangement in which an actor can be held to account by a forum'.[32] Private regulatory regimes, in particular those operate at a transnational level, have been said to pose obstacles in terms of accountability. One factor in this debate is the issue of transparency.[33] Accountability is closely linked to the dimension of transparency: openness and availability of information and data empowers the actors subject to the initiatives of a regulatory body to hold it to account, whilst the disclosure of decision-making processes also allows a regulatory body to be accountable to the public.

A further complicating factor in warranting the accountability is the issue of 'many hands'.[34] This points to the dispersal of functions and powers within a regulatory regime, making it difficult to trace back who is responsible for what.[35] This problem is amplified in the context of TPR of the advertising industry where the functions of standard-setting and enforcement are dispersed amongst various actors operating on various levels of governance. Indeed, it is difficult to hold to account the standard-setter for the ways in which others enforce their rules, just like it is difficult to hold to account the enforcer for rules it did not write.[36]

The key questions that arise in the debate on accountability and TPR of the advertising industry are: (i) what actor should be held to account (i.e. the accountor); (ii) to whom (i.e. the forum or accountee); (ii) for what activity (i.e. action); and (iii) by which means (i.e. the mechanism)?[37] These strongly interrelated questions can be addressed by distinguishing between public and private mechanisms to hold private regulators accountable. These can exist either at the transnational or national level.

[29] An exception is the Dutch SRO which provides for procedures that are generally open to the public.

[30] The jury of the predecessor of the Swedish Ro, the MarknadsEtiska Rådet (Council of Marketing Ethics), used to give dissenting opinions. This practice was abandoned when the Council was reformed to the Ro in 2009.

[31] Black 2008, *op. cit*.. See for a discussion of the concept of accountability applied in relation to TPR: Curtin and Senden 2011, *op. cit.*.

[32] Curtin and Senden 2011, *op. cit.*, 166.

[33] See e.g. T.N. Hale, 'Transparency, Accountability and Global Governance' (2008) 14(1) *Global Governance*, 73-94.

[34] Black 2008, *op. cit*., 143 and Curtin and Senden 2011, *op. cit.*, 182.

[35] D.F. Thompson, 'Moral Responsibility of Public Officials: The Problem of Many Hands' (1980) 74(December), American Political Science Review, 905-915; M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4), European Law Journal, 447-468, 457; Y. Papadopoulos, 'Problems of Democratic Accountability in Network and Multi-level Governance' (2007) 13(4), European Law Journal, 469-486.

[36] Cf. Black 2008, *op. cit*.. 143.

[37] Cf. Curtin and Senden 2011, *op. cit.*, 181.

Transnational level

At the transnational level accountability for rulemaking activities by the standard-setting trade associations may first be provided in the private domain through voting mechanisms and internal reporting obligations as required by rules of association. Within the ICC, for example, internal rules ensure that company members and the national committees have the final say in the adoption of the transnational codes and can hold the members of the Marketing and Advertising Commission and its Task Force accountable for their work in drafting the codes.

However, these accountability mechanisms, which exist in all of the transnational bodies under review here, are only available to the membership of these bodies and not to third parties, either the regulated or beneficiaries. While annual reports are usually made public, this may not offer sufficient information about the activities carried out by the standard-setting body. Low levels of transparency thus make it difficult for third parties to hold the bodies accountable for their rulemaking activities. However, in order to show greater levels of accountability, also to third parties, several transnational standard-setters have engaged in monitoring exercises detailing the results and levels of compliance with their codes and commitments. EASA reports on the achievements of its SRO members in complying with the Charter commitments. The IFBA, the ERFD (CEPS) and the Brewers of Europe, on the other hand, have contracted with major auditing firms to verify the level of compliance by member companies and member associations with their codes and commitments.

In the public domain, several mechanisms can be identified via which the industry can be held to account. An important way through which the European private trade associations have sought to enhance accountability for their rulemaking activities vis-à-vis third parties is by participating in the European Commission-led roundtable discussion forums on private regulation in advertising. The 2005 Platform for Action on Diet, Physical Activity and Health, the 2005 Roundtable on Self-Regulation and the 2006 Alcohol and Health Forum all included the participation of Commission staff, consumer organizations, NGOs and experts. In these forums, panels with diverse constituents have addressed the strengths and weaknesses of the private codes, allowing for information sharing, increased transparency, discussion and the creation of new public commitments by the industry to improve the status quo. Also in the case of OBA, the Commission has recently applied the tested format of roundtable discussions. In December 2010, DG INFSO organized a Roundtable on OBA in online advertising to make the industry accountable for the choices it makes in regulating OBA in online advertising and addressing the concerns of public interest groups and indeed the Commission itself.

National level

At the national level the ability of third parties to submit complaints to SRO juries contributes to higher levels of accountability amongst advertising practitioners for their advertising conduct. The industry engages consumers, competitors, NGOs and at times government authorities in the regulatory process by inviting them to submit complaints about advertising behavior to SROs. The fact that independent juries oversee these complaints handling procedures is crucial. Where the independence of the jury is warranted, this provides an easily accessible and credible forum to hold the practitioners accountable for their advertising practices. Such complaint handling procedures may also be seen as an

intermediary accountability mechanism for the standard-setter of the codes. During these procedures it will be determined whether the rules in place are sufficiently clear, precise and coherent to administer in practice. Where rules are badly drafted, juries must adjust and reinterpret the rules, thus evaluating the practical use of the codes and the competency of the rule maker.

Exceptionally, courts and public agencies might hold SROs accountable for their standard-setting and enforcement activities. In a limited set of common law jurisdictions, judicial review has been available as a mechanism of accountability as regards the way in which the SROs apply their procedures and sanctions.[38] Judicial review offers third parties affected by the operation of SROs the possibility to test the legality of their activities before a constitutional and independent organ and as such adds to the legitimacy of the SRO operations.

However, judicial review is only seldom available. In most countries, in particular civil law jurisdictions, judicial review is limited to decisions taken by regulators endowed with statutory powers. SROs usually do not have such powers. In these jurisdictions civil tort claims, or *species* thereof (including libel), have been used as a legal vehicle to challenge the allegedly wrongful SRO decision.[39] Typically, claims are brought against SROs in relation to the enforcement practices and not as regards the adoption of standards. Nevertheless, the tort claim may in theory constitute an indirect or at times even direct control over the standard-setting process as it challenges the private regulatory regime to alter its practices and standards.[40]

An SRO might also be held to account for their standard-setting and enforcement activities by public agencies or administrative authorities. This is typically the case when an SRO has been delegated regulatory powers by the public agency. It must be stressed that this is very exceptional. An example of this can be seen in the UK, where in 2004 the regulator of media and telecommunications, the Office of Communications (OFCOM), formally contracted out its statutory powers to adopt and enforce codes of conduct for television and radio advertising under the Control of Misleading Advertising Regulations 1988 and the Communications Act 2003 to the British SRO.[41] The delegating contract requires that OFCOM is consulted when the SRO drafts codes of conduct. In fact, any code needs written approval by OFCOM.[42] In addition, the SRO has an annual reporting duty.[43] These conditions provide

[38] In the UK (R v Advertising Standards Authority Ltd ex parte The Insurance Service Plc (1989) ALR 77) and New Zealand (Electoral Commission v Cameron [1997] 2 NZLR 421), decisions of the local SRO have been held susceptible to judicial review on the basis of the 'public law function' that these private bodies exercise. See for a discussion: P.P. Craig, *Administrative Law*, 6th ed., (Sweet & Maxwell, London 2008), 880-894 and A.S. Butler, 'Is this a Public Case?' (2000) 31(4), Victoria University of Wellington Law Review, 747-780.

[39] See for an analysis: P. Verbruggen, 'Advertising' in F. Cafaggi (ed), *Enforcement of Transnational Private Regulation: A Case Book* (forthcoming Edward Elgar).

[40] See for an appraisal: F. Cafaggi, 'Judicial Enforcement of Transnational Private Regulation', in F. Cafaggi (ed), *Enforcing Transnational Private Regulation* (forthcoming Edward Elgar).

[41] Authorisation of the Contracting Out (Functions relating to Broadcasting Advertising) and Specification of Relevant Functions Order, SI 1975/2004 (hereinafter: the Authorisation of the Contracting Out 2004). Section 4.a will discuss this formal delegation of regulatory and enforcement powers in greater depth.

[42] Article 4(b) Authorisation of the Contracting Out 2004.

[43] Article 5 Authorisation of the Contracting Out 2004.

OFCOM with a very strong mechanism to hold the SRO to account for its rulemaking activities.

iv. Recognition and support by government authorities

The legislature and/or executive can recognize private regulation as an appropriate means to regulate the advertising industry. Such governmental recognition strengthens the legitimacy of private regimes and it may offer a regulatory mandate to the private regime and, more generally, approves of its codes or procedures. This has important implications both in legal and practical terms. There are two principal institutional forms through which government has given support to private regimes regulating advertising, namely (a) delegation of regulatory powers to a regime and (b) *ex post* recognition of advertising codes or regimes.

(a) Delegation

The first institutional form of governmental support of private regimes is delegation. In the case of delegation a public authority formally transfers (a part of) its legal powers to the private regime on the basis of which the private regime can unilaterally affect the rights and obligations of individuals.[44] The regime then applies the statutory powers it is endowed with as if it were the public authority. In other words, the private delegatee effectively steps into the shoes of the public authority. Therefore, the decisions of the private regime assume the same force of law as if taken by the public regulator itself. A further consequence of such formal delegation is that the private regime does not need to have consent of those it seeks to regulate. The rules and decisions adopted by the delegatee not only bind the individuals that have voluntarily submitted themselves to the private regime, but become legally binding upon all those concerned. This *erga omnes* effect could not be achieved without a delegated public law mandate as core principles of private law (i.e. private autonomy, privity and freedom of contract) and the rule of law principle would object to it. It also implies that, since the private regime can exercise public legal powers, its decisions will also be subject to judicial review. Through these procedures compliance with principles of administrative law (e.g. *ultra vires*, openness, due process, consistency, accessibility and accountability), and human rights obligations (e.g. principle of non-discrimination, freedom of expression, and fair trial) can be assessed.

Such formal delegation has not been witnessed at the transnational level, for example between the WHO and ICC and the European Commission and EASA. Also at the national level, delegation is very exceptional and the main example here is provided by OFCOM in the UK, which has delegated its statutory powers to adopt and enforce codes of conduct for television and radio advertising under the Control of Misleading Advertising Regulations 1988 and the Communications Act 2003 to the British SRO. This delegation enabled the SRO to unilaterally regulate broadcast advertising within the scope of its delegated competences. The codes it adopts and the decisions its takes on compliance have therefore become legally binding upon the entire broadcast advertising sector, regardless of whether market actors have subscribed to the codes or regime itself. This has clearly enhanced the capacity of the regime to secure compliance with the rules it oversees, not only in terms of legal powers,

[44] See in general: C.M. Donnelly, *Delegation of Governmental Power to Private Parties. A Comparative Perspective* (Oxford, Oxford University Press 2007) and G. Metzger, 'Private Delegations, Due Process, and the Duty to Supervise,' in J. Freeman and M. Minow (eds), *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, Cambridge, MA 2009), 291–309.

but also in terms of status and practical importance the private regime has assumed in the industry. Compliance with the codes set by the private regime and the decisions taken by it is no longer voluntary, but can be attained by reference to the applicable public legal framework. In other words, if the regulated does not follow the delegatee's decisions, administrative law determines what legal sanctions may be imposed. In the case of the British regime, OFCOM is likely to fine or suspend or revoke the broadcast license of media owners in case of persistent failure to comply under the private regime.

(b) *Ex post* recognition

The second and somewhat more common institutional form via which government has given support to private regulatory regimes concerns the *ex post* recognition of the private regime, its standards or its enforcement activities. Such recognition may differ significantly in terms of form and scope. As regards the form of *ex post* recognition, the endorsement may occur through legislative acts and formal decisions of public authorities, but also via informal, soft law measures, such as policy guidelines, covenants and protocols. In terms of scope, the recognition may concern the private regime itself or can be limited to specific standards or enforcement decisions adopted under that regime.

These variations in form and scope have different implications for the enforcement capacity of the private regime, both in legal and practical terms. If a private regime as such is formally recognized through legislative acts, its regulatory functions are attributed a 'public function'. As a result, the standards and enforcement decisions of the private regime become binding also upon third parties. This form of *ex post* recognition is thus very akin to the delegation of public standard-setting and enforcement powers to the private regime.[45] An example is provided by the Dutch private regime of advertising control. In the Netherlands, the Media Act of 2008 stipulates that all broadcasters are to subscribe to and comply with the Dutch Advertising Code or any other code developed by the national SRO. This obligation effectively empowers the SRO to regulate the broadcasters as regards their advertising activities. Compliance with the code and the decision of the SRO applying that code thus become a statutory obligation, which can be enforced by the Dutch media authority that oversees the application of the Media Act.

If however, only a specific standard or enforcement decision is approved, the public function the regime is endowed with is much smaller and the effects the regime generates for third parties is limited to that specific standard or decision. The *ex post* recognition of a regime, its codes or decisions by informal means has even more limited and diffuse legal effects, though may still have important practical implications for private regulation and its influence on third parties. In Germany, for example, the enforcement guidelines adopted by the state media authorities require each individual authority to apply the code of conduct adopted by the national SRO as regards the advertising of alcoholic beverages.[46] The recognition through

[45] See below.

[46] Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, die Produktplatzierung, das Sponsoring und das Teleshopping im Fernsehen' (Joint guidelines of the State Media Authorities on Advertising, Product Placement, Sponsoring and Telemarketing on Television – Joint Guidelines Television) (2010), http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Richtlinien/10-05-12_RS_Werberichtlinien_ FERNSEHEN-23_2_10-Fliesstext_final.pdf, accessed 31 December 2010; and Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring sowie Teleshopping im Hörfunk (Joint guidelines of the State

such soft law means does not imply that the codes adopted by the regime will be formally binding on third parties, but will *de facto* provide strong incentives for compliance amongst all broadcasters. This clearly assists the private regime in Germany SRO dealing with complaints about taste and decency in advertising to achieve compliance with the alcohol code.

The recognition of private regulation through hard and soft law means can also be witnessed in the context of European advertising regulation. A number of secondary EU law (Directives) specifically promote and encourage the use of codes of conduct to regulate advertising, including the Unfair Commercial Practices Directive, the Misleading and Comparative Advertising Directive and the Audiovisual Media Services Directive.[47]

In addition, the European Commission has given crucial informal support to EASA's activities to enhance the performance of national regimes of private regulation and to strengthen the European dimension of private regulation. DG SANCO and DG INFSO have been particularly active in this sense. In 2005, DG SANCO hosted the 'Advertising Self-Regulation Roundtable', at the request of EASA and the WFA. The concluding report of the Roundtable, the Madelin Report, singled out much of the same elements for the effective operation of SROs as the EASA Best Practice Self-Regulation Model did. Consequently, the Madelin Report to a large extent validated EASA's model and confirms it as 'the' common European roadmap to enhance the effectiveness of private regulation in advertising. The backing of its efforts by the Commission has implicitly mandated EASA to drive further the integration of the different national approaches to private regulation in the European advertising industry.

This can also be witnessed recently in the approach the Commission has taken to regulate OBA in online advertising. In December 2010, DG INFSO organized a Roundtable on OBA to make sure that the approach taken by the industry would follow the principles that EASA had already established for other self-regulatory regimes in Europe. While the European Commission leaves space for the online advertising industry to regulate the matter of OBA, it seeks to control this process by making sure EASA's approach is followed through. The informal delegation this implies to EASA offers an important recognition of EASA's regulatory activities and genuinely offers a degree of legitimacy to it.

It must be stressed, however, that the examples of delegation and recognition noted here are the exception rather than the rule. While private regulation is generally recognized at the European level and in some EU Member States government authorities have established specific collaborative understandings offering support to – either through recognition or delegation – private regulation, there are many other countries in Europe and beyond in which such arrangements do not exist. In the Central and Eastern European countries, for example, governments have not readily engaged with industry to recognize their regulatory

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Media Authorities on Advertising, Implementation of Separation between Advertising and Programmes and on Sponsorship and Teleshopping – Joint Guidelines Radio) (2010), http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/ Richtlinien/10-02-23_DLM_SYNOPSE_WerbeRL_HOERFUNK_final.pdf, accessed 31 December 2010.

[47] See in detail Part I, Section C.2 above.

activities.[48] It can be hypothesized that the circumstances that private regulation does not have strong historical roots in these countries and the lack of a corporatist tradition has so far prevented government from recognizing private regimes of advertising regulation. In the Western European countries where government has recognized the private regimes, these regimes have greatly benefited and developed into robust systems of advertising control.

c. Summary

Table III.1 summarizes the findings as regards the dimension of legitimacy by using a simple scale of ++, +, +/-, -, and --.

Evaluative criterion	*Score*	*Remarks*
(i) Inclusion	+	Industry participation is generally high in both transnational and national trade associations adopting codes of conduct. The involvement of beneficiaries (i.e. consumers and NGOs) is not strongly developed, but has improved recently.
(ii) Procedural transparency	-	Code drafting remains largely secretive and enforcement procedures generally take place behind closed doors.
(iii) Accountability	+/-	Low levels of transparency also affect accountability. Mainly members hold trade associations to account for their rule-making activities, but are supplemented with mechanisms such as reporting, complaints handling and judicial review.
(iv) Recognition and support by government authorities	+	Private regimes only occasionally enjoy endorsement for government, although their overall effectiveness appears to benefit from such support.

Table III.1. Summary of findings on legitimacy

The analysis shows that regulated entities are typically enabled to participate in the process leading to the adoption of codes. However, codes have spillover effects on non-members, who are typically excluded. The involvement of the supposed beneficiaries, in the case of advertising mainly consumers and NGOs, is not strongly developed yet. However, a positive trend can be signaled in the practice of industry associations, both at the transnational and national level, which increasingly allow for non-industry stakeholder participation in the code drafting processes by organizing consultative procedures. Levels of procedural transparency are generally low. Code drafting procedures remain largely secretive in that little information is publicly available as regards who writes the codes and what procedure is followed for that purpose. Also enforcement practices remain largely closed to the public: it is only the result of the enforcement activity (i.e. the SRO jury decision) that is publicized.

