

Draft Standard Clause for Co-Regulation Approach in Directive /Regulations and Regulations Concerning the Digital Single Market

Digital markets are characterized by a high speed of innovation and the constant introduction of new products and services. While most of these products create benefits for the everyday life of consumers and citizens, some of them lead to new challenges and public debates which can potentially impede the trust of consumers in digital markets. Directives and Regulations have to strike a balance to ensure the necessary level of consumer trust without creating unnecessary barriers for innovation and a flourishing digital single market. In a fast moving environment facts and assumptions leading to regulatory decisions might not be the same 12 months later. But Directives and Regulations cannot be changed every year. A co-regulatory approach has the potential to combine and link the general objectives and principles set out in public regulation (made for a longer period of time) with an additional pillar of codes of conduct developed through multi-stakeholder-processes which can provide context specific interpretation of public rules and react flexibly to newly emerging challenges. The development and implementation of these codes of conduct should follow certain minimum standards such as provided by the EU-Principles for Better Self- and Co-Regulation. At the same time these codes of conduct should be scrutinized by the competent public authorities which should confirm whether these codes are in conformity with the governing laws and regulations and constitute good practice in accordance with established principles of good self- and co-regulation. This declaration of conformity should have the legal effect that (compliant) subscribers of confirmed codes of conduct should be able to claim a rebuttable presumption of conformity with the law underlying the code of conduct. This mix of classical legislative mechanisms with additional publicly recognized private regulation will be an important enabler for the creation of a digital single market trusted by consumers throughout the EU. To enhance regulatory consistency across member states the development, recognition and implementation of codes of conduct should be coordinated at European level as far as possible.

Directives and Regulations in the context of the digital single market should therefore contain a chapter on co-regulation such as:

Article X

1. The Member States, the competent supervisory authorities and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper application of this Directive /Regulation, taking account of the specific features of different business sectors and the specific needs of micro, small and medium-sized enterprises. Member States shall provide effective incentives for industry to develop and subscribe to such codes of conduct.
2. Associations and other bodies representing economic operators may prepare codes of conduct, or amend or extend such codes, for the purpose of specifying the application of provisions of this Directive /Regulation, such as:

[Examples]...

3. Such a code of conduct shall contain mechanisms which enable the self-regulatory bodies referred to in Article Y to carry out the mandatory monitoring of compliance with its provisions

by the economic operators which undertake to apply it, without prejudice to the tasks and powers of the competent supervisory authority.

4. Associations and other bodies referred to in paragraph 2 which intend to prepare a code of conduct, or to amend or extend an existing code, may submit the draft code to the Commission and ask it to confirm the compliance of the code of conduct with this Directive /Regulation. The Commission shall declare in reasonable time whether the draft code, or amended or extended code, is in compliance with this Directive /Regulation and shall approve such draft, amended or extended code if it finds that it constitutes good practice in accordance with the EU-Principles for Better Self- and Co-Regulation. The Commission shall publish such approved codes of conduct without delay in the Official Journal of the European Union.
5. Before approving a code of conduct as specified in paragraph 4 the Commission shall consult with Council and Parliament through the following fast-track comitology procedure...
6. An economic operator who has undertaken to follow and is compliant with a code of conduct approved by the Commission according to paragraph 4 and referenced in the Official Journal of the European Union shall be deemed compliant with the articles of this Directive /Regulation and the corresponding national law covered by the code of conduct.

Article Y

1. The monitoring of compliance and enforcement of an approved code of conduct may be carried out by a self-regulatory body which has an appropriate level of expertise in relation to the subject-matter of the code and is accredited for this purpose by the competent public authority. If a code of conduct provides for a self-regulatory body in order to enforce the provisions of this code with the signees, the appointed self-regulatory body may ask the competent public authority to be accredited for this purpose under the following conditions:
 - a. Demonstration of sufficient expertise in relation to the subject matter of the code,
 - b. Sufficient financial means for the time of planned validity of the code,
 - c. Establishment of procedures which allow it to assess the eligibility of economic operators to apply the code, to monitor their compliance with its provisions and to periodically review its operation,
 - d. Establishment of procedures and structures to deal with complaints about infringements of the code,
 - e. Transparent processes and independent decision making which ensure fair and neutral decisions in cases of breach and prevent conflicts of interest, including a hearing right for signees and complainants before a decision is taken,
 - f. Ability to take appropriate action in cases of infringement of the code by a signee, including suspension or exclusion of the signee from the code.
2. Self-regulatory bodies that have not been accredited by the competent public authority can appeal against the decision at the competent court.
3. The competent supervisory authorities will not take action against signees of an approved code to enforce articles of national law implementing this Directive /Regulation which are covered by the approved code of conduct as long as the self-regulatory body enforces the code effectively and does not exceed its scope of judgment.
4. The competent public authority shall revoke the accreditation of a self-regulatory body referred to in paragraph 1 if the conditions for accreditation are not, or no longer, met or actions taken by the body are not in compliance with this Directive /Regulation.