Low levels of procedural transparency also affect levels of accountability. Members of the trade associations can hold the decision-makers privately accountable for their actions by following internal governance mechanisms (e.g. voting procedures), but several other accountability mechanisms exist. At the transnational level, trade associations have engaged in informal dialogues with public institutions and made public commitments to promote and establish effective private regulatory schemes. Third party auditors are paid to verify the fulfillment of these commitments and the results are published and presented to these public institutions. At the national level, complaints handling procedures before SROs are

[48] An exception is Romania, where the SRO and the National Audiovisual Council has adopted a collaborative protocol, allowing the SRO to refer cases to this public body. See: European Advertising Standards Alliance 2010*, op. cit.*, 138.

the principal means through which advertising practitioners and, indirectly, the private rule maker can be held to account. Only seldom private regulators can be held to account before courts and administrative agencies. Finally, e*x post* recognition of private regulation – either through hard law or soft law means – and the delegation of regulatory powers to the private regime harness the authority and regulatory capacity of private regimes. While the experiences with these institutional forms have been positive in some countries and at the European level, this practice is not widespread however.

2. Enforcement

a. Evaluative Framework

For rules to have effect it is crucial that they are enforced. Enforcement can be understood as the activities through which compliance with regulatory norms is secured in relation to entities subject to these rules.[49] The rationales of enforcement action may vary from prevention and punishment, to deterrence and compensation.[50] These rationales may be combined in enforcement strategies and policies pursued by a regulator.[51] Public institutions such as administrative agencies and courts have traditionally been at the centre of attention of studies of enforcement, but scholars increasingly recognize the importance of privately established mechanisms of enforcement. Arbitration, mediation or private tribunals are well-known examples, but also less formal, market-based mechanisms like the decision to contract, buy, invest, insure or certify have been identified as playing a significant role in regulatory enforcement, in particular in relation to transnational private standards.[52]

In the academic literature on regulatory enforcement a number of factors have been distinguished that are key to the functioning of enforcement.[53] The factors that will be used here to evaluate the enforcement of rules featuring the private regimes for the control of advertising practices are the following:

i. *Monitoring* serves the purpose of assessing the extent to which those that are subject to regulatory rules comply with these rules. Monitoring activities thus constitute a functional precursor of enforcement action as it allows for the detection of levels of (non-)compliance. Accordingly, it is key instrument for the regulator administrating the rules to determine whether and how to take enforcement action.

ii. *Ex ante compliance mechanisms* are instruments that are used by regulators with the view to prevent that rule violations occur before the regulated product or practice is used on the market. Practices of licensing, registration and certification are examples

[49] C. Scott, 'Non-Judicial Enforcement of Transnational Private Regulation' in F. Cafaggi, *Enforcing Transnational Private Regulati*on: Ensuring Compliance in a Global World (forthcoming Edward Elgar).
[50] See for a discussion: Baldwin, Cave and Lodge 2011, *op.cit.*, 238-243.
[51] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford Socio-Legal Studies, Oxford University Press, New York 1992).
[52] Scott 2011, *op. cit.*.
[53] The analytical framework suggested here builds on: Ayres and Braithwaite 1992, *op. cit.*; F. Haines, *Corporate Regulation: Beyond "Punish or Persuade"*, (Clarendon Press, Oxford 1997), 218-229; N. Gunningham and P. Grabosky, *Smart Regulation: Designing Environmental Policy*, (Oxford University Press, Oxford 1998); C. Parker, *The Open Corporation: Effective Self-regulation and Democracy*, (Cambridge University Press, Cambridge 2002); and R. Baldwin and J. Black, 'Really Responsive Regulation' (2008) 71(1), Modern Law Review, 59-94.

of such mechanisms. When applied effectively, they potentially reduce the need to undertake enforcement action *ex post*.

iii. *Remedies and sanctions* are the measures regulatory bodies can impose on regulated entities that do not comply with the applicable rules. The ways in which remedies and sanctions are applied are crucial to understand the function that enforcement has in particular domain.

iv. *Enforcement of sanctions* is concerned with the ability of the regulatory body to ensure that the sanctions it imposes are indeed complied with. The power to impose sanctions is indeed key, but sanctions remain without effect if violators can simply ignore them. One of the principal criticisms addressed to private regulatory bodies is that they cannot make their sanctions incumbent on infringers. Therefore the question is to what extent these bodies can ensure compliance with their sanctions and what mechanisms they employ for that purpose.

b. Findings

i. Monitoring

Transnational level
Very little monitoring activities take place at the transnational level. This can be explained by the fact that transnational codes typically require that they are implemented either at national or company level. The IFBA Global Policy is an exception. In 2009, this company-run initiative organized a monitoring exercise to assess the level of compliance by participating food and beverage companies. The exercise was carried out by a commercial auditing firm against payment by the IFBA.

Also EASA has been concerned with monitoring. Since 2006, it has coordinated cross-border monitoring exercises in relation to the ICC Framework for Responsible Food and Beverages Communications, the EFRD Common Standards and the Brewers' Guidelines. Funding for these initiatives came from the respective industries, as well as from the WFA. However, the transnational dimension to these monitoring exercises was merely organizational. As methodology to these exercises EASA requested a number of its SRO members to assess the compliance of ads with the applicable national codes via which the transnational codes had been implemented. In other words, the monitoring was organized and coordinated at a European level, but the actual exercise was carried out at the national level by SROs through the screening of national advertising practices.

National level
Apart from the EASA-led monitoring exercises, national SROs only seldom engage in monitoring activities. EASA's BPR on advertising monitoring spurs the SRO members to carry out monitoring exercises on a regular basis and across different sectors and media.[54] However, only few SROs have the capacity and resources to actually do so. While the British, Irish and French SROs have been able to monitor advertising on a regular and structured basis (i.e. yearly), other SROs simply do not have the funding to do it. At best, they might

[54] EASA, Best Practice Recommendation Advertising Monitoring (unpublished document, on file with author).

have engaged with specific industries or sectors to monitor sector-specific codes or carry out monitoring sporadically, that is, 'at the request of a sector or a branch' or not 'on a systematic basis'.[55]

The poor state of development of SRO monitoring practices entails that for their enforcement activities national systems of private regulation are primarily dependent on incoming complaints. As noted previously, consumers submitted 95% of the total of complaints on advertising received by European SROs in 2008, while competitors, civil society groups and public authorities accounted for the rest.[56] However, complainants are only likely to address their concerns about advertising to the SROs if these bodies have a major profile in the sense that these complainants are sufficiently aware of their existence and functions. Even where the public knows what the SROs do, there must also be a significant complaints culture amongst interested parties to generate a substantive and steady stream of incoming complaints.[57] On top of that, the threshold of filing a complaint must be at a minimum in order to facilitate complaint submission. The success of enforcement action is therefore dependent on meeting these conditions. However, where SROs face problems in terms of their profile or visibility, where they reside within a jurisdiction in which there is no significant culture of complaining by consumers, or the submission of complaints is burdensome for consumers, enforcement action taken on the basis of the incoming complaints may not suffice to control advertising. In these cases, pro-active monitoring is a desirable adjunct.[58]

Another pitfall generally acknowledged for reactive enforcement approaches in areas of consumer protection is that violations that are not easily detectable are unlikely to surface in a complaints-based setting.[59] Expertise is required to identify these violations and is more likely to lie with the SROs themselves rather than with individual consumers. Also in these cases, it is likely that a significant enforcement deficit will emerge if only a reactive, complaints-based enforcement approach is followed.

ii. *Ex ante* compliance mechanisms

Transnational level

The case of advertising provides two principal *ex ante* compliance mechanisms: copy advice and pre-clearance. These mechanisms have as their main purpose to prevent that deceptive, offensive or distasteful advertisements appear in the market place by assessing the codes compliance of ads *before* they are publicized. These services are typically provided by the SRO secretariat, usually upon the condition that a (membership) fee has been paid. The services remain separated from the complaint handling process before the SRO jury, the *ex post* control.[60]

[55] These are the Dutch and Italian SROs respectively. See: European Advertising Standards Alliance 2010, *op. cit.*, 111 and 123.
[56] See Part II, Section A.7.a.ii above.
[57] Organisation for Economic Co-operation and Development, 'Best Practices for Consumer Policy: Report of the Effectiveness of Enforcement Regimes' (OECD, DSTI/CP(2006)21/FINAL) (Paris, 2006) http://www.oecd.org/dataoecd/56/7/37863861.doc, 48.
[58] Ibid., 48.
[59] Ibid., 48.
[60] See in detail Part I, Section C.4 above.

Accordingly, the *ex ante* control of advertising practice is completely decentralized. If a firm want to receive copy advice on its advertising or have its advertising pre-cleared, it must turn to the SRO that is competent for the marketed in which the advertising will be used. This triggers costs for companies engaging in cross-border advertising campaigns. To reduce these costs, EASA recently established a one-stop-shop online service via which advertising practitioners can request for copy advice and pre-clearance in multiple European countries.[61] So far, this coordinative facility is the only transnational activity observed.

National level

At the national level most of the SROs, at least in Europe, provide for copy advice. EASA notes that 22 of 25 of its SRO members engage in copy advice activities.[62] However, the degree with which they do so differs greatly per SRO. While in France, Spain and the UK, the copy advice activities of the SROs are particularly developed, the Dutch and Swedish SROs and the German DW are just developing theirs and have taken on only a handful of cases recently.[63]

A practice of pre-clearance is even less pronounced in Europe. In only six European countries ads are pre-cleared on a systematic basis. In France and the UK tens of thousands of television and radio commercials are pre-cleared annually, but pre-clearance practices are very limited in other countries that do have it. In Italy, the Netherlands, and Spain, for example, pre-clearance is required for particular products (e.g. non-prescription medicines, alcoholic drinks, and financial services), while in Ireland it is only used as a sanction that is imposed by the SRO jury on repeat code-offenders.[64]

All other things being equal, the proper use of copy advice and pre-clearance increases levels of code compliance of advertisements and reduces the need to take enforcement action *ex post*, that is, complaint handling by the SRO. After all, if through copy advice and pre-clearance an advertisement is blocked or amended that would otherwise have been considered to violate the applicable codes, on average fewer interventions are needed after the publication of the advertisement in point. The question thus emerges whether these *ex ante* control mechanisms indeed make a difference in practice: do they actually lead to a higher level of compliance amongst industry members, thus reducing *ex post* enforcement activities?

A tentative way to answer this question is to assess whether pre-cleared ads, in the case that they are subject to investigation by the SRO jury, comply more often with the applicable codes than advertisements that have not been pre-cleared. The data made available in the annual reports of the British ASA provides an opportunity for such an assessment. In the UK, pre-clearance is required for practically all broadcast advertising. Two separate private bodies provide pre-clearance services: Clearcast for television ads and the Radio Advertising Clearance Centre (RACC) for radio commercials. Table III.2 provides an overview of the total

[61] www.ad-advice.org, accessed 31 December 2010.
[62] European Advertising Standards Alliance 2010, *op. cit.*, 237.
[63] Interviews SRC, DW, and Ro.
[64] European Advertising Standards Alliance 2010, *op. cit.*, 237.

of unique broadcast ads (i.e. (pre-cleared) and non-broadcast (not pre-cleared) ads reviewed by the SRO jury, the ASA council, in the period of 2007-2009.

	2007		*2008*		*2009*	
	Broadcast	Non-broadcast	Broadcast	Non-broadcast	Broadcast	Non-broadcast
Compliance	111 (53%)	162 (34%)	101 (47%)	149 (27%)	129 (48%)	90 (16%)
Violation	90 (43%)	300 (63%)	106 (49%)	387 (69%)	127 (47%)	431 (75%)
Other*	9 (4%)	17 (4%)	8 (4%)	21 (4%)	11 (4%)	54 (9%)
Total ads reviewed	209 (100%)	479 (100%)	215 (100%)	557 (100%)	267 (100%)	575 (100%)

Table III.2. ASA Council adjudications on broadcast and non-broadcast advertising
Sources: ASA Annual Reports 2007-2009[65]

The overview suggests over the past three years, compliance levels of broadcast ads were 20% higher than in the case of non-broadcast ads. Compliance levels of pre-cleared advertisements have thus been considerably higher than ads that have not been pre-cleared.

Importantly, the annual reports of the British SRO also seem to suggest that pre-clearance activities in the UK greatly reduce the overall *ex post* enforcement activities of the ASA. Table III.3 gives an overview of the enforcement activities undertaken by the ASA between 2007 and 2009.

	2007		*2008*		*2009*	
	Broadcast	Non-broadcast	Broadcast	Non-broadcast	Broadcast	Non-broadcast
Investigated	350 (13%)	1,845 (16%)	361 (7%)	1,781 (17%)	437 (9%)	1,819 (20%)
Not Investigated	2,291 (87%)	9,523 (84%)	4,457 (93%)	8,640 (83%)	4,293 (91%)	7,448 (80%)
Total	2,641 (100%)	11,368 (100%)	4,818 (100%)	10,421 (100%)	4,730 (100%)	9,265 (100%)

Table III.3. ASA investigations on broadcast and non-broadcast advertising
Sources: ASA Annual Reports 2007-2009[66]

The overview indicates that broadcast advertising is less often subject to SRO investigations when compared to non-broadcast advertising. We might extrapolate from this that *ex ante* evaluations (in this case pre-clearance) can reduce the need for *ex post* enforcement action. Importantly, *ex post* enforcement is costly for SROs, whereas copy advice and pre-clearance are services that are usually offered against payment of a (membership) fee. Cost-efficiency

* The complaint has been withdrawn or resolved informally during the stage of formal investigations.
[65] http://www.asa.org.uk/About-ASA/Annual-Report.aspx, accessed 31 December 2010.
[66] *Ibid*..

arguments would thus lead SROs to engage more actively in *ex ante* enforcement activities. On the one hand this would safe resources for *ex post* mechanisms, while on the other hand it could generate important resources for the SROs. By engaging in *ex ante* evaluations, SROs could thus create a new source of revenue while reducing costs for its *ex post* compliance mechanisms.

iii. Remedies and sanctions

National private systems administered by SROs constitute the principle mechanisms through which transnational codes of advertising practices are enforced. However, these transnational codes do not suggest any specific means to enforce the rules they promulgate. In the rules adopted by the IFBA and EASA no reference is made to the enforcement of their respective norms. In other codes, i.e. those of the ICC, EFRD and the Brewers of Europe, it is suggested that national SROs should oversee the compliance with the rules. However, also these codes do not suggest any particular means of enforcement.

As discussed above,[67] SROs have at their disposal a number of different remedies and sanctions. Here, it is assessed how these enforcement instruments are applied, what type of function complaint handling by the SROs seems to fulfill, and what concerns can be raised when taking into account that function.

Application of remedies and sanctions

The practice of SROs suggests that there is a clear hierarchy in the way in which the remedies and sanctions are applied by SROs. Building on the concept of the 'enforcement pyramid' proposed by Ayres and Braithwaite in relation to enforcement strategies applied by public regulatory agencies,[68] Figure III.2 seeks to illustrate a sanction escalation policy that is typically applied by an SRO.

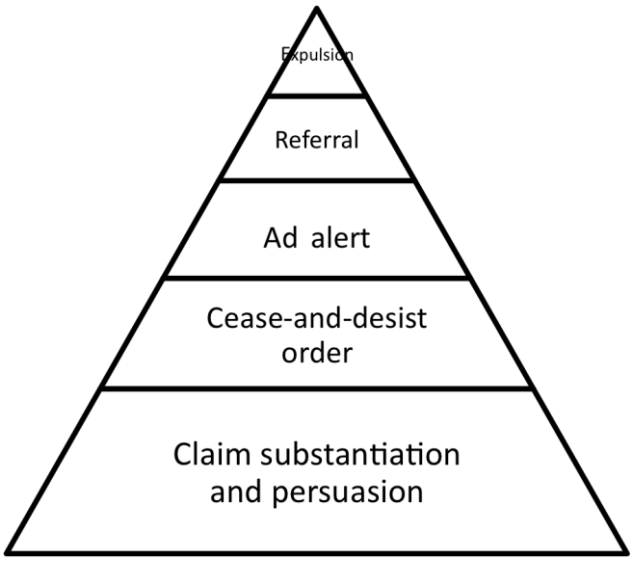

Figure III.2. Example of an SRO sanction escalation policy (Source: adopted from Ayres and Braithwaite, 1992)

[67] See at Section II.A.7.a.iv. above.
[68] Ayres and Braithwaite 1992, *op. cit.*.

In addressing (potential) breaches of codes of advertising practices the SROs typically first try to notify the advertiser, agency or medium that a publicized advertising campaign they have been concerned with has been complaint about and is subject to the investigation of the SRO to determine whether it is in violation with the applicable codes. In this stage, which forms the base of the sanction pyramid, the SRO may require the advertiser to substantiate its claims and, if this fails, persuade it to withdraw or amend the campaign so that it from then onwards conforms to the code. This often proves to be sufficient to remedy a breach. In the UK, this practice of informally settling complaints about advertising prior to complaint adjudication by the SRO jury is particularly developed. In 2009, the ASA headed informal investigations on 1,414 unique ads (63%) out of a total of 2,256. In these cases, the ASA investigation teams believed that the issues raised by the advertisements were 'minor and clear cut' and sought to settle the dispute by 'asking advertisers to withdraw or amend their ads voluntarily'.[69] Were the advertiser does not respond to this preliminary phase, the ASA can bring the issue before the jury, the ASA Council, in particular if the breach of the code is believed to be grave and where it is not clear whether the code has been breached.[70] As a result, only 842 (37%) unique ads were adjudicated before the ASA Council in 2009. Similarly, the German DW prefers to settle complaints so that a jury decision is not needed. It estimates that about 50% of the complaints are resolved in that way.[71]

Should the preliminary enforcement stage not lead to the withdrawal or amendment of the advertising campaign, the SRO jury can escalate up one segment of the pyramid and decide to apply a more stringent remedy or sanction, typically the order to withdraw the advertisement or amend it so that it is compliant. Here the SRO might offer assistance to the advertiser or agency to alter the ad and bring it in accordance with the code.[72] The remedy is functionally equivalent to a prohibitive injunction (a cease-and-desist order) that can be administered under public law. The order is typically directed to the advertiser or the agency that created the advertisement and runs the campaign and is usually accompanied by some form of adverse publicity (e.g. the publishing the decision on the SRO website). If the advertiser or agency does not follow the decision of the SRO voluntarily, the SRO can ask the media to block the advertising or send out a warning to the media about a specific advertisement or campaign, a so-called 'ad alert'. The alert often generates additional media attention, and thus increases the adverse publicity for the advertiser involved.

Should this is still not be sufficient to stop the advertising from (re)appearing, the SRO can resort to even more interventionist means positioned towards the apex of the pyramid. Such sanctions include the imposition of fines, the referral to public agencies and ultimately the expulsion of membership. However, these sanctions are applied only very exceptionally, if available at all to the individual SRO.[73] In the UK, the ASA only seldom applies such sanctions. For example, referrals to public agencies concerned with advertising, such as the Office of Fair Trading (OFT) and OFCOM happen only 'once it is established that an

[69] ASA and CAP, 'Responsive Regulation for an Evolving Industry' (Annual Report 2009) (London, 2010) http://www.asa.org.uk/~/media/Files/ASA/Annual%20reports/ASA_CAP_Annual%20Report_2009.ashx, accessed 31 December 2010, 13.

[70] Paragraph 23 Non-Broadcast Complaint Handling Procedures and Paragraph 28 Broadcast Complaint Handling Procedures.

[71] Interview DW 4 May 2010.

[72] The British ASA is an example here.

[73] See also Boddewyn 1988, *op. cit.*.

advertiser is unable to work within the rules'.[74] Apparently, this has happened only in a handful of cases over the past five years.[75] In the Netherlands, the policy of the local SRO is not to refer any case to the consumer protection agency, even if it cannot secure compliance itself.[76]

Similarly, advertising practitioners are virtually never fined. These sanctions are only available to a couple of SROs. In that case, contractual arrangements with a sector-specific trade association mandate the SRO to administer these sanctions in case of non-compliance. Also expelling an advertiser, agency or media owner from membership is a sanction of which the application remains largely theoretical. The question also emerges whether this is a desirable course of action for the SRO. The consequence of the application of this sanction is that the advertising practitioner becomes unregulated, placing the expellee under a less strict regime of oversight and control.

Data on the application of remedies and sanctions is only sparsely available. Annual reports of SROs do not generally disclose the types of remedies and sanctions administered, thus affecting levels of transparency. The SRO operating in Belgium, the *Jury d'Ethique Publicitaire* (JEP), is an exception, however. Table III.4 illustrates its sanctioning record and gives an overview of the decisions it took in the period of 2004-2009 in relation to unique advertisements.

	2004	*2005*	*2006*	*2007*	*2008*	*2009*
No jurisdiction	0	2	1	2	6	4
Compliance	61	87	86	117	144	71
Opinion d'avis[*]	12	14	12	10	14	3
Cease-and-desist order	33	58	57	67	218	93
Denial of media access	9	6	4	3	3	10
Other sanctions (referral, fine, compensatory damages, etc)	1	0	0	0	0	0
Total	116	167	160	199	385	181

Table III.4. Decisions taken by JEP
Sources: JEP Rapport d'Activites 2008 and Rapport d'Activites 2009[77]

[74] ASA and CAP 2010, *op. cit.*, 3.
[75] In 2008, the ASA referred only one case on misleading advertising to the OFT. In its annual report the ASA holds that the previous occasion was in 2005. See: ASA and CAP, 'Effective Self-regulation: Keeping Advertising Standards High. Annual Report 2008' (London, 2009) http://www.asa.org.uk/About-ASA/~/media/Files/ASA/ Annual%20reports/ASA_ CAP_annual_report_08.ashx, accessed 31 December 2010. at 3. Also Parry has noted that referrals have been very infrequent in the 1990s. See: D.L. Parry, 'The Future of Voluntary Regulation of Advertising' (2008) Consumer Law Journal 8, 137-159, at 149.
[76] Interview SRC, 16 April 2010, Sofia. However, another mechanism has been designed in order to ensure that the cases in which the SRO cannot secure compliance are dealt with by the consumer agency. See in detail below.
[*] In the case of advertising that challenges common standards of taste and decency, the JEP formulates a non-binding *opinion d'avis* discouraging the use of such advertising. See Article 2 of the *Jury d'Ethique Publicitaire Règlement* (2010), http://www.jep.be/media/pdf/reglement_jep/ reglement_jep_fr_oct_2010_.pdf, accessed 31 December 2010.
[77] www.jep.be, accessed 31 December 2010.

The table shows that the SRO was able to settle the bulk of the disputes by ordering the advertiser or agency to withdraw or amend the advertising in point. Where the advertiser or agency did not voluntarily comply with the decision of the jury, the jury turned to the media to stop the advertisement in point for reappearing. This proved only necessary in a limited number of cases. Only once in the period of 2004-2009 an advertiser was held to offer compensation to the claimant. Since 2005, the JEP concluded a covenant with the national alcohol industry allowing it to impose fines for non-compliance with the applicable sector-specific code. So far, the competence has not been used, however.

Function of enforcement

The image that emerges is that in the application of their enforcement instruments, the SROs primarily follow a persuasive approach and only if this fails, are willing to resort to more deterrent means. How can this approach be explained? Two factors appear crucial here. First, the central objective of private regulation in advertising is to improve ethical standards amongst advertising practitioners and promote the use of responsible marketing communications with the view to ensure that advertising is fair, honest, tasteful and not misleading.[78] Therefore the main objective of the ICC Consolidated Code is: 'to demonstrate responsibility and good practice in advertising and marketing communication across the world'.[79] The application of deterrent sanctions to violations of the codes of advertising practices does not fit neatly with this purpose and, instead, would be more closely related with consumer protection rationales. However, while the industry indeed seeks to contribute to a high level of consumer protection, it does so only from the perspective of promoting higher ethical standards amongst advertisers, advertising agencies and the media on an industry-wide basis.[80] Consequently, the function of the enforcement of private regulation in advertising cannot be to attain full and unconditional compliance in the industry. This would require codes of conduct to assume more law-like attributes, including punitive and deterrent sanctions and more precise wording. Instead, the enforcement activities undertaken by the SROs should be viewed primarily as proactive by putting to a stop irresponsible conduct, persuading the practitioners involved, and educating them to (better) comply with the rules in the future. The copy advice and pre-clearance facilities, as well as the pre-jury trial procedures, in which the advertisers and agencies can substantiate their claims and disputes are settled amicably, are particularly functional here. They facilitate learning processes and correct non-compliance at an early stage.

Second, the complaint handling procedures administered by the SROs serve different purposes than procedures before courts or public agencies. The main purpose of SRO enforcement is to correct advertising practitioners and stop their irresponsible conduct, not to penalize them. SROs aim to achieve this in a faster, better accessible and more cost-efficient way than courts or agencies can do. Further, while the SRO procedures are complementary to public enforcement mechanisms as regards misleading advertising, they are often concerned with issues that are considered by courts and agencies as 'trivial' or

[78] J.J. Boddewyn, 'Advertising Self-regulation: True Purposes and Limits' (1989) 18(2), Journal of Advertising, 19-27, 24.
[79] Preamble Consolidated ICC Code, 9.
[80] Boddewyn 1989, *op. cit.*, 23-24.

'soft' and therefore not dealt with.[81] About 60% of the complaints handled by SROs in Europe concern matters of social responsibility, taste and decency, and health and safety.[82] Here the SROs fill an important gap left by more restrictive legal mandates of public enforcement institutions, which have as a result of this generally been very reluctant to address these matters. In fact, the lack of judicial jurisdiction to deal with the issues motivated the establishment of SRO in some countries.[83] Important to acknowledge, however, is that the issues of taste and decency do not lend themselves easily to be controlled through remedies and sanctions with compensatory or punitive rationales. These matters do not so much contradict legal standards on unfair competition or consumer protection, but of morality, integrity and ethics. Accordingly, different, more lenient approaches seem appropriate to address non-compliance.

The mild sanctioning approach taken by SROs makes them vulnerable to critiques of regulatory capture and undermines the image that the SRO is indeed a fierce industry watchdog defending the consumer's interests. Therefore, several claims have been made that the sanctions available to SROs should be extended to include fines and compensation.[84] However, with the perspectives of persuasion and education in mind, these claims seem to be off the mark. While more interventionist sanctions can be desirable from the perspective of unfair competition and consumer protection laws, the codes of advertising practice primarily serve a different purpose and are more often applied in contexts other than the strictly legal domain. If compensation or punitive damages are sought, recourse should be had to judicial or administrative procedures, which codes and SRO procedures do not preclude.

Concerns and reservations

This does not mean, however, that no reservations can be made as regards the effect of the remedies and sanctions available to the SRO. One can, for example, question the impact that adverse publicity has on code violators. Except for cases that raise widespread public controversies, the publication of the decision via the SRO website or in its periodical is not likely to get much attention from other media, competitors or from consumers. The fact that SRO decisions appear almost on a daily basis further undermines the naming and shaming effect that is expected from the publication. In the UK, for example, the ASA Council decided on 842 advertisements in 2009.[85] This means that about seventy decisions appear every month. This large number of rulings hollows out the shaming factor and also decreases the chances that every offender receives attention in the media.

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[81] See in general: J.J. Boddewyn, 'Controlling Sex and Decency in Advertising Around the World' (1991) 20(4), Journal of Advertising, 25-35. See for France: J. Boddewyn and E. Loubradou, 'The Control of "Sex in Advertising" in France' (2011) *Journal of Public Policy and Marketing* 30(2), 220-225. See for an analysis of regulation of soft issues in advertising in Asia: Z. Gao and J. Kim, 'Regulation of Soft Issues in Advertising in Confucian Societies: A Comparative Examination' (2009) 21(1) Asia Pacific Journal of Marketing and Logistics, 76-92.

[82] Data taken from European Advertising Standards Alliance, 'European Trends in Advertising Complaints, Copy Advice and Pre-clearance. 2008 data' (Brussels, 2009) on file with author, 16.

[83] This was the case in Germany and Austria.

[84] See for example: B. Middleton and D. Rodwell, 'Regulating Advertising - Time to Get Though?' (1998) 8Consumer Policy Review, 88-92 and S. Locke, 'Self-Regulation in Advertising' (1994) 4(2), Consumer Policy Review, 111-116.

[85] ASA and CAP 2010, *op. cit.*, 12.

Also the use of ad alerts raises concerns and has been viewed as a 'somewhat unreliable form of sanction', since SROs 'cannot control the incidence, amount, timing, location, editorial content etc of any such publicity'.[86] The adverse publicity that the advertisement receives via the ad-alert may even generate free publicity for the offender.[87] The infamous shock-campaign by United Colors of Benetton was just an example of this. Being aware that the campaign would be subject to SRO enforcement, the Italian fashion designer and retailer continued to use the campaign throughout the 1990s and used large format photographs depicting provocative and repulsive issues that had little to do with the products the company was selling.

iv. Enforcement of sanctions

The remedies and sanctions administered by the SROs are not likely to resort any effect when the code infringer can simply ignore them and continue its practice without much impediment. There are a number of ways in which the SROs have sought to make the remedies and sanctions they impose incumbent on infringers. These can be dovetailed in private and public mechanisms.

Private mechanisms

Three private mechanisms can be distinguished: (a) the involvement of gatekeepers; (b) the creation of tracking mechanisms to follow-up on sanctions; and (c) the use of agreements between SROs and non-compliant firms. Finally, a number of related concerns to these approaches are identified.

(a) Gate keeping

The principal way in which SROs have sought to make their private remedies and sanctions incumbent on violators is by involving the media in their governance structures. The enrolment of media in the SROs has proven key to enhancing the enforcement capacity of these private regimes.[88] Most of the advertisements produced today require a medium to reach its target audience. Broadcasters, newspaper and magazine owners, postal services, Internet Service Providers (ISPs) and firms offering online advertising services constitute a barrier between the advertiser and the target audience of its marketing communications. Given their intermediary role, they can halt a substantial part of the non-compliant ads in a fast and inexpensive way. Media thus put "teeth" to the private regime and act as a gatekeeper.[89] The enrollment of media owners in private regulatory regimes is therefore considered essential to establish an effective private regime. Not surprisingly, EASA's Best Practice Self-Regulatory Model insists on the participation of media to the regime.[90]Also the Madelin Report recommends the enrollment of media.[91]

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[86] Parry 2000, *op. cit.*, 147.

[87] Ibid., 147.

[88] G. Miracle and T. Nevett, *Voluntary Regulation of Advertising. A Comparative Analysis of the United Kingdom and the United States* (Lexington Books, Toronto 1987), 288-290 and D. Harker, 'Achieving Acceptable Advertising. An Analysis of Advertising Regulation in Five Countries', (1998) *International Marketing Review* 15, 101-118.

[89] Harker 1998, *op. cit.*, 104.

[90] EASA Best Practice Self-Regulatory Model 2004, Principles 1, 4 and 8.

[91] European Commission, 'Self-Regulation and the Advertising Sector: A Report of Some Discussion among Interested Parties' (DG SANCO, Madelin Report) (Brussels, 2006) http://ec.europa.eu/dgs/health_consumer/self_regulation/docs/report_advertising_en.pdf, accessed 31 December 2010.

In the US, by contrast, the press and broadcast media have not subscribed to the national private regulatory system, in part because of antitrust concerns.[92] Instead of participating in the national system media companies perform separate clearance and pre-vetting activities. However, it has been noted by scholars that since the media owners often miss the right incentives or expertise to perform this task vigilantly, this form of private control remains imperfect.[93] It has therefore been held that the absence of media participation curbs the effectiveness of the system.[94]

The principal benefit of having the media owners serve as gatekeepers in the private regime of advertising regulation is that compliance with SRO decisions is not solely dependent on the willingness of the advertising practitioner itself. However, the gate-keeping role of media owners is likely to depend on the fact whether they have included in their contract with advertisers or agencies a clause that requires the latter parties to comply with the code of advertising practices overseen by the relevant SRO. In case of non-compliance, such a clause offers the media owner the possibility to suspend its performance under the contract or completely withdraw from it.[95] If such a clause was not part of the contract, the refusal to publish an advertisement that was found to breach a code of conduct might constitute a breach of contract on the part of the media owner. Indeed, the private law nature of the advertising codes requires that they must be agreed upon before they can have binding effect. Without such consent from an advertiser, a media owner that blocks the publication of a campaign might indeed face damage claims. In that case, it is unlikely that the media owner will function as a backstop to the private enforcement activities of SROs. The contractual arrangement between de media owner and the advertiser is thus a crucial factor in the design and effectiveness of SRO enforcement activities.

(b) Tracking

An additional approach to making sure that code violators comply with the SRO decisions is to actively monitor their compliance with these decisions. A number of European SROs has set up specific teams for this purpose. After a jury has passed its decision that the advertising infringes the code, the SRO engages with the advertiser or agency in order to assess their willingness to follow that decision and thus ascertain the likelihood that they will comply with the ruling. In the UK, compliance teams ask the code-violator to submit a

[92] P. LaBarbera, 'The Antitrust Shadow over Advertising Self-Regulation', Current Issues and Research in Advertising (1992) 4, 57-70.

[93] H. Rotfeld, Power and Limitations of Media Clearance Practices and Advertising Self-regulation', *Journal of Public Policy & Marketing* (1992) 11, 87-95 and C. Galloway, H. Rotfeld and J. Richards, 'Holding Media Responsible for Deceptive Weight-Loss Advertising', *West Virginia Law Review* (2006) 107, 353-384.

[94] Miracle and Nevett 1987, *op. cit.*, 121.

[95] Recently, the Italian *Corte Suprema di Cassazione* (Supreme Court) addressed the issue in *T.O. v Istituto Autodisciplina Pubblicitaria* (Cassazione civile Sez. III, 20 Augustus 2009, No. 18522), in which it held that the effects of SRO jury decisions on third parties are acceptable where these parties engage in contractual obligations with parties that have obliged themselves to follow the code of conduct and the SRO decisions. More specifically, it considered:

> " (…) the jury should certainly not be seen as an organ of the state and consequently as having the power to make decisions with "erga omnes" effect. It is obvious that the system of advertising self-regulation binds only those who submit themselves to it, even if it is inevitable that the rules of the [Code of Advertising Self-regulation] and decisions of the jury indirectly extend their effects to those who enter into advertising contracts with associated parties. It concerns, evidently, also a free choice of the third party, who could have freely avoided entering into relations with associated parties (…) (translation PV)"

written assurance that it will stop or amend the advertising found to breach the code. This can either be before or after the formal ASA Council procedure.[96] If they do not obtain the assurance, the CAP will repeat the request and consider other sanctions to receive a satisfactory assurance.[97] Compliance tracking is thus an important element in the sanction escalation policy of a SRO as it allows the SRO to determine more precisely what type of sanction will be appropriate to ensure code-compliance.

The Dutch system has recently copied the British practice of compliance requests. In 2009, the SRC erected a Monitoring and Compliance Service to monitor compliance with the jury decisions. Where a negative response is given to a compliance request, or where a response fails to be delivered by a code violator, the SRC will issue an ad alert, which is directed not only to the media but also to the public authorities cooperating with the SRC.[98] According to the annual reports of the SRC, compliance rates with SRO decisions are very high and range to over 90%.[99]

(c) (Non-)binding agreements

With the compliance requests and the commitments, the British and Dutch SRO seek to pressure the code infringer to comply with the decisions passed by the SRO. They do not perceive the written commitments as a contract between them and the advertising practitioner obliging the latter to comply with the SRO decision. There is, however, one SRO member of EASA that does seek to obtain commitment on the side of the advertiser to abstain from certain practices by contracting: the *Wettbewerbszentrale* (WBZ). The WBZ is the federal trade association in Germany and oversees the application by its members of the German Unfair Competition Law Act (*Gesetz gegen den unlauteren Wettbewerb* - UWG). While it does not administer any code of conduct, it can be seen as a SRO as it seeks to regulate the industry on its own motion and uses persuasion to motivate advertising practitioners to behave ethically and lawfully.[100] Where the WBZ believes that an advertisement infringes the UWG, it requests the infringer to discontinue the conduct that gave rise to the infringement by sending him or her a warning letter (*Abmahnung*). The letter invites the advertiser or agency to sign a declaration (*Unterlassungserklärung*), whereby he or she promises to amend or stop the use of the advertisement under challenge. This declaration, which amounts to a contract when signed, is legally binding and the breach thereof is subject to a contractual penalty fine (*Vertragsstrafe*) defined in the declaration.[101] Should the *Abmahnung* be disrespected in the future, the pecuniary penalty becomes payable to the WBZ, for which procedures before the civil courts can be initiated under the UWG.[102]

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[96] Paragraph 21 Non-broadcast Complaint Handling Procedures and Paragraph 26 Broadcast Complaint Handling Procedures.

[97] Committee of Advertising Practice, 'Post investigation compliance': http://bcap.org.uk/ Compliance/Post-investigation-compliance.aspx

[98] Article 33(1) and (2) Jury Reglement.

[99] 93% in 2008 and 98% in 2009. Stichting Reclame Code, 'Jaarverslag 2009' (Amsterdam, 2010) http://www.reclamecode.nl/bijlagen/6-12-2010_12_35_25.PDF, accessed 31 December 2010, 22.

[100] Boddewyn 1988, *op. cit.*, 136.

[101] H. Piper and A. Ohly, *Gesetz gegen den unlauteren Wettbewerb. Kommentar*, 4th ed., (Beck, Munich 2006), 996-999.

[102] § 8 Abs. 1 UWG read in conjunction with § 12 Abs. 1 UWG.

The strongly legalized practice followed by the WBZ can be explained by the function it fulfils, namely overseeing the application of the UWG by its members. The practice has not been adopted by other SROs in Europe, as it does not sit easy with the informal and often non-legal way of dispute resolution followed by the SROs.

(d) Related concerns

It was identified that the enforcement of SROs sanctions is strongly dependent on the fact whether SROs have been able to enroll media owners as gatekeepers to their regime. It must be noted, however, that the gate-keeping role of media owners is not carried out with the same rigor across the different media involved with advertising. SROs report in several interviews to this case study that the sanctions they administered in relation to advertising appearing in digital media (e.g. Internet, mobile telephones, or game consoles) cannot be enforced with the same degree of stringency as in traditional media (i.e. print, broadcast, and outdoor), in part because of the difference in commitment to the national private regimes between digital (online) and traditional (offline) media.

In the case of traditional media there is a strong practice of private regulation. Since the 1970s, the printed press and broadcasters have committed to follow codes of advertising practice. In addition, legal frameworks have fostered compliance with such codes and SRO decision by these media. In the Netherlands, for example, the Dutch Media Act requires both commercial and non-commercial broadcasters to be a member of the Dutch SRO. In the UK, on the other hand, the OFCOM has made compliance with the SRO enforcement decisions by media broadcasters a condition to obtain and extent licenses for their commercial activities. As such, OFCOM makes adherence to SRO decisions by a broadcaster *de facto* binding.

The situation is different for digital media. A tradition of private regulation of advertising practices is absent here. The online advertising industry has swiftly developed in the past two decades, but few companies concerned with the advertising have committed to private regulation on advertising. The US and European initiatives on OBA are a first step, but solely address issues of privacy in behavioral targeting and leave the content dimension open. Also the applicable legal framework does not facilitate commitment on the part of media owners to actively engage in private regulatory regimes concerning advertising. The Internet allows businesses to advertise their products and services simply by posting ads on their own websites. Here, a potential gatekeeper may be the ISP, that is the company that offers access to Internet to its customers. However, ISPs do not have any legal obligation to take away advertising that is misleading or indecent. Existing legal frameworks, in principle, exonerate ISPs from civil, administrative and/or criminal liability for the data they process or store.[103] In addition, ISPs have not individually signed up to the private regulatory systems committing themselves to adhere to the codes of advertising practice and the decisions taken thereon by SROs. Accordingly, they are not likely to fulfill a gate-keeper role here and the compliance with SRO decisions becomes solely dependent on the decision of the advertiser itself.

[103] For the EU see: Articles 12-15 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1).

Similar problems arise as regards firms offering online advertising services. Key examples are the major online search engines, trading platforms and social network communities, which provide advertisers and agencies paid-for services to market products. Because of their strategic intermediate position also these companies may act as gatekeepers. However, so far they have not been willing to do so. The recent decision of the European Court of Justice (ECJ) in the case *Google v Louis Vuitton* clarified that European law does not impose upon these companies any obligation to monitor the content of the advertising that is produced through their paid-for services in so far as these services are 'neutral' and 'merely technical, automatic and passive'.[104] Only at the request of a court or administrative authority online search engines or trading platforms can be required to remove advertising that infringes the law or disable access to it.[105] This will only be in a very limited set of cases – mostly criminal offences – and is unlikely to happen where an advertisement infringes an industry code.

As such, European SROs have little to pressure ISPs or online advertising service providers with in order to have them act as a gatekeeper to their systems. A jury decision might therefore remain without effect, unless the ISPs or online advertising service providers cooperate voluntarily and sign into the private regulatory regimes. This raises the question to what extent these new players in the media field have already subscribed to the codes of conduct governing advertising practices. The main association representing the interests of the new media in Europe is the Interactive Advertising Bureau (IAB) Europe. Its national divisions are in many cases members of the national SROs and IAB Europe, which includes both national IABs and corporate members, is a Board Member of EASA. IAB Europe has thus been very much involved in the standard-setting processes of private regulation.

However, IAB Europe members have shown little of commitment to private regulation in the enforcement stage of the codes. Whenever a SRO finds that an online advertisement violates the code it will, as it does in other cases, first approach the advertiser concerned and try to get rid of the advertisement by persuading the advertiser to comply. If this fails, however, the SROs could usually fall back on the media owners to assist them in getting rid of the non-compliant advertising. What is typical, however, in the case of advertising through digital media is that the search engines, auction websites and social network communities have been more resistant to grant such support. Individual SROs face problems in ensuring compliance with their codes in the digital context if advertisers do not voluntary comply with their decisions. While naming and shaming approaches are still available, SROs cannot rely on the gate keeping function the media has traditionally had in the system.

Very few SROs have engaged in a debate with the online advertising services firms to settle this issue. At the forefront is the British system administered by the CAP and ASA. In line with EASA's BPR on Digital Marketing Communications, the CAP recently extended the scope of its advertising codes to also include non-paid for online ads and the paid-for services

[104] *Joined Cases C-236/08 to C-238/08*, decision of 23 March 2010, n.y.r. A similar ruling was given by the New York Court of Appeal (2nd Circuit) in *Tiffany (NJ) Inc. and Tiffany and Company v. eBay inc.* (Tiffany II), Docket No. 08-3947-cv, judgment of 1 April 2010. Here the court ruled that eBay could not be held liable for transmitting advertisements for counterfeit Tiffany jewelry that were placed on the eBay website by individual eBay users. However, eBay itself could be held accountable for the false and misleading advertising in so far as it itself promoted the sale of genuine Tiffany jewelry on its website in a misleading way. The case was sent back to the district court to determine this matter.

[105] See Articles 12(2), 13(2) and 14(2) E-commerce Directive.

provided by ad networks linking to those ads. As a result, it can now apply the sanctions it used to apply to print and broadcast advertising also in relation to digital advertising. In a policy document explaining the change in remit, also for the ASA, the CAP suggests a new policy in securing compliance in relation to digital advertising. It holds in the section Sanctions:

> *"We already know that if a marketing communication is considered in breach of the Advertising Codes, the vast majority of marketers willingly undertake to amend or withdraw the marketing communication. If they refuse, CAP's present sanctions are very effective at gaining compliance and these will apply to the new remit. However to strengthen CAP's ability to secure compliance on websites and in other non-paid-for space online under the advertiser's control, CAP's member bodies have agreed new sanctions:*
>
> - *Providing details of an advertiser and the non-compliant marketing communication on a special part of the ASA website.*
> - *Removal of paid-for search advertising – ads that link to the page hosting the non-compliant marketing communication may be removed with the agreement of the search engines.*
> - *ASA paid-for search advertisements - the ASA could place advertisements online highlighting an advertiser's continued non-compliance."*[106]

The second and third sanctions proposed here assume the cooperation of the search engines. In the second case, the search engine would agree to take away a link to the advertising for which it has received payments. For misleading advertising there are indeed policy guidelines operated by the key players in this field and advertisers using the services can report violations by other advertisers to the service provider.[107] However, it is unclear how these internal standards apply to issues of taste and decency and how they are related to applicable codes of practice. This would indeed require parties facilitating paid-for search advertising such as Google, Yahoo and Microsoft to include in their privacy policies or standard clauses for advertising contracts the obligation to comply with codes of advertising practices.[108]

The very same concerns about the commitment of potential gatekeepers may emerge in relation to mobile telephone advertising. Mobile telephone operators, just like online advertising service firms, have traditionally not been engaged in private regulation and are yet to be involved in systems of private regulation. At the national level several initiatives have been taken to include mobile telephone operators as gatekeepers. Noteworthy is the practice that the Dutch SRO, SRC, developed in relation to so-called 'text message services'. A number of companies that provided ring tones and graphical and animated characters for mobile telephones were reported to be advertising their services in a misleading fashion. To tackle these practices, the main telecom operators in the Netherlands adopted a code prohibiting the practices and formulated a template prescribing the exact way in which

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[106] Committee of Advertising Practice, 'Extending the Digital Remit of the CAP Code' (2010), available at: http://www.cap.org.uk/Media-Centre/2010/~/media/Files/CAP/Codes/CAP%20Digital%20Remit%20Extension.ashx, accessed 31 December 2010.

[107] Google, 'Feedback on AdWords ads', http://adwords.google.com/support/aw/bin/request.py?hl=en&contact_type=feedback&displayed=&origin=cluster&rd=1, accessed 31 December 2010.

[108] Google's digital advertising service called Adwords, which includes the obligation to comply with local codes of advertising practice in its general conditions for advertising contracts. See Google, 'Adwords Terms and Conditions', https://adwords.google.com/select/tsandcsfinder?, accessed 31 December 2010. It is unclear whether Yahoo and Microsoft follow the same approach.

these services could be advertised. The SRC was to oversee the application of the code and administer sanctions in case of violation.[109] To enforce its sanctions on the companies, the SRC has teamed-up with the incumbent mobile telephone operators to shut down the operations of the non-compliant companies.

The varying extent to which media can and are willing to play the role of gatekeeper raises the wider concern that much of impact of the remedies and sanctions administered by SROs will depend on the type of medium in which the advertisement appears. Advertising in more traditional media can be addressed more easily by SROs as they enjoy wide support of print and broadcast media to ensure compliance by advertising practitioners, whilst this support, as indicated by the interviews conducted with SROs, is likely to be less in the case of advertising through digital media, in particular online advertising.

A problem related to this is that in integrated advertising campaigns, which use different types of media to promote the products and services, the outcome of SRO enforcement activities may vary across the media involved. As a result, newspaper ads and television commercials might be blocked, but the corresponding Internet advertising may still be available if the advertiser does not voluntarily complies with the decision. Such divergence in enforcement outcomes is not desirable in terms of consistency and credibility and should be prevented.

Public mechanisms
In addition to the private mechanisms discussed above, also two public means of ensuring compliance with SRO sanctions can be distinguished: (a) cooperation with administrative agencies and (b) adjudication.

(a) Cooperation with administrative authorities
Where SROs might not succeed to ensure compliance with their jury decisions, they may consider referring the case to the existent competent public agencies. Basic conditions for referral include the institutional design of public regulatory enforcement, the substantive overlap between the codes administered by the SRO and the legal mandate of the public authorities, and the willingness on the part of the SRO to refer.

Public authorities concerned with the enforcement of advertising regulation typically exist in the policy fields of competition, consumer protection, media, and health and safety law. Perhaps the most apparent overlap in competences between public agencies and SROs concerns the issue of misleading advertising.[110] Typically, consumer protection and/or competition law agencies are competent to deal with this matter, depending on how national statutes have allocated enforcement powers here.

In countries such as the Netherlands, Spain and the UK, public agencies concerned with the enforcement of consumer protection law have engaged with SROs to define the conditions under which they will coordinate their enforcement action in cases of misleading advertising with SRO enforcement. The model used by the British Office of Fair Trading (OFT) can be

[109] Stichting Reclame Code, 'Reclamecode SMS-dienstverlening' (2009) Available at: http://www.reclamecode.nl/nrc/pagina.asp?paginaID=275%20&deel=2, accessed 31 December 2010.
[110] In Germany and Austria no public authorities exists generally dealing with misleading advertising.

used to illustrate how such cooperation can be designed. In the UK, the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) implement the UCP Directive in the national legal order and stipulate that the OFT 'shall have regard to the desirability of encouraging control of unfair commercial practices by such *established means* as it considers appropriate having regard to all the circumstances of the particular case (emphasis added / PV).'[111] The guidance issued by the OFT on the implementation of the CPRs 2008 explains that 'established means' should be taken to include ASA enforcement action.[112]

To further specify this partnership as regards the enforcement of the CPRs 2008, the OFT and ASA have adopted so-called 'Case Handling Principles'. These principles stipulate that the OFT is only to take action in exceptional cases, namely 'where there is clear evidence of an act contrary to the relevant legislation, which harms the collective interests of consumers'.[113] In all other cases, the principles require the OFT to contact the ASA to verify whether it has already acted. If the ASA indeed launched enforcement action, the principles hold that the OFT may decide the following courses of action:

> *"a) to act in parallel. OFT could also attack the advertisement and any other infringements of domestic or community legislation. If ASA's action was successful, OFT could drop action on the advertisement and carry on the other concerns.*
> *b) leave action entirely to ASA. In such cases, OFT would report its concerns to the ASA's attention and ASA would outline the scope of its investigation and investigate any areas of additional concern highlighted by OFT (if within the scope of its Code). OFT could nevertheless bring a separate action if it later identified serious concerns falling outside the Code.*
> *c) where a case was being considered by ASA, and evidence subsequently emerged that the advertising was part of a wider scam, OFT might elect to take immediate Enterprise Act action (i.e. before ASA action is completed)."*[114]

It follows clearly from the Case Handling Principles that the task of enforcing the implementing measures of the UCP Directive in the UK is primarily to be achieved through the operations of the ASA. The OFT retains back-stop legal powers, but only acts if considered truly necessary and when the breach harms the collective interest of consumers.

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[111] Regulation 19(4) CPRs 2008. A similar provision has been adopted for the regulation of unfair practice in B2B relations. See Regulation 13(4) of the Business Protection from Misleading Marketing Regulations 2008 (BPRs).

[112] Office of Fair Trading and Department of Business Enterprise & Regulatory Reform, 'Consumer Protection from Unfair Trading. Guidance on the UK Regulations Implementing the Unfair Commercial Practices Directive' (2008) <http://www.oft.gov.uk/shared_oft/business_leaflets/cpregs/oft1008.pdf> (hereinafter OFT Guidance 2008). In its section 'Compliance and Enforcement' the OFT Guidance 2008 reads: "11.6 There are alternative well-founded and effective systems of regulation (including self-regulation) in place in the UK. If enforcers are satisfied that complaints and cases are clearly within the scope of these systems and can be adequately dealt with by them, they will be able to refer such complaints and cases to the relevant body (to ensure that businesses comply with the CPRs). 11.7 As under the previous consumer protection regime, the Advertising Standards Authority (ASA) (…) are considered to be established means in the areas described below, and appropriate cases falling within their areas of expertise will usually be referred to them for action. (…) 11.9 The ASA is considered as the 'established means' for ensuring compliance with the CPRs and BPRs in nonbroadcast advertising. (…)"

[113] Principle 5. Principle 3 notes that: 'OFT believes that in virtually all cases, the consumer interest will be best served by action by the ASA under the self-regulatory regime. OFT will use established means wherever possible and will encourage other regulatory bodies with power to act against misleading advertising to adopt the OFT approach to established means.'

[114] Principle 7.

The private regime administered by the ASA thus principally functions as a filtering mechanism for the OFT. An obvious advantage of the arrangement for the OFT is that it allows the public agencies to prioritize and select cases to focus its limited enforcement resources on. In addition, it might generate information necessary to initiate investigative procedures or administrate remedies and sanctions.

The fact that the ASA can refer cases to the OFT when its own compliance mechanisms fail should be considered as the principal benefit for the ASA. The threat of being referred to the OFT is a potentially powerful deterrent that may motivate most of the practitioners to comply with the codes. However, this threat should not be overstated too much and requires some nuance. First of all, the Complaint Handling Principles leave open the conditions under which it should refer cases to the OFT, thus leaving the SRO free to decide when and at what stage to refer to the public agency. As analysis of the practice showed in the previous subsection, referrals hardly ever happen and if they do it is at a very late stage. Moreover, referrals can only take place as regards misleading advertising that harms the collective interest of consumers. Issues of taste and decency and small scale, individual consumer complaints about misleading advertising will not be covered since the enforcement mandate of the OFT is confined to CPRs breaches.

In the Netherlands, a similar agreement between the SRO and the public agency concerned with the enforcement of consumer protection laws, the Consumer Authority (*Consumentenautoriteit*) exists.[115] Also in this covenant no specific conditions have been laid down under which the SRO has to refer to the public agency. However, to ensure that the agency knows what type of cases the SRO is dealing with and to what extent its enforcement action has been successful, the two organizations keep a close rapport. More specifically, the agency receives the agenda, decisions, and compliance reports of the SRO. Should an advertiser not comply with the SROs activities, the agency can follow-up on the information it receives from the SRO and decide, on the basis of its discretionary competences, whether it will pursue action or not.[116] Interestingly, the authority may use the compliance record of an advertiser with the codes and SRO decisions as a proxy for the determination of the height of the administrative fine that it can administer if the practice violates the consumer protection statute.[117] Therefore, if an advertiser has repeatedly ignored the SRO decisions, this could lead to higher fines imposed by the authority. This increased level of sanctions may motivate the code-infringers to comply faster with the SRO enforcement activities.

However, to establish and maintain cooperative approaches between the public authorities and SROs mutual trust is required. In some countries, public authorities have been resistant to engage with the private regimes and design cooperative strategies. In Italy, for example, the SRO has not been able to establish relationships with the competition law authority (*Autorità Garante della Concorrenza e del Mercato*), which is competent in the field of misleading advertising.[118] This is despite the explicit recognition in the Italian Consumer

[115] Samenwerkingsprotocol tussen de Consumentenautoriteit en de Stichting Reclame Code 2010 (Cooperation Protocol 2010), http://www.consumentenautoriteit.nl/pv_obj_cache/pv_obj_id_59FE712A64F00CB3D557FB95349DC1E622ED0000 accessed 31 December 2010.
[116] Interview SRC, 16 April 2010, Sofia and Interview Consumentenauthoriteit 22 October 2010, The Hague.
[117] Ibid..
[118] Interview IAP, 19 March 2010, Florence.

Code that the initiation of the private regulatory system may lead, upon the discretion of the authority, to the suspension of the administrative proceedings to await the final decision of the SRO.[119] In Central and Eastern European countries, private regulation does not have strong historical roots. Here, a lack of a corporatist tradition has prevented public authorities from strongly engage with SROs in their enforcement activities.[120] However, the express encouragement of the creation of private regulatory systems by the European legislature (in particular the UCP and AVMS Directives) may motivate changes in these and other European countries so that more interactions between public agencies and SROs can be observed in the future.

(b) Adjudication

SROs usually do not initiate judicial proceedings to ensure compliance with its jury decisions. An exception is the German WBZ, which may start civil law proceedings under the national Unfair Competition Law Act (UWG) when an advertiser violates the contractual undertaking it had signed previously with the WBZ. What is more common is that the SRO is sued in court by an advertiser or advertising agency because it found their advertisement contrary to the applicable codes. Typically, the claim is that the publication of the decision by the SRO has caused or will cause damages on the part of the claimant and thus the compensation should be award or, respectively, an injunction should be granted to prohibit the SRO from publishing the litigious decision. Only seldom courts award these claims.[121] Instead, they often confirm the decision taken by the SROs, thus increasing the pressure on the advertiser or agency involved to comply with the original SRO decision.

c. Summary

Table III.5 summarizes the findings on the dimension of enforcement.

Evaluative criterion	*Score*	*Remarks*
(i) Monitoring	--	SRO monitoring policies are underdeveloped, making enforcement activities fully dependent on outsiders' input.
(ii) *Ex ante* compliance mechanisms	+/-	While copy advice and pre-clearance facilities are in place in many countries, the state of development varies strongly between different SRO.
(iii) Remedies and sanctions	+	SROs have at their disposal several remedies and sanctions, which are applied following an implicit sanction escalation policy. This allows the SROs to settle most of the disputes with minimal effort and at great speed, but also makes them vulnerable to critiques of regulatory capture.
(iv) Enforcement of sanctions	+/-	There are several private and public means via which SROs can enforce their sanctions. Media are key and have been profound gatekeepers in print and broadcast advertising. Digital media owners have yet to commit to such a role.

Table III.5. Summary of findings on enforcement

[119] Codice del Consumo, Article 27.3.

[120] An exception is Romania, where the SRO and the National Audiovisual Council has adopted a collaborative protocol, allowing the SRO to refer cases to this public body. See: European Advertising Standards Alliance 2010*, op. cit.*, 138.

[121] See for a discussion of national case law P. Verbruggen, 'Advertising' in F. Cafaggi, *Enforcement of Transnational Private Regulation: A Casebook* (forthcoming Edward Elgar).

Most of the compliance monitoring related to the transnational codes takes place at national level given that transnational codes are implemented by national industries in the local context. However, in Europe, monitoring is only carried out by a small number of SROs. Underdeveloped monitoring strategies are likely to create potential gaps in SRO oversight, in particular where consumers do not submit their complaints to the SRO or violations are hard to discover, and should thus be matured. *Ex ante* compliance mechanisms (i.e. copy advice and pre-clearance) to control advertising conduct are fully decentralized. Strong variations can be observed between SROs in terms of their use of these instruments. Pre-clearance is required in only some countries, but is banned for historical, cultural and legal reasons in others. While copy advice is more common, not all SROs have developed a strong policy here. In theory, copy advice and pre-clearance reduce the need for complaint adjudication. They may also generate important revenues for SROs as they are typically provided on the basis of payments. Accordingly, SROs should install and optimize their copy advice and, where possible, pre-clearance facilities.

SROs have at their disposal a wide set of remedies and sanctions (e.g. claim substantiation, order to withdraw or amend ads, and the expulsion of membership), at times supplemented with more interventionist sanctions (e.g. corrective statements, fines, withdrawal of trading privileges, referral to public authorities). These means are applied following an often implicit sanction escalation policy. Such policy allows the SROs to settle most of the disputes with the least interventionist means, but also at great speed. However, as the bulk of the cases are settled by what seems to be a mere 'slap on the wrist', the application of a number of sanctions remains largely theoretical and undermines the image of the SRO being a fierce industry watchdog. Those that have been found to breach the applicable codes cannot easily ignore the remedies or sanctions administered by the SROs. The enforcement of sanctions is greatly helped by the involvement of media owners to the private systems. Media owners play the role of gatekeeper and can effectively deny media access to code-infringers. This role is, however, seriously undermined in the context of digital media advertising, where major media owners have not (yet) fully committed to the private regulatory systems.

3. Quality

a. Evaluative Framework

Regulatory quality concerns the assessment and evaluation of regulatory performance and impact. The theme of regulatory quality has risen to the top of political agendas of Western capitalist countries in the context of efforts to enhance the management of public regulatory regimes and policy. In 1995, the Organisation for Economic Co-operation and Development (OECD) adopted the first international recommendation promoting several principles on regulatory quality.[122] In 2005, the OECD updated these principles and adopted the *Guiding Principles for Regulatory Quality and Performance*.[123] Central to these OECD Guidelines is the use of regulatory impact assessment (RIA) instruments to determine the desirability and tools of regulation. Whereas emphasis was initially put on RIA as an *ex ante* devise, the OECD and the EU have more recently also stressed the importance of *ex post* evaluations,

[122] OECD, Recommendation of the Council of the OECD on Improving the Quality of Government Regulation, including the OECD Reference Checklist for Regulatory Decision Making, 9 March 1995, OECD/GD(95)95, OECD, Paris.

[123] OECD, *Guiding Principles for Regulatory Quality and Performance* (Paris 2005), http://www.oecd.org/fr/reformereg/34976533.pdf, accessed 31 December 2010.

examining the impact of regulation in place on those affected, both the regulated and the intended beneficiaries of regulation.[124] The key rationale of emphasizing both *ex ante* and *ex post* impact assessments is the understanding that regulation and regulatory policy is a continuous process and requires evaluation throughout the full policy cycle.[125]

The principle question this section asks is to what extent private regulators in the advertising industry have been concerned with regulatory quality. The analysis of the dimension of quality is based on the following two aspects:

i. *Impact assessment* concerns the question of whether and how private regulatory regimes use evaluative mechanisms (both *ex ante* and *ex* post) to determine the desirability and effectiveness of codes of advertising practice.

ii. *Regulatory performance indicators* relates to the degree to which private regulatory regimes set criteria or benchmarks by which performance and effectiveness of their activities, including standard-setting, monitoring and enforcement, are measured.

b. Findings

i. Impact assessment

Private regulatory regimes in the field of advertising do not engage in *ex ante* evaluations of the codes, guidelines or recommendations they adopt. RIA of the kind that has become common place in OECD countries to evaluate the desirability and tools of regulation before regulation is actually adopted is foreign to private regulators in this policy domain.

Ex post impact assessments, that is, an evaluation of the (cost-)effectiveness of codes of conduct after they have been adopted and implemented, are generally absent as well. No private regulatory regimes have been observed to engage in a systematic analysis of the costs and benefits of the normative codes they adopted. What seems to have become rather common, however, is to periodically review existing codes and regulatory frameworks.[126] Several private regulatory regimes have sought to establish an automatic review process of the codes they adopt and administer. For example, the ICC has recently committed to review its Consolidated Code in cycles of 3 to 4 years.[127] The IABEurope Framework for OBA in online advertising is to be reviewed after 3 years.[128] EASA Best Practice Self-regulation

[124] See for example the Action Plan on simplifying and improving the regulatory environment, COM (2002) 278 final and the Interinstitutional Agreement on better law making [2003] OJ C321/4, paras. 25-30.

[125] See in general on regulatory quality and impact assessment in the public domain: C. Radaelli and F. De Francesco, 'Regulatory Impact Assessment' in R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, Oxford 2010), 279-301 and Baldwin, Cave and Lodge 2011, *op.cit.*, 315-337.

[126] Principle 2 OECD Guiding Principles for Regulatory Quality and Performance requires regulators to: "update regulations through automatic review procedures such as sun-setting."

[127] International Chamber of Commerce, 'ICC Paper on Code Drafting: Maintaining the Effectiveness of Self-regulation in Marketing Communications' (Commission on Marketing and Advertising, ICC Document No. 240-46/557) (Paris, 2010) http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/pages/548%20ICC%20paper%20on%20code%20drafting%20FINAL%20130110.pdf, accessed 31 December 2010, 1.

[128] Principle VII. (Review) of the IABEurope Framwork reads: "The undersigning Companies and Associations shall regularly review this Framework at least every 3 years in response to the development of OBA and business practices, and modify or add to the Framework as appropriate."

Model also requires SRO members to have in place 'a procedure of regular review and updating of the code'.[129] In its BPR on Code Drafting and Consultation, EASA specifies that the frequency in which review of codes should occur is once every 4 to 5 years and at least take account of any ICC code revisions.[130]

However, what appears to be the main rationale of these review procedures is to make sure the codes are up to date and adequately respond to developments in marketing practices, societal concerns and technology.[131] An assessment of the costs, benefits, distributional effects, impact on competition and market openness, and administrative burdens of the regulation, as required by the 2005 OECD Guiding Principles for Regulatory Quality and Performance, is not carried out.[132]

What then can explain the underdeveloped practice of impact assessment in the context of private regulation of the advertising industry? One aspect might be that codes of conduct and other documents laying down norms for the advertising industry are often used as political rather than truly regulatory devices. They are instruments that embody a part of the agenda of the industry to prevent or, at least, decrease the necessity that legislative or executive action is taken to regulate more of the industry and its practices. The background of RIA in the public domain has principally been to rationalize regulatory policy by mapping the (anticipated) costs and benefits associated with regulation, promoting evidence-based decision making, and depoliticizing regulatory policy.[133] For the advertising industry, however, private regulation is a key means of expressing its political agenda and interests, in addition to lobbying. The industry might therefore feel much less inclined to adopt impact assessments of its own, although there might be good reasons to do so.

So far, it seems as if the choices to adopt regulatory action and in which forms are mainly made on the basis of industry interests and intuition, rather than on evidence-based grounds. To improve regulatory policy by the advertising industry, in particular the focal institutions concerned with private regulation such as the ICC and EASA, it can be suggested to introduce more structured procedures of evaluation, both *ex ante* and *ex* post, of the whole regulatory cycle and across different levels of regulation,

ii. Regulatory performance indicators

A practice that is much more developed in the advertising industry – and in particular when compared to other industries – is the use of performance indicators to strengthen the effectiveness of private regulatory activities, including standard-setting, monitoring and enforcement. EASA plays the central role here. In 2004, EASA made a public commitment to enhance the effectiveness of private regulation in the European advertising industry by

[129] Principle 4 EASA Best Practice Self-Regulatory Model 2004.

[130] EASA, Best Practice Recommendation Code Drafting & Consultation (unpublished document, on file with author).

[131] In the preamble to the ICC Consolidated Code, the ICC holds: "The Code Revision Task Force of the ICC Commission of Marketing and Advertising will regularly review the Code's provisions, to ensure that they continue to reflect the latest developments in technology, marketing practice and society." Principle 4 EASA Best Practice Self-Regulatory Model 2004 holds that code revision is necessary to ensure "that it keeps abreast of developments in the market place, changes in public concerns and consumer sensitivity, and the advent of new forms of advertising."

[132] Principle 2 OECD Guiding Principles for Regulatory Quality and Performance.

[133] Radaelli and De Francesco 2011, *op. cit.*.

adopting a Charter on Advertising Self-regulation and pledging to monitor and report on progress in the implementation of this Charter.[134] The Charter and the Best Practice Self-Regulation Model that is put forward in it introduce performance indicators for EASA's membership. The EASA BPRs, which set out performance standards for SRO, can be seen as detailing these indicators. They cover issues such as SRO communications, funding and standards of service, monitoring activities, code drafting, complaints handling, copy advice, jury composition, publication of SRO decisions, claim substantiation and digital media communications. These indicators are both organizational and operational in nature, and do not necessarily reflect existing practices in particular SROs, but also indicate governance options that SROs are invited to pursue in the future.

The approach that EASA has taken was driven by concerns that the European Commission had expressed over the strong degree of divergence amongst codes and systems, and the implication for this for the Internal Market. To prevent legislative measures in this field that would bypass industry self-regulation, EASA and other industry representatives at the European level initiated a bottom-up harmonization approach as to the institutional and operational standards of SROs. The Roundtable on "Advertising Self-Regulation Roundtable", organized by the European Commission in 2005 and the concluding report – the Madelin Report – have validated EASA approach and confirmed key performance indicators relating to code adoption, monitoring and enforcement activities. EASA has kept track on compliance with the implementation of performance indicators by asking its SRO members to report to it on progress. EASA and SROs agree on meeting these indicators, although the failure to comply will not be sanctioned.

The approach that EASA has taken and the recognition this has had from the European Commission has improved key aspects in the governance of private regulation in the advertising industry. It enhanced transparency and participation in code adoption and revision, improved complaint handling procedures in terms of accessibility and speed, and strengthened the independence of SRO enforcement action. More generally, EASA improved the coordination of regulatory policies amongst the European SROs and strengthened the credibility of private regulation in the advertising industry in Europe.

c. Summary

Table III.6 summarizes the findings on the dimension of quality.

Evaluative criterion	*Score*	*Remarks*
(i) Regulatory impact assessment	-	Solid analytical impact assessment of regulation is lacking. Whether regulatory action needs to be taken and in what forms is determined mainly on the basis of private interests and intuition.
(ii) Regulatory performance indicators	++	The European advertising industry has been heavily concerned with the evaluation of its regulatory performance. Since the early 2000s EASA has developed BPRs to benchmark SRO performance in relation

[134] European Advertising Standards Alliance, 'Advertising Self-Regulation Charter' (EASA, (Brussels, 2004) http://www.easa-alliance.org/01/MyDocuments/SR_CHARTER_ENG.pdf/download, accessed 31 December 2010.

to others and identify areas of improvement. EASA monitors progress on a yearly basis and reports this to the European Commission.

Table III.6. Summary of findings on quality

4. Effectiveness

a. Evaluative Framework

Regulatory effectiveness concerns the degree to which regulation and the regulatory regime achieves the objectives it sets. The main aim of private regulation in the advertising industry is to ensure that advertising is fair, honest, tasteful and not misleading. The type of analysis that has been carried out in this case study does not allow for a comprehensive evaluation of the extent to which private regulation meets this objective. What is possible, however, is to single out a set of factors that affect the ability of private regulation to attain its goals and be effective. The following factors, which partly overlap with the criteria discussed in relation to the dimensions of legitimacy, enforcement and quality, is employed in the remainder of this evaluative assessment to identify the strengths and weaknesses of the effectiveness of private regulation in the advertising industry[135]:

i. *Industry commitment and capacity* are required to ensure that industry members adopt and follow the private rules. Such support is needed from all interrelated levels of the industry and should include all tiers in the supply chain, that is advertisers, agencies and media owners. The participation of all industry segments is considered crucial for the capacity to effectively adopt, monitor and enforce private regulation.

ii. *Private interests* such as reputation or commercial benefits are important drivers for private regulation. Private regulation is more likely to achieve its aim where it meets industry interests and these interests are aligned among different industry actors. Private regulation that only concerns public and not private interests is likely to fail do to a lack of buy-in on the industry side.

iii. *Government pressures and oversight* drive the creation and development of private regulation. The threat of adopting new legislation, renewing existing laws or taking executive action spurs the industry to live up to these standards and revise them in the light of the new legal framework.

iv. *Credible sanctioning* reflects the industry's commitment to abide by the regulatory rules and respond to non-compliant behavior. Where code infringements have no consequences for the violator, codes are not likely to be followed and have impact on

[135] These factors building empirical studies on the effectiveness of private regulation in different industries including: A. Héritier and S. Eckert, 'New Modes of Governance in the Shadow of Hierarchy: Self-Regulation by Industry in Europe' (2008) 28(1) Journal of Public Policy, 113-138; D. Michael, 'Federal Agency Use of Audited Self-Regulation as a Regulatory Technique', (1995) 47(Spring) Administrative Law Review, 171'-253; and A. Ogus, 'Rethinking Self-Regulation' (1995) 15(1) Oxford Journal of Legal Studies, 97-108. These conditions have also been identified to play a role in the effectiveness of private regulation in the advertising industry. See in particular: D. Harker, 'Achieving Acceptable Advertising. An Analysis of Advertising Regulation in Five Countries', (1998) International Marketing Review 15, 101-118; A. Campbell;, 'Self-regulation and the Media', (1999) 51(3) Federal Communications Law Journal, 711-772 and W.H. van Boom *et al, Handelspraktijken, reclame en zelfregulering* (Boom juridisch uitgevers, The Hague 2009).

advertising behavior. Where sanctions are available, but not or poorly administered this also undermines the effectiveness of the rules.

b. Findings

i. Industry commitment

Codes of advertising practice enjoy a large degree of support from the advertising industry. This commitment is signaled by a number of factors. First, industry actors have organized themselves through representative bodies, both at transnational and national level, which adopt codes of practice and have created private systems for their application and revision. These systems adopt a tripartite structure, ensuring that all segments of the industry are represented in its operation. Accordingly, all interrelated levels of the industry are included in the adopting, implementation, monitoring and enforcement of the rules, allowing for the control of advertising behavior from the early stage of the creation of the advertisement through the final stage of the dissemination via the media. The tripartite structure of private regulation of advertising should be considered key to its effectiveness.[136]

Second, the industry's commitment to private regulation is also signaled by the long and established tradition of private regulation in the industry. Since the early 1900s several Western industrialized nations developed national systems for the control of advertising practices. From these experiences the 1937 ICC code emanated and served as a guideline for other national industries to establish private systems of their own. Since the 1960s and 1970s most Western industrialized nations have been familiarized with private systems of advertising control. More recently, countries in Eastern Europe have created private regimes and many systems are in development in Latin America and Asia.

The commitment by the advertising industry to private regulation is further demonstrated by the fact that codes are regularly updated and revised. The periodical review of codes, as noted above, shows commitment of the industry to improve or adapt the system in view of new developments in marketing practices, societal concerns and technology.[137] As a result, the rules in place retain their practicability for both industry and consumers. Finally, also the fact that the private regimes are entirely funded by the industry signals its commitment to private regulation. Membership fees or levies fund the SROs in their activities adopting, monitoring and enforcing the codes of conduct. This means that no external funding (e.g. by government) is used and the financial burden is carried solely by the industry.

However, the industry's commitment is somewhat undermined by the reluctance of weighty digital media owner to apply and enforce codes of conduct to advertising publicized through their Internet-based services. Unlike the press, television and radio, digital media owners, in particular major search engines, auction websites and social network communities, are yet to fully implement codes of conduct on advertising and enforce the decisions of the SRO juries in relation to advertising appearing through their services. SROs have reported to struggle to deal with these global actors in a systematic and structured fashion, in part because the latter prefer a global approach to private regulation rather than having to deal

[136] Harker 1998, *op. cit.*, 114. See also Boddewyn 1988, *op. cit.*, 330-333.
[137] See Part III, Section B.3.b.i above.

with SROs on a territorial basis. Consequently, the gate keeping function that media owners have traditionally assumed in relation to private regulation has not fully developed in this context. This stance undermines the capacity of SRO to ensure code compliance and makes SRO enforcement activities in digital domain particularly weak.

ii. Private Interests

Crucial to the effectiveness of private regulatory regimes is that its aim aligns with the interests of the industry. In the case of the private regimes under review here this is very much the case. The general objective of the private regimes is to ensure that advertising and other forms of marketing are fair, honest, tasteful and not misleading. As such, the advertisers seek to promote trust in advertising and their brand names amongst potential buyers. This helps to deliver the long-term and ultimate aim of advertising: persuade consumers and businesses to buy the products advertised. Reputation and commercial benefits are therefore important drivers for effective private regulation.

However, private regulation does not only concern the private, commercial interests of the industry. It may also serve public interests, such as fair competition, consumer protection and protection of human rights, in particular rights of non-discrimination, data protection and privacy. The potential overlap between public and private interests has motivated some governments to collaborate with private regulatory regimes in delivering these public policy goals. Public and private interests do not necessarily overlap, however. As a result, private regulation may not be that effective in attaining public policy goals. An example of the misalignment of public and private interests is provided by the case of the IFBA Global Policy, which emerged as an industry response to the 2004 WHO Global Strategy on Diet, Physical Activity and Health.[138] The IFBA Global Policy major food and beverage companies have committed to promote products which fulfill nutrition criteria based on accepted scientific evidence and/or applicable national and international dietary guidelines. As such, the IFBA aims to contribute to reducing obesity among children, a public concern. IFBA sponsored audits point out that the compliance of member companies is very high and that industry is thus promoting healthier products to children.[139] However, independent research carried out in relation to the US Children's Food and Beverage Advertising Initiative – the US version of the IFBA global pledge – pointed out that food and beverage advertising to children continues to be predominated by products of extremely poor nutritional value.[140] The study found that more than two-thirds of all advertising by participating companies was for foods and beverages with low nutritional quality and that truly healthy foods account for less than 1% of all advertising of the participating firms.[141] The study concludes that:

"(…)our evidence distills to two key points: (1) the industry has done everything it promised in terms of fulfilling the details of its self-regulatory pledges and (2) that effort has been completely ineffective in shifting the landscape of food marketing to children away from its overwhelming emphasis on non-

[138] See in detail Part II, Section B.3.b above.

[139] The audit report by Accenture indicates 100% in print advertising, and 98-99% in television advertising. See: Accenture, 'Compliance Monitoring of Global Advertising for Television, Print, and Internet for the International Food & Beverage Alliance' 2009) https://www.ifballiance.org/sites/default/files/IFBA%20Compliance%20Monitoring%20Report%2010%20Nov09.pdf, accessed 31 December 2010.

[140] D. Kunkel, C. McKinley and P. Wright 'The Impact of Industry Self-Regulation on the Nutritional Quality of Food Advertised on Television to Children' (2009) Children Now Report, http://www.childrennow.org/uploads/documents/adstudy_2009.pdf, accessed 31 December 2010.

[141] Ibid., 25-26.

nutritious products that place children at risk of becoming obese. With self-regulation fully implemented, nearly three-quarters (72.5%) of all food advertising to children continues to promote low-nutrient, high-density products that are classified in the poorest nutritional category by governmental standards."[142]

The standards set by initiatives such as the IFBA Global Policy may thus be followed through, but nonetheless prove not to be sufficient to achieve any material changes in the type of advertising of food products that reaches children. The commitment of the industry is simply too limited – and arguably the private commercial interest too high – to significantly reduce the advertising of unhealthy products to children. Private regulation of the kind proposed by the IFBA may therefore be rather ineffective in attaining public policy objectives such as the reduction of child obesity rates.

The case study also demonstrates that with the advertising industry the interests may not be aligned. The different segments of the industry – advertisers, agencies and media owners – indeed have different interests. In particular, digital media owners have gained considerable market shares in offering advertising services and have engaged in a strong competition with traditional media (print and broadcast) for advertising revenues.[143] So far, digital media owners, in particular those providing Internet-based services, have not fully committed to private regulation as they seek to further increase their market share. Not subscribing to private codes on advertising also offers digital media a further competitive advantage: advertisers are free to use particular types of advertising which are banned under the code. This divergence of interests amongst media may dent the effectiveness of private regulation. Where interests are too far apart, chances are slim that private regulation will come about, be forceful enough, and/or will be complied with by practitioners.

iii. Government support and oversight

Government has proven to be an important driver for the establishment and development of private regulatory regimes in the advertising industry. Both at the national and transnational level governmental bodies pressure SROs and the industry at large to progress and innovate systems of private regulation.[144] Should these systems fail to meet the expectations, legislative or executive action may be the consequence. In the area of food advertising, for example, recommendations by the WHO on dietary habits, physical activity and health and the activities spurred by them at the national and regional levels have triggered the adoption of the ICC Framework on Responsible Food and Beverage Communications and the IFBA Global Policy on Marketing and Advertising to Children. Also the IABEurope Framework for OBA in online advertising and the complementing EASA BPR on OBA (in draft) have emerged in a context of pressure being exercised by the European Commission to design a credible regime of private regulation.

At the national level, on the other hand, support and oversight by government have proven significant in harnessing the effectiveness of SROs. In the UK, Spain and Netherlands, for example, support by legislative measures and oversight by public authorities exercising enforcement powers in relation to advertising regulation have helped these national systems to gain important public functions in the control of misleading and comparative

[142] Ibid., 35.
[143] See in detail Part I, Section B.3.b above.
[144] Compare: Boddewyn 1998, *op. cit.*, 333.

advertising. Clearly, such recognition has boosted their status as industry watchdogs in these countries.

iv. Credible sanctioning

Private regulatory regimes for the control of advertising behavior have established fairly developed sanctioning policies. Non-compliance with the applicable advertising codes generally results in enforcement action, which can be very informal activities such as warnings and persuasion, but may also include formal investigations, hearings and sanctioning. As explained in relation to the dimension of enforcement, remedies and sanctions are applied according to an implicit sanction escalation policy: SROs prefer to settle the dispute first by warning or persuading the advertiser or agency to comply with the codes. Naming and shaming strategies or denial or access to media may be used to prevent the advertiser from using the advertisement in the future. Sanctions such as fines and compensation are only seldom available to the SROs and if they are, they are applied only in very exceptional cases. This can be partly explained by the function enforcement activities play: rather than punishing the advertising practitioner and awarding compensation to complainants, the SROs seek to educate and persuading advertisers, agencies and media to comply with the rules in the future.

Crucial to the credibility of the sanctioning policies is the independence of the SRO jury from the industry. First, jury members should not be impartial to the individual disputes that lay before them. Second, the majority of the jury members should have a non-industry background so that they are not guided by or tied to industry interests (e.g. consumer representatives, judges, laymen and scientists). This is key because such independence mitigates risks of regulatory capture, which are typically present in the case of private regulation. Since capture or industry bias may prevent any real enforcement action from happening, the installation of a jury that includes a majority of non-industry stakeholders is crucial to the effectiveness of private system.

In this sense it is positive that EASA's Best Practice Self-regulation Model suggests that a jury 'should have a majority of independent members and its chairman should be an independent person'.[145] However, EASA does not report on the degree to which this recommendation is met by its SRO membership. It only reports on the commitment set out in the EASA Charter to give '[d]ue consideration of the involvement of independent, non-governmental lay persons in the complaint adjudication process.' According to EASA, 21 out of 25 SROs comply with this Charter commitment.[146]

To gain more insights as regards the extent to which SRO juries indeed have a majority of independent members, a preliminary review was made of the websites, statutes and/or procedural rules of 12 European SROs. Table III.7 (see below) summarizes the findings of this review. It suggests that 5 out of these 12 SROs have in place a jury in which non-industry stakeholders form the majority. While it must be acknowledged that the EASA Charter commitment is an important first step in securing the independence of the SRO juries from

[145] European Advertising Standards Alliance, 'EASA Best Practice Self-Regulatory Model' (Brussels, 2004), http://www.easa-alliance.org/binarydata.aspx?type=doc&sessionId=ayufse45uivrinab2lt1bh45/EN_BestPracticeModel.pdf, accessed 31 December 2010.

[146] European Advertising Standards Alliance 2010, *op. cit.*, 237.

industry, it is crucial for the credibility of SRO sanctioning and, in turn, the effectiveness of the private regime, that the industry further opens up jury membership and allows non-industry stakeholders to have the majority of votes in the jury.

SRO	*Independent members*	*Independent chairperson*	*Majority of independent members*
Austria	X	X	X
Belgium (JEP)	✓	✓	X
France (ARPP)	✓	✓	✓
Germany (DW)	X	X	X
Ireland (ASAI)	✓	✓	✓
Italy (IAP)	✓	✓	X
Netherlands (SRC)	✓	✓	X
Poland (Rada Reklamy)	✓	X	X
Spain (Autocontrol)	✓	✓	✓
Sweden (Ro)	✓	✓	X
Switserland (Schweizerische Lauterkeitskommission)	✓	✓	✓
United Kingdom (ASA)	✓	✓	✓

Table III.7. Preliminary review of elements of independence in SRO juries[147]

c. Summary

Table III.8 (below) summarizes the findings concerning the dimension of effectiveness. The effectiveness of private regulation in advertising depends first of all on the industry's commitment to it. It can be held that this is generally strong and this is signaled by the long tradition of adopting of codes of advertising practices, by the continued revision of these codes and by the fact that private system is funded solely by industry itself. However, this is undermined by the resistance of weighty digital media actors to apply and enforce codes of conduct to advertising used through their media. These new actors have so far preferred not to full comply with the current private systems for the control of advertising as they seek to further increase their share in the advertising market. Not all interests in the advertising industry thus seem aligned and this poses problems to the effectiveness of private regimes.

Evaluative criterion	*Score*	*Remarks*
(i) Industry commitment and capacity	-	While industry commitment and capacity are generally strong in the area of print and broadcast advertising, digital media have yet to fully subscribe to current systems of private regulation. This gap dents the industry's capacity to regulate advertising and ensure compliance

[147] Sources: websites, statutes and rules of procedure of the individual SROs and EASA 2010, *op.* cit.. Limited publicly available data and language proficiency prevent a wider review at this point.

		across all media.
(ii) Private interests	+/-	Industry interests such as reputation and brand value strongly align with the objectives of private regulation, though not necessarily with public policy objectives. Interests of digital media owners to increase their share in the advertising market create tensions with traditional media and may prevent their full commitment to private regulation.
(ii) Government pressures and oversight	+	Government pressures have driven the establishment and further development of private regulation. Recognition in legal acts and oversight by national public authorities has assisted SROs in assuming important public functions in the control of advertising.
(iii) Credible sanctioning policies	+/-	Sanctioning policies gain credibility where SRO juries have a majority of independent, non-industry stakeholders. Although most of the European SROs have involved such stakeholders in their adjudicative procedures, few SROs allow them to have a majority in the jury.

Table III.8. Summary of findings on effectiveness

In the past, government pressures have been very important in motivating the industry to develop systems of private regulation and they may also do so again in relation to digital advertising. The effectiveness of the private regulation is further affected by the credibility of sanctioning policies. To mitigate the risk that the industry interests may capture the SRO juries, non-industry stakeholders should constitute the majority of these juries. While most of the European SROs have involved such members in their juries, a preliminary review of twelve Western European SROs suggests that there is ample space for improvement still.

Fabrizio Cafaggi and Paul Verbruggen

Policy Recommendations

This section includes several policy recommendations to improve the governance of TPR of advertising. Given the complexity of the governance design of the transnational regime, the recommendations will be divided according to two macro variables: (1) the governance level of on which regulation is adopted and (2) the type of media involved in advertising. In addition, several recommendations are given to improve the quality of regulation and regulatory performance (3).

1. Governance Level

a. The transnational level

The development of relationships between advertising and single fields ranging from food safety to health, from environmental protection to antidiscrimination suggests that coordination at the transnational level needs to improve both in relation to sector-specific international organizations and local SROs. The ICC often reacts to recommendations proposed by international and intergovernmental organizations or by other transnational private regulators. These relationships are informal or take the form of exchanges of observers in the governance bodies.

A higher degree of coordination requires instruments that can operate as framework agreements with both binding and non-binding commitments. We propose to deploy regulatory agreements in a double form: bilateral and multilateral between the ICC and other transnational private regulators and international governmental organizations in order to coordinate policy and making commitments to comply with sector-specific rules. In these agreements parties can undertake different types of obligations. They can:

(i) Commit to comply with regulations adopted by other organizations;
(ii) Define common procedural rules that enable mutual consultation and possibly even stronger co-regulatory processes;
(iii) Or define common rules concerning standard setting.

To illustrate the latter point, in the field of food advertising, nutritional values of food and beverages can be agreed upon between Codex Alimentarius Commission of the WHO and the ICC or other private regulatory bodies. The IFBA Global Policy, for example, required signatory food and beverage companies to promote products that fulfill specific nutrition criteria based on accepted scientific evidence and/or applicable national and international dietary guidelines. The policy remains unclear, however, about what nutrition criteria and dietary guidelines are adopted. This lack of clarity was considered an important reason why the US version of the IFBA policy remained ineffective in changing the approach of the industry to the marketing of unhealthy food and beverages to children.[148] By coordinating

[148] D. Kunkel, C. McKinley and P. Wright 'The Impact of Industry Self-Regulation on the Nutritional Quality of Food Advertised on Television to Children' (2009) Children Now Report, http://www.childrennow.org/uploads/documents/adstudy_2009.pdf, accessed 31 December 2010.

with the WHO Codex Alimentarius Commission, an expert-led standardization body on health risks for food products, uniform criteria and guidelines could be adopted for the initiative, thus promoting coordination between WHO and the private initiative, and increasing the initiative's credibility.

The framework agreements require a particular governance architecture that includes monitoring and dispute resolution devices. They should generate committees composed by the regulators and integrated by third parties, primarily independent experts that can monitor the implementation of the agreement, and refer to the standard setters in order to modify. Enforcement does not concern the framework agreement, thus dispute resolution requires more mediation-like devices in order to prevent stalemates and promote coordination and further cooperation.

b. The European level

The differences between public and private strategies at EU level require careful scrutiny. The move towards full harmonization with the UCP Directive reinforced the coordinating function of EASA, given the lack of any similar institution or mechanism in the public domain.[149] EASA is undergoing a relevant transformation that requires a careful design of its governance, taking into account incentives of national SROs, among which competitive dynamics coexist with cooperative interactions. This in part reflects different market powers of the segments of the advertising industry, and in part different regulatory traditions in the field of advertising.

At the European level the choice of EASA has been that of coordinating practices taking place at Member State level without engaging directly into definition of material rules for advertising. EASA does not draft codes concerning substantive issues, but the digital media debate clearly shows that a new dynamic is emerging. Rather it defines rules concerning the regulatory processes that SROs engage into at domestic level. The promotion of ex-ante regulation through copy-advice is a noticeable example of how the best practice model influences the balance between ex ante and ex post mechanisms to monitor and enforce compliance. The report shows that often the line between standard setting and monitoring is grey and EASA BPRs have been rather influential in rule interpretation, especially in the light of the Madelin Report.

What at the moment seems the most urgent need is the promotion of different forms of coordination among national SROs, which can include all or only a limited number of organizations. Some examples can contribute to indicate the path:

(i) Mutual recognition in the field of pre-clearing and copy advice. For advertisements showed in different countries it would be useful to define a mutual recognition regime whereby if an advertisement has been pre-cleared by one SRO that pre-clearance can be 'recognized' by other SROS where the rules are sufficiently similar. This regime will reduce the costs that enterprises now have to incur to pass a pre-clearing scrutiny in every system before engaging into a European campaign.

[149] See on governance design in the field of European private law: F. Cafaggi, 'The Making of European Private Law: Governance Design' in F. Cafaggi and H. Muir Watt (eds), *Making European Private Law* (Edward Elgar, Cheltenham, 2010), 289-351.

(ii) Creation of *ad hoc* multiple SROs dispute settlement systems when there are disputes concerning advertising showed in different countries.
(iii) Creation of bodies that can coordinate different interpretations of similar rules by each national bodies. These committees can then revise SRO decisions, identify the reasons of different interpretation and suggest guidelines for SROs.
(iv) Creation of monitoring bodies including consumer organizations for cross-border complaints.

In addition, EASA and the European advertising industry at large, should maintain their efforts to stimulate the creation of effective SROs where they still do not exist. For the settlement of disputes and frustrations over advertising practices SROs have proven to be important complementary mechanisms to public law enforcement. Consumers may gain substantially benefits from the presence of such private dispute settlement systems if compared to a situation where such systems are absent. As such, the European advertising industry can make an important contribution to the objective of EU law to create a level-playing field between EU Member States as regards the regulation of fair competition and consumer protection.

c. The national level

At national level two major transformations are taking place; (i) new combinations between private and public enforcement due to the implementation of UCP Directive (primarily through administrative enforcement) and the AVMS Directive; and (ii) new organizational features concerning public enforcement brought about by digital advertising where various administrative agencies are responsible to monitor and enforce regulatory violations, with the involvement of telecom and internet providers. In order to keep pace with these developments we suggest that improvements should be made in relation to three topics:

(i) Non-industry stakeholder involvement

The involvement of non-industry stakeholders should be advanced further, both in terms of rule-making and enforcement activities. Such involvement enables those individuals that are supposed to benefit from the application of the rules, consumers and NGO representatives in such activities, to contribute to code adoption and application. Specifically, public consultations on code drafting and other forms of outsider involvement in rule-making procedures facilitates transparency and helps industry rule-makers to be accountable also to non-industry actors that benefit from their activities.

Also in relation to enforcement activities, the inclusion of non-industry stakeholder in juries offers benefits to the industry. Outsider involvement signals credibility and independence, and reduces risks of capture. Furthermore, the inclusion of experts (e.g. judges and academics) in SRO juries may enhance the quality and consistency of decisions rendered.

(ii) Enforcement capacity

To enhance the capacity of SROs to promote and ensure rule-compliance in the industry it is necessary to strengthen the monitoring policies of individual SROs. Systematic monitoring programs signal the industry's commitment to ensure compliance both to laggards in the industry, but also to interested third parties such as consumers, NGOs and government. In addition, ex officio monitoring decreases dependency on complaint input from third parties to take enforcement action. Where a violation is detected, this should lead to an inquiry

and/or adjudication before the jury. If resource constraints impel the SRO to hold structural monitoring exercises, SRO staff should at least have the possibility of submitting a complaint to the SRO upon the discovery of advertising practices that are at odds with the applicable codes. Potential concerns over misuse of powers in this *ex officio* practice are mitigated where the jury is composed of a majority of non-industry representatives.

Second, SROs should more actively engage in *ex ante* compliance mechanisms. Copy advice and pre-clearance services reduce the need for complaints handling and may thus reduce costs related to such *ex post* control mechanisms. At the same time, copy advice and pre-clearance can generate important resources for the SROs. Pre-clearance, however, may run counter to legal, cultural and historical obstacles, in particular in relation to the right of freedom of expression, and may thus not be feasible in all circumstances. SROs also free, however, to use pre-clearance as a sanction, particularly in relation to repeat offenders, and require them to submit advertising copy before they launch a new campaign. Concerns over the freedom of expression are unlikely to arise in relation to copy advice, as this *ex ante* control mechanism remains voluntary and not binding for the advertising practitioner. Its compliance function can nonetheless be significant.

Third, it should be considered to promote the practice for juries to refer to past decisions having broadly the same factual context as part of the argumentation to decide a case. This enhances transparency in the decision-making process and can also improve consistency between decisions.

(iii) Public-private coordination

SROs and public regulators should actively engage with each other to discuss and design possible ways of collaboration. Such collaboration is likely to remain informal initially, but could in time be formalized through protocols, covenants or delegation. Collaboration should facilitate information sharing. Coordination creates a win-win situation: it allows government to prioritize and focus its often cramped enforcement budget, while SRO legitimacy and enforcement activities benefit from the support and oversight of government.

2. Digital Advertising

The report details the weaknesses faced by the current governance design of private regimes as regards advertising through digital advertising. Here, new media actors offering advertising services such as search engines, auction websites, social network communities, mobile phone operators have not fully engaged with the SRO regimes in place and this undermines the effectiveness of these regimes. Clearly, in the current set-up of the SROs, commitment of the digital media owners to the codes adopted by transnational and national private bodies is crucial to secure compliance in the digital domain.

In addition, digital media owners may promote compliance with codes of conduct and SRO decisions by including in their advertising contracts with the advertisers the obligation to comply with codes and decisions. The incorporation of such compliance clauses in the contracts generates important attention for the codes and their application to digital advertising. Moreover, the contract makes compliance with the codes and decisions binding on the advertiser and this improves the enforceability of codes in this domain.

3. Quality of regulation and regulatory performance

Improving regulatory quality by refining indicators is certainly one of the most important challenges ahead for private regulation. The European advertising industry provides one of the most advanced attempts to introduce performance indicators in private regulation. A more structured process following the path of performance indicators would improve both effectiveness and legitimacy. Many of the regulatory objectives of private regulation (fair competition, consumer protection, privacy and data protection) are strictly correlated to the role of public authorities, in particular independent regulators but sometimes government agencies in the field of unfair trade practices. An integrated approach combining the action of private and public regulators should be able to capture the many forms of interaction that are taking place in this field. There is a strong need to coordinate impact assessment between regulators in the private and public domain and to measure the effectiveness of coordination among them.

Regulatory impact assessment cannot be done at each governance level separately, but needs to be coordinated given the decentralized nature of standard setting, monitoring and enforcement of advertising regulation. We propose:

(iv) a set of common principles concerning quality of public and private regulation on advertising;
(v) a full regulatory cycle impact assessment including both ex ante and ex post evaluation;
(vi) and the definition of indicators distinguishing between organizational innovation and regulatory performance.

While the leading role of EASA at the EU level should be maintained, a stronger approach to regulatory quality at ICC level should be introduced in order to cover the whole regulatory chain. The EASA International Council may prove an appropriate forum for this.

The indicators adopted by EASA cover both organizational innovation of SROs (sustained funding, the independence of the jury, promotional SRO activities) and regulatory activity (public consultation in code drafting, monitoring, access to justice, complaints handling, and effectiveness of sanctioning policies). A clearer distinction between organizational and performance indicators and ways to define the goals and measure the degree of compliance would improve the quality of the regulatory process. The forthcoming guidelines concerning OBA in digital advertising should be complemented by indicators on both organizational innovation and regulatory performance in order to ensure a clear and effective private regulatory framework.

Annex I: General Case Study Template

PART (I) – Introduction. General overview

I.A. Brief introduction on the key-elements of the study (e.g.: relevance of the sector within the national and international industry; main changes occurred in recent years; development and relative importance of (trans)national private regulation for the sector).

I.B. Brief historical description of the sector

The birth of the industry (type, dimension), the role of enterprises and other main actors (NGOs, public bodies, associations, etc.).

- What is their roles?
- What is their legal forms?
- What are their main activities?
- Which type of relationship is set among the different actors?

In this part their critical aspects concerning functioning and the evolutionary perspective should be presented.

I.C. General overview of sector regulation at national and international level:

- What is regulated?
    - Economic regulation (regulation aimed at addressing the impediments to competition)
    - Social regulation
        - Health and safety
        - Environmental protection
        - Consumer protection
        - Human rights protection
        - Financial stability
        - Others
- Why is the sector regulated? what is the rationale for regulation?
    - Economic / market failure justification for regulation:
        - Impediments to competition (e.g. monopolies)
        - Asymmetrical information
        - Externalities

        - Coordination problems
        - Others
    - Distributive justice
    - Paternalism
- How is the sector regulated?
    - Regulatory instruments for economic regulation:
        - Public ownership
        - Price and quality regulation
        - Competitive public franchising
    - Regulatory instruments for social regulation:
        - Private law
        - Administrative instruments:
            - Prior approval
            - Mandatory standards (output or input standards)
            - Information disclosure
            - Economic instruments
- Is the sector highly or poorly regulated?
    - Is it possible to define a benchmark to assess the intensity or complexity of regulation?
- What is the level of regulation? Who are the competent institutions (national v. international level, public v. private actors, etc.)?
- Are there private organisations (e.g. enterprises, associations) involved in the regulatory process and how?
    - At what level of the regulatory process are private organisations present?
        - Standard-setting
        - Monitoring
        - Enforcement
    - Are private organisations the only actors responsible for a given level of regulation or rather is the responsibility shared among private and public actors?
    - Is there a private actor that has a monopoly over a given regulatory level or is there a competitive structure?
- What is the underlying regulatory model?

I.D. International dimension

Given the previous background information, highlight the international dimension of the sector, e.g.

- Relationships among enterprises at international level
    - Do enterprises at international level cooperate and/or compete with each other?
    - Are there formal relationships among enterprises at international level and of what type are they?
        - E.g. joint-ventures; research and development cooperation agreements etc.
        - Is the relationship horizontal or vertical?

-Existence of associations to which members from different countries participate

- International organizations regulating the sector (with coordinated or overlapping competences), etc
- Formal or informal international cooperation through for example the creation of networks…
- Cross-border characteristics of the sector: Do the goods and services provided by the sector easily move across the borders of national jurisdictions?
    - Is there a cross-border (as opposed to national or local) market for goods or services in a given sector?
    - Is there a potential for a cross-border market ?
    - Is there international public regulation or are national regulations harmonised (in either intended or non-intended way), or are national regulations diversified?

PART (II) – The emergence of transnational private regulatory regimes

II.A. Existing TPRERs

This part will describe the existing TPRERs in the sector focusing on

- Conditions that lead to the emergence of transnational regulation (e.g. lack of national regulation; existence of international regulation (will not necessarily act as enhancing); international dimension of the sector; level of competition in the sector; etc.)

- What are the incentives for the industry to set up TPRERs? (Intrinsic: promotion of integrity and safety of the industry, absence of public regulation, rent-seeking, not realised gains from cross-border activity, etc. or External: pressure by public actors, fear of public intervention, etc)

- National, international or global dimension

- Main actors that participate to the TPRER?

    - At which stage? creation/implementation/enforcement/monitoring

    - With which function? standard-setting, monitoring, enforcement

- What is its relationship with national or international regulation? (given that its pre-existed)

    -None

    - Private regulation fills the gaps left by public regulation

    - Public regulation fills the gaps left by private regulation

    - Public regulation requires private regulation

    - Delegation by public regulation

    - Ex-post approval of private regulation by public acts

        - By public regulation or by judges (centralised vs. decentralised recognition)

    - Contract

- Source of financing

    - Public vs. private

    - Internal (industry) vs. external

    - Membership fees / selling regulatory outputs etc.

- Mechanisms of standard-setting

- Internal or external monitoring concerning application of the TPRER

    - External – by whom? Public vs private actors, centralized or decentralized, atomistic or sustained monitoring, etc.,

    - Internal: sustained or atomistic? Centralised or decentralised?

- Internal or external enforcement (dispute settlement)?

    - Internal: are all the stakeholders represented? Constant or ad hoc mechanism?

    - External: public or private?

- Participation of legal/financial/technical consultants in the elaboration of the TPRER

- Existence of sanctions and if so what type: compliance v. deterrence / contract v. statute? It is also important to survey whether these sanctions are established and administered by a private body itself on the basis of privately established standards (i.e. the TPRERs) or whether the body evaluates the behaviour of private actors against public law standards.
    - Public or private sanctions?
    - Types of sanctions: formal or informal; financial (paying a certain fee to TPRER or another body or compensation to the party harmed), naming and shaming, expelling from TPRER etc.
    - Possibility to impose public means to enforce sanctions
- Types of TPRERs
    - Technical vs. interest-based TPRERs
        - International business organisations; international NGOs;
    - Legal form
        - Contractual or organisational model
            - Types of contractual relationships
            - Organisational forms: association, foundation, cooperative, company
    - Type of members
        - Meta-organisations
        - Individual market players
        - Public actors

II.B. Failed TPRERs

- Weaknesses of the TPRERs
    - low quality standards
    - insufficient monitoring and/or sanctions
    - too many actors
    - diversified interests
    - opacity
- Conditions that drive to the dissolution of the TPRERs if any (e.g. changed market conditions, national or international regulatory intervention (regulatory intervention might also be sign of success of a TPRER; its effectiveness convinced the statutory regulator to codify the TPRER))

Part (III) – Conclusions

In this last part each of the following elements should be autonomously evaluated to provide a useful framework. Common parameters should be chosen to facilitate the comparison between sectors.

III.A. Legitimacy

- Procedural transparency
- Inclusion (are all those affected by a norm represented in the creation process?)
- Accountability of private regulators?

It may be useful to differentiate among the regulatory levels: standard-setting, monitoring and enforcement

III.B. Effectiveness

- What are the means used to render the regulation effective in practice?

III.C. Enforcement

- Mechanisms
  - Formal vs. informal (Specify in more detail)
  - Centralised vs. decentralised
  - Costly vs. not costly
  - Public vs. private

- Do they depend upon the source of the norms? Are various norms considered in the enforcement process (e.g. private and public, private from different sources)?
- Perception of enforcement by (1) regulatees; (2) third parties

III. D. Quality

- Certainty, predictability,
- unambiguity, coherence
- accessibility
- Adaptability, flexibility
- Efficacy
- Costs of standard-setting, monitoring and enforcement
- Conformity with public rules

Annex II: List of Interviews

Interviews 2, 17, 20 and 24 were conducted in Dutch and interviews 21-23 in French. Interviews 21-23, 28 and 29 were conducted by Fabrizio Cafaggi.

No	Date	Location / Type	Organization
1	23 Nov. 2009	Brussels	EACA
2	24 Nov. 2009	Brussels	JEP
3	24 Nov. 2009	Brussels	EASA
4	24 Nov. 2009	Brussels	EGTA
5	25 Nov. 2009	Brussels	EFRD
6	25 Nov. 2009	Brussels	Landmark Europe (EU-Pledge)
7	26 Nov. 2009	Brussels	WFA
8	26 Nov. 2009	Brussels	European Commission (DG INFSO)
9	27 Nov. 2009	Brussels	Brewers of Europe
10	19 Mar. 2010	Florence	ASA
11	19 Mar. 2010	Florence	Autocontrol
12	19 Mar. 2010	Florence	ARPP
13	19 Mar. 2010	Florence	IAP
14	19 Mar. 2010	Florence	EASA
15	15 Apr. 2010	Sofia	Rada Reklami
16	15 Apr. 2010	Sofia	Clearcast
17	16 Apr. 2010	Sofia	SRC
18	16 Apr. 2010	Sofia	ASA
19	4 May 2010	Telephone	DW
20	22 Oct. 2010	The Hague	Consumentenautoriteit
21	27 Oct. 2010	Paris	ARPP
22	27 Oct. 2010	Paris	CSA
23	27 Oct. 2010	Paris	DGCCRF
24	29 Oct. 2010	Telephone	Commissariaat voor de Media
25	12 Nov. 2010	Stockholm	Reklamombudsmannen
26	15 Nov. 2010	Telephone	EASA
27	29 Nov. 2010	Florence	ARPP
28	15 Dec. 2010	Brussels	European Commission (DG INFSO)
29	17 Dec. 2010	Brussels	EASA

Annex III: Discussion Paper Mid-term Roundtable

I. Introduction: Case Study Elements

The globalization of markets challenges national governments in delivering on social and economic policy objectives through national regulatory regimes. The emergence of transnational private regulatory regimes (TPRERs) can be explained as both part of the response to the limits of national governments and their cause. However, these regimes have been subject to criticisms by academics and by policy makers, focusing on their lack of legitimacy and poor effectiveness. Advertising constitutes an industry in which both concerns have prominently emerged. The case study therefore addresses the challenges of private advertising standards face in terms of legitimacy and effectiveness and identifies the institutional responses developed to them. Of particular interest to the case study are the enforcement mechanisms the industry has developed to address non-compliant advertising behaviour.

Main Research Questions

The research aims to answer the following main questions:

- What conditions and motivations can explain the emergence of TPRERs in the advertising industry? Do these vary across sectors, recipients, and media?
- What is the relationship between TPRERs and public regulation?
- What is the relationship between TPRERs and national private regimes?
- Are TPRERs successful in regulating the conduct of the advertising industry in terms of legitimacy, quality, enforcement, and effectiveness?

Methodology

As a first step in determining the focus of the case study, Oliver Gray and Jean-Pierre Teyssier were consulted in July 2009 on what topics are most relevant to the industry. From September 2009, the academic literature on the advertising industry, its international dimension, and its regulation was surveyed. As a follow-up to this desk study, eleven interviews were conducted in Brussels late November 2009 with representatives of EASA, WFA, EACA, egta, EU Pledge, Brewers of Europe, EFRD, JEP, and the European Commission (DG INFSO). This first round of interviews served the purpose of identifying and appreciating the different roles the institutions have to play in the emergence, development and governance of (transnational) advertising self-regulation. Three fields of activity were specifically discussed: digital media, food advertising to children, and alcohol advertising. Part of the Workshop and a second round of interviews planned for April-May 2010 will focus on the enforcement of private advertising standards. The final report is anticipated in July 2010.

Objective of the Workshop

The purpose of the Workshop is to verify and discuss the provisional research results the case study gives us. A critical reflection is required at this intermediary stage in order to test the evidence gathered and receive input from a selected group of stakeholders 'in the field' as regards the assumptions that were made, matters that were put out of context, or significant developments that were overlooked.

II. Provisional Research Results

The research conducted so far has focused on the emergence and development (ED), and enforcement (EF) of TPRERs, their rules, and governance. Below, a number of hypotheses are set out that have been developed on the basis of the literature study, followed by the evidence that falsifies the hypothesis.

Hypothesis ED.1 The existence of representative organizations at the international level increases the probability of transnational private regulation.

Background

Private regulation in advertising is typically developed and administered by industry associations of advertisers, agencies, and/or media. The existence of private regimes requires 'industry capacity', that is, the ability of the industry to organize itself and set uniform standards. One would expect transnational private regulation only to emerge when international industry associations of the same kind exist.

Evidence

The International Advertising Practice Code adopted by the ICC in 1937 and following revisions constitute the most important manifestation of a TPRER in advertising. The ICC represents the interests of business at a global level. Other associations that operate at a transnational level, including IAA, WFA, and EASA play a crucial role in promoting private advertising standards, developing them at the international level, and encouraging adoption at the national level. In the alcohol sector, European trade associations have adopted pan-European codes on alcohol advertising. However, a new type of private regulation, namely that of individual companies committing to self-imposed standards, is emerging in the food sector. The 2007 EU Pledge and IFBA initiative 'Global Policy on Marketing and Advertising to Children' constitute a shift away from the traditional associational model of private advertising standards. This does not mean that associations play a less important role, however. The company-based initiatives in the food sector were indeed strongly driven by WFA, but also by the CIAA. In sum, we can submit that the hypothesis is strongly validated.

Hypothesis ED.2 The emergence and development of TPRERs are enhanced by (the threat of) regulatory action by government.

Background

Academic literature suggests that a 'shadow of hierarchy', that is the credible threat of public regulation, incentivizes private actors to draw up regulatory arrangements to guide their own behaviour. Several writers have shown that strong links between government pressure and the development of private regulation at the national level also exist in relation to private advertising standards.

Evidence

The adoption of TPRERs in the food and alcohol sector has strongly been incentivized by the threat to governmental regulation. In the food sector, the 2004 WHO Global Strategy on Diet, Physical Activity and Health has triggered the creation of the ICC Framework for responsible food and beverage communications, as well as the IFBA Global Policy on Marketing and Advertising to Children. In Europe, the adoption of national private regimes

was further stimulated by the European Commission led Platform for Action on Diet, Physical Activity and Health. In the alcohol sector, similar dynamics are observed. The activities of the European Commission in the Alcohol and Health Forum have lead to increased attention to advertising standards for alcohol advertising. The pending WHO Global Strategy to reduce the harmful use of alcohol is likely to trigger further transnational responses by the industry. Equally, European law and pressures exerted by the European Commission have increased the role of EASA in harmonizing advertising self-regulation in Europe. No conclusive evidence was found as regards generally applicable ICC Codes, although it follows from the 2006 Consolidated ICC Code that the code seeks to forestall (further) government intervention in the advertising profession. The ICC is thus responsive to regulatory activities of governments. Overall, the hypothesis is therefore valid.

Hypothesis ED.3: New forms of media are likely to create new TPRERs.

Background
Media determines the way in which advertising reaches the public. Media innovation presents advertisers and agencies with more intrusive ways to influence, persuade, or even deceive its audience, in particular young and inexperienced consumers. This asks for new means of regulation, including private regulation.

Evidence
From an historical perspective, it can be submitted that the emergence of new forms of media has motivated the adoption of new TPRERs. The revision of the general ICC code of 1955, for example, was instigated by the rise of television as a commodity good, commercial television, and the general importance television had assumed in society. Also the revision of the ICC Code in 2006 was, in part, motivated by the rise of a new medium. The development of electronic communication techniques, such as Internet and mobile telephone, offered advertisers innovative ways of to reach potential buyers. Internet advertising, and more general, digital advertising led to the revision of the EFRD Common Standards for Commercial Communications for Spirits in 2008. The hypothesis can therefore to a large extent be validated.

Hypothesis ED.4.1 TPRERs are likely to determine how national regimes should adopt the advertising standards at the national level.

Hypothesis ED.4.2 TPRERs stimulate the emergence and development of national systems of advertising self-regulation more than national systems stimulate the emergence and development of TPRERs.

Background
TPRERs require in their provisions that they are implemented at the regional, national, or local level. It follows from EASA's Blue Book that national codes are frequently updated to follow the latest version of the ICC Code. Thus, where national codes do not (fully) cover the subject matter addressed by the TPRER, or run counter to it, one would expect the national regimes to adapt accordingly.
Evidence

The TPRERs drive a process of harmonization in private advertising standards. This process is necessarily industry driven, without imposing strict legal obligations on national code owners to comply and implement the norms of the TPRERs. National regimes are therefore free in the way in which they adopt TPRER standards, not only in form but also in substance. The absence of obligations to comply with TPRERs standards in terms of form and substance can explain, together with prevalent local traditions and preferences, the variety of national private advertising standards, that is, through general codes, sector specific codes, or even company codes in the case of food and alcohol advertising. This process of liberal or spontaneous harmonization is not comparable to the harmonization pursued by the EU, where the instrument of European law is key. Consequently, hypothesis 4.1 cannot be validated.

Nonetheless, TPRERs strongly affect the emergence and development of national regimes. In the alcohol sector, the European Sprits Organisation (CEPS) and Brewers of Europe require their national member associations to adopt the transnational codes they devise. Common efforts by The Brewers of Europe and EASA have been crucial in erecting new self-regulatory systems in Luxembourg, Bulgaria, and Cyprus. In addition, EASA and European trade associations for advertisers, agencies, and media organize workshops and meetings to raise awareness, sensitize, and educate national SROs, professionals, and representatives of national associations.

While it is true that TPRERs stimulate the birth and development of national regimes, the relationship between the transnational and national level cannot be understood as only a top-down relationship. Indeed, national regimes also exercise influence on the emergence and development of TPRERs. Historically, the US and UK experience with private advertising standards preceded the adoption of the 1937 ICC Code. Moreover, the code adoption mechanism in the ICC allows from input from national regimes through the representatives of national ICC Chapters and, slightly more direct, through EASA, as this organization is represented in the ICC's standard-setting body. Further, the ICC follows national trends in adopting regulation. Very recently, national codes on sustainability claims in advertising led to the decision of the ICC's Commission on Marketing and Advertising to adopt an ICC guidance document on the matter.

In sum, TPRERs and national regimes influence each other in a reciprocal fashion, giving rise to a multi-level governance system. It is observed, however, that TPRERs are more likely to influence national regimes, especially in jurisdictions where self-regulatory systems are developing. As the necessary capacity, experience, and resources might be lacking to develop new standards of their own, they tend to follow the standards stipulated at the transnational level. Consequently, it is held that hypothesis 4.2 is validated.

Hypothesis EF.1 The enforcement of TPRERs is more likely to take place at the national level than at the transnational level.

Background

Advertising has a local impact. It is designed for national markets, to address local opinions and sentiments, and uses language, emotion, and humor to optimize its effect. The costs of

establishing a centralized, private enforcement body at the trans-national level entails are likely to outweigh the benefits, as it will face the difficulty of grappling with the language, culture, and humor used in the ad under review. In addition, it would have to deal with an enormous caseload: in Europe alone, more then 50.000 complaints are handled annually.

Evidence
As held above, TPRERs require their adoption at the regional, national, or local level. After national advertising industries have transposed the framework rules in their codes, local SROs monitor code-compliance and handle complaints on advertising. The ICC provided for a transnational enforcement body, the International Council on Marketing Practices, which was erected in 1949 but again abolished by the 2006 Consolidate ICC Code. This body had the purpose to establish the compliance (or non-compliance) by advertising with ICC code rule in disputes of an international nature. Not only did the body suffer from a lack of popularity among ICC members and a low number of disputes submitted to it, its *raison d'être* was largely taken away by EASA cross-border compliant mechanism, which was set up in 1992 in order to deal with advertising complaints having an international dimension through cooperation between national SROs.

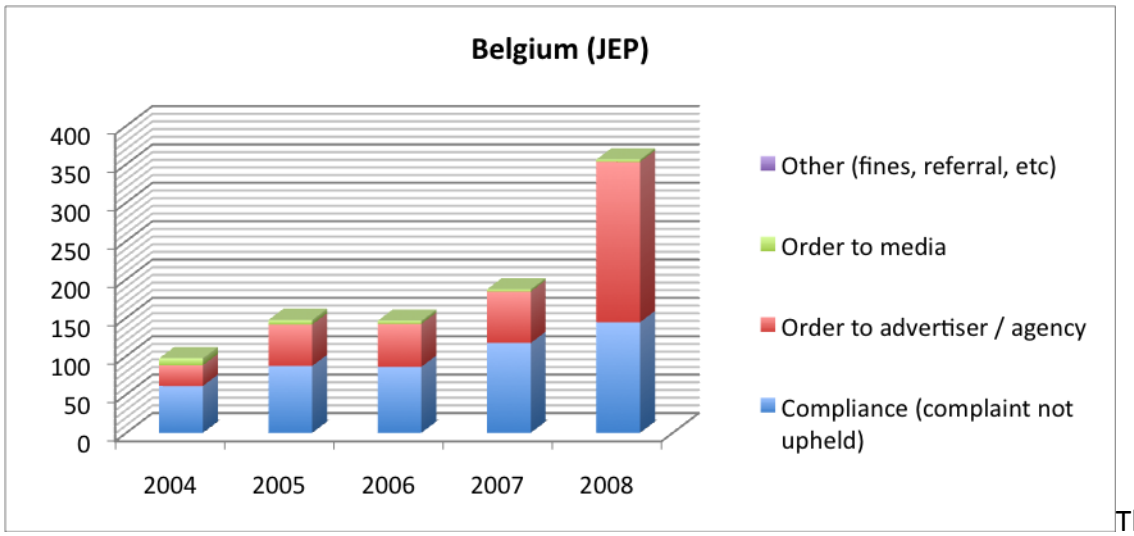
The enforcement of TPRERs is therefore essentially based on national systems of advertising self-regulation. Note should be taken, however, of an important develop-ment in the area of online (behavioral) advertising, which challenges this design. Here, global market players exercise pressures on the rest of the advertising industry to adopt global systems of self-regulation to deal with advertising complaints. Such systems would undermine the present design of local enforcement and redefines the multi-level balance between national and transnational private regulation. In sum, however, the hypothesis is confirmed.

Hypothesis EF.2 The enforcement of advertising self-regulation is predominantly concerned with stopping code-violations and securing code-compliance, rather than sanctioning the violation.

Background
SROs are generally equipped with soft sanctions. Typically they enforce the codes they oversee and remedy the situation resulting from a breach of the code via: (i) denial of access to media; (ii) publication of the names of violators; (iii) denunciation to public authorities; (iv) membership expulsion; and (v) litigation. The latter three enforcement means are, however, only used very rarely. Academics have held that the true purpose of advertising self-regulation is limited to increasing the ethical standards in advertising. Penal sanctions do not fit this purpose.

Evidence
National codes of conduct and rules of procedure offer SROs a host of means to enforce these codes. Most common are the order directed to the advertiser or agency to stop, amend, or withdraw the advertisement in point. In addition, SROs all have the possibility to order the affiliated media to stop using the ad or refer the case to the responsible public authorities. Other means of enforcement differ greatly among the national systems and

include membership expulsion, litigation, corrective advertising, damages, fines, mandatory copy-advice, and the withdrawal of trade privileges and trade recognition. Empirically, these latter type of the remedies and sanctions are rarely applied, as evidenced by the following data from Belgium.



The hypothesis is confirmed on the basis of the data available from Belgium, but requires more data collection from national SROs.

Hypothesis EF.3 The enforcement of advertising self-regulation is more likely to function as a mechanism that precedes the enforcement through administrative or judicial means rather than being used at the same time.

Background

SROs present themselves as 'first line' enforcement mechanisms: they are easily accessible, free of charge, and fast. The basic function of SROs has thus been said to be clearing the market of the most apparent forms of deceptive and distasteful advertising. For those who violate the rules more than once, if not, frequently (repeat offenders) and those who intentionally do not comply with rules ('rogue traders') legal backstops are needed to provide the necessary 'add on' enforcement action. The EU Directives on Misleading and Comparative Advertising and Unfair Commercial Practices, as well as the Audiovisual Media Services Directive reinforce this pattern of sequential enforcement.

Evidence

In view of the apparent overlap between codes of conduct and advertising law, various SROs have liaised with the responsible national administrative authorities to increase the effectiveness of their enforcement actions. Cooperation between SROs and administrative authorities is more frequent as regards broadcast advertising than it is for non-broadcast advertising. SROs in the United Kingdom, Spain, and the Netherlands have concluded agreements with authorities deciding on questions of case management and information exchange. In these jurisdictions, SROs are positioned as the first instance to treat cases that violate advertising regulation. They will engage in dialogue with the agencies when this is considered necessary. If the administrative authorities undertake enforcement action, the

SROs stop their proceedings. Agencies, on the other hand, reserve their right to start enforcement action while the SRO pursues action. Although sequential enforcement action is predominant, simultaneous action is possible. As regards judicial enforcement, the majority of the SROs reviewed (nine in total) stipulate in their procedural rules that their proceedings are pre-empted in case of concurrent litigations. The hypothesis is therefore not strongly validated and requires more inquiry into national practices.

III. Further Questions of Discussion:

Finally, this discussion paper has the purpose to identify questions for discussion. These are centered on the dimensions of legitimacy, enforcement, and effectiveness.

Legitimacy

Legitimacy constitutes the acceptance that a person or organization has a right to govern, by those it seeks to govern and those on whose behalf it purports to govern. Legitimacy of private regulators is extremely important, because they cannot simply rely on public competence to motivate compliance with the rules they set. Private regulators thus need to invest in the ways in which they motivate the conduct their rules require. This raises the question of how private regulators (i.e. the advertising industry) have increased themselves the legitimacy of their activities.

1. What initiatives has the industry taken to enhance its legitimacy?
2. How do these initiatives affect practices of standard-setting (code formation), monitoring, and/or enforcement?
3. To what extent are these initiates industry-drive or motivated by pressures by government?

Alternatively, is had been held that the legitimacy of private regulators can be based on the values and objectives they pursue via their rules and the results they attain. In this respect, the question emerges whether the legitimacy of private regulators varies across regimes for specific products (e.g. food, alcohol) or recipients of advertising (e.g. women, children).

4. To what extent does advertising self-regulation play a role in delivering sector-specific goals, like decreasing overweight, obesity and related health diseases, or irresponsible alcohol consumption and related harm?
5. To what extent is it successful here?

Enforcement

Private regulators in the advertising industry have developed their own mechanisms of enforcement. National differences in the design of SROs are considerable and are the result of industry development, political culture, legal frameworks, and funding. The following set of questions, which can be answered in relation to individual SROs, serves to further appreciate the operation of these enforcement systems.

<u>Receipt of complaints</u>

1. What percentage of the total complaints are received by your SRO from:
    - Competitors?
    - Consumers?
    - Public authorities?
    - SRO staff?

2. Is there a trend in the complaints reviewed? Are there particular sectors or media that are increasingly subject to complaints? Why is this so?

Monitoring

1. Does your system monitor industry compliance?
2. Does it monitoring on its own motion?
3. Why does it monitor (rationale)?
4. How does it monitor (method)?
5. What is it monitoring focused (object)?
6. How often does it monitor (frequency)?
7. Is there a monitoring policy that determines these issues?
8. Is the monitoring policy made public?
9. Can monitoring lead to complaint handling before the SRO jury?

Procedure

1. Is there a written or oral enforcement procedure?
2. Who has standing in the procedure?
3. Is the procedure open to the public?
4. When and how does your SRO engage in investigation and fact-finding?
    - Is this prior or during the procedure?
    - Can it hear witnesses or experts?
    - Can it do so on its own motion?
5. How many complaints are settled prior to the proceedings before the SRO jury (e.g. via amicable settlement, mediation, or informal pressure)?

Application of sanctions

1. What sanctions are imposed most often? Why?
2. Is the SRO jury free to decide which sanctions it imposes?
3. What sanctions are imposed on:
    - Repeat offenders?
    - Rogue traders?

Relationship with administrative enforcement

1. Has your SRO established a cooperative relationship with administrative agencies regarding its enforcement activities? If so:
    - How has this relationship been framed? (design: informal practices, contract, law)
    - How does cooperation take place (method)?
    - What is cooperation focused on (object)?
    - How often does cooperation take place (frequency)?
2. Does your SRO refer cases to agencies and if so how often?
3. Do agencies refer cases to your SRO and if so how often?
4. What is the result of cooperation in terms of enforcement action?
    - SRO action pre-empts agency action.
    - Agency action pre-empt SRO action.
    - Agency and SRO can pursue action simultaneously.

Relationship with judicial enforcement

1. Does judicial enforcement (litigation) pre-empt SRO enforcement?
2. Does SRO enforcement pre-empt litigation?
3. Can the judiciary review an SRO jury decision?
4. Does the SRO jury consider itself bound by case law of the courts?
5. Is the judiciary bound by SRO jury decision?
6. What importance does the judiciary attach to SRO decisions?

Effectiveness

The effectiveness of private regulation depends, amongst others on the legitimacy and enforcement of its rules. Important to appreciate is however the perception of the industry: why and when does it consider private regulation effective? In other words, what is the benchmark the industry employs for effectiveness? The following questions serve to further appreciate the reasons for effectiveness of advertising self-regulation.

1. Why is advertising self-regulation effective?
2. What are reasons for ineffectiveness?
3. What means does the industry use to increase the effectiveness of systems of advertising self-regulation?
4. To what extent does monitoring, pre-clearance, and copy advice affect the effectiveness of the system?
5. How does effectiveness vary across media?
    - Print
    - Broadcast
    - Online and digital
5. Are the sanctions employed by SROs effective?
6. Is the effectiveness of sanctions improved by the:
    - Large number of complaints handled?
    - Speed with which a non-compliant ad can be removed?
    - Cost savings achieved by the system?
    - Level of compliance by the industry at large?
    - Extent to which violators comply with decisions taken by the SRO?
    - Extent to which the violator can be punished for the misbehavior?
    - Cooperation the SRO has established with public authorities?
7. Is the effectiveness of the system assessed and, if so, how?
    - By the organization itself?
    - By (independent) third parties